LAND USE PLANNING
AND PRIORITIES IN HAWAI'I

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The use of land in Hawai'i is intensely regulated. A recent partial listing of major permits required for residential and resort development runs to some 75 pages. An overlapping environmental permit index, attached to the listing as an appendix, contains hundreds of entries. As briefly summarized below, the regulations are applied at both State and county levels, generally according to State and county plans that are usually "laws" themselves. The process of land use planning and regulation has become enormously complex.

THE LAND REGULATORY SYSTEM IN BRIEF

Land use controls in Hawai'i are exercised at two levels of government: State and county. Each level controls private land within its jurisdiction, and the county does not control State-owned lands or have jurisdiction over certain other lands. Moreover, neither the State nor the county has jurisdiction over Federal lands.

The State

The State of Hawai'i controls land by three principal means: the Land Use Law, the Hawai'i Environmental Impact Statement Law, and the Coastal Zone Management Act.

The Land Use Law provides for a Land Use Commission, which initially divided the entire land area of the State into four districts: Agricultural, Conservation, Rural, and Urban. Significant private land development is permitted only in the Urban district. Once land is classified as Urban, Hawai'i's four counties assume control of the land regulatory process. However, less than 7% of the State is so classified, leaving the release of developable land wholly up to the State. For example, plans to develop a 'second city' on Campbell Estate Agricultural land on O'ahu were impossible until the Land Use Commission reclassified the land to Urban.

In addition to classifying land, the Land Use Commission is primarily responsible for regulating use in the Agricultural District (about 47% of the State's land area). Most of the remaining land (46%) is classified Conservation, the use of which is controlled by the governing Board of the Department of Land and Natural Resources (the Land Board). Lands with a Conservation
District classification include national and state parks, lands with a slope of 20° or more, lands in existing forestry and water reserves, and marine waters and offshore islands. In reality, only lands within the Protective "P" Subzone of the Conservation District are protected for "conservation" reasons. Both the Land Use Commission and the Land Board must conform their land use regulatory activities to the Hawai'i State Plan (Act 100), but the Plan’s provisions are so general and its goals so diverse that determining conformance is nearly impossible.

The Hawaii Environmental Impact Statement Law requires an Environmental Assessment and, depending upon the contents of this document, an Environmental Impact Statement for developments in the State Conservation District, the Coastal Zone, county historic districts, and Waikiki. However, environmental assessments and environmental impact statements, filed with the Governor, are "information only" and if the procedural standards of the Hawaii Environmental Impact Statement Law are satisfied, a landowner’s responsibilities are over, regardless of any substantive environmental problems disclosed by either the environmental assessment or the environmental impact statement.

The Coastal Zone Management Act requires developments in the State’s Coastal Zone to be reviewed for consistency with the State’s Coastal Zone Management objectives as set forth in a plan or program. The State has delegated to the four counties the authority to make such reviews and to grant or deny Shoreline Management Area permits for development. An unanswered question is whether the counties can deny such permits for development already permitted under their respective local land use plans and regulations (like zoning ordinances), or only put conditions on such developments to better protect coastal values.

County Land Use Regulation

Hawaii’s four counties—Hawaii’s only local governments since no municipal governments exist—regulate the private use of land (but, as indicated, only land already classified as Urban by the State’s Land Use Commission) by three primary techniques: development plans, zoning, and subdivision controls.

County Development Plans—Each county has prepared and adopted plans of various degrees of detail (Honolulu’s eight development plans, complete with maps, are quite detailed), projecting how all land within its respective jurisdiction should be developed over the next decade or so. Adopted by the local county council, the plans have the force of law. Honolulu’s charter specifically provides that zoning and subdivision ordinances may be neither initiated nor adopted unless they conform to county development plans.

Zoning—All four counties have adopted zoning ordinances which divide all the urban land under their jurisdiction into land use districts regulating the intensity and type of use permitted on private land. Such ordinances must conform to the county development plans and are applicable only on land zoned Urban by the Land Use Commission.

Subdivision—The control of the land development process itself is exercised by means of subdivision ordinances which regulate the intensity of all single-family residential development and some multifamily and commercial
development as well. There is some question whether these regulations have application to such things as planned developments and "horizontal property regimes" (condominiums). Planned developments and condominiums do not involve the development of individual dwelling units on individual "lots" in a "subdivision."

MAJOR ISSUES

There are several major issues in land use planning and control law which vitally affect the process in Hawai'i. Among the most important are:

Regulatory Takings

At what stage in the land regulatory process does a regulation sufficiently devalue private land that it becomes a "taking" (like an exercise of eminent domain, commonly called "condemnation") under the Fifth Amendment to the U.S. Constitution? In March 1987, the U.S. Supreme Court decided that such a regulatory taking occurs only when an "otherwise valid" regulation deprives a landowner of all economic value, considering the land in question as a whole. That is, a landowner may not separate air rights or subsurface rights and claim that the loss of all of them through regulation is a "taking," without considering what other rights in the land are relatively untouched. "Otherwise valid" means a regulation passed to protect the health and safety and preserve the economic integrity of the county.

Moreover, a landowner may not even raise the "taking" issue until he or she has sought unsuccessfully all potentially available land use permits to use the property in question (the so-called "ripeness" issue), and has tried to have the county or State condemn the property through its eminent domain laws (right of a government to take private property for public use, provided the government pays for it).

The Compensation Issue

Once a landowner has gotten over the formidable "ripeness" and "taking" barriers, compensation, not merely the striking down of the offending regulation, is appropriate as a remedy for a "regulatory taking." The U.S. Supreme Court held this to be true in June 1987. However, it appears that compensation is not available unless all use—not merely all economic use—of the land is taken by the offending regulation (for example, zoning private land for a park without paying for it). Finally, compensation is available only if the offending regulation is not "insulated" by the State's laws passed to protect public health and safety.

Conditions on Land Development Permits

The Supreme Court also held (again, in June 1987) that government may impose conditions such as dedications, impact fees, and other exactions upon the land development process, provided there is an essential or rational connection between the condition and alleviation of whatever problem the land development is expected to cause. Thus, it would be legal to impose a fee to help defray the costs of new water supplies for a residential development, but it would be illegal to require the dedication of lateral beach access in the name of preserving beach views.
Preservation of Protected "P" Subzone Lands in the Conservation District

Department of Land and Natural Resources Regulation 4 provides for land use within the Conservation District. Included in the Conservation District is a Protected or "P" Subzone to protect valuable resources in such areas as restricted watersheds, plant and animal sanctuaries, and significant historic, archaeological, geological, and other unique sites. All land encompassing the Northwestern Hawaiian Islands (except Midway Atoll) and areas necessary for preserving natural ecosystems are in the P Subzone. A great deal of authority is vested in the Board of Land and Natural Resources to change boundaries and reclassify lands in the Conservation District. Although notification and public hearings are required to do this, and appeals of Board decisions are possible, pressures on Conservation District lands for development are increasing. Conflicts arise among those who would preserve natural areas and those who would develop lands for economic gain.

Preservation of Coastline and Agricultural Land versus Housing Needs

In the face of declining need for agricultural land and increased public interest in preserving coastal lands free of development, how should Hawai‘i address the need for vastly more housing? The current controversies over the proposed residential development near Sandy Beach on O‘ahu, the past litigation over Queen’s Beach, and the Myers hotel/condominium project in Waikiki, together with the Waiala Estates litigation and continued controversy over Campbell Estate’s second city development plans, typify the conflicts in goals and case-by-case considerations inherent in the land use process.

THE FUTURE

There has not been this much ferment in land development law in Hawai‘i for decades. There is an urgent need to review existing State and county laws to bring them into conformance with new national standards of permissible regulations and conditions of land use. Many counties are currently wrestling with land development conditions such as impact fees and community benefit assessments, as well as major revisions to zoning and subdivision codes. Other counties are striving to close loopholes in the land development process left by various State laws. All are contemplating some form of public-private partnerships in the land development process to remove some of the uncertainty and increase community participation at an earlier stage in land development decision-making, generally by means of development agreements under a 1985 State enabling statute.

The raw material from various studies indicating a possible surplus of agricultural land, a shortage of housing, and Statewide concern for preserving various amenities (from beach to mountain to historic structure) needs to be synthesized, probably at the State level. The synthesis should be used as a basis for reallocating land use decision-making power between the State and counties. Decisions about preservation of areas of critical State concern and construction developments with Statewide impact should remain with the State. The counties should control the rest.
In Hawai'i we still need to make land use decisions openly, intentionally, and consciously as a society. Decisions should not be made reactively, accidentally, or covertly by a segment of our society. We must conserve what is uniquely Hawaiian but provide for development required for a sophisticated Pacific island state in the last part of the 20th century. Absolute land preservation and absolute land development will always conflict absolutely. A judicious and planned mix of the two will allow regulation of our Island Paradise.

Important References


