

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition)
of)
DOUGLAS MELLER)
For a Declaratory Order)
Concerning the Shoreline)
and Zone of Wave Action)
_____)

DOCKET NO. DR83-9

DOUGLAS MELLER

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State Land Use Commission, Honolulu, Hawaii.**

JUN 30 1986

Date

by

Robert Lead

Executive Officer

DECLARATORY ORDER

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DECLARATORY ORDER

THE PETITION

This matter arises from a Petition for a Declaratory Order to the Land Use Commission ("Commission") filed pursuant to Rule 8-1 of the Commission's Rules of Practice and Procedure and District Regulations, by Douglas Meller, who is requesting that a declaratory ruling be issued by the Commission clarifying matters pertaining to "shoreline" and "zone of wave action" in the State Land Use District Regulations ("Regulations"). The requested ruling specifically raises the following questions:

1. Does the "zone of wave action" as defined in State Land Use District Regulations include storm waves?

2. Does the "zone of wave action" as defined in State Land Use District Regulations include tidal waves, i.e., tsunamis?

3. Can the "maximum inland line of the zone of wave action" be further inland than the "shoreline" as defined in State Land Use District Regulations?

4. In shoreline areas where District Maps do not designate the location of the Conservation District boundary, if almost every year waves wash further inland than the vegetation line or the "shoreline" certified by the State Surveyor, is it

the intent of State Land Use District Regulations that the Conservation District extend inland of the vegetation line or the "shoreline" certified by the State Surveyor?

5. If a seawall or other structure built without permits is observed to be obstructing the inland wash of waves in an area where District Maps do not designate the location of the Conservation District boundary, is it the intent of State Land Use District Regulations that such seawall or structure be treated as if it were in the Conservation District?

6. If prolonged winter surf causes property damage to land and structures in an area where District Maps do not designate the location of the Conservation District boundary, is it the intent of State Land Use District Regulations that the Conservation District include the portions of private properties which have been damaged by winter surf?

7. In shoreline areas where District Maps do not designate the location of the Conservation District boundary, is it the intent of State Land Use District Regulations that the Conservation District include private properties inundated by storm waves from Hurricane Iwa in November, 1982?

8. If an agency or a member of the public submits a petition to the State Land Use Commission disputing the location of a "shoreline" certified by the State Surveyor, does the Commission have authority or a legal responsibility to resolve the uncertainty by making its own determination of the location of the "shoreline" upon which the "shoreline setback line" must be based?

9. Would it constitute a district boundary amendment if the Commission was to amend its State Land Use District Regulations so that the "zone of wave action" had an identical definition as "shoreline?"

PURPOSE OF PETITION

Petitioner's stated purpose for requesting the clarification of matters pertaining to "shoreline" and "zone of wave action" arises from personal concerns as a private planning consultant and as an unofficial advisor to several environmental organizations with respect to shoreline properties located in the Conservation District.

PROCEDURAL HISTORY

The Petition was received by the Land Use Commission on September 16, 1983. By letter dated October 13, 1983, Mr. Meller was informed by the Commission that in accordance with Rule 8-3, the Commission had voted to set the matter for hearing on December 1, 1983. In addition, the Commission requested that he prepare and submit by November 15, 1983 a memorandum addressing at least one factual context from which his questions arose, and a memorandum of law regarding the Commission's jurisdiction to hear the matter. Pursuant to the Commission's written request dated October 13, 1983, the Department of the Attorney General submitted a legal memorandum regarding the Petition of Douglas Meller on November 9, 1983. Written testimony was received by the Land Use Commission from Clinton R. Ashford, attorney for the Campbell Estate Trustees, on October 4, 1983 and later supported by a memorandum dated November 30, 1983; Michael McElroy, Director of Land Utilization, City and County of Honolulu, on November 7, 1983; Kazutaka Saiki, State Land Surveyor, Department of Accounting and General Services, on November 30, 1983; and Avery H. Youn, Planning Director, County of Kauai on December 2, 1983.

Subsequent to the December 1, 1983 hearing, Mr. Meller's request was scheduled for action on the Commission's

agenda at its December 13, 1983 meeting. The request again appeared on the Commission's agenda at its December 11, 1984 meeting and action was taken to respond to all questions in the negative.

COMMISSION ACTION

Jurisdiction of the Commission to entertain the request of Mr. Meller appears to be an unclear matter, not capable of any final resolution. It should be noted that the questions presented to the Commission are speculative and hypothetical and it appears that a purely advisory opinion is being sought. Generally, the Commission does not issue declaratory orders on questions that are speculative or purely hypothetical and do not involve existing facts or facts expected to be existing in the near future. Section 8-5(1), Rules of Practice and Procedure. There is considerable concern that such matters are better resolved at some future time when the Commission has before it an actual controversy with concrete facts. Because there is no "actual controversy" to which the Commission would be required to respond, the Commission's authority to issue a declaratory order seems unclear. Life of the Land v. Land Use Commission, 63 Haw. 166, 594 P.2d 1079 (1981), Charles E. Dalton, et al. v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969).

Moreover, there is some concern as to whether Mr. Meller is an "interested person" within the meaning of Section 91-8, H.R.S. or Rule 8-1(1), Rules of Practice and Procedure. He states his interest as being that of a private planning consultant and advisor to several environmental organizations. Further, he does not have a property interest in any shoreline property. Such interest does not appear to rise to the level of an interested person within the meaning of Section 91-8, H.R.S. or Rule 8-1(1), Rules of Practice and Procedure.

However, in an attempt to render some assistance in matters that are seldom simple and uncomplicated, the Commission

favors the issuance of a declaratory order and endeavors to remove uncertainty as provided under Rule 8-1(2), Rules of Practice and Procedure. Because Mr. Meller provided only limited and general facts in the questions requested to be answered, however, response has been confined to general principles concerning interpretation of terms, rather than any attempt to determine any line or boundary in any specific location.

POSITION OF THE PARTIES

Campbell Estate - against the issuance of a declaratory order.

Department of the Attorney General, State of Hawaii - against the issuance of a declaratory order.

Department of Land Utilization, City and County of Honolulu -

- 1) for a change in the definition of "zone of wave action."
- 2) location of the certified shoreline is under the purview of the State Land Surveyor.
- 3) in cases of shoreline disputes, aggrieved party may appeal to the State Land Surveyor.

Department of Accounting and General Services, State of Hawaii -

- 1) waves that regularly reach the permanent vegetation growth line affect shoreline certification.
- 2) any seawall or other structure built without permits that can be proven to have been constructed below the shoreline is under the jurisdiction of the Department of Land and Natural Resources.
- 3) case-by-case analysis is applied in shoreline certification.
- 4) except for a few controversies, most of the landowners whose property suffered damages from Hurricane Iwa were satisfied with the shoreline certification process.

Planning Department, County of Kauai -

- 1) storm waves, tsunami or hurricane surges should be excluded when determining either shoreline or zone of wave action.
- 2) shoreline certification rests with the State Surveyor and the Board of Land and Natural Resources.
- 3) shoreline setback rules should be deleted if the Commission is not responsible for its administration.

APPLICABLE REGULATIONS

1. H.R.S. 205-4 Amendments to district boundaries.

(a) Any department or agency of the State, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district.

2. H.R.S. 205-33 Prohibitions.

(b) Except as otherwise provided in this part no structure or any portion thereof, including but not limited to seawalls, groins, and revetments, shall be permitted within the shoreline area; provided that any lawful nonconforming structure existing on June 22, 1970 shall be permitted; provided further that any structure which is necessary for safety reasons or to protect the property from erosion or wave damages shall be permitted. A structure not conforming to this section but for which a building permit application has been filed on or before June 22, 1970, shall also be permitted as a nonconforming structure, subject to the ordinances and regulations of the particular county.

(c) Any nonconforming structure, including but not limited to residential dwellings, agricultural structures, seawalls, groins, and revetments may be replaced or reconstructed within the shoreline area; provided that no nonconforming structure shall be substantially enlarged or changed to another nonconforming use within the shoreline area. If the use of any nonconforming structure is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited.

3. H.R.S. 91-1 Definitions.

(5) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

4. H.R.S. 91-9 Contested cases; notice; hearing; records.

(a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

- (1) The date, time, place, and nature of hearing;
- (2) The legal authority under which the hearing is to be held;
- (3) The particular sections of the statutes and rules involved;
- (4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided, that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;
- (5) The fact that any party may retain counsel if he so desires and the fact that an individual may appear on his own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and

informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decision, the record shall include:

- (1) All pleadings, motions, intermediate rulings;
- (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
- (3) Offers of proof and rulings thereon;
- (4) Proposed findings and exceptions;
- (5) Report of the officer who presided at the hearing;
- (6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein.

5. Rule 6-1 Standing to Initiate Boundary Amendments.

The following persons may initiate a petition to the Commission for district boundary amendment:

- (1) Land Use Commission.
- (2) State departments or agencies.
- (3) County departments or agencies in which the land is situated.
- (4) Any person with a property interest in the land sought to be reclassified.

6. State Land Use Commission District Regulations, Reg. 1-4 Definitions.

(22) "Shoreline" means the upper reaches of the wash of waves, other than storm and tidal waves, usually evidenced by the edge of vegetation growth.

. . . .

(29) "Zone of wave action" shall mean that portion of the shore lying between the sea and any visible marks which indicate the farthest extent to which the maximum annual wave advances inland including, but not limited to, the vegetation line or line of debris, the crest of the sand or dune line, or the rocky shore.

7. State Land Use Commission District Regulations, Reg. 2-2(3) Standards for Determining District Boundaries.

The following standards shall be used in establishing the district boundaries. In determining the boundaries for the "C" Conservation district, the following standards shall apply:

(b) Lands susceptible to floods, and soil erosion, lands undergoing major erosion damage and requiring corrective attention by the State or Federal Government, and lands necessary for the protection of the health and welfare of the public by reason of the lands' susceptibility to inundation by tsunami and flooding, to volcanic activity and landslides may be included in this District.

. . . .

(f) Lands having an elevation below the maximum inland line of the zone of wave action, and marine waters, fish ponds and tide pools of the State shall be included in this District unless otherwise designated on the district maps. All offshore and outlying islands of the State of Hawaii are classified Conservation unless otherwise indicated.

8. State Land Use Commission District Regulations, Reg. 4-1 Statement of Intent.

The regulations contained in this Part IV are intended to reasonably expedite the eventual

elimination of existing uses or structures that are not in conformity with the provisions of this part because their continued existence violates basic concepts of health, safety and welfare as well as principles of good land use. However, in applying the aforesaid regulations, no elimination of non-conforming uses or structures shall be effected so as to cause unreasonable interference with established property rights.

9. State Land Use Commission District Regulations Reg. 4-5 Existence of Non-Conforming Use is a Question of Fact.

Whether a non-conforming use exists shall be a question of fact and shall be decided by the County Planning Commission after public notice and hearing.

10. State Land Use Commission District Regulations Reg. 6-1 Requirements for Boundary Amendments.

No amendment of a land use district boundary shall be approved unless the Commission finds upon the clear preponderance of the evidence that the proposed boundary amendment is reasonable, not violative of Section 205-2 and consistent with the Interim Statewide Land Use Guidance Policies established pursuant to Chapter 205, H.R.S., or any State Plan hereafter enacted by the Legislature, which State Plan shall supersede the Interim Statewide Land Use Policies. Except when the Commission finds that an injustice or inequity will result, the Commission shall observe and comply with the Interim Statewide Land Use Guidance Policies set forth below:

- (1) Land use amendments shall be approved only as reasonably necessary to accommodate growth and development, provided there are no significant adverse effects upon agricultural, natural, environmental, recreational, scenic, historic, or other resources of the area.
- (2) Lands to be reclassified as an urban district shall have adequate public services and facilities or as can be so provided at reasonable costs to the petitioner.
- (3) Maximum use shall be made of existing services and facilities, and scattered urban development shall be avoided.

- (4) Urban districts shall be contiguous to an existing urban district or shall constitute all or a part of a self-contained urban center.
 - (5) Preference shall be given to amendment petitions which will provide permanent employment, or needed housing accessible to existing or proposed employment centers, or assist in providing a balanced housing supply for all economic and social groups.
 - (6) In establishing the boundaries of the district in each county, the Commission shall give consideration to the general plan of the county.
 - (7) Insofar as practicable conservation lands shall not be reclassified as urban lands.
 - (8) The Commission is encouraged to reclassify urban lands which are incompatible with the interim statewide land use guidance policy or are not developed in a timely manner.
11. State Land Use Commission District Regulations
Reg. 8-1 Establishment of Shoreline Setback Lines.

- (1) Shoreline setback lines are established throughout the State by the Commission at 40 feet inland from the upper reaches of the wash of waves other than storm and tidal waves, usually evidenced by the edge of vegetation growth, except that such shoreline setback lines shall be 20 feet on any land parcel of record when any one or more of the following exist:
 - (a) Where the average depth of a parcel, as measured from the shoreline or the seaward boundary of the parcel, whichever is the less, is less than 100 feet;
 - (b) Where the parcel is less than one-half (1/2) acre and where that parcel area is less than the minimum lot area required by the respective County zoning or subdivision ordinance applicable to said parcel; or

- (c) Where the buildable area of the parcel is reduced to less than 50 percent of the parcel area after applying the 40 foot shoreline setback line and all State and County requirements wherein the parcel is located, including but not limited to front and side yard setbacks, cross-slope requirements, and terrain requirements.
- (2) Counties through ordinance may require that shoreline setback lines be established at a distance greater than that established by the Commission.

FINDINGS OF FACT

The Land Use Commission, after having duly considered the record in this docket and testimony submitted by parties makes the following conclusion:

1. "Zone of wave action" as defined in Reg. 1-4(29) of the Regulations does not include storm wave and tidal wave. As defined, "zone of wave action" does not expressly include storm wave and tidal wave; instead, it is indicated by "visible marks which indicate the farthest extent which the maximum annual wave advances inland including, but not limited to, the vegetation line."

The key word in the definition is "annual." In its ordinary and popular sense, the word "annual" is defined as meaning "returning, performed, or current every year." Funk & Wagnall, New Comprehensive International Dictionary of the English Language (1973). The term "annual" reflects consistency in the matter and is not intended to encompass unpredictable or inconsistent occurrences. Similarly, the Hawaii Supreme Court in Application of Sanborn, 57 H. 585, 562 P.2d 771 (1977) in its determination of the location of shoreline boundary, construed the term "upper annual reaches of the wave" to exclude storm and tidal waves. Implicit in the court's definition of high water mark to reflect normal high tide within the range of normal seasonal fluctuations is a presumption that normal or annual

should be interpreted to exclude such inconsistent or erratic occurrences as storm and tidal wave.

In another shoreline boundary dispute, the Court in Application of Ashford, 50 H. 314, 440 P.2d 76 (1968), described the term "high water mark" to exclude any line caused by extraordinary phenomena such as storms and tidal waves. The law as applied in Hawaii is that beachfront title line runs along the upper annual reaches of the wave, excluding storm and tidal wave. County of Hawaii v. Sotomura, 55 H. 176, 181-182, 517 P.2d 57, 61-62 (1973). The Commission takes a position consistent with Sotomura, Ashford, and Sanborn, by excluding storm and tidal waves from "zone of wave action" as defined under the Regulations.

2. The maximum line of the "zone of wave action" cannot be further inland than the "shoreline" as defined in the Regulations. Again, Petitioner's question addresses those situations that arise out of extraordinary, inconsistent occurrences. Although the definition of "zone of wave action" does not expressly exclude extraordinary occurrences, the term "visible marks" which indicate the farthest extent of the maximum annual wave as it advances inland appears to address the matter by using the annual wave as the measure. Specific reference to visible marks is in conformance with the Commission's intent to exclude those specific, extraordinary occurrences referred to as Petitioner's "maximum inland line."

It is recognized that long-standing public use of Hawaii's beaches to an easily recognizable boundary has ripened to a custom or right. Sotomura citing State Rel. Thornton v. Hay, 254 Ore. 585, 462 P.2d 671 (1969). Sanborn also recognized that in construing land court decrees, generally, natural monuments control. The underlying purpose of setting forth visible marks as a measurement in determining "zone of wave action" represents the Commission's desire to lend consistency in the area of boundary line disputes. Although "zone of wave action" does not provide an exhaustive inventory of visible

marks, nevertheless, it is subject to those constraints established by the Commission including, but not limited to the shoreline.

3. It is not the intent of the Regulations that the Conservation District extend inland of the "shoreline" certified by the State Surveyor in a situation where waves annually wash further inland than the certified "shoreline."

In a letter dated November 30, 1983, Mr. Kazutaka Saiki, State Land Surveyor, informed the Commission that he was not aware of any location where the yearly high wash of waves regularly extend further inland than the shoreline. Admittedly there are intermittent occurrences where storm-generated waves extend further inland than the shoreline; however, the certified shoreline is not affected by these erratic occurrences.

The court in Sotomura recognized that while the debris line may change from day to day, the vegetation line is a more permanent monument in determining the shoreline. This preference for a more consistent reference point is reflected in the Regulation's definition of "shoreline" in Reg. 1-4(22) which provides that this is the "upper reaches of the wash of waves other than storm and tidal waves, usually evidenced by the edge of vegetation growth." The occurrence of a storm-generated or tidal wave that extends further inland than the certified shoreline in a single given year alone does not justify extending the Conservation District inland of the certified shoreline. A more permanent showing through normal, seasonal wave action is required to extend the shoreline further inland. The extension inward of the Conservation District would necessarily follow the recertification of the shoreline.

4. It is not the intent of the Regulations that a seawall or other structure built without permits obstructing the inland wash of waves be treated as if it were in the Conservation District.

State Land Use Commission District Regulations,
Reg. 4-1 provides in relevant part that:

The regulations . . . are intended to reasonably expedite the eventual elimination of existing uses or structures that are not in conformity with the provisions of this part because their continued existence violates basic concepts of health, safety and welfare as well as principles of good land use. However, in applying the aforesaid regulations, no elimination of non-conforming uses or structures shall be effected so as to cause unreasonable interference with established property rights.

Under H.R.S. 205-33(b), these structures include but are not limited to seawalls, groins, and revetments within the shoreline area, provided that any structure which is necessary for safety reasons or to protect property from erosion shall be permitted. Existence of the non-conforming use shall be a question of fact and shall be decided by the County Planning Commission after public notice and hearing. Reg. 4-5, State Land Use Commission Regulations.

5. It is not the intent of the Regulations to include portions of private properties damaged by prolonged winter surf within the Conservation District.

In determining boundaries for the "C" Conservation District, the language in Reg. 2-2(3)(b), unlike that of Reg. 2-2(3)(f), is permissive rather than mandatory. Lands that are susceptible to floods and soil erosion, lands undergoing major erosion damage and requiring corrective action by the State and Federal government, and lands necessary for the protection of the health and welfare of the public by reason of the lands' susceptibility to inundation by tsunami and flooding, to volcanic activity and landslides may be included in this District. However, such determination is discretionary, meant to be undertaken on a case-by-case basis rather than by any blanket interpretation of a definitional section.

6. It is not the intent of the Regulations to include private properties inundated by storm waves from Hurricane Iwa in the Conservation District.

Re. 2-2(3)(f) of the Regulations provides in relevant part that:

In determining the boundaries for the "C" Conservation District, the following standards shall apply [to] lands having an elevation below the maximum inland line of the zone of wave action. . .

The maximum inland line was not intended as a reference point for those extraordinary occurrences such as storm-generated or tidal waves, but rather normal, seasonal fluctuations. The court in Sanborn faced similar problems in its interpretation of high water mark and concluded that the true line of high water in this jurisdiction is along the upper annual reaches of the waves, excluding storm and tidal waves. County of Hawaii v. Sotomura, 55 H. 176, 181-82, 517 P.2d 57, 61-62 (1973).

7. The Commission does not have the statutory authority to resolve a dispute over the location of a certified shoreline. Reg. 8-1 vests the Commission with the authority only to establish shoreline setback line, not to certify shorelines. Such responsibility jointly rests with the State Surveyor and the Board of Land and Natural Resources.

Attention is directed to Hawaii Revised Statutes, Chapter 91, Administrative Procedure Act ("Act") for guidance. If the dispute falls under the definition of a "contested case" within the meaning of Section 91-1(5) of the Act, then the party affected by the agency's decision has recourse under the subsequent Section 91-9 of the Act. See Town v. Land Use Commission, 55 H. 538, 524 P.2d 84 (1974).

8. Petitioner's proposed suggestion that the commission amend "zone of wave action" to conform with the "shoreline" definition in Reg. 1-4(22) does not constitute a district boundary amendment.

Part VI of the Regulations is controlling and contains a list of procedural requirements which govern proceedings for district boundary amendments. All presuppose that boundaries to specific parcels of land would be considered. As noted under Rule 6-1, established pursuant to Chapt. 205, H.R.S., only those individuals "with a property interest in the land sought to be reclassified," or any department or agency of the State including the Land Use Commission or any department or agency of the county in which the land is situated have standing to initiate boundary amendments.

9. Based on a review of the Petition, the testimony submitted to the Commission and the provisions of Chapter 205, Hawaii Revised Statutes, notwithstanding the non-specific nature of the questions presented, the Land Use Commission has decided that the matters set forth in the Petition be addressed.^{1/}

CONCLUSIONS OF LAW

1. "Zone of wave action" as defined in Reg. 1-4(29) of the State Land Use District Regulations does not include storm and tidal waves.

2. The maximum line of the "zone of wave action" cannot be further inland than the "shoreline" as defined in Reg. 1-4(22) of the Regulations.

3. It is not the intent of the Regulations that the Conservation District in accordance with Reg. 2-2(3) of the Regulations extend inland of the "shoreline" certified by the State Surveyor unless a re-certification of the shoreline by the State Surveyor requires an extension further inland of the previously established conservation district.

^{1/} It is noted that portions of Chapter 205A, Hawaii Revised Statutes, have been amended by Act 258, Sess. Laws Haw. (1986), which was enacted on May 29, 1986. This is not reflected in the Commission action which had been taken prior to the effective date of the amendment to Chapter 205A.

4. It is not the intent of the Regulations that a seawall or other structure built without permits obstructing the inland wash of waves be treated as if it were in the Conservation District within the provisions set forth in Reg. 2-2(3) and Reg. 4 of the Regulations.

5. It is not the intent of the Regulations to include portions of private properties damaged by prolonged winter surf within the Conservation District in accordance with Reg. 2-2(3) of the Regulations.

6. It is not the intent of the Regulations to include private properties inundated by storm waves from Hurricane Iwa in the Conservation District within the provisions set forth in Reg. 2-2(3) of the Regulations.

7. The Commission does not possess the statutory authority to resolve a dispute over the location of a certified shoreline.

8. Amending "zone of wave action" to conform with the "shoreline" definition does not constitute a district boundary amendment within the provisions set forth in Reg. 6-1 of the Regulations.

ORDER

FOR GOOD CAUSE APPEARING, it is hereby ordered that the foregoing declaratory ruling be issued, addressing the subject matter of the Petition concerning shoreline and zone of wave action.