# Review of the Regulation of Residential Construction in the Conservation District

A Report to the Governor and the Legislature of the State of Hawai'i

Report No. 91-1
January 1991

**THE AUDITOR**
STATE OF HAWAI'I

## The Office of the Auditor

The missions of the Office of the Auditor are assigned by the Hawaii State Constitution (Article VII, Section 10). The primary mission is to conduct post audits of the transactions, accounts, programs, and performance of public agencies. A supplemental mission is to conduct such other investigations and prepare such additional reports as may be directed by the Legislature.

Under its assigned missions, the office conducts the following types of examinations:

1. *Financial audits* attest to the fairness of the financial statements of agencies. They examine the adequacy of the financial records and accounting and internal controls, and they determine the legality and propriety of expenditures.

2. *Management audits,* which are also referred to as *performance audits,* examine the effectiveness of programs or the efficiency of agencies or both. These audits are also called *program audits,* when they focus on whether programs are attaining the objectives and results expected of them, and *operations audits,* when they examine how well agencies are organized and managed and how efficiently they acquire and utilize resources.

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9. *Special studies* respond to requests from both houses of the Legislature. The studies usually address specific problems for which the Legislature is seeking solutions.

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# OVERVIEW

THE AUDITOR
STATE OF HAWAII

# Review of the Regulation of Residential Construction in the Conservation District

## Summary

Citizens wanting to protect Hawaii's natural beauty have turned to the laws and rules governing land use in the conservation district. The laws, however, and the rules implementing them, may disappoint many. Framed about thirty years ago, they allow residential construction in the conservation district under certain designations. We reviewed Chapter 205 and Section 183-41, *Hawaii Revised Statutes*, and Title 13, Chapter 2, of the *Hawaii Administrative Rules* and also examined the process for approving applications to build on conservation lands. We believe that current regulation would be strengthened by adopting specific standards for residential construction, by making the statutes and rules more consistent with each other, and by reexamining--and reframing if necessary--the definition of nonconforming use.

State law assigns zoning authority over conservation lands to the Department of Land and Natural Resources. The department exercises its authority through the Board of Land and Natural Resources--the body that decides on applications to build in these areas. Approval or denial of an application rests mainly on the requirements of the particular subzone and whether the proposed use is deemed either "nonconforming" or "conditional."

We found that because the department's rules lack specific standards for residences, they give wide discretion to the board. Provisions in the rules for nonconforming use may exceed the authority of the statutes, and provisions for conditional use are not strongly backed by construction standards. Further, by allowing new homes to be built under the nonconforming designation, both statutes and rules part from the usual regulatory practice of phasing out nonconforming uses.

In the processing of applications, the department has for the most part complied with the statutes and rules. However, our survey of a sample of applications showed that the department has accepted applications with inadequate environmental assessments and has also incorrectly designated certain proposed uses as nonconforming.

The laws and rules contain the dual public purposes of preservation and conservation. Preservation seeks to protect land areas from any kind of development, while conservation seeks to manage an area's resources.

Therefore, additional steps would be needed to achieve the level of protection many would desire. These measures could include reexamining the intent of the laws governing the conservation district, designating particular natural landmarks for special protection, using the State's powers of eminent domain, and other political initiatives.

## Recommendations and Response

We recommend that the Department of Land and Natural Resources propose legislation to describe the construction standards, such as house size and height, that the rules should include and then adopt these specific standards in the rules. The department should make the rules' definition of nonconforming use consistent with the statute and link the definition of conditional use to standards for residential construction. If the department determines that it is inappropriate to give landowners a legal right to a future residence under a nonconforming designation, it should propose corrective legislation. In the processing of applications, the department should take greater care to ensure that all legal requirements are met.

The department concurs with our recommendations. It says it will seek immediately to develop appropriate legislation. In addition, based on an opinion from the Land Use Division of the Department of the Attorney General, the department will ask the Board of Land and Natural Resources to give special protection to Mount Olomana, one of the areas where residential construction has become a concern.

## Background

State law divides Hawaii's lands into four land-use districts--urban, rural, agricultural, and conservation. Conservation lands make up approximately 48 percent of the total. Owned either by government or private parties, the conservation district consists of environmentally sensitive areas, such as forests, watersheds, scenic and historic sites, park lands, and areas containing threatened or endangered plants, fish, and wildlife.

The rules of the Department of Land and Natural Resources regulate land use, including residences, in the conservation district. The department's Office of Conservation and Environmental Affairs processes the applications for residential construction and makes recommendations to the Board of Natural Resources. Final decisions to approve, modify, or deny the recommendation rest with the board.

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# Review of the Regulation of Residential Construction in the Conservation District

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Submitted by

**THE AUDITOR**
STATE OF HAWAII

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# Foreword

Senate Concurrent Resolution 150 of 1990 requested the auditor to review the rules of the Department of Land and Natural Resources regulating residential construction in the conservation district and to examine the granting of permits for residential construction under these rules. This report presents our evaluation and recommends some improvements.

We acknowledge the cooperation and assistance of the Department of Land and Natural Resources, the Department of the Attorney General, the Land Use Commission, the Office of State Planning, county planning and land utilization departments, the Save Mount Olomana Association, and the Friends of Hawea Point.

Newton Sue
Acting Auditor
State of Hawaii

January 1991

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# Chapter 1
## Introduction

Hawaii's land area is divided by the State into four districts--urban, rural, agricultural, and conservation. Conservation lands, owned by government and private parties, take up nearly half the area. The scenic qualities of these lands can make them highly desirable for building a home.

Many citizens who believe in preserving the natural wonders of the state have questioned the appropriateness and legality of residential construction on conservation lands. Their concerns have been intensified by recent requests for single-family residences in environmentally sensitive areas, particularly Mount Olomana (Oahu) and Hawea Point (Maui). These proposed houses, and others, have been criticized for threatening the environment and scenery.

This report explores some of the concerns being expressed. It reviews aspects of the State's regulation of residential construction in the conservation district under the statutes and under the rules implementing them. The 1990 Legislature, in Senate Concurrent Resolution 150, requested the review. The resolution questioned whether the rules of the Department of Land and Natural Resources (DLNR) violate or are inconsistent with their enabling statutes and whether permits for residential construction have been granted in violation of the rules themselves. Reports by the legislative committees declared that the size, number, and configuration of proposed single-family residences in the conservation district have been the source of controversy.

## Objectives of the Review

1. Determine the adequacy of existing statutes and rules in providing a suitable framework for regulating residential construction in the conservation district.

2. Examine the review and approval process for residential construction in the conservation district.

3. Recommend improvements if appropriate.

## Scope and Methodology

We analyzed the pertinent statutes and rules and reviewed DLNR's procedures and practices for approving and denying applications for residential construction in the conservation district. Our focus

was on the activities of DLNR's Office of Conservation and Environmental Affairs (the conservation office), which analyzes applications and submits them to the Board of Land and Natural Resources for approval or denial. We did not examine DLNR activities outside the application, review, and approval process, such as enforcement activities designed to detect and punish parties who fail to submit applications when required by law or who fail to abide by the terms of the board's approvals.

Fieldwork for the review consisted of interviews and data collection at DLNR and the conservation office. We interviewed representatives of other entities with jurisdiction over or knowledge of land use in the conservation district, including the Department of the Attorney General; the Land Use Commission; the Office of State Planning; the county departments of planning or land utilization; and the Save Mount Olomana Association and Friends of Hawea Point, two community groups that had testified on Senate Concurrent Resolution 150.

We analyzed the statutes and rules for comprehensiveness, consistency, clarity, reasonableness, and fairness, and we examined DLNR's review and approval process for compliance with the statutes and rules, as well as consistency, reasonableness, and fairness.

A base of 50 applications for new residential construction (construction proposed for land previously undeveloped) was compiled from materials provided by the conservation office. These were applications processed by the office in the five-year period from 1985 through 1989. We examined every fifth file for a sample of 10 cases (20 percent of the total).

We also examined four application files outside the random sample for residential construction from 1988 to 1990. Two of these cases, for the houses at Mount Olomana (Oahu) and Hawea Point (Maui), were cited in the committee reports for Senate Concurrent Resolution 150. The other two cases, for residences at Lanikai (Oahu) and Kiholo Bay (Hawaii), were particularly controversial or of special concern to legislators.

Our work was performed from May through November 1990 in accordance with generally accepted government auditing standards.

# Chapter 2
## Background

Here we describe the legal basis for residential construction and the process followed by the Department of Land and Natural Resources (DLNR) in reviewing the applications for residential construction on conservation lands.

Our discussion centers on two key laws enacted about 30 years ago--one of them before statehood--governing land use in Hawaii. These laws, and the rules adopted to implement them, constitute the legal basis for residential construction in the conservation district. The laws "grandfather" certain previous and intended uses, and they specify residences as a use that may, under certain circumstances, be permitted.

## Legal Basis for Residential Construction

The legal basis for residential construction in the conservation district is found in Chapter 205, *Hawaii Revised Statutes* (the land use law) and Section 183-41, HRS (the forest and water reserve zones law).

### *Land use law*

Originally enacted in 1961, the land use law requires that all lands in the state be placed into one of four land use districts: urban, rural, agricultural, or conservation. The law makes the Land Use Commission, placed administratively with the Department of Business and Economic Development, responsible for determining the boundaries of each district and for deciding upon petitions for boundary amendments. The DLNR is responsible for administering the conservation district; it exercises its authority through the Board of Land and Natural Resources. The land use law gives the counties zoning authority in other districts.

The land use law says little about the urban district, requiring simply that it include activities or uses provided by the ordinances and regulations of the counties. The law defines the rural and agricultural districts in greater detail. In summary, it says the rural district contains land uses characterized by low-density residential lots in non-urban areas and the agricultural district includes such uses as farming, aquaculture, wind-generated energy production, agricultural parks, and open area recreational facilities including golf courses and driving ranges.

## Conservation district

The land use law requires that as of July 11, 1961, the conservation district would consist of the forest and water reserve zones established under the forest and water reserve zones law enacted in 1957. The Land Use Commission, whose responsibility is to classify the use of all lands in the state, determines the boundaries of the conservation district.[1]

The conservation district is made up of lands in the existing forest and water reserves, lands in national or state parks, marine waters and offshore islands, and all submerged state lands. The land use law defines the conservation district as follows:

> Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept.[2]

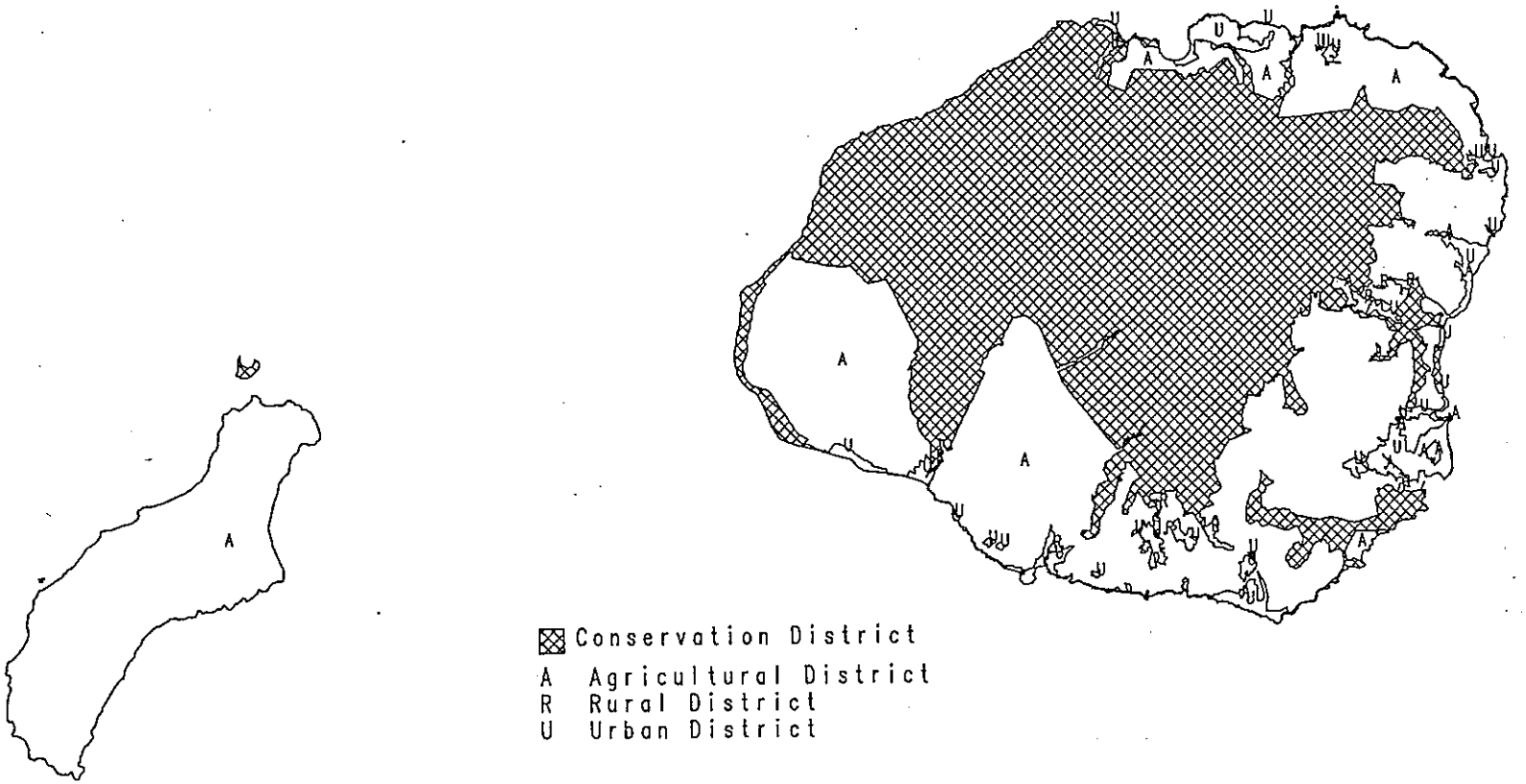
Made up of federal, state, county, and private lands, conservation is the largest of the four districts. As of January 1989, the Land Use Commission classified approximately 1,967,194 acres, or 48 percent of the state's total area, as conservation.[3] Conservation land makes up approximately 51 percent of Hawaii, 42 percent of Maui, all of Kahoolawe, 42 percent of Lanai, 30 percent of Molokai, 40 percent of Oahu, 56 percent of Kauai, none of Niihau, and 2,300 acres on other Hawaiian islands. (See Figures 2.1, 2.2, 2.3, and 2.4).

### *Forest and water reserve zones law*

The land use law, in Section 205-2(4), sets the boundaries of the conservation district as those "forest and water reserve zones" established as of July 11, 1961, by the forest and water reserve zones law, Section 183-41, HRS. This law, enacted in 1957 and containing the zoning provisions on forests and water reserves, directs DLNR to adopt regulations that govern essentially all land use within the conservation district. It states that no use--except a use deemed to be "nonconforming"--may be made of these lands unless that use is in accord with DLNR's regulations.[4]

## FIGURE 2.1

Conservation District Boundaries - County of Kauai

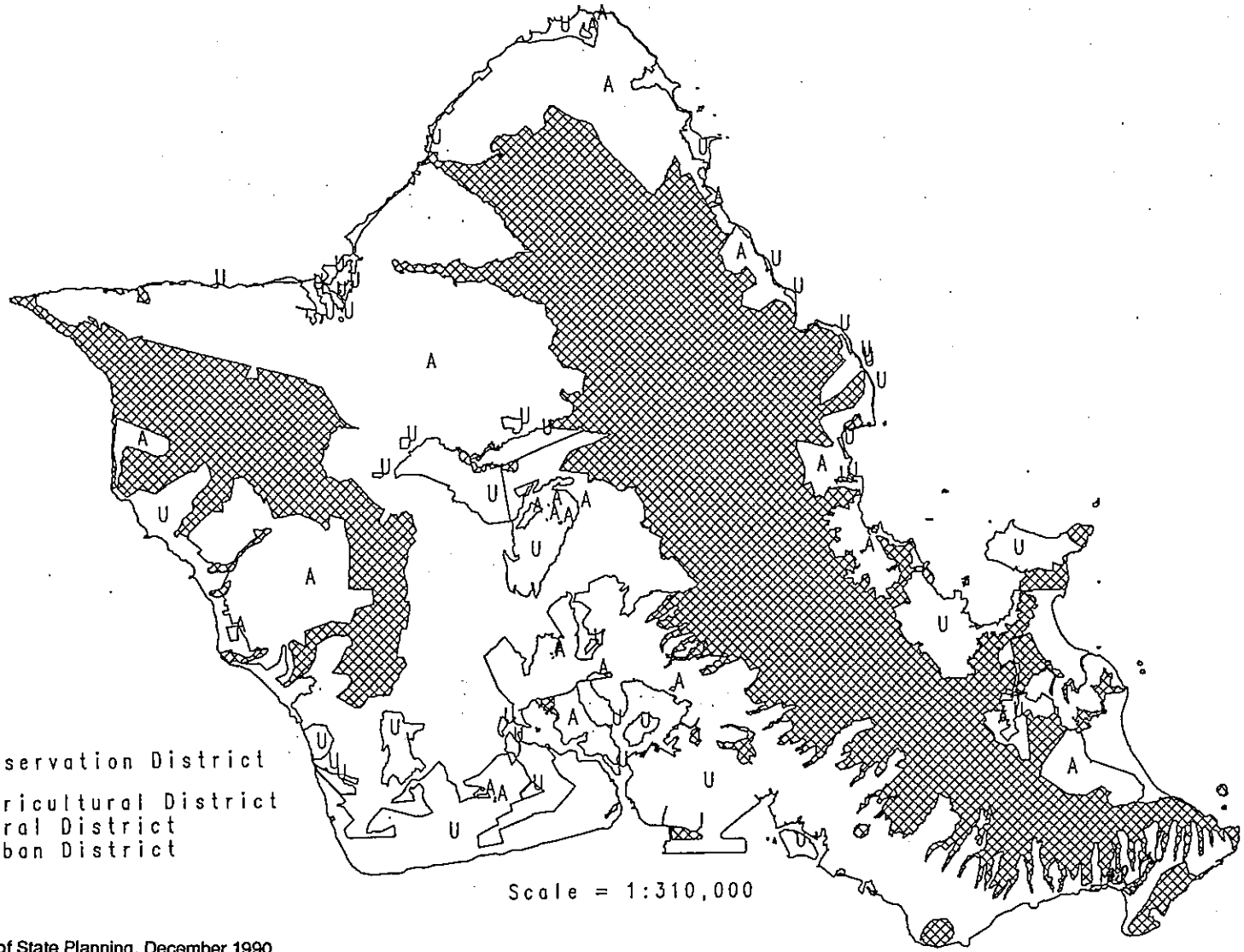



Scale = 1:425,000

Source: Office of State Planning, December 1990.

# FIGURE 2.2

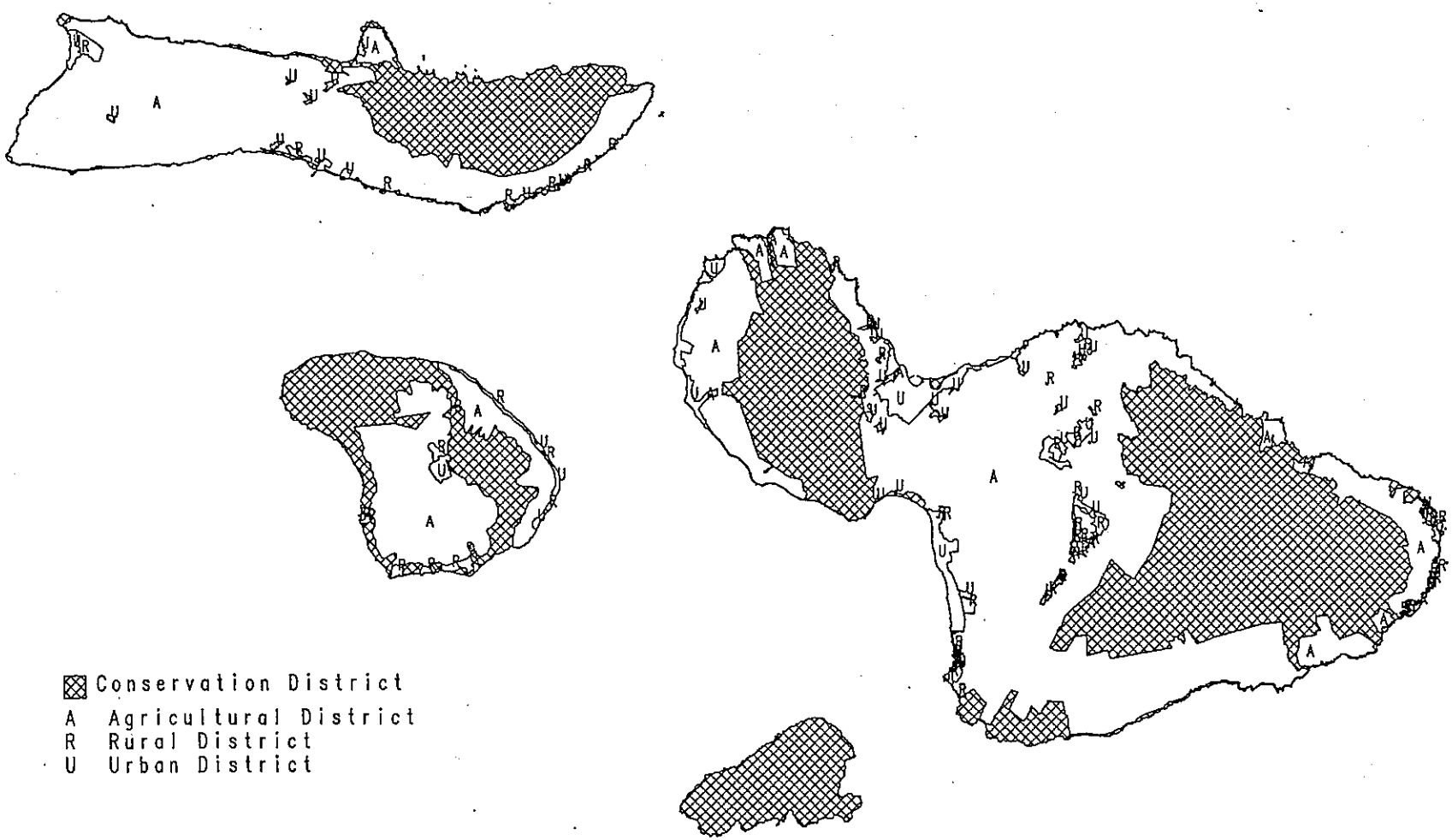
## Conservation District Boundaries - Island of Oahu




Source: Office of State Planning, December 1990.

## FIGURE 2.3

Conservation District Boundaries – County of Maui

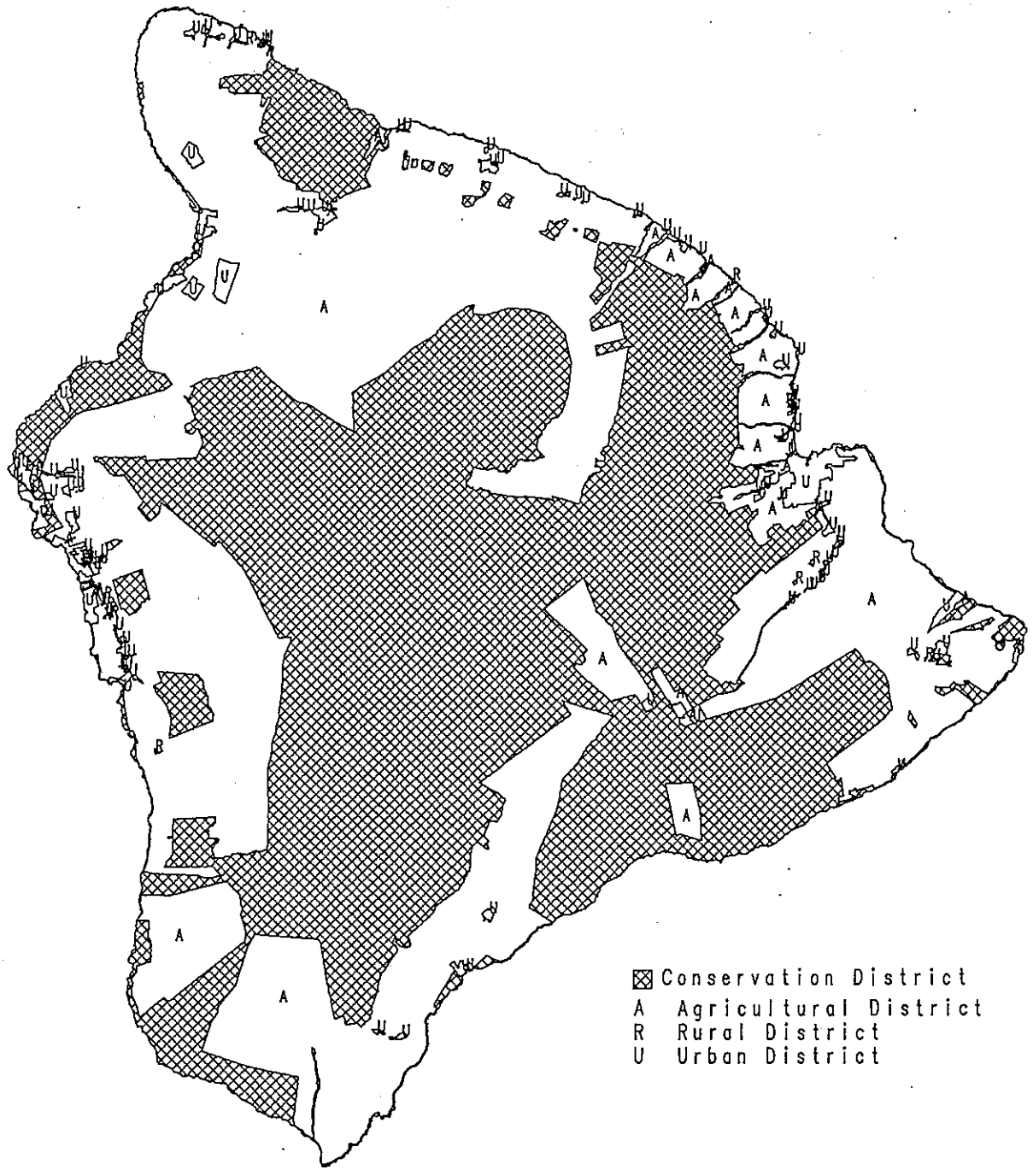



Scale = 1:560,000

Source: Office of State Planning, December 1990.

## FIGURE 2.4

Conservation District Boundaries - Island of Hawaii




Scale = 1:750,000

Source: Office of State Planning, December 1990.

Under the authority of the forest and water reserve zones law, DLNR has adopted regulations (Title 13, Chapter 2, *Hawaii Administrative Rules*) that establish general provisions, define key terms, create subzones within the conservation district, and set forth the procedures for processing the applications for residential construction on conservation lands. The rules define *residence* as a "building used or designated and intended to be used as a home or dwelling place for one family." They also state that the Board of Land and Natural Resources must approve the use of all buildings, structures, premises, or land in the district.

## Subzones

The DLNR's regulations, which have the force of law, establish subzones within the conservation district and specify the uses permitted in these subzones. These uses may be residential, agricultural (farms, flower gardens, nurseries, orchards, commercial timber, grazing), and recreational. The regulations also control the extent, manner, and times of permitted uses. They require that subzone objectives be given "primary consideration" when applications for land use are reviewed.

Prior to 1978, the rules established two subzones--general use and restricted watershed. The current rules establish four subzones, for protective, limited, resource, and general uses.[5] The protective use subzone is the most restrictive and the general the most permissive. The objective of the *protective subzone* is to protect restricted watersheds, marine sanctuaries, plant and wildlife sanctuaries, sites of historic, archaeological, and geological significance, and other unique areas. The objective of the *limited subzone* is to limit uses where natural conditions, such as steep slopes, may constrain human activities. The objective of the *resource subzone* is to develop areas to ensure the sustained use of natural resources. The objective of the *general subzone* is to designate open space where specific conservation uses may not be defined but where "urban use would be premature."

The Board of Land and Natural Resources approves applications for residences in the conservation district if they qualify under "conditional use" or "nonconforming use" defined in the regulations and statutes. Simply stated, a nonconforming use is a past use that does not have to conform to all of the restrictions in the statutes and rules; a conditional use is one that is allowed under certain conditions. In theory, these definitions permit residential construction in every subzone of the conservation district. The provisions of the forest and water reserve zones law allow landowners who can prove nonconforming status the right to a residence in *any* subzone. In addition, board policy allows

landowners to build conditional use residences in the general and resource subzones. The board allows one conditional or nonconforming use house on each lot.

## Nonconforming use

"Grandfather" clauses in the forest and water reserve zones law allow two kinds of nonconforming use within the conservation district. These clauses cover activities that were (1) already being conducted or (2) intended to be conducted, on or before the dates stated in the statutes.

The first clause covers a range of activities circumscribed by *previous use* of the land. It allows continued use of "any building, premises or land for any trade, industrial, residential, or other purpose for which the building, premises or land is used on July 1, 1957, or at the time any regulation adopted under authority of this part takes effect." The second provision covers a narrower range of activities circumscribed by *intended use* of the land. It considers as nonconforming any parcel of ten acres or less in the forest reserve "which, as of January 31, 1957, was subject to real property taxes and upon which the taxes were being paid, and which was held and intended for residential or farming use, whether actually put to such use or not." The rules include in the definition the requirement that intended nonconforming use is limited to either one residential dwelling or a farm with no more than one residential dwelling.

## Conditional use

Conditional use is not mentioned in the forest and water reserve zones law but is defined in the rules. A conditional use is "a use, other than a permitted use . . . which may be allowed by the board under certain conditions as set forth in this chapter and as determined by the board." The term is essentially a discretionary land use designation that authorizes the Board of Land and Natural Resources to approve an activity that is not a permitted use.

Some have challenged the legality of creating a conditional use category in the rules when there is no specific mention of conditional use in the statute. But the Hawaii Supreme Court in 1985 upheld the authority of the Board of Land and Natural Resources to approve conditional use applications under the provisions of the forest and water reserve zones law, Section 183-41, HRS. The court held that the conditional use may be allowed as long as it "will not have a detrimental impact on necessary forest growth, present and future water resources, and/or open spaces for the public use and enjoyment."[6]

## Guidelines and conditions

The rules provide the following guidelines for the board in reviewing applications for residential construction:

1. All applications shall be reviewed so that the objectives of the subzone or subzones are given primary consideration.

2. All applications shall be reviewed so that any physical hazard, as determined by the department, shall be alleviated by the applicant when required by the board.

3. All applications shall meet the purpose and intent of the State's conservation district.[7]

The rules also establish 15 conditions for land use in the conservation district (see Table 2.1). A structure, for example, must be compatible with the locality, preserve or improve the natural beauty of the area, and harmonize with physical and environmental conditions. The board may deviate from the 15 conditions if it accepts written justification that there are no practical alternatives; there will be no significant adverse effects to the environment; there is no conflict with the objective of the subzone; and there is no inconsistency with the public health, safety, or welfare.

Landowners and other users of the conservation district must comply with all applicable laws, rules, and regulations of the federal, state, and county governments. The Board of Land and Natural Resources may revoke its approval if an applicant fails to comply with the board's conditions.

# Review Process for Residential Construction

The DLNR's Office of Conservation and Environmental Affairs (the conservation office) processes the applications for land use in the conservation district and makes recommendations to the Board of Land and Natural Resources. The board makes the final decision and can approve, modify, or deny the recommendations of the conservation office.

A conservation district use application is the form used to review proposed residences and other land uses. Applications submitted to DLNR must be approved by the board before any work may begin. Actions of an emergency nature may be acted on by the board's chairperson.

## TABLE 2.1
## Conditions for Land Use in the Conservation District

1. The use shall be compatible with the locality and surrounding areas, and appropriate to the physical conditions and capabilities of the specific parcel or parcels of lands.

2. The existing physical and environmental aspects of the subject areas, such as natural beauty and open space characteristics, shall be preserved or improved upon, whichever is applicable.

3. All buildings, structures, and facilities shall harmonize with physical and environmental conditions stated in this rule.

4. Use of the area shall conform with the program of the appropriate soil and water conservation district or plan approved by and on file with the department.

5. When provided or required, potable water supply and sanitation facilities shall have the approval of the Department of Health and the Board/Department of Water Supply.

6. When provided or required, boat harbors, docks, and similar facilities shall have the approval of the Department of Transportation.

7. The construction, alteration, moving, demolition and repair of any building or other improvement on lands within the conservation district shall be subject to the building codes of the respective counties in which the lands are located; provided that prior to the commencement of any construction, alteration, or repair of any building or other improvement, four copies each of the final location map, plans, and specifications shall be submitted to the chairperson or an authorized representative, for approval; provided, further that any alteration or repair which does not change or expand on the existing land use shall not be subject to the above.

8. Provisions for access, parking, drainage, fire protection, safety, signs, lighting, and changes in the landscape shall have the approval of the chairperson or an authorized representative.

9. Where any interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard.

10. Obstruction of public roads, trails, and pathways shall be minimized. If obstruction is unavoidable, the applicant shall provide roads, trails, or pathways acceptable to the department.

11. Except in the case of public highways, access roads shall be limited to a maximum of two lanes.

12. Overloading of off-site roadways, utilities, and public facilities shall be minimized.

13. Clearing areas for construction purposes shall require prior approval by the chairperson; ground cover of slopes over 40 percent shall not be removed unless specifically authorized by the chairperson.

14. Cleared areas shall be revegetated within 30 days unless otherwise provided for in a plan on file with and approved by the department.

15. Upon approval of a particular use by the board, any work or construction to be done on the land shall be initiated within one year of the approval of the use and all work and construction shall be completed within three years of the approval of the use.

Source: Section 13-2-21, *Hawaii Administrative Rules.*

## The 180-day requirement

The provisions of the forest and water reserve zones law say that landowners may "automatically" put their land to the requested use if DLNR fails to make a decision within 180 days after an application is received. The board may, at the applicant's request, approve an extension of 90 days when an environmental impact statement is required or a contested case hearing is requested. The 180-day clock begins to run when the department receives the application.

## Environmental assessments

The environmental impact statements law (Chapter 343, HRS) requires an environmental assessment of any proposed use within the conservation district. An environmental assessment is a written evaluation of whether an action may have a significant effect on the environment. Such actions require the preparation of another document, an environmental impact statement. The impact statement must disclose the environmental, economic, and social effects of the proposal on the community; describe ways to minimize the adverse effects; and identify alternatives to the proposed action.

The staff of the conservation office reviews the applicant's project description and the environmental assessment. If either is incomplete or not in compliance with the laws and rules, the office rejects the application. If an environmental impact statement is required, the office informs the applicant and withholds approval until the statement is received and approved.

## Special management areas

Clearance from the counties is required if the property is within a "special management area" created under the coastal zone management law (Chapter 205A, HRS). This law was enacted in response to a federal statute that sought to encourage the planning, management, and regulation of land use in coastal areas. Because of their unique nature and value, special management areas require attention beyond that given in a typical management plan. Most projects in these areas require a permit from the appropriate county.[8] Single-family residences that are not part of a larger development are one exception to the requirement. The conservation office informs applicants for residential construction that they are responsible for obtaining clearance from the appropriate county.

## Staff analysis

Once it has accepted an application for residential construction, the conservation office determines whether the application is for nonconforming or conditional use and whether a public hearing is required. Public hearings are usually not required for residential construction. (Hearings are required for a proposed commercial use, a proposed conditional use in the protective subzone, or a proposed subdivision of a parcel in the conservation district.) The office notifies applicants of its findings and any requirements for special management areas or environmental impact statements.

The office sends copies of the application to federal, state, and county agencies, as well as other divisions within DLNR, that may have special expertise or an interest in the application. In its report to the board, the office includes the agency comments and a recommendation for approval or denial of the application. The office presents the report to the board at a regularly scheduled meeting. After a decision is made the department informs the applicant in writing of the decision and any conditions the board may have imposed.

## Appeals and contested cases

Applicants may appeal the board's decision to the circuit court of the circuit in which their land is located. The board can also review its decision in a contested case hearing under Chapter 91, HRS (Administrative Procedure Act). Decisions in contested cases can be appealed to the circuit court.

Contested case requests are made by the board on its own motion or upon the written petition of a government agency or interested person who qualifies as a "party." The DLNR's rules of practice and procedure define "party" as (1) the petitioner, (2) government agencies whose jurisdiction includes the land in question, (3) persons who have a property interest in the land, lawfully reside on the land, are adjacent property owners, or who otherwise can demonstrate they will be "directly and immediately affected" by the board's decision, or (4) other persons who can show a substantial interest in the matter.

## Enforcement

The DLNR is responsible for providing procedures and personnel to enforce the forest and water reserve zones law and the zoning regulations adopted under that statute. The department or the owners of land affected by the zoning regulations can go to court to enforce them. Violators may be fined up to $500 in addition to administrative costs and damages to state land. Persistent willful violations can result in an additional fine of up to $500 per day.

# Chapter 3
## Findings and Recommendations

We first discuss the dual public purpose of the laws governing use of conservation lands. We then address some problems in the regulatory framework for residential construction and review the manner in which the Department of Land and Natural Resources (DLNR) implemented the statutes and rules in processing applications for this construction.

## Summary of Findings

1. The regulatory framework for residential construction in the conservation district has problems that need attention.

   - The standards for residential construction in the conservation district are much broader than those governing construction in the urban district. These give the Board of Land and Natural Resources wide discretion in approving applications for residential construction.

   - The statute and rules for nonconforming use contain longstanding inconsistencies.

   - The statute and the rules allow new homes to be built as a nonconforming use. This differs from usual legal and regulatory practice, which seeks to discourage new uses under this designation.

   - The definition of conditional use in the rules should be linked to standards for residential construction, which are now lacking.

2. The Department of Land and Natural Resources has for the most part complied with the statutes and rules governing residential construction. However, there have been problems with environmental assessments, designations of nonconforming use, and the 180-day requirement.

## Dual Public Purpose

Citizens concerned with preserving the natural wonders of the state have turned to the land use law (Chapter 205, *Hawaii Revised Statutes*) and the forest and water reserve zones law (Section 183-41, HRS) for help in protecting the conservation district. It is in these laws that scenic and natural values find their expression. But the laws, and the rules adopted under them, are

bound to disappoint many. They do not have, as some might wish, an orientation that is purely preservationist. Instead, the laws contain the dual public purposes of preservation and conservation. Preservation seeks to protect land areas from any kind of development, while conservation seeks to manage natural resources and fully use them.

The dual public purposes of preservation and conservation are apparent in the land use law and the forest and water reserve zones law. The land use law speaks of "protecting," "preserving," and "conserving"; it also speaks of uses "not detrimental to a multiple use conservation concept." In multiple use, land is used for two or more purposes (for example, water conservation, timber production, and foraging) in order to increase the benefits derived from an area.[1] The forest and water reserve zones law requires DLNR both to "maintain, improve, protect, limit the future use of, or otherwise conserve open spaces" and to "allow and encourage the highest economic use" consistent with maintaining pure water supplies.

The dual public purposes of preservation and conservation can also be found in the Constitution of the State of Hawaii:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.[2]

Concerned citizens have wondered if residential construction violates the intent of the conservation district. The Legislature, through the forest and water reserve zones law, apparently intended to allow residences. The provisions of nonconforming use in that law permit certain preexisting residential uses to continue and allow certain land previously intended for residential use to be developed in that manner. That law also names residences as a possible permitted land use in the conservation district.

The land use law and the forest and water reserve zones law therefore cannot now protect the conservation district to the degree some might want. This chapter suggests some improvements to make the regulatory framework more effective. But ultimately the protection desired by many citizens cannot be achieved without taking additional steps. With the recognition that attitudes toward the proper balance of environmental protection and development may have changed over 30 years, there could be a comprehensive reexamination of the intent of both the land use law and the forest

and water reserve zones law. Other measures could be the designation of particular natural landmarks for special protection, increased use of the State's powers of eminent domain, and other political initiatives.

## Problems in the Regulatory Framework

Thoughtful effort should be focused on the laws and rules governing residential construction in the conservation district. This section discusses the need to frame specific standards for residential construction, to bring consistency between the rules and the statute for nonconforming use, and to reexamine the statutory definition of nonconforming use and the standards for conditional use. We also touch on some constitutional concerns related to regulation in this area.

### *Broad standards give board wide discretion*

The broad standards for residential use contained in the rules give wide discretion to the Board of Land and Natural Resources in approving applications for residences. The absence of specific standards may have contributed to a perception that the board grants applications for any development of any size or scope and that certain applications have been granted illegally.

The conditions for building and the guidelines for reviewing applications are often vague and subjective. For example, it is hard to determine whether certain controversial residences violate the vague condition that uses must be "compatible with the locality and surrounding areas." It is hard to decide whether a proposed single-family residence, especially a large one, violates the subjective condition that natural beauty and open space be preserved or improved upon. The condition that buildings and structures "harmonize" with the environment and the guideline that all applications be reviewed in "such a manner" that subzone objectives are given "primary consideration" are other examples of vagueness.

The Board of Land and Natural Resources should adopt clearer, more specific standards in its rules to regulate such things as the size and height of single-family residences. These standards could be modeled on county zoning ordinances. Unlike DLNR's rules, county land use ordinances address permitted uses and structures; minimum and maximum lot sizes; footage requirements for front, side, and rear yards; maximum building areas; maximum heights; and setback requirements. These are far more specific and comprehensive than DLNR's rules.

The DLNR should not be expected to adopt zoning regulations identical to those of the counties. The conservation district differs in many ways from the urban district. Lot sizes can vary from less

than an acre to several thousand acres, whereas urban lots are fairly uniform in size. The department should look to tailoring building standards to the conservation district's unique features. For example, standards for minimum and maximum square footage and height could be adopted that vary depending upon the subzone.

The Office of Conservation and Environmental Affairs has argued that existing standards do ensure that houses blend into the landscape. Placing maximum house sizes on private lots of several acres, it says, would be "somewhat subjective." We believe, however, that the current controversy surrounding the construction of large houses in environmentally sensitive areas suggests this approach is not sufficient. The Legislature has charged DLNR with regulating the conservation district. Clearer, more specific rules for residential construction would help to ease controversy and ensure minimal intrusion into environmentally sensitive areas. To facilitate the adoption of clearer rules, the conservation office should propose amendments to the forest and water reserve zones law to the Legislature that specify what sorts of standards the rules will include.

## *Statutes and rules not consistent on nonconforming use*

In line with general principles of administrative law, the Hawaii Supreme Court has said that rules and regulations exceeding the scope of the statute they were designed to implement are not valid.[3] We found that in two instances, the rules for nonconforming use may have exceeded the authority of the statute. In one case, the rules are more restrictive than the statute and may prohibit activity the statute intended to allow. In the second case, the rules are broader than the statute and may allow activity that the statute intended to restrict.

The forest and water reserve zones law, in Section 183-41(a), states that no use, *except* a nonconforming use, shall be made of the forest and water reserves zones (now the conservation district) unless that use is in accord with zoning regulations adopted by DLNR. The department's current rules state that no use, *including* a nonconforming use, may be made unless that use is in accord with the regulations. When the law was enacted in 1957, the Legislature apparently intended to exempt nonconforming uses from all regulations adopted by DLNR. The provision in the rules appeared some years later, in 1978. By *including* nonconforming use within the scope of regulation, the department may have intended to limit the intrusion of residences into sensitive areas. In spite of good intentions, however, the rule did exceed the scope of the statute.

The second case concerns one of the two definitions of nonconforming use. The forest and water reserve zones law, in Section 183-41(b), designates as "nonconforming" any parcel of

ten or fewer acres *contained within the boundaries of the forest reserve* which, as of January 31, 1957, was subject to real property taxes and upon which the taxes were being paid, and which was held and intended for residential or farming use, whether actually put to such use or not. The rules, while retaining most of the language, omit the words "contained within the boundaries of the forest reserve."

The original intent of the law was to "grandfather" the right to build a residence on land that *as of January 31, 1957, was within the forest and water reserve zones*. The omission of the key clause when DLNR first adopted the rules in 1964 broadened the definition of nonconforming lands. The rules subsequently could be interpreted as permitting *any* parcel of land that meets the other legal criteria to be given nonconforming status, no matter when that land was included in the conservation district.[4] As we discuss later, the DLNR has made this interpretation on at least one occasion.

## Statutory definition of nonconforming use needs reexamination

When zoning regulations are adopted or amended, some existing land uses will no longer conform.[5] The first statutory definition of nonconforming use is consistent with usual regulatory practice. It "grandfathers" uses that existed *prior* to the enactment of the law. The second definition, however, differs from usual regulatory practice. It provides for future residential use based on the *prior* paying of property taxes and the *previously existing intent* to use land for residential purposes. Usual practice seeks to discourage nonconforming uses, not to encourage new uses under a nonconforming designation. The second statutory definition of nonconforming use has given landowners the legal right to build on sensitive or hazardous lands where the Board of Land and Natural Resources would otherwise deny requests for residences.

That the second definition of nonconforming use is out of step with usual regulatory practice is also revealed by comparing the forest and water reserve zones law with sections of the laws relating to county zoning and land use. The statute granting zoning authority to the counties for lands outside the conservation district (Section 46-4, HRS) does not provide for *new* uses under a nonconforming designation. Instead, it allows (1) the continuation of existing nonconforming uses or (2) their gradual elimination by county ordinance (except for existing buildings or premises used for residential or agricultural purposes which cannot be phased out). The four counties all define nonconforming use as a use that lawfully existed *before* the adoption of their zoning ordinances and which does not conform to the regulations of the district in which it is located.

Similarly, the land use law, in Section 205-8, does not allow new uses under a nonconforming designation in other districts. In the agricultural and rural districts, it permits the continuation of lawful uses of land existing when the districts were established. But it prohibits the change or expansion of any nonconforming use to another nonconforming use, including the replacement, reconstruction, or enlargement of nonconforming buildings. If any nonconforming use is discontinued or held in abeyance for one year, the further continuation of that use is prohibited.

The provisions for nonconforming use in the forest and water reserve zones law were enacted in 1957, when environmental concerns in Hawaii may have been different from what they are today. The second definition in the statute should be examined to determine if giving landowners a legal right to a future residence in the conservation district is still appropriate. If it is not, the law should be amended to delete the second definition and make the law consistent with other zoning practice. One model for such legislation can be found in Section 205-8, HRS, of the land use law described above.

## Rules lack standards for conditional use

The rules' definition of conditional use describes it as "a use, other than a permitted use . . . which may be allowed by the board under certain conditions as set forth in this chapter and as determined by the board." This is the only provision in the rules that directly addresses conditional use. Without standards for such use, the Board of Land and Natural Resources has great discretion in approving applications for residences.

The term "conditional use" first appeared in the rules when they were revised in 1978. The Office of Conservation and Environmental Affairs acknowledges that the term is vague but states that there is a "perceived need of flexibility in allowing for land to be used." The office felt it could not specifically identify conditional use because land use is still evolving. Listing conditional uses in the rules, the office argues, could make it difficult to approve a land use not listed and defined in the rules.

This may be a valid argument for unanticipated land uses, but it need not apply to residences where it is possible to anticipate the types of uses that applicants may request and create standards for them. At the very least, DLNR should require that residential construction allowed under a conditional use conform to standards for residences, such as for house size and height, that we discussed in a previous section.

## Constitutional concerns

In its efforts to regulate residential construction, the Department of Land and Natural Resources feels constrained by U.S. Supreme Court decisions relating to the concept of "taking." The Fifth

Amendment to the Constitution of the United States, which under the Fourteenth Amendment applies to the states, requires that "private property [shall not] be taken for public use, without just compensation." When a land use regulation excessively restricts land use without compensation, the landowner can argue that there has been a taking without compensation.[6] The U.S. Supreme Court recently held that if certain land use regulations result in a taking, then just compensation through monetary damages is owed to the landowner under the fifth amendment, no matter what state law says.[7]

The following are seven factors a court might examine when determining if a regulatory taking has occurred. Courts will examine some, but not necessarily all, of these factors; they will usually at least look at the degree of decline in property value.[8] With few exceptions, no single factor would mean a taking by itself:

1. A land use regulation does not relate to a legitimate state interest;

2. Assuming a legitimate state interest, the regulation does not substantially advance that interest;

3. The advancement of a legitimate state interest places the disproportionate burden of securing a benefit upon a single landowner when it is more properly borne by the general community;

4. The regulation entails a permanent physical occupation;

5. Reasonable investments were made prior to general notice of the regulatory program;

6. The economic effect of the regulation is to deprive the landowner of all, or substantially all, beneficial use of the property and there are no compensating reciprocal benefits; or

7. The regulation abrogates an essential element of private property.[9]

Under these criteria, forbidding residential construction on private land in the conservation district might constitute a regulatory taking, and the State could be liable to landowners. We suggest, however, that specifying standards similar to those adopted by the counties for the urban district would not unreasonably restrict property owners from using their land. Specific standards, we believe, for such things as house size and height would not amount to a taking. To resolve its concerns, DLNR should request the

attorney general's opinion on the constitutionality of any proposals for restricting residential construction in the conservation district.

### Precedent

The Board of Land and Natural Resources has been hesitant to deny conditional use applications for residences in the general subzone of the conservation district because this would break with the past practice of granting such applications. Like other administrative bodies, the board is justifiably concerned with avoiding arbitrary and capricious decisions. However, the board's policy on residential construction states that each case must be *treated on its individual merits*. The board is therefore not bound by precedent and is obligated by its own policy to examine applications for residences on a case-by-case basis.

## Implementation of the Statutes and Rules

Our review of a sample of applications for residential construction in the conservation district indicates that the Department of Land and Natural Resources has complied for the most part with the statutes and rules when processing such applications. The few problems we found were with environmental assessments, designations of nonconforming use, and the 180-day requirement. Our sample consisted of 14 applications processed by the Office of Conservation and Environmental Affairs. A summary of the characteristics of the cases we examined is provided in the appendix to this report.

### Inadequate environmental assessments

The Department of Health's rules specify the contents of environmental assessments and the criteria for determining when an environmental impact statement is needed.[10] Of the 14 cases we examined, 11 were not in compliance. Of these, one file did not contain an environmental assessment and ten had assessments that did not meet the requirements of the rules. In our sample, two had adequate assessments and one had an environmental impact statement that was accepted by the conservation office.

Those assessments we examined did not satisfactorily describe the potential environmental impacts or the proposed mitigation measures required by the rules of the Department of Health. In some cases, the environmental assessment could not be distinguished from the rest of the application. Most assessments were two pages or less in length; one assessment was only two sentences long. The most blatantly inadequate assessment that the conservation office accepted stated only: "The proposed use qualifies as an exempt action according to Section 1:33a.3 of the EIS regulations."

These problems were underscored by the staff of the conservation office, who noted in a report to the board in one case that "more detailed information and analysis is required to consider potential environmental impacts." The office made this statement *after* it accepted the environmental assessment for that application.

The Office of Environmental Quality Control in one case expressed concern that the intent of Chapter 343, HRS (the environmental impact statements law) had been circumvented. This was because the conservation office failed to require the applicant to submit a new environmental assessment when the residence for which the assessment had been prepared differed substantially from the one the board approved.

The consequences of the noncomplying environmental assessments were not serious in all cases. In 6 of the 11 cases of noncompliance, the potential environmental impact appeared to warrant an environmental impact statement under the "significance criteria" in the Department of Health's rules. In these 6 cases, however, the conservation office recommended, and the board approved, conditions to address the significant impacts.

The appearance of inadequate environmental assessments in 11 of the 14 cases we examined suggests that the conservation office is not guided by standards for these documents nor is the office doing enough analysis of applications before accepting them. Part of the problem may be that applicants do not receive enough guidance in preparing a proper assessment (copies of previous assessments may not be sufficient). The office should develop standards for environmental assessments that comply with the rules of the Department of Health and from these draft a model assessment for applicants.

## *Incorrect designations of nonconforming use*

The office incorrectly gave nonconforming status to 3 of the 14 applications in our sample. As a result, in two cases the applicants obtained a legal right to a house in the limited subzone where they otherwise would have been prohibited from building under the policy of the Board of Land and Natural Resources. In the first case, the office erred by giving nonconforming status to a property that was not included in the conservation district until 1969. Prior to that, the land had been designated agricultural and in 1968 the parcel had also been subdivided from a larger lot. In the second case, the office gave nonconforming status to property that had been enlarged by the purchase in 1967 of a separate plot of 2,229 square feet.

In the third case, the office incorrectly granted nonconforming status to a lot in the general subzone that had been formed by consolidating two adjoining properties.

All three cases violated the definition of nonconforming use found in the forest and water reserve zones law. The lands were not parcels as of the date specified in the law, since one lot resulted from a subdivision and two lots from the merger of separate properties. According to the law, nonconforming land must have been contained within the boundaries of the forest reserve (later the conservation district) as of January 31, 1957. One property clearly did not meet this requirement because it was in the agricultural district until 1969. Designating land as nonconforming which was not placed in the conservation district until 1969 may have resulted from the omission of key statutory language from the rules. As we discussed earlier, the rules did not include the clause "contained within the boundaries of the forest reserve."

### *Missed 180-day deadline*

In one case where the board denied an application, the First Circuit Court overturned the decision because the board failed to render it within the 180 days required by the forest and water reserve zones law. The DLNR argued that the 180-day clock began to run upon payment of a $50 fee owed by the applicant to cover the cost of a public hearing. The court, however, said that the $50 was not a processing fee and that the clock began to run on the date the application was received.[11] To avoid legal challenge and ensure that residential construction is allowed by design and not by default, the office should be more careful in its starting of the 180-day clock.

## Recommendations

1. The Department of Land and Natural Resources should propose legislation amending the forest and water reserve zones law, Section 183-41, HRS, to describe the standards, such as for house size and height, that the rules for residential construction should include. Based upon this legislation, the department should adopt rules with specific standards.

2. The Department of Land and Natural Resources also should ensure that the statute and rules are consistent in defining nonconforming use.

3. The Department of Land and Natural Resources should determine whether giving landowners a legal right to a future residence in the conservation district under a designation of nonconforming use is appropriate. If building a new residence is inappropriate, the department should propose legislation to delete the second definition of nonconforming use contained in the forest and water reserve zones law. The department should also amend its rules to ensure that the definition of conditional use is linked to standards for residential construction.

4. In reviewing conservation district use applications for residential construction, the Department of Land and Natural Resources should take greater care in ensuring that environmental assessments comply with the rules of the Department of Health, in classifying applications as nonconforming uses, and in ensuring that applications are acted upon within 180 days of their receipt.

# Notes

## Chapter 2

1. Section 205-2, HRS.

2. *Ibid.*

3. Hawaii, Department of Business and Economic Development, *The State of Hawaii Data Book, 1989: A Statistical Abstract*, Honolulu, November 1989, p. 171. The acreage of the other three districts is as follows: 171,214 in the urban district, or 4 percent of the state's total area; 10,196 in the rural district, or .2 percent of the state's total area; and 1,963,784 in the agricultural district, or 48 percent of the state's total area.

4. Section 183-41, HRS, also states that land uses may be made under a temporary variance granted by the Department of Land and Natural Resources. Temporary variances are not granted for residential construction.

5. Section 13-2-15, *Hawaii Administrative Rules*, also establishes a special subzone for "areas possessing unique developmental qualities which complement the natural resources of the area." These include the following special subzones: Hawaii Loa College; Haka Site (cemetery); Kapakahi Ridge (nursing/convalescent home); Sea Life Park; Milolii-Hoopuloa (fishing village); and Hale O Ho'oponopono (educational purposes).

6. *Stop H-3 Association et al.* v. *State of Hawaii Department of Transportation et al.*, Hawaii Reports, v. 68, 1985, p. 163.

7. Section 13-2-21, *Hawaii Administrative Rules.*

8. David L. Callies, *Regulating Paradise: Land Use Controls in Hawaii*, Honolulu, University of Hawaii Press, 1984, pp. 87-92.

## Chapter 3

1. Hawaii, Legislative Reference Bureau, *Public Land Policy in Hawaii: The Multiple-Use Approach*, Report No. 1, 1965 (Rev. 1969), Honolulu, p. 17.

2. Article XI, Section 1, Constitution of the State of Hawaii.

3. *Stop H-3 Association et al.* v. *State of Hawaii Department of Transportation et al.*, Hawaii Reports, v. 68, 1985, p. 161.

4. As of January 1989, there were 104,594 more acres in the conservation district than there were in August 1964, when records were first kept. See Hawaii, Department of Business and Economic Development, *The State of Hawaii Data Book, 1989: A Statistical Abstract*, p. 171.

5. Daniel R. Mandelker, *Land Use Law*, Charlottesville, Virginia, The Michie Company, 1982, pp. 130-131.

6. *Ibid.*, pp. 15-16.

7. Brian W. Blaesser and Alan C. Weinstein (eds.), *Land Use and the Constitution: Principles for Planning Practice*, Chicago and Washington, D.C., Planner Press, 1989, p. 2.

8. *Ibid.*, p. 14.

9. *Ibid.*, p. 70.

10. Sections 11-200-10 and 11-200-12, *Hawaii Administrative Rules*. One application was filed shortly before these sections took effect, and the board made its decision after the rules were in force. We used these sections as a framework for reviewing this particular environmental assessment.

11. There is also a question in this case of whether the applicant has complied with the requirement in the rules that any work or construction on the property begin within one year of approval of the application. The board could revoke the approval if the applicant has not fulfilled this condition. The question in this case is whether soil test borings satisfy the requirement. The Office of Conservation and Environmental Affairs has requested an attorney general's opinion on this subject.

# Response of the Affected Agency

## Comments on Agency Response

We transmitted a draft of this Review of the Regulation of Residential Construction in the Conservation District to the Department of Land and Natural Resources on December 12, 1990. A copy of the transmittal letter to the department is included as Attachment 1. The response from the department is included as Attachment 2.

The department concurs with our recommendations. It will work immediately to develop appropriate legislation to implement our recommendation that specific standards be developed for residential construction. It will ensure consistency in the definition of nonconforming use in the statutes and the rules. It will also act to meet our concerns about inadequate environmental assessments, incorrect designations of applications as nonconforming uses, and missing the 180-day deadline for acting on applications. The department agrees with us that most zoning does not allow nonconforming residential use based on previously intended use but provides a historical explanation for why Hawaii's conservation land laws are an exception to the rule.

The department also says that it had already begun to reexamine some of its procedures; that it will be increasing its efforts at public education; and that based on an opinion from the Land Use Division of the Department of the Attorney General, it will be seeking special protection for Mount Olomana, one of the areas where there has been concern about residential construction.

**ATTACHMENT 1**

STATE OF HAWAII
**OFFICE OF THE AUDITOR**
465 S. King Street, Room 500
Honolulu, Hawaii 96813

(808) 548-2450
FAX: (808) 548-2693

December 12, 1990

*C O P Y*

The Honorable William W. Paty, Jr.
Chairperson
Board of Land and Natural Resources
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

Dear Mr. Paty:

Enclosed are three copies, numbers 6 to 8 of our draft report, *Review of the Regulation of Residential Construction in the Conservation District*. We ask that you telephone us by Monday, December 17, 1990, on whether you intend to comment on our recommendations. This report will be issued around the beginning of January. If you wish your comments to be included in the report, please submit them no later than Thursday, December 27, 1990.

The Governor and presiding officers of the two houses of the Legislature have also been provided copies of this draft report.

Since the report is not in final form and changes may be made, access to this report should be restricted to those whom you might wish to assist you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

Newton Sue
Acting Auditor

Enclosures

JOHN WAIHEE
GOVERNOR OF HAWAII

WILLIAM W. PATY, CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES

DEPUTIES

KEITH W. AHUE
MANABU TAGOMORI
RUSSELL N. FUKUMOTO

AQUACULTURE DEVELOPMENT PROGRAM
AQUATIC RESOURCES
CONSERVATION AND ENVIRONMENTAL AFFAIRS
CONSERVATION AND RESOURCES ENFORCEMENT
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STATE PARKS
WATER AND LAND DEVELOPMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
P. O. BOX 621
HONOLULU, HAWAII 96809

DOC. NO.: 9457E

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RECEIVED
Dec 24 10 12 AM '90
OFC. OF THE AUDITOR
STATE OF HAWAII

TO: Honorable Newton Sue
Acting Legislative Auditor

FROM: William W. Paty, Chairperson
Board of Land and Natural Resources

SUBJECT: Legislative Auditor's Review of Residential Construction in the Conservation District

Our review of your report finds it to be comprehensive, properly focused, and well researched. It points out to the reader some of the highly complex and technical aspects on administering the land use laws as they relate to the State Constitution, the statutes, Administrative Rules and the Conservation District.

We understand that as a part of your audit you also reviewed the organization of the Office of Conservation and Environmental Affairs, and the number of permanent staff assigned as well as their job descriptions. Although not a focus or mentioned, your interview of our Administrator did incorporate our concerns regarding staffing, and the need to hold and attract planners needed for this key function.

Included in the administration biennium budget for the upcoming Legislature to consider, we have provisions for four (4) additional planners, to better serve the public with these complex and technical aspects of the Conservation District, as well as increasing our enforcement activity.

Given the recent concerns regarding residential construction at the windward side, we had begun, at the request of the Land Board, to reexamine and evaluate our procedures, and your review enabled us to focus on the issues in a timely manner. We concur with all four of your recomendations.

We will be asking the Governor to allow us to submit proposed legislation to implement Recommendation Number 1 this upcoming session. Perhaps the reader may appreciate the complexity of this issue from a review of the appendix which indicate a wide variance in parcel size resulting in varying house square footage estimates. Additionally, we feel that the U. S. Supreme Court's action in Nollan v. California Coastal Commission in June 1987 (107 S. Ct. 3141 (1987)) effectively restricts our abilities somewhat in this area.

Relative to Recommendation Number 2, we will ensure that the statute and rules are consistent in defining non-conforming use.

Of particular interest was your bringing to our attention the omission of the key clause when DLNR first adopted the rules in 1964, relative to "within the forest and water reserves zones," regarding non-conforming use on pg. 19. That is very educational to us.

Also, we agree that most land use zoning does not provide for the second definition of non-conforming use where land intended for a residential unit could, if in compliance with the other criteria, qualify as a non-conforming use. Our understanding was that, when the Legislature enacted this provision, Hawaii was somewhat unique in that these parcels, usually under ten (10) acres were known as kuleana lands, and were parcelled out to native Hawaiians under a legislative act of August 6, 1850, more commonly known as the Kuleana Act. However, this issue may certainly be discussed more as a part of Recommendation Number 3.

Additionally, we will review our action in ensuring Environmental Assessments comply with the rules of the Department of Health, in classifying applications as non-conforming uses, and, in ensuring that applications are acted upon within 180 days of their receipt as suggested in Recommendation Number 4.

Also, towards increasing our public education efforts we will be coming out shortly with a special section in our next issue of the Hawaii Resource devoted to conservation zoned lands.

Although mentioned, but not a focus of the report, based upon an opinion from the Land Use Division of our Department of Attorney General, we will be asking the Board for the designation of Mt. Olomana on Windward Oahu, one of the areas of concern which brought about the report, as designated unique area, which will then allow it the criteria to be placed in the Protective subzone of the Conservation District.

Lastly, we feel it's important to note that throughout the auditing process we felt that the standards of reasonableness and fairness that were mentioned in the report relative to analyzing the statutes and rules were also applied to us.

## APPENDIX
## Characteristics of Examined Applications for New Residential Construction in the Conservation District

| Island | Acreage of Parcel | Subzone | House Square Footage Estimates | Use | EIS | Public Hearing | Land Board Decision[1] | Year of Land Board Decision | Contested Case Activity |
|---|---|---|---|---|---|---|---|---|---|
| Oahu | 8.65 | General | 5,000 | Conditional | No | No | Approved | 1985 | No |
| Hawaii | 5.00 | Limited | 1,500 | Conditional | No | No | Denied | 1986 | No |
| Maui | .26 | Limited | N/A[2] | Nonconforming | No | No | Approved | 1988[3] | No |
| Oahu | 20,807 sq. ft. | Limited | 3,162 | Nonconforming | No | No | Approved | 1986 | No |
| Oahu | 79,511 sq. ft. | General | 5,000 | Conditional | No | No | Approved | 1987 | No |
| Kauai | 35,218 sq. ft. | Limited | N/A[4] | Conditional[5] | No | No | Approved | 1988 | No |
| Hawaii | 24.40 | Resource | N/A[6] | Conditional | No | No | Approved | 1987 | No |
| Oahu | 34.31 | Resource | N/A[7] | Conditional | No | No | Approved | 1988 | No |
| Oahu | 2.46 | General | 4,850[8] | Nonconforming | No | No | Approved[9] | 1989 | Yes[10] |
| Kauai | 12,019 sq. ft. | Limited | 1,400 | Conditional[5] | No | No | Approved | 1989 | No |
| Hawaii | 25.50 | Resource | 2,192 | Conditional | No | Yes[11] | Approved | 1989 | No |
| Maui | 7.70 | General | 45,750[12] | Conditional | No | Yes[13] | Approved | 1990 | Yes[14] |
| Oahu | 75.90[15] | Limited | 32,680 | Conditional | Yes | Yes[16] | Denied[17] | 1988 | Yes[18] |
| Hawaii | 3.00 | Resource | 21,164 | Nonconforming | No | No | Approved | 1989 | No |

[1]The Board of Land and Natural Resources approves residential applications with 8 or 9 standard conditions and with additional conditions on a case-by-case basis.

[2]Not available. File indicated use of .26 acre and 3-bedroom house.

[3]Rejected in 1987 when applicant could not prove nonconforming use. Applicant was informed application would be approved if nonconforming use could be proven.

[4]File indicated a house of no more that 2,500 square feet.

[5]The Office of Conservation and Environmental Affairs usually recommends denial of conditional use residences in the limited subzone. But the board approves such applications for parcels that are part of the Haena Hui petition approved by the Fifth Circuit Court in 1967. The board feels legally obligated to grant all such applications.

[6]File indicated a "medium sized" single-family residence.

[7]File indicated a "3-bedroom, 1-1/2 bath, prefabricated house."

[8]Latest estimate available.

[9]The board subsequently revoked this approval in 1990 for noncompliance with one of its conditions.

[10]Petitions for a contested case were received but rendered moot when the board revoked the approval.

[11]Application involved a commercial farm.

[12]Includes building area, covered walkways and lanais, paved recreation space, and garage and guest parking.

[13]Public informational hearing.

[14]The board granted a petition for a contested case hearing. However, the case became moot when the parties entered into a conflict mediation process.

[15]Applicant sought to change 4.36 acres of this parcel to the general subzone, where the residence would be located.

[16]Application involved a subzone boundary amendment request.

[17]However, the First Circuit Court overturned the board's denial because the board failed to make its decision within 180 days.

[18]A petition for a contested case hearing was filed but later withdrawn.

**Source:** Conservation district use application files, Department of Land and Natural Resources, Office of Conservation and Environmental Affairs.