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Office of the Director

September 21, 1977

RR: 0051

Mr. William Y. Thompson, Chairman
Board of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Dear Sir:

DLNR REGULATION 4

We acknowledge with pleasure receipt of Draft 4 of the proposed revision of DLNR Regulation 4, which is long overdue. We appreciate the statement of philosophy in the transmittal letter of 16 August, and we find the provisions of the draft in keeping with that philosophy and commend the DLNR staff on its preparation.

To the preparation of these comments on provision of the draft, the following persons have contributed: Harold Baker, Agricultural and Resource Economics; Doak C. Cox and Kenneth Hill, Environmental Center; and Charles Lamoureaux, Botany. We have one general comment, which we will follow with a number of detailed comments identified with specific sections of the regulation.

General Comment

Among uses the draft distinguishes those "conditional," those "non-conforming," and those "permitted." It is not clear whether a "permitted use" is: 1) one that is to be automatically permitted by the regulation itself, or 2) one for which application or proposal must be made to DLNR.

The first meaning is suggested by:

1) The statement that a "permitted use" is one permitted as a matter of right, and 2) by the introductions to the lists of permitted uses in each subzone (2B1b, 2C1b, 2D1b, and 2E1b) which indicate that the permitted uses are to be as listed.

The second meaning is suggested by: 1) the DLNR transmittal letter of 16 August 1977 indicating that permitted uses are those "which we would permit as a matter of right;" 2) the provision in 4A1 that application or proposal must be made "prior to the initiation of any work." The provision in 4B12, and 4C1 indicates that at least a proposal (if not application) must be made for "establish[ment] of a permitted use."

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We assume the second meaning is the intended one. If this is correct we suggest that the definition of permitted use in 1A16 be changed to replace "is permitted as a matter of right" by "will be permitted as a matter of right," and that the word "are" be replaced by "may be" in the introductions to 2B1b, 2C1b, 2D1b, and 2E1b.

In the second interpretation, the approval of a permitted use is a ministerial action, the approval of a conditional use is an discretionary action, consistent with II-B (p. 2) in the introduction to the revised regulation.

Detailed comments

1 A 16 (p. 2). In addition to the problem with the definition of "permitted use" discussed in our general comment, we see another problem. If a permitted use is one that will be allowed anywhere in a subzone, it would seem that any other permit requirements than those in Regulation 4 will be invalidated.

For example, if under Reg. 4a forestry is permitted use in subzone L, which includes lands of up to 40% slope, would DLNR be unable to refuse to permit forestry on slopes approaching 40% that are especially subject to soil erosion. If commercial fishing is a permitted use in subzone R, would all permits required for commercial fishing and limitations placed on such fishing under other regulations be voided. We suggest adding to Sec. 1A16 the phrase unless limited or prohibited under other regulations.

1 A 18 (p. 2). The reason for restricting the definition of "public fishery area" so as to exclude salt-water areas is not clear to us.

1 A 21 (p. 3). We suggest that the definition of "scenic reserve" be that the scenic, etc. values outweigh the values of all conflicting uses, and that it should not be necessary that the scenic, etc. values outweigh all other values including values associated with uses compatible with scenic enjoyment.

2 A 1 c (1) (p. 4). The comma after "lands" should be deleted, and a comma inserted after "Refuge."

2 B 1 b (2) (p. 5). We suggest that this subsec be begun with the word "Non-destructive."

2 C 1 b (3) (p. 5). We question whether construction of a large dam for flood control purposes should be a "permitted use" in the L subzone.

2 C 1 b (4) (p. 5). See comments on 1 A 16.

2 D 1 b (2), (3), (4) (p. 6). See comment on 1 A 16.

2 E 1 (p. 6). There is a presumption that urban use may eventually be appropriate in subzone G. We suggest replacement of the word "premature" by is "currently deemed inappropriate."

2 E 1 a (1) (p. 6). See above comment.

2 E 1 a (2) (p. 7). The inclusion of lands suitable for farming, etc. in subzone G seems inconsistent, since farming, etc. are not uses permitted in this subzone.

4 A 1 (p. 7). We recognize that the applicant for, or proposer of a use in the Conservation District must be protected against dilatory tactics by the State, but some of our reviewers are concerned with the provision for automatic approval of proposed uses if applications are not acted on within 180 days. However, we note that grants of conditional use permits in the P subzone or for controversial uses, and permits for commercial uses even if "permitted uses," must be subject to public notice and hearings.

4 B 3 a (5) (p. 9). We wonder what provision will be made for monitoring of operations in case of the discovery of significant archaeological remains in the course of development.

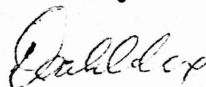
4 C 2 d (p. 9). Replace "it related to" by "to which it relates."

6 A 13 (p. 12). The 40% slope criterion for allowing clearing without special approval is exceedingly lax.

6 A 14 (p. 12). We suggest that this subsection begin with: "Adequate erosion control measures shall be undertaken in cleared areas and such areas shall be..."

6 C 1 (p. 13). We suggest that "practical alternatives" be replaced by "reasonable alternatives consistent with the intent of these regulations."

Yours very truly,



Doak C. Cox
Director

DCC/ck

cc: Harold Baker
Charles Lamoureux
Kenneth Hill
OEQC