

202-1

TITLE MC-12

DEPARTMENT OF PLANNING

SUBTITLE 02

MAUI PLANNING COMMISSION

CHAPTER 202

**SPECIAL MANAGEMENT AREA RULES**

Subchapter 1 General Provisions

|            |   |
|------------|---|
| §12-202-1  | Title                                       |
| §12-202-2  | Purpose                                     |
| §12-202-3  | Scope [and exemptions]                      |
| §12-202-4  | Definitions                                 |
| §12-202-5  | Severability                                |
| §12-202-6  | Special management area boundaries and maps |
| §12-202-7  | Implementation of rules                     |
| [§12-202-8 | (Reserved)                                  |
| §12-202-9  | (Reserved)]                                 |

Subchapter 2 Special Management Area Permit Procedures

|                     |  |
|---------------------|--|
| §12-202-10          | Special management area objectives and policies                        |
| §12-202-11          | Special management area review guidelines                              |
| <u>§12-202-11.5</u> | <u>Special management area categorical exemptions</u>                  |
| §12-202-12          | Assessment and determination procedures                                |
| §12-202-13          | Notice of application and notice of public hearing; adequacy of notice |
| §12-202-14          | Special management area minor permit procedures                        |
| §12-202-15          | Special management area use permit procedures                          |

202-2

- §12-202-16 Special management area emergency permit procedures
- §12-202-17 Amendments to [and determinations of] permit [terms, conditions, and time stipulations] approvals.
- §12-202-18 (Reserved)
- §12-202-19 (Reserved)
- §12-202-20 (Reserved)]

Subchapter 3 Procedures to Adopt Special Management Area Rules; Declaratory Rulings; [and] Adoption and Amendment of Boundaries and Maps; Enforcement; and Appeals

- §12-202-21 Petition and procedures to adopt, amend, or repeal special management area rules; declaratory rulings
- §12-202-22 Adoption and amendment of special management area boundaries and maps
- §12-202-23 Enforcement
- §12-202-24 Conflicts with other laws
- §12-202-25 Penalties
- §12-202-26 Appeal of director's decision; filing the notice of appeal; settlement of appeal
- §12-202-27 Content of the [notice of] appeal
- §12-202-28 Joint or consolidated appeals
- §12-202-29 Service of the notice of appeal
- §12-202-30 Payment of fees
- §12-202-31 Contested case hearing on appeal
- §12-202-32 Disposition of appeal

202-3

## SUBCHAPTER 1

### GENERAL PROVISIONS

**§12-202-1 Title.** The rules in this chapter shall be known as the "Special Management Area Rules for the Maui Planning Commission." [.] [Eff 1/1/94] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §205A-29)

**§12-202-2 Purpose.** The purpose of these rules is to implement Hawaii Revised Statutes (HRS) chapter 205A, relating to coastal zone management and special management areas, and to establish application procedures for special management area assessments, emergency permits, minor permits, and use permits, time periods within which hearings must be held, and procedures to provide notice to individuals whose property rights may be affected. The rules further the policy of the [state] State to preserve, protect and where possible, restore the natural resources of the coastal zone. The rules also assist the commission in giving full consideration to the [state] State policy of establishing special controls on development within the areas along the shoreline [to avoid permanent loss of valuable coastal resources and foreclosure of land use and management options of these resources, and] to provide adequate access to beaches, recreational areas, and natural reserves. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-27, 205A-29, 205A-30) (Imp: §§ HRS 205A-1 to 205A-33)

**§12-202-3 Scope. [and exemptions.]** (a) The rules contained in this chapter shall apply to the special management area on the island of Maui as designated on the special management area maps and specifically excluding the islands of Kahoolawe, Molokai, and Lanai.

(b) [The] At the discretion of the director, the rules in this chapter [shall] may not apply to special management area and shoreline setback area applications that have been deemed complete by the director before the effective date of these rules. An application shall be deemed complete by the director upon receipt of final agency comments and a notification [letter is] being sent by the County [director] to the applicant to that effect. Applications deemed

202-4

complete [shall] may be processed under the rules in effect at the time the application was deemed complete. [Eff 1/1/94] (Auth: HRS §§46-4, 91-2, 205A-27, 205A-29) (Imp: HRS §205A-23)

**§12-202-4 Definitions.** For the purposes of this chapter, and unless it is plainly evident from the context that a different meaning is intended, the definitions of this chapter shall be those set forth in sections 205A-1, 205A-22, and 205A-41, HRS ([a copy] copies of which shall be provided pursuant to section 12-202-7), and as follows:

"Categorical Exemption" means a proposed use, activity, or operation for which a special management area assessment, emergency permit, minor permit, or use permit is not required, pursuant to section 12-202-11.5.

"Commission" means the Maui planning commission.

["Crops" means agricultural produce or parts of plants or trees cultivated for commercial or personal use, including but not limited to the raising of livestock and aquaculture.

"Cultural resources commission" means the Maui County cultural resources commission established under chapters 2.40 and 2.88 of the Maui County Code.

"Debris line" means a line marking the landward limit of debris deposits resulting from the upper reaches of the wash of waves.]

"Department" means the department of planning of the County of Maui.

"Development" means any of the uses, activities, or operations on land or in or under water within a special management area as defined by section 205A-22, HRS, as amended.

"Director" means the director of the department of planning of the County of Maui.

"Director of public works [and environmental management]" means the director of the department of public works [and environmental management] of the County of Maui.

"Environmental assessment" or "environmental impact statement" [or "EIS"] means an informational document that is prepared in compliance with chapter 343, HRS, and the rules of the office of environmental quality control.

"Erosion hazard line" means the mapped 80 percent cumulative probability contour of the coastal erosion hazard zone

with 3.2 feet of sea level rise approved by the Hawaii Climate Change Mitigation and Adaptation Commission as part of the 2017 Hawaii Sea Level Rise Vulnerability and Adaptation Report, as accessible within the Hawaii Sea Level Rise Viewer hosted by the Pacific Islands Ocean Observing System, and as may be updated from time to time.

["Estuarine sanctuary" means a research area which may include any part or all of an estuary, adjoining transitional areas, and adjacent uplands, constituting to the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over a period of time the ecological relationships with the area.]

"Estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage.

"Exempt action" or "exemption" means a proposed use, activity, or operation that is not a development as determined by the director and as defined by section 205A-22, HRS, and as otherwise provided herein.

["Family" means a family as defined in title 19 of the Maui County Code, as amended.]

"HRS" means the Hawaii Revised Statutes, as amended.

"Hana advisory committee" means the Hana advisory committee to the Maui planning commission pursuant to chapter 2.28 of the Maui County Code.

["NBCIDAC" means the Napili Bay civic improvement district advisory committee.

"Nonstructural improvements to existing commercial structures" means non-habitable improvements to existing structures, which improvements are adjunct to the main structure not to exceed fifty square feet in floor area; or temporary structures for special events not to exceed fourteen consecutive days. Improvements may include, but not be limited to, window or door replacement or addition, reroofing, storage additions, signage, tents, and booths.]

"Owner" means all holders of an equitable or legal interest in real property on the island of Maui, including any lessee holding under a recorded lease with a term of five years or more.

"Plot plan" means a detailed map prepared to [a] scale, based upon an accurate instrument survey, defining and showing the

202-6

design of the proposed action and the existing physical condition of the land, including [but not limited to] parcel boundaries, topography, natural and [man made] constructed features, trees, and structures. The director may require the applicant to set forth in the plot plan cross sections of the site at designated locations.

"Proposed action" means any use, activity, or operation proposed by an applicant [on land] within the special management area.

"Renovation" means the remodel, change, update, or upgrade of a structure that does not result in a significant change to its configuration or floor plan, does not increase existing floor area, and does not add floors, including replacement of cabinets, fixtures, roofs, wall surfaces, and floor surfaces.

"Repair" means the reconstruction or renewal of any part of an existing structure, but not the entire structure, solely for the purpose of its maintenance.

["Scenic amenities" means significant coastal features including, but not limited to, areas of vegetation, growth, land forms such as dunes or rock outcroppings, mountain and seaward visual corridors, beaches, aquatic areas, and archeological and historic sites.

"Shoreline survey" means the actual field location of the shoreline prepared by a land surveyor registered in the State of Hawaii. Such survey maps developed by the registered land surveyor shall bear the surveyor's signature and date of field survey and the certifying signature and date of the chairman of the board of land and natural resources.]

"Single-family residence" means [a] one single-family dwelling and [any accessory dwelling] all accessory structures thereto, including one accessory dwelling as defined in and provided by title 19 of the Maui County Code, as amended[.], that together can be considered an exempt action pursuant to section 205A-22, HRS, provided that the total floor area, as defined by Title 19, Maui County Code, is less than 7,500 square feet and that it is not part of a larger development.

"Urban design review board" means the Maui County urban design review board as established under chapters 2.26 and 2.40 of the Maui County Code, as amended.

"Use" means a use as defined in title 19 of the Maui County Code, as amended.

202-7

["Vegetation growth" means any plant, tree, shrub, grass, or groups, clusters, or patches of the same naturally rooted and growing.

"Vegetation line" means a line marking the seaward limit of vegetation growth.] [Eff 1/1/94; am 9/28/97, am and comp 9/25/03, am and comp 4/21/08] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §205A-29)

**§12-202-5 Severability.** If any provision of these rules or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of these rules [which] that can be given effect without the invalid provision or application. To that extent the provisions of these rules are severable. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §§91-2, 205A-9)

**§12-202-6 Special management area boundaries and maps.** The special management area shall be all lands so designated on the maps adopted by the commission as of November 19, 1975, or as amended pursuant to section 205A-23, HRS, which maps are in the keeping of the department. These maps shall be the official special management area to be administered and enforced under these rules. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-23, 205A-27, 205A-29) (Imp: HRS §205A-23)

**§12-202-7 Implementation of rules.** The director shall provide such applications in a form as may be necessary to accomplish the intent of these rules, and shall provide upon request, a copy of sections of Hawaii Revised Statutes referenced in these rules. Such copies shall be provided as a convenience to the public and shall be accompanied with a disclosure cautioning readers that reproduced sections should not be relied upon to be accurate, complete, or applicable to any particular application and that reference should be made to the Hawaii Revised Statutes, all supplements thereto and [Acts] acts of the [state] State legislature. The director may also publish with the rules, or separately, tables, charts, or other graphics that will serve to clarify or illustrate various provisions. A charge may be imposed for copying costs. [Eff 1/1/94, am and comp] (Auth: HRS §§91-2, 205A-290) (Imp: HRS §205A-29)

[§12-202-8 (Reserved)]

§12-202-9 (Reserved)]

## SUBCHAPTER 2

### SPECIAL MANAGEMENT AREA PERMIT PROCEDURES

**§12-202-10 Special management area objectives and policies.** (a) The objectives and policies of this chapter shall be those set forth in section 205A-2, HRS, as amended.

(b) In implementing these objectives and policies, the department or the commission, as appropriate, shall fully consider ecological, environmental, recreational, cultural, historic, and [aesthetic values] scenic resources as well as needs for economic development[.] and hazard mitigation. [Eff 1/1/94] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4)

**§12-202-11 Special management area review guidelines.** The review guidelines set forth in section 205A-26, HRS, as amended, shall be used by the director and the commission, as appropriate, for the review of developments proposed in the special management area. [Eff 1/1/94] (Auth: HRS §§91-2, 91-4.2, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-26)

**§12-202-11.5 Special management area categorical exemptions.** Section 205A-22, HRS, provides a definition for "development." Any development requires a special management area permit pursuant to chapter 205A-22, HRS, and these rules. Section 205A-22, HRS, also provides a list of uses, activities, and operations excluded from the definition of "development;" these excluded uses, activities, and operations, however, must first undergo a special management area assessment to determine whether they have a cumulative impact or a significant environmental or ecological effect on the special management area. If the director assesses any such use and determines it does not have a cumulative impact or a significant environmental or ecological effect on the special management area, then a special management area permit is not required.

Pursuant to HRS 205A-26(2) it is hereby assessed and determined that any use, activity, or operation listed below is not considered "development" pursuant to section 205A-22, HRS; by its minimal nature, does not have a cumulative impact or a significant environmental or ecological effect on the special management area; and therefore is exempt from any requirements for a special management area assessment or permit. However, such uses, activities, or operations may be subject to other assessment or permitting requirements, such as a building permit, a historic district permit, or a flood development permit; subsections (d), (h), (j), (k), and (l) herein may require a shoreline setback approval if within the shoreline area.

(a) Transfer of land title; creation or termination of easements, covenants, or other rights in structure or land;

(b) Normal and customary agricultural activities on land currently or historically used for such activities, provided that appropriate best management practices are implemented to minimize impacts to nearshore waters;

(c) Changes in uses or operations, including changes between short-term and long-term occupancy of dwelling units and various uses of beach parks that are under county or state jurisdiction, that do not increase the density or intensity of use. Increases in the density or intensity of use can be demonstrated by increased off-street parking requirements or storage needs, or other effects as determined by the director;

(d) On private property, one temporary event and its signage, such as a fundraiser, community event, festival, fair, luau, and family celebration, occurring not more than once in a thirty-day period, and limited to ninety-six hours including setup and takedown, and involving no new ground altering activity; on public property, such temporary events and signage under a county or state permitting authority; provided that if any event is on the shoreline, then shoreline setback approval is required;

(e) Archaeological, geophysical, percolation, engineering, soils, and other scientific testing conducted by a licensed archaeological or scientific professional involving temporary excavation limited to the minimum extent determined necessary and appropriate or as

approved by the State Historic Preservation Division, and employing best management practices protective of the environment and natural and cultural resources;

(f) Nonstructural interior maintenance, repairs, and renovations to existing, lawfully established structures that involve no expansion, no ground disturbance, and do not increase the density or intensity of use, such as paint, floors, carpets, cabinets, and interior walls and doors. Increases in the density or intensity of use can be demonstrated by increased off-street parking requirements or storage needs, or other effects as determined by the director;

(g) Nonstructural exterior maintenance, repairs and renovations to existing, lawfully established structures that involve no ground disturbance, such as doors, windows, shutters, siding or roofs and, for structures erected in 1981 or after, to protect against impacts from lead-based paint, painting with related preparatory work;

(h) Driveway and parking lot patching and repairs, but not resurfacing;

(i) Exterior installation on and maintenance, repairs, and renovations to existing, lawfully established structures that involve no ground disturbance and that are nonstructural, such as signage, wireless antennae and other transmission equipment, satellite dishes, and roof mounted equipment, such as photovoltaic and solar panels;

(j) Nonstructural single-story enclosures of existing, lawfully established roofed residential lanais, decks, patios, balconies, carports or similar structures that are accessory to single-family dwellings and multi-family dwellings and that are included in the definition of "floor area" in Title 19 of the Maui County Code, provided that those enclosures will not result in the total floor area of a single family residence exceeding 7,500 square feet;

(k) Site improvements, except in coastal dunes, involving limited ground disturbance, such as minor surface grading and grubbing, installation of turf, shallow landscaping, and irrigation, and installation of asphalt or concrete slabs and driveways up to six inches deep and up to three hundred square feet;

(l) Site improvements, except in coastal dunes, involving limited ground disturbance more than six inches deep and up to sixteen square feet for holes or trenching, such as the installation, removal, or maintenance of trees and shrubs, utility pedestals, ground signs, water, sewer, and conduit lines, walls and fences up to four feet in height, telephone and light poles, mailbox posts, and solar panels, provided that the improvements may be subject to shoreline setback approval, and provided that this does not include new wireless telecommunications towers, windmills and wind turbines.

(m) Operation and maintenance activities for public roadways and drainage systems, subject to approval by the applicable state or county agency, such as vegetation-management activities, including tree trimming and cutting and vegetation removal, and clearing obstructions, provided that beach sand is placed on adjacent beach and dunes if there is an adjacent beach or dune and the obstruction consists solely of beach sand.

(n) With the application of best management practices to protect the marine and land environment, emergency protection of Department of Environmental Management wastewater infrastructure or Department of Water Supply infrastructure at imminent risk of failure which would substantially affect public health or safety, including significant water loss, or contamination of surface water, land, or water supply.

**§12-202-12 Assessment and determination procedures.**

(a) [All] Any proposed [actions] action within the special management area that could be determined to be a development and that does not fully fall within any of the categorical exemptions listed in section 12-202-11.5 shall be subject to an assessment and a determination made by the director as to whether it is a development and requires a special management area use permit or minor permit or is an exempt action. Such assessment shall be pursuant to sections 205A-22 and 205A-26, HRS, and the significance criteria set forth in this section.

(b) The applicant or the director may waive assessment and determination, and the applicant may apply for a special

management area use permit pursuant to the provisions of sections 12-202-13 and 12-202-15.

(c) Assessment applications shall be filed in accordance with the following submitted in a format prescribed by the department and shall include the following information and documentation:

[(1) Any applicant for a proposed action which has been assessed under the National Environmental Policy Act (42 U.S.C. §4321, et. seq.) or under chapter 343, HRS, and for which a findings of no significant impact (FONSI) has been filed or a required EIS has been accepted, may apply directly for a special management area use permit or special management area minor permit.

(2) Any applicant seeking an assessment shall submit an application form, provided by the department, to the central coordinating agency. The application shall require the following information and documentation:

(A)]

(1) Identification of the applicant [along with] and documentation of ownership or tenancy and, if the applicant is not the owner, authorization by the [owners] owner of the parcel on which the proposed action is to occur; if the subject parcel has more than one owner and does not have a managing association authorized to submit the application, evidence of notification to all owners shall also be provided;

[(B)]

(2) Tax map key number and acreage or square footage of the parcel on which the proposed action is to occur;

(3) A location map;

[(C)]

(4) A plot plan, drawn to scale, of the parcel upon which the proposed action is to occur[, and photographs or VHS format video tape identifying the area where the proposed action is to occur]; the plot plan shall identify any special flood hazard area, 3.2-foot sea level rise

exposure area, and the erosion hazard line within the parcel, if applicable;

(5) If the proposed action involves new structures, the applicant shall provide dimensioned floor plans, sections, and elevations;

(6) Photographs identifying the area where the action is to occur; video may also be provided;

[(D)] A shoreline survey if the land abuts the shoreline; provided, if the proposed action will occur outside of the shoreline setback area, the director may waive a survey if:

(i) the shoreline is fixed by a manmade structure or structures which have been approved by appropriate government agencies and for which engineering drawings exist to locate the interface between the shoreline and the structure;

(ii) the shoreline is fixed by natural stabilized geographic features such as cliffs and rock formations; or

(iii) the parcel is not abutting the shoreline.

(E)]

(7) A written description of the proposed action, including [but not limited to] the use, length, width, height, [depth,] building materials, [and statement of objectives;] size of structures in square feet and, if applicable, area, depth, or volume of grubbing, grading, fill, and any other ground-altering activity such as utility installation;

[(F)]

(8) A written description of the anticipated impacts of the proposed action on the special management area that addresses or describes:

[(i)]

(A) The environmental setting of the parcel that is the subject of the proposed action;

[(ii)]

- (B) The relationship of the proposed action to [land use plans, policies, and control of the affected area] the objectives and policies of chapter 205A, HRS; zoning; and the general plan;
- [(iii)]
- (C) The probable impact, including cumulative impacts, of the proposed action on the [environment;] special management area; and
- [(iv)] Any probable adverse environmental effects that can be avoided;
- (v) Alternatives to the proposed action;
- (vi)]
- (D) [Mitigating measures] Measures proposed to minimize [impact] potential impacts, including best management practices.]; and
- (vii) Any irreversible or irretrievable commitment of resources.
- (G) A plan of the proposed action designating in dimensions the location of the proposed action on the parcel. If structures are included, the plan shall also show a dimensioned floor plan, sections, elevations, and other physical features;
- (H)]
- (9) A written estimated valuation of the proposed action; the director may require an estimated valuation [as estimated] by an architect, engineer, or contractor licensed by the department of commerce and consumer affairs, State of Hawaii, or [written valuation of the proposed action as estimated by] the administrator of the development services administration, department of public works, County of Maui;
- [(I)] The state land use district boundary designation, community plan designation, county zoning designation, and any other special designation, if applicable.]
- (10) A zoning and flood confirmation form, completed and signed by the department unless the Department ceases the use of such form;

[(J)]

(11) [An] A draft environmental assessment [and findings of no significant impact or an] or a draft environmental impact statement, if the proposed action is subject to chapter 343, HRS, and the department is the reviewing agency; [if required, pursuant] or the agency decision letter and any final environmental document, if the proposed action is subject to chapter 343, HRS, and a government agency has determined that the action is exempt, issued a finding of no significant impact, or accepted a final environmental impact statement;

[(K)]

(12) Any oral or written comments received by the applicant from governmental or [non-governmental] nongovernmental agencies, community organizations, applicable design review committees, or individuals with regard to the proposed action, and a summary of the dates and attendance of public meetings held on the proposed action;

[(L)]

(13) Any other information and documentation required by the department to properly process the application; and

[(M)]

(14) An administrative fee as established in the [county] County budget.

(d) The assessment application shall be reviewed as follows:

(1) Upon submission of [a completed] an application that contains all required information, the director may submit the application to appropriate agencies for review and comment. The director shall request such agencies to provide their comments on the application within thirty days from the date on which the application was distributed for review, or as otherwise specified by the director. The director shall determine that the application is complete when adequate agency comments and, if applicable, applicant responses have

been received. Upon a determination that an application is complete, the director shall review the proposed action and make a written evaluation as to:

- (A) The valuation of the proposed action. The director may request that the applicant's estimates of the total cost or fair market value [may] be verified by the director of public works, [and environmental management.] The director of public works [and environmental management] shall use the most recent building valuation data provided by the International Conference of Building Officials. In the event of a conflict between the estimates of the applicant and the director of public works, [and environmental management,] the higher estimate amount shall be used by the director for the purposes of an assessment of the proposed action; [and]
  - (B) Whether the proposed action is [or is not] a development or is an exempt action or, upon further consideration, the proposed action did not require a special management area assessment and is a categorical exemption pursuant to section 12-202-11.5; and
  - (C) The potential adverse environmental and ecological effects based upon the following significance criteria [set forth in subsection (e).]:
- [(e) In considering the significance of potential environmental and ecological effects, the director shall evaluate:
- (1)
    - (i) The sum of those effects that adversely affect the quality of the environment and the ecology, and [shall evaluate] the overall and cumulative adverse effects of the proposed action[.];  
[(2)]
    - (ii) Every phase of a proposed action, its expected primary and secondary consequences, and its cumulative and [short] short-term or long-term

effects. A proposed action may have a significant adverse effect on the environment when the proposed action potentially

(A) Involves an irrevocable [commitment to loss or destruction of] or substantial and detrimental effect on any natural or cultural resources;

(B) Significantly curtails the range of beneficial uses of the environment;

(C) Conflicts with the [county's] County's or the [state's] State's long-term environmental policies or goals;

(D) Substantially and detrimentally affects the economic or social welfare [and activities] of the community, [county,] County, or [state] State;

(E) Involves substantial [secondary impacts, such as population changes and increased effects on] and detrimental effects on public facilities, [streets,] such as increased demand on drainage, sewage, and water systems, beach access, recreational opportunities, and pedestrian walkways;

(F) In itself has no [significant adverse] substantial and detrimental effects but cumulatively has [considerable effect] substantial and detrimental effects upon the environment [or involves a commitment for larger actions];

(G) Substantially and detrimentally affects a rare, threatened, or endangered species of animal or plant, or its habitat;

(H) Is inconsistent with the [state] State plan, [county's] County general plan[,], including the Maui Island Plan and appropriate community plans, zoning, and subdivision ordinances;

(I) [Detrimentially] Substantially and detrimentally affects air or water quality [or ambient noise levels];

(J) **[Affects]** Substantially and detrimentally affects or is likely to suffer damage by being located in an environmentally sensitive area, such as flood plain, shoreline, coastal dune, tsunami zone, erosion-prone area, sea level rise exposure area, geologically hazardous land, estuary, fresh waters, or coastal waters;

(K) Substantially and detrimentally alters natural land forms and existing public views, or curtails or forecloses potential improvements to public views, to and along the shoreline; or

(L) Is inconsistent with the objectives and policies of chapter 205A, HRS.

**[(f)] (e)** Based upon the assessment and review of the application, the director shall make a determination and notify the applicant in writing within thirty calendar days after the application is complete that the proposed action either:

(1) Is exempt from the requirements of this chapter because it is not a development pursuant to section 205A-22, HRS, as amended;

(2) **[Requires]** Is a development and requires a special management area minor permit pursuant to section 205A-22, HRS, as amended, which shall be processed in accordance with section 12-202-14; or

(3) **[Requires]** Is a development and requires a special management area use permit pursuant to section 205A-22, HRS, as amended, which shall be processed in accordance with sections 12-202-13 and 12-202-15[;].

**[(4)]** Requires a special management area emergency permit pursuant to section 205A-22, HRS, as amended, which shall be processed in accordance with section 12-202-16; or

**(5)(g)]**

**(f) [Cannot be processed because]** If the director determines that the proposed action is a development and requires a special management use or minor permit, and if the proposed action is not consistent with the [county] County general plan[,] including the

Maui Island Plan and applicable community plan, [and] or zoning, [unless] the director shall notify the applicant that a general plan, community plan, or zoning [application for an appropriate] amendment is required and that an amendment application can be processed concurrently with the SMA permit application. [Eff 1/1/94; am 9/28/97; am and comp 9/25/03; am and comp 10/10/03; am and comp 12/20/04) (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-29, 205A-30.)

**§12-202-13 Notice of application and notice of public hearing; adequacy of notice.** (a) [Where a public hearing is required to be held pursuant to these rules, the applicant shall prepare a notice of application and legible map. The form of the notice shall be provided to the applicant by the department.] Where these rules require a public hearing, the applicant shall prepare for the department's review a notice of application with a legible location map using a form provided by the department. Prior to publication, the department shall review the notice of application for completeness. [The] Within ten calendar days of departmental approval, the applicant shall submit the notice of application to a newspaper for publication. [to a newspaper within ten days of departmental approval.] The applicant shall publish the notice of application once in a newspaper printed and issued at least twice weekly in the County and which is generally circulated throughout the County.

(b) [A public hearing before the commission shall commence within one hundred twenty calendar days, or as soon thereafter,] When required by these rules, the commission shall hold a public hearing after the director has determined the application is [complete.] ready for public hearing.

(c) [Where a public hearing is required to be held pursuant to these rules, the] When these rules require a public hearing, the applicant shall prepare for the department's review a notice of public hearing with a legible location map using a form provided by the department. The department shall notify the applicant of the date of the public hearing at least forty-five days prior to the public hearing date. The department shall approve the applicant's notice of

public hearing before mailing. [The applicant's mailed notice of public hearing shall be approved by the department before mailing and shall include:

- (1) The applicant's name, mailing address, and the nature of the proposed development;
- (2) The street address of the parcel that is the subject of the application (if available);
- (3) The tax map key number(s) of the parcel;
- (4) A location map;
- (5) The name of the applicant's agent and mailing address (if applicable);
- (6) The date, time, and place of the public hearing; and
- (7) A statement that additional information may be obtained at the department's office, providing the department's address and telephone number.]

(d) The [applicant's mailed] applicant shall mail the notice of public hearing [shall be mailed] not less than thirty calendar days before the hearing date by certified or registered mail or with delivery confirmation, postage prepaid, to owners of record of real property situated within five hundred feet of the boundaries of the parcel that is the subject of the application. The applicant shall obtain the addresses of the owners of record from the real property tax division, department of finance, within thirty calendar days prior to the mailing of the notice of public hearing. The applicant shall also send notice to all persons who have requested the commission in writing to be notified of the subject special management area proceedings.

(e) Not less than thirty calendar days prior to the public hearing date, the director shall publish a notice of public hearing, once, in a newspaper that is printed and issued at least twice weekly in the County and which is generally circulated throughout the County, [and] pursuant to section 1-28.5, HRS. The notice shall state the nature of the proposed development, the date, time, and place of the hearing, and all other matters required by law.

(f) The director may authorize the consolidation of the hearing with any other hearing required pursuant to law, or pursuant to any rules adopted thereunder.

(g) The mailed notice of public hearing shall be deemed adequate, and the failure of any owner to receive such notice shall not invalidate any application, proceedings, assessment, or determination by the commission if the applicant, by affidavit, verifies that the names and addresses of owners of real property situated within five hundred feet of the subject parcel were obtained from the County of Maui real property tax ~~[roll,] division, department of finance,~~ [and that current ownership was verified with the records of the County's real property tax division,] within thirty days of the mailing of the notice of public hearing, stating both the date the addresses were obtained and the date notice was mailed, accompanied by receipts of certified or registered mail[,] or evidence of delivery confirmation. If there are multiple owners of [the] a property, notification of [the person(s)] all persons listed by name [on] in the records of the County of Maui real property tax ~~[roll] division, department of finance,~~ shall be deemed adequate notice as to all owners. [Eff 1/1/94; am 9/28/97; am 11/13/00] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §§1-28.5, 205A-29)

**§12-202-14 Special management area minor permit procedures.** (a) If [it] the director has [been] determined that the proposed action is a development and requires a special management area minor permit, the assessment application submitted pursuant to section 12-202-12 may be deemed the minor permit application[,] provided that when development for which a minor permit is required is started before obtaining a permit, an additional fee of \$100 shall be paid by the applicant. The payment of said fee shall not relieve any persons from fully complying with the requirements of these rules nor from any penalties prescribed in section 12-202-25.]

(b) The director shall approve, approve with conditions, or deny such permit in accordance with the guidelines in section 205A-26, HRS, as amended. The director may ask the commission to approve standard conditions that shall thereafter apply to all minor permits, in addition to any project-specific conditions, to ensure that permitted activities comply with chapter 205A, HRS. Any final decision shall be transmitted to the applicant in writing and shall be appealable pursuant to section 12-202-26.

(c) The director shall notify the commission, at the commission's next regularly scheduled meeting, of [the issuance by the director] the director's approval of special management area minor permits, receipt of which shall be acknowledged by the commission. Such notification shall include[, but not be limited to,] the name of each applicant, the proposed development, [authorized by the permit,] and the location and purpose of the development. [Eff 1/1/94; am 9/28/97, am and comp 12/28/02] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-26, 205A-29, 205A-30)

**§12-202-15 Special management area use permit procedures.**

(a) Any person whose proposed [development] action is a development and requires a special management area use permit, or who has waived an assessment by the department, shall file an application with the department on a form provided by the department, which may be required to be filed electronically, and which shall require:

- (1) All information and documentation required pursuant to section [12-202-12,] 12-202-12c; [excluding valuation of the development;] and
- (2) [The real property tax map key number of parcels and the names and addresses of owners of real property for real property situated within five hundred feet of the boundaries of the parcel on which the proposed development is to occur, obtain from the County of Maui real property tax division;
- (3)] An administrative fee as established in the [county] County budget. [When development for which a fee is required is started before obtaining a permit, the fee shall be doubled.] The payment of the fee for development without a permit shall not relieve any persons from fully complying with the requirements of these rules nor from any penalties prescribed in section 12-202-25.
- [(4) Any other relevant information and documentation required by the director.]

(b) Upon receipt of the application, the director shall review the application based on the policies, objectives, and guidelines as provided in sections 12-202-10 and 12-202-11 and, if necessary, request that the applicant provide any additional data or information as may be required for review of the proposed development. The application shall not be [deemed complete] transmitted for agency [transmittal] review until the director is satisfied that the application has fulfilled all application requirements and has addressed the policies, objectives, and guidelines.

(c) The director shall submit the application, with all relevant information, to appropriate agencies for review and comment. The director shall request such agencies[, boards, and commissions] to review and comment on the proposed development within thirty days from the date on which the application was distributed for review[, and shall request such agencies to address the maintenance, restoration, and enhancement of the special management area consistent with the objectives, policies and guidelines of chapter 205A, HRS, as amended.]

(d) The director shall [inform the applicant of any legal requirement to] present the proposed development, if applicable, to the urban design review board[, the cultural resources commission and the NBCIDAC or the Hana advisory committee] for comment and recommendations to the commission. [The urban design review board and the cultural resources commission shall address the maintenance, restoration and enhancement of the special management area consistent with the objectives, policies, and guidelines of chapter 205A, HRS, as amended.] The [commission may designate the NBCIDAC or the] Hana advisory committee is hereby designated by the commission to conduct the public hearing.

(e) [Upon receipt of final agency comments, the application shall be deemed complete by the director and shall be scheduled for public hearing.] Upon receipt of agency comments and, if applicable, adequate applicant responses, the director shall schedule the application for public hearing.

(f) The commission shall approve a special management area use permit, subject to terms and conditions as permitted in sections 205A-26(1) and 205A-26(3), HRS, as amended, and any standard

conditions approved by the commission if it finds the criteria set forth in sections 205A-26(2) and 205A-26(3), HRS, as amended, have been met. The commission shall deny a special management area use permit if it finds these criteria have not been met.

(g) Findings of fact, conclusions of law, and decision and order shall be issued in accordance with the rules of practice and procedure for the commission in effect when action is taken.

(h) The director may ask the commission to approve standard conditions that shall thereafter apply to all permits, in addition to any project-specific conditions, to ensure that permitted activities comply with chapter 205A, HRS. [Eff 1/1/94; am 9/28/97, am and comp 12/28/02, am and comp 4/21/08] (Auth: HRS §§91-2, 91-4.2, 205A-26, 205A-27, 205A-29) (Imp: HRS §§205A-4, 205A-26, 205A-28, 205A-29)

**§12-202-16 Special management area emergency permit procedures.** (a) An owner or authorized representative may apply for a special management area emergency permit when the owner or representative has concluded that danger or substantial harm to property, any person, or the public health, safety, and welfare is imminent. The director will consider the application, including best management practices to protect the environment, and determine whether the project is a development and therefore requires a permit, and whether conditions justify issuance of a permit to begin work immediately. The purpose of an emergency permit is to allow an urgently needed protective measure, principally of a temporary nature. The temporary measure may also be allowed as a permanent measure only after the director has determined it is the best environmentally sound alternative. A temporary measure may be allowed for no more than one hundred eighty day days while, if necessary, a permanent measure is formulated, permitted, and completed. The director may approve a time extension for a temporary measure when the director determines the permit holder is making adequate progress toward completing a permanent measure, but cannot reasonably do so within the time the emergency permit, or an extension thereof, allows.

(b) Any person seeking a special management area emergency permit shall file an application with the director~~].~~ before commencing any emergency work. The application, provided by the department, shall require:

- (1) Identification of the applicant ~~[along with]~~ and documentation of ownership or tenancy and, if the applicant is not the owner, authorization by the ~~[owners]~~ owner of the parcel on which the proposed action is to occur; if the parcel has more than one owner and does not have a managing association authorized to submit the application, evidence of notification to all owners shall be provided.
- (2) The tax map key ~~[number(s)]~~ number and acreage or square footage of the parcel on which the proposed action is to occur;
- (3) A written description of the proposed action, including~~,~~ but not limited to,~~]~~ the length, width, height, ~~[depth,]~~ and type of materials, ~~[for any proposed action]~~ size of structures in square feet and, if applicable, area, depth, or volume of grubbing, grading, or fill and any other ground-altering activity;
- (4) A written statement of the emergency or imminent danger ~~[and]~~ or substantial harm to property, any person, or the public health, safety, or welfare; and why the proposed development would be immediately required to prevent danger or substantial ~~[physical]~~ harm ~~[to persons or property, or to allow the reconstruction of structures damaged by natural hazards to their original form];~~
- (5) The most current shoreline survey, if available and applicable;
- (6) Photographs ~~[or VHS format video tape]~~ identifying ~~[the emergency at the affected area and shoreline property boundaries]~~ where the emergency exists and where the action is to occur; video may also be provided;
- (7) Any other relevant information requested by the director; ~~[and]~~

- (8) Electronic copies of all application documents; and
- (9) An administrative fee as established in the County budget.

[(b)](c) The director may [waive] allow the deferral of the filing of a written application [where] if the applicant demonstrates to the satisfaction of the director that imminent danger [and] or substantial harm to [a habitable structure] property, any person, or the public health, safety, and welfare, would result from the delay in filing a written application. After giving verbal approval [of an oral] to such a request, the director shall issue a written [permit,] confirmation of the verbal approval, which shall contain:

- (1) The date and time the request was made;
- (2) The date the permit was issued;
- (3) Applicant's and project names, address, email address, and telephone number;
- (4) Tax map key number (if available);
- (5) Statement of the imminent danger posed and the substantial harm that [would] could occur [to the habitable structure] if the permit were not granted; [and]
- (6) The permitted temporary measures;
- (7) The requirement that not more than thirty calendar days after the approval of the request, the permit holder shall submit a written emergency permit application as provided in subsection (b), and that if the applicant fails to do so, the director may require that any temporary measure be removed; and
- (8) The statement that other permits may be required.

[(c)] (d) [Not more than ten calendar days after the date of the oral request, the applicant shall submit the required written emergency permit application. If the applicant fails to submit such application, information, and documentation within the ten day period, the director may require that the temporary measures be removed.] No special management area emergency permit shall allow the reconstruction of structures if such structures were not lawfully constructed.

[(d)] (e) [Except as provided in subsection (e),] After reviewing a written application, the director shall issue a written special

management area emergency permit where the applicable provisions of this section have been met and [:

- (1) The] the director finds the criteria set forth in sections 205A-22 and 205A-30, HRS, as amended, have been met.];
- (2)] In the event of impending or presently occurring disaster, the mayor [has waived] may waive the requirements of sections 12-202-12, 12-202-14, or 12-202-15, but not this section.]; or
- (3) In the event of a state-declared emergency, the governor, after conferral with and the recommendation of the mayor, has waived the requirements of sections 12-202-12, 12-202-14, or 12-202-15.]

[(e) No special management area emergency permit shall allow the reconstruction of structures damaged by natural hazards to their original form if such structures were previously found not to be in compliance with the federal flood insurance program or were not legally constructed.]

(f) The director may place reasonable terms, conditions, and time stipulations upon such permit.

(g) The director shall set [an expiration] a date [for the permit, not to exceed one hundred eighty days, and set a time limitation within] by which the applicant shall [apply] submit an application for a permit pursuant to sections 12-202-14 or 12-202-15[.], or by which the applicant must remove or terminate any temporary measures.

(h) For an emergency permit request that is the result of or that otherwise involves coastal erosion, the director shall consult with the State department of land and natural resources, office of conservation and coastal lands, or other relevant State agency, on whether to approve any temporary measure in order to benefit both the applicant and neighboring shoreline properties, to resolve the emergency situation expeditiously, and to minimize the environmental impact to the coastal zone. Any such approval, in addition to any project-specific conditions, shall include the following conditions:

- (1) Within ninety days, the applicant shall provide the department a description of potential long-term

alternatives designed to alleviate the emergency situation, which shall include:

(A) alternatives, including relocation of threatened structures or elevation of structures, and dune or beach restoration;

(B) assessment of other viable alternatives, which may include protective or erosion control measures, such as groins, and offshore structures such as breakwaters;

(C) a description of how each alternative complies with chapter 12-203 of the commission's shoreline rules, if applicable;

(D) a draft timeline to plan, design and complete each long-term alternative; and

(E) a list of potential federal, State, and County permits required to achieve each long-term solution.

(2) Within ninety days of the permit's approval, the permit holder shall consult with the department about such long-term alternatives to understand the requirements and restrictions for work permitted in the shoreline area, as defined in the commission's shoreline rules, if applicable.

(3) The temporary measure must be removed unless the permit holder submits an application by the date specified by the emergency permit to allow the temporary measure to remain, pursuant to subsection (i).

(i) No less than thirty days prior to the expiration date of an emergency permit, the permit holder may apply for a time extension for any permit provision on a form provided by the department. Such application shall include, at a minimum:

(1) a description of the permit holder's preferred alternative;

(2) evidence that the permit holder is making adequate progress toward completing permanent measures, but reasonably cannot do so within the time allowed by the emergency permit; and

(3) a plan and timeline for obtaining all required permits.

The director may approve a time extension for no more than one hundred eighty days at a time.

(j) If the director finds there is no imminent danger or substantial harm to property, any person, or the public health, safety, or welfare, or that the requirements of subsection (h) were not met, the director shall deny the emergency permit. If the director denies the emergency permit, the denial shall be in writing, setting forth facts sufficient to demonstrate the application did not meet the requirements for issuance of the emergency permit pursuant to subsection (h). The director shall notify the applicant it can submit an application for an assessment, a special management area use or minor permit in accordance with these rules, and shall inform the applicant of the right to appeal pursuant to section 12-202-26.

~~(j)~~(k) The director shall ~~[submit reports]~~ provide notice of the director's approval of all ~~[determinations regarding]~~ emergency permits to the commission ~~[for review]~~ at the next regular meeting after the permit has been issued, receipt of which shall be acknowledged by the commission. ~~[Such reports shall include all facts and reasons for the determination.~~

(i) If the director denies the emergency permit, the denial shall be in writing, setting forth facts sufficient to demonstrate the application did not meet the requirements for issuance of the emergency permit pursuant to subsection (d). The applicant shall be informed of his right to appeal pursuant to section 12-202-26 herein.] [Eff 1/1/94; am 9/28/97] (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§91-2, 91-14, 205A-30)

**§12-202-17 Amendments to [and determinations of] permit [terms, conditions, and time stipulations] approvals.** (a) Request. Any person who has been issued a special management area emergency permit, minor permit, or use permit may request the director or commission, as appropriate, to amend[, delete, or determine] any [conditions placed upon such] permit approval.

(b) Form. Any person seeking to amend[, delete, or determine] a permit [condition] approval shall file an application with the department in a form provided by the department, the content of which shall include:

- (1) [The term, condition, or time stipulation to be amended, deleted, or determined;

- (2) If an extension of a time stipulation is requested, the length of time extension desired] A description of the requested amendment;
- [(3)] (2) The reasons and justification for the [requested amendment, deletion, or determination] request;
- [(4)] (3) An administrative fee as established in the County budget; [and]
- (4) If the request is for a permit transfer, the transferor's consent and a notarized affidavit from the transferee acknowledging and agreeing to comply with the permit approval;
- (5) If the request is to amend a time stipulation, the length of time requested, an analysis of whether any changes have occurred within the special management area since the granting of the permit that may cause the permit holder's development to have a substantial adverse environmental or ecological effect or adversely affect the capacity or condition of infrastructure; and
- [(5)] (6) Any other information and documentation requested by the director.

[(c) Unless otherwise provided, any application for an extension of a time stipulation must be filed not less than sixty calendar days prior to the expiration date of the time condition, provided that the director for good cause may waive such sixty day requirement.

Unless waived by the applicant and the director, notice of the public hearing to amend or determine the permit shall be given pursuant to the procedures set forth in section 12-202-13. A public hearing shall not be waived if a petition to intervene was filed or any person, other than the applicant, was admitted as a party to any prior proceeding on the matter, unless a written waiver from all parties has been received by the department. In instances in which the proposed amendment or determination does not clearly pertain to or could not affect the same rights, privileges or interests on which the intervention was based, a written waiver from all parties shall not be required for purposes of waiving a public hearing.] If applicable, the

director shall circulate the request to appropriate agencies for review and comment.

~~[(d)]~~ (c) Permit transfer. Unless otherwise specified in the permit [conditions,] approval, the director may issue a written approval for a special management area use permit transfer.~~],~~ if the permit holder submits a written request for a permit transfer to include the following:

- (1) Reason(s) for permit transfer;
- (2) Transferor's consent; and
- (3) Notarized affidavit from transferee acknowledging the conditions established with the subject permit and agreement by transferee to comply with these conditions.]

The director shall notify the commission, at the commission's next regularly scheduled meeting, of the issuance of any permit transfer, receipt of which shall be acknowledged by the commission. Such notification shall include~~], but not be limited to,]~~ the ~~[aforementioned information provided to the department and]~~ permit transfer approval letter. Nothing in this section shall prevent the director from forwarding any permit transfer request to the commission for ~~[consideration]~~ action in accordance with procedures set forth in this section.

~~[(e)]~~ (d) Time stipulation. Unless otherwise specified in the permit [conditions] approval, the director may approve a ~~[special management area use permit]~~ time extension of no more than five years to initiate construction or to complete construction, ~~[if the permit holder submits a written request for a time extension. The request shall include the following:]~~ provided that

- ~~[(1)]~~ Reason(s) for permit time extension;
- (2) Length of time extension requested;
- (3) An analysis of whether any changes have occurred within the special management area since the granting of the permit that may cause the permit holder's development to have a substantial adverse environmental or ecological effect; and
- (4) An analysis of whether any changes have occurred within the special management area since the granting

of the permit that may cause the permit holder's development to adversely affect the capacity or condition of infrastructure.

If] the director determines that there have been no changes within the special management area since the granting of the permit that will cause the permit holder's development to have any substantial adverse environmental or ecological effect[, and that there have been no changes within the special management area since the granting of the permit that will cause the permit holder's development to] or adversely affect the condition or capacity of infrastructure.], the director may grant up to a two-year time extension.]

If a petition to intervene was granted and any person other than the applicant was admitted as a party to any prior proceeding on the matter, the director shall notify such person at the person's last known address at least ten days prior to taking action on the time-extension request to determine if such person has any objections or concerns that the director should consider in deciding whether to approve or disapprove the request or forward the request to the commission.

The director shall notify the commission at the commission's next regularly scheduled meeting of the issuance of any time extension, receipt of which shall be acknowledged by the commission. Nothing in this section shall prevent the director from forwarding any time extension request to the commission for action in accordance with procedures set forth in this section.

[Prior to granting or denying any permit time extension request, the director shall notify the commission of the request at the commission's next regularly scheduled meeting, receipt of which shall be acknowledged by the commission. Such notification shall include, but not be limited to, the information provided to the department by the permit holder. The commission may review the permit time extension request at its next available meeting after receiving notice or waive review of the request. If the commission waives review of the request, the director may grant or deny the time extension and forward a copy of the determination to the commission.]

If the director finds there have been changes within the special management area since the granting of the permit that will cause the permit holder's development to have any substantial adverse environmental or ecological effect, or adversely affect the condition or capacity of infrastructure, the request shall be scheduled for commission action.

(e) Amendment or determination other than transfer or time extension. Unless otherwise specified in the permit approval, the director may approve or deny nonsubstantive amendments to the permit and may make determinations regarding permit approvals when such amendments or determinations are nonsubstantive; for the purposes of this subsection, "nonsubstantive" means that any impact to the special management area or to the condition or capacity of infrastructure is not discernibly different than that associated with the current approval. If the director determines that the requested amendment or determination is substantive, then the director shall forward the request to the commission for action. The director shall determine whether a public hearing shall be held and, [(f) After review and final comment by appropriate agencies, the application shall be deemed complete by the director, and the application shall be referred to the commission and,] if a public hearing is required, set a date for the hearing and provide notice as required by section 12-202-13. The commission shall conduct a hearing in accordance with the procedures set forth in its rules.

(f) Intervention. If a petition to intervene was granted and any person other than the applicant was admitted as a party to any prior proceeding on the matter, and the proposed amendment or determination clearly pertains to or could affect the same rights, privileges or interests on which the intervention was based, the applicant shall notify such person in writing, at the person's last known address, of the requested amendment or determination, and ask if such person requests that a public hearing be held. The applicant shall provide the department with evidence of such notification, including proof of mailing, which shall be verified by the department and be to the satisfaction of the director. A public hearing on the requested amendment or determination shall be held if requested by any such person within thirty days of the date the applicant's notice was mailed. Notice of public hearing shall be given pursuant to the procedures set forth in section 12-202-13. The commission shall conduct a hearing in accordance with the procedures set forth in its rules. This section shall not apply to requests for

permit transfers or time extensions. Requests for permit transfers shall be processed pursuant to section 12-202-17(c) and requests for time extensions shall be processed pursuant to section 12-202-17(d).

(g) Commission action. Findings of fact, conclusions of law, and decision and order for any special management area use permit application seeking to amend[, delete,] or determine any permit [terms, conditions, and time stipulations] approval shall be issued in accordance with the rules of practice and procedure of the commission in effect when action is taken and the review guidelines as set forth in section 12-202-11. [Eff 1/1/94; am 9/28/97, am and comp 4/21/08] (Auth: HRS §§91-2, 205A-29, 205A-30) (Imp: HRS §§205A-26, 205A-29)

[§12-202-18 (Reserved)

§12-202-19 (Reserved)

§12-202-20 (Reserved)]

### SUBCHAPTER 3

#### **PROCEDURES TO ADOPT SPECIAL MANAGEMENT AREA RULES; DECLARATORY RULINGS; [AND] ADOPTION AND AMENDMENT OF BOUNDARIES AND MAPS; ENFORCEMENT; AND APPEALS**

**§12-202-21 Petition and procedures to adopt, amend, or repeal special management area rules; declaratory rulings.** The commission may adopt, amend, or repeal any of [its] these rules by following the procedures outlined in its rules of practice and procedure section 12-201-92. Any interested person may petition the commission for a declaratory order as to applicability of any statutory provision or, of [any] these rules, or of any order of the department or the commission relating to the special management area pursuant to the commission's rules of practice and procedure section 12-201-93. [Eff 1/1/94] (Auth: HRS §91-2) (Imp: HRS §§91-3, 91-4, 91-6, 91-7)

**§12-202-22 Adoption and amendment of special management area boundaries and maps.** (a) [Any amendment to the boundaries of any special management area map adopted and filed with the department as of November 19, 1975, or as amended pursuant to section 205A-23, HRS, as amended, and these rules, may be initiated by the director in accordance to the requirements of this section.] The director may, at any time, initiate a review of and amendments to the boundaries of any special management area map in accordance with the requirements of this section.

(b) [The director may at any time initiate comprehensive review and amendments to the special management area boundaries.

(c) The commission, by a two-thirds vote of its total membership, may direct the director to initiate a [comprehensive] review of and amendments to the special management area boundaries.

[(d)] (c) The director shall give notice of the director's intent to amend the special management area boundaries to the commission, the general public, and the office of planning, stating the initiation date and estimated completion date of the director's review and [shall submit] submittal of the proposed amendments to the commission. Upon submittal of the proposed amendments to the commission, the director shall schedule the proposed amendments for public hearing.

Not less than thirty calendar days before the public hearing date, the director shall publish a notice of public hearing once in a newspaper that is printed and issued at least twice weekly in the County and [which] is generally circulated throughout the County, [and] pursuant to section 1-28.5, HRS. The notice shall state the proposed amendment, the date, time, and place of the hearing, a map of the proposed boundary amendment, and all other matters required by law.

The notice published in the newspaper shall be deemed adequate, and the failure of any owner to receive such notice shall not invalidate any amendments, proceedings, assessment, or determination by the commission.

[(e)] (d) The commission may amend the special management area boundaries only upon the finding that the amendments will further the objectives and policies of chapter 205A, HRS, as amended, and will be consistent with the general plan and other applicable ordinances of the County of Maui. Upon review of the State of Hawaii office of planning, pursuant to section 205A-23, HRS, the commission shall render a final decision and issue a written order and, if applicable, [may] direct the director to issue a [written order and] final map within sixty calendar days after the final vote of the commission, unless otherwise extended by vote of the [members of the] commission. [Eff 1/1/94; am 9/28/97; am 11/13/00] (Auth: HRS §91-2) (Imp: HRS §§1-28.5, 205A-23)

**§12-202-23 Enforcement.** (a) The [appropriate enforcement agency as designated by the County Charter] director shall enforce these rules, except as otherwise provided herein.

(b) Any [development] use, activity, or operation pursuant to these rules and section 205A-22, HRS, as amended, that [has not received a required] requires and fails to obtain a special management area exemption, emergency permit, minor permit, or use permit [pursuant to this part] or has failed to comply [complied] with conditions established with any such [a] permit, is a violation of these rules and chapter 205A, HRS. [shall be removed or the violation shall be corrected by immediate application for and subsequent granting of the appropriate permit or other means as determined by the director.] The violation shall be corrected by requiring the owner or violator to pay all applicable fines and take the following corrective actions:

- (1) any unpermitted use, activity, or operation has ceased;
- (2) any unpermitted construction has been removed with appropriate permits;
- (3) an exemption, emergency permit, minor permit, permit amendment, or use permit has been issued; or
- (4) other means determined by the director have been achieved.

Applicable fines shall accrue until the violation is corrected. No other [state or county] permit or approval shall be construed as special management area permit approval pursuant to this part.

(c) [Where the shoreline is affected by a manmade] If a portion of a constructed structure is situated within the special management area, and the structure [that] has not been authorized with government agency permits required by law, [if any part of the structure is on private property,] then for purposes of enforcement of this part, the [development] entire structure shall be construed to be entirely within the special management area and shall be [removed or the violation shall be corrected.] subject to enforcement accordingly.

- (d) Issuance of notice of violation and order.

- (1) The ~~landowner~~ owner shall, and [or] the alleged violator may, [or both, shall] be notified by the enforcement agency [by certified or registered mail] of an alleged violation of [this rule,] these rules and any approval, permit, or permit condition issued pursuant thereto[, or any condition of a special management area permit approval.] The director shall provide service by at least one of the following methods as the director deems appropriate: certified or registered mail, regular mail with delivery confirmation, personal service, posting on the property, or publishing the notice once per week for three consecutive weeks in a newspaper that is printed and issued at least twice weekly in the County and is generally circulated through the County. The date of service shall be the date on which the certified or registered mail is accepted, the date of regular mail delivery confirmation, the date of personal service, the date of posting on the property, or the date of the last publication in the newspaper. If the director uses more than one method of service, then the date of service shall be the later of the dates of service.
- (2) The notice of violation and order shall include~~], but not be limited to,]~~ the specific section of ~~[this rule which]~~ these rules that has been violated[.]; the nature of the violation[.]; and the [remedy(ies)] remedy required or available[.], including cessation or removal of the violation, subject to applicable permitting requirements;]. The notice of violation and order may also require that the violative activity cease, or that the violative development be removed;] that [a] an initial civil fine be paid not to exceed \$100,000 per violation; [and] that a civil fine be paid not to exceed \$10,000 per day for each day in which the violation persists, in addition to the foregoing and any other penalties[.]; and that the landowner or violator may appeal the notice of violation pursuant to section 12-202-26 within thirty days of the date of service. The filing of an appeal shall not correct or suspend any violation or stay the assessment and accumulation of fines. The following criteria shall be considered in assessing the initial and daily fines:
- (A) Previous violations by the same person;
  - (B) The degree of damage to the environment, including damage to the shoreline and marine resources;
  - (C) The degree of cooperation provided by the violator during the investigation;
  - (D) Amount necessary to deter future violations; and
  - (E) Evidence of circumstances beyond the control of the violator.
- [(2) The notice of violation and order shall state that the order shall become final thirty days after the date of its mailing unless written request for a hearing is mailed or delivered to the enforcement agency within said thirty days. Nothing in this section shall prevent

the landowner or violator from seeking to negotiate a settlement or resolve a dispute.

- (3) If the violator seeks a negotiated settlement with the enforcement agency, but waives the right to a hearing, the enforcement agency, in consultation with the department and the corporation counsel, may negotiate a settlement agreement with the landowner or, if appropriate, the violator, that provides for cure of the violation, set any fine, and inspection of parcel by the enforcement agency and the department. The proposed settlement shall be forwarded to the commission for final action.
- (4) Any request for a hearing shall be in writing and delivered, or mailed and postmark dated, to the department within thirty days, as stated on the notice. Upon receipt of a request for a hearing, the department shall specify a time and place for the person subject to the order to appear and be heard. The hearing shall be conducted by the director or the director's designee in accordance with the provisions of chapter 91, HRS, as amended.]
- (5) (3) The department, in consultation with the department of the corporation counsel, may institute a civil action in any court of competent jurisdiction for the enforcement of any settlement agreement or order issued pursuant to this section.
- [(6)] (4) Nothing in this section shall prohibit the department, through the corporation counsel, from filing an order or motion directly with a court in the event that public health, safety and welfare may be at risk. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-43, 205A-43.6) (Imp: HRS §43.6)

**§12-202-24 Conflicts with other laws.** In case of a conflict between the requirements of any other [state] State law or [county] County ordinance regarding the special management area, the more restrictive requirements shall apply in furthering the purposes of this part. Nothing contained in this part shall be construed to diminish the jurisdiction of the [state] State department of transportation over wharves, airports, docks, piers, or other commercial harbors, and any other maritime facilities constructed by the [state] State; provided that such plans are submitted for the review and information of the officer of the respective agency charged with the administration of the [county] County zoning laws, and found not to conflict with any [county] County ordinances, zoning laws, and building codes. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-48) (Imp: HRS §205A-48)

**§12-202-25 Penalties.** Any person who violates any provision of these rules shall be liable for an initial civil fine not to exceed \$100,000 per violation and maximum daily fine of \$10,000 in addition to any other penalties until the violation is [corrected.] remedied. A civil fine may be imposed by the department

after an opportunity for [a] an appeal hearing under chapter 91, HRS, as amended, and subsection 12-202-26(b) herein. [unless said hearing is otherwise waived.] A special management area permit application submitted subsequent to an applicant's having completed the development or having been cited for the activity or construction without having obtained special management area approval, shall not stay any order to pay civil fines[.], including initial and accumulating daily fines. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-32) (Imp: HRS §§205A-22, 205A-26, 205A-28, 205A-29, 205A-30, 205A-33)

**§12-202-26 Appeal of director's decision; filing the notice of appeal; settlement of appeal.** (a) For decisions other than enforcement proceedings pursuant to section 12-202-23, appeal of the director's decision may be made to the commission by the filing of a notice of appeal with the department not later than ten days after the receipt of the director's written decision, or, where the director's decision is not required by the commission or these rules to be served upon appellant, not later than ten days after the meeting at which the commission received notification of the director's decision. For enforcement proceedings pursuant to section 12-202-23, appeal of a notice of violation may be made to the commission by the filing of a notice of appeal with the department within thirty days of the date of service. The notice of appeal shall be filed in accordance with section 12-201-20 of the rules of practice and procedure for the Maui planning commission. The department shall notify the commission, at the commission's next regularly scheduled meeting, of the filing of the notice of appeal.

(b) An owner or violator who receives a notice of violation and order who believes that any part of the notice of violation and order, including fines, was issued in error, may submit a written request for the director to negotiate a final resolution of issues, including any corrective action that must be taken by the owner or violator, any permits that are required, any fines that must be paid, and any actions that are required by the department. The request shall be submitted within ten days of the date of service of the notice and may be submitted in addition to or instead of an appeal pursuant to subsection (a).

(c) If the director and the owner or violator agree on a resolution that involves a waiver of fines totaling less than \$50,000, then the director will notify the owner or violator in writing and establish which party shall draft the agreement. At the commission's next regularly scheduled meeting, the director shall notify the commission of the agreement, receipt of which shall be acknowledged by the commission.

(d) If the director and the owner or violator agree on a resolution that involves a waiver of fines totaling \$50,000 or greater, then the director will notify the owner or violator in writing and establish which party shall draft the agreement. The agreement shall be submitted to the commission for final action. The commission may accept, accept with modifications, or reject the agreement.

(e) If the director and the owner or violator do not agree on a resolution, the director will notify the owner or violator in writing of the director's termination of the negotiation. Submittal of any request for a negotiated resolution shall not affect the accrual of daily fines or any time limitations for appealing the notice of violation and order to the commission. [Eff 1/1/94; am and comp 9/28/97; am and comp 11/4/02] (Auth: Charter §§ 8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

**§12-202-27 Content of the [notice of] appeal.** The [notice of] appeal to the commission shall identify the party [or parties taking] making the appeal [in the caption and body of the notice of appeal]. The [notice of] appeal shall designate the decision appealed from and shall state the reasons for the appeal. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

**§12-202-28 Joint or consolidated appeals.** If two or more parties are entitled to appeal [from] a decision of the director to the commission and their interests are such as to make joinder practicable, they may file a joint appeal and thereafter proceed on appeal as a single appellant. Appeals that are filed separately may be consolidated by order of the commission upon the commission's own motion, upon motion of a party, or upon stipulation of the parties to the several appeals. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

**§12-202-29 Service of the [notice of] appeal.** If the appellant is someone other than the applicant, appellant shall serve a file-marked copy of the appeal by mail or delivery thereof to counsel of record for each other party, or, if a party is not represented by counsel, to the party at the party's last known address. Proof of service shall be filed with the department within seven days after the filing of the [notice of]appeal[.], and the department shall notify the commission of the filing of the appeal at the next regular meeting. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

**§12-202-30 Payment of fees.** Upon the filing of any separate or joint [notice of] appeal, the appellant shall pay such fees as are set forth in the County budget ordinance. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

**§12-202-31 Contested case hearing on appeal.** The commission shall hold a contested case hearing on the appeal. The director, the appellant, the owner, and, where the appellant is someone other than the applicant, the applicant shall be parties to the proceedings. Subchapters 3, 4, and 5 of the rules of practice and procedure for the Maui planning commission, relating to

petitions to intervene, contested case procedures, and **[post hearing]** post-hearing procedures, respectively, shall govern the proceedings, except that petitions to intervene on an appeal shall be filed with the commission no later than ten days after the meeting at which the commission received notification of the filing of an appeal. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15)(Imp: HRS §§205A-29, 205A-30, 205A-49)

**§12-202-32 Disposition of appeal.** The commission may affirm the decision of the director, or may remand the case to the hearing officer, if any, with instructions for further proceedings; or it may **[reverse]** modify the decision of the director if the substantial rights of the appellant may have been prejudiced because the decision is:

- (1) Based on clearly erroneous findings of material fact or erroneous application of the law; or
- (2) Arbitrary or capricious in its application; or
- (3) A clearly unwarranted abuse of discretion. [Eff 11/4/02; comp 11/4/02; am and comp 12/20/04] (Auth: HRS §§91-14(g)(6), 205A-43, 205A-43.5, 205A-43.6, 205A-45, 205A-49, Maui County Charter §§8-8.4, 13-2(15)) (Imp: HRS §§205A-29, 205A-30, 205A-43, 205A-43.5, 205A-43.6, 205A-45, 205A-49, Maui County Charter §§8-8.4, 13-2(15))