

TITLE MC-12

DEPARTMENT OF PLANNING

SUBTITLE 04

LANAI PLANNING COMMISSION

CHAPTER 402

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DEPT OF PLANNING
COUNTY OF HAWAII

SPECIAL MANAGEMENT AREA RULES

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SUBCHAPTER 1

GENERAL PROVISIONS

§12-402-1 Title. The rules in this chapter shall be known as the "Special Management Area Rules for the Lanai Planning Commission". [Eff. January 30, 1994] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §205A-29)

§12-402-2 Purpose. The purpose of these rules is to implement HRS chapter 205A, relating to coastal zone management and special management areas, and to establish application procedures for special management area 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 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 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. January 30, 1994] (Auth: HRS §§91-2, 205A-27, 205A-29, 205A-30) (Imp: §§ HRS 205A-1 to 205A-33)

§12-402-3 Scope and exemptions. (a) The rules contained in this chapter shall apply to the special management area on the island of Lanai as designated on the special management area maps and specifically excluding the islands of Kahoolawe, Molokai and Maui.

(b) The rules in this chapter shall 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 letter is sent by the director to the applicant to that effect.

Applications deemed complete shall be processed under the rules in effect at the time the application was deemed complete. [Eff. January 30, 1994] (Auth: HRS §§46-4, 91-2, 205A-27, 205A-29) (Imp: HRS §205A-23)

§12-402-4 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 HRS sections 205A-1, 205A-22, and 205A-41, (a copy of which shall be provided pursuant to section 12-402-7), and as follows:

"Central coordinating agency" means the land use and codes administration division of the department of public works and waste management, County of Maui.

"Commission" means the Lanai 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.

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

"Director of public works and waste management" means the director of the department of public works and waste management of the County of Maui.

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

"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.

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

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

"Owner" means all holders of an equitable or legal interest in real property on the island of Lanai, 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 design of the proposed action and the existing physical condition of the land, including but not limited to property boundaries, topography, natural and man made 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.

"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 single family dwelling, as defined in title 19 of the Maui County Code, as amended.

"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.

"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. January 30, 1994] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-1, 205A-22, 205A-29)

§12-402-5 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 can be given effect without the invalid provision or application. To that extent the provisions of these rules are severable. [Eff. January 30, 1994] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §§91-2, 205A-9)

§12-402-6 Special management area boundaries and maps. The special management area shall be all lands so designated on the maps presently 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. January 30, 1994] (Auth: HRS §§91-2, 205A-23, 205A-27, 205A-29) (Imp: HRS §205A-23)

§12-402-7 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 of the State Legislature. A charge may be imposed for copying costs as provided by law. [Eff. January 30, 1994] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §205A-29)

§§12-402-8 to 9 Reserved.

SUBCHAPTER 2

SPECIAL MANAGEMENT AREA PERMIT PROCEDURES

§12-402-10 Special management area objectives and policies. (a) The objectives and policies of this chapter shall be those set forth in HRS section 205A-2, as amended.

(b) In implementing these objectives and policies, the department or the commission, as appropriate, shall fully consider ecological, cultural, historic, and aesthetic values as well as needs for economic development. [Eff. January 30, 1994] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4)

§12-402-11 Special management area review guidelines. The review guidelines set forth in HRS §205A-26, 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. January 30, 1994] (Auth: HRS §§91-2, 91-4.2, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-26)

§12-402-12 Assessment and determination procedures.

(a) All proposed actions within the special management area shall be subject to an assessment and a determination made by the director. Such assessment shall be pursuant to 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 12-402-13 and 12-402-15.

(c) Assessment applications shall be filed in accordance with the following:

- (1) Any 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 negative declaration 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 department. The application shall require the following information and documentation:
- (A) Identification of the applicant along with documentation of ownership or authorization by the owners of the land on which the proposed action is to occur;
 - (B) Tax map key number and acreage of the land on which the proposed action is to occur;
 - (C) A plot plan, drawn to scale, of the land 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;
 - (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 the shoreline is fixed by:
 - (i) manmade 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) natural stabilized geographic feature such as cliffs and rock formations; or
 - (iii) if the property is not abutting the shoreline.
 - (E) A written description of the proposed action, including but not limited to the use, length, width, height, depth, building materials, and statement of objectives;
 - (F) A written description of the anticipated impacts of the proposed action on the special management area that addresses or describes:

- (i) The environmental setting of the property that is the subject of the proposed action;
 - (ii) The relationship of the proposed action to land use plans, policies, and control of the affected area;
 - (iii) The probable impact, including cumulative impacts, of the proposed action on the environment;
 - (iv) Any probable adverse environmental effects that can be avoided;
 - (v) Alternatives to the proposed action;
 - (vi) Mitigating measures proposed to minimize impact; 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 land. If structures are included, the plan shall also show a dimensioned floor plan, sections, elevations, and other physical features;
 - (H) Verification of the valuation of the proposed action as estimated by an architect, engineer, or contractor licensed by the department of commerce and consumer affairs, State of Hawaii, or verification of the valuation of the proposed action as estimated by the administrator of the land use and codes administration, County of Maui;
 - (I) The state land use district boundary designation, community plan designation, county zoning designation, if applicable, and any other special designation, if applicable;
 - (J) An environmental assessment and negative declaration or an environmental impact statement, if required, pursuant to HRS chapter 343; and
 - (K) Any other information and documentation required by the planning department to properly process the application.

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

(1) Upon submission of a completed application, the director shall review the proposed action and make a written evaluation as to:

(A) The valuation of the proposed action. The applicant's estimates of the total cost or fair market value may be verified by the director of public works and waste management. In the event of a conflict between the estimates of the applicant and the director of public works and waste management, the higher estimate amount shall be used by the director for the purposes of an assessment of the proposed action;

(B) Whether the proposed action is or is not a development; and

(C) The potential adverse environmental and ecological effects based upon the significance criteria set forth in section 12-402-12(e).

(e) In considering the significance of potential environmental and ecological effects, the director shall evaluate:

(1) 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) Every phase of a proposed action, its expected primary and secondary consequences, and its cumulative and short or long-term effects. A proposed action may have a significant adverse effect on the environment when the proposed action:

(A) Involves an irrevocable commitment to loss or destruction of any natural or cultural resources;

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

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

- (D) Substantially affects the economic or social welfare and activities of the community, county, or state;
- (E) Involves substantial secondary impacts, such as population changes and increased effects on public facilities, streets, drainage, sewage, and water systems, and pedestrian walkways;
- (F) In itself has no significant adverse effects but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;
- (G) Substantially affects a rare, threatened, or endangered species of animal or plant, or its habitat;
- (H) Is contrary to the state plan, county's general plan, appropriate community plans, zoning and subdivision ordinances;
- (I) Detrimentally affects air or water quality or ambient noise levels;
- (J) Affects an environmentally sensitive area, such as flood plain, shoreline, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh waters, or coastal waters;
- (K) Substantially alters natural land forms and existing public views to and along the shoreline; or
- (L) Is contrary to the objectives and policies of HRS chapter 205A.

(f) Based upon the assessment and review of the application, the director shall make a determination and notify the applicant in writing within thirty (30) calendar days after the application is complete that the proposed action either:

- (1) Is recommended exempt from the requirements of this chapter because it is not a development pursuant to HRS section 205A-22, as amended, and that the application and director's recommendation has been referred to the commission for final determination, which shall be processed in accordance with section 12-402-13.1;
- (2) Requires a special management area minor permit pursuant to HRS section 205A-22, as

- amended, which shall be processed in accordance with section 12-402-14;
- (3) Requires a special management area use permit pursuant to HRS section 205A-22, as amended, which shall be processed in accordance with sections 12-402-13 and 12-402-15;
 - (4) Requires a special management area emergency permit pursuant to HRS section 205A-22, as amended, which shall be processed in accordance with section 12-402-16; or
 - (5) Cannot be processed because the proposed action is not consistent with the county general plan, community plan, and zoning, unless a general plan, community plan, or zoning application for an appropriate amendment is processed concurrently with the SMA permit application. [Eff 1/30/94; am and comp 9/26/08] (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-29, 205A-30)

§12-402-13 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. Prior to publication, the department shall review the notice of application for completeness. The applicant shall submit the notice of application for publication to a newspaper within 10 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, after the director has determined the application is complete.

(c) Where a public hearing is required to be held pursuant to these rules, 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 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 property that is the subject of the application (if available);
- (3) The tax map key number(s) of the property;
- (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 notice of public hearing shall be mailed not less than thirty calendar days before the hearing date by certified or registered mail, postage prepaid, to owners of real property situated within five hundred feet of the boundaries of the land that is the subject of the application. The applicant shall also send notice to all persons who have requested the commission in writing to be notified of 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. 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 situate within five hundred feet of the subject property were obtained from the County of Maui real property tax roll, and that current ownership was verified with the records of the County's real property tax division,

within thirty days of the mailing of notice of public hearing, stating both the date the addresses were obtained and the date notice was mailed, accompanied by receipts of certified mail. If there are multiple owners of the property, notification of the person(s) listed by name on the records of the County of Maui real property tax roll shall be deemed adequate notice as to all owners. [Eff. January 30, 1994] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §205A-29)

§12-402-13.1 Commission review and final determination of special management area exemption. (a) All proposed action within the special management area recommended exempt under section 12-402-12(f)(1) shall be placed on the agenda for review and final determination at the next commission meeting.

(b) The commission shall make a determination and notify the applicant in writing within thirty calendar days after the application is reviewed by the commission that the proposed action is either:

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

(c) Applications determined not exempt shall be transmitted to the director with findings and conclusions, and the director shall process the application under paragraphs (2), (3), (4), or (5) of section 12-402-12(f).

(d) If the commission does not make a determination and notify the applicant in writing within sixty calendar days as provided in subsection (b), the proposed action shall be deemed exempt. [Eff 9/26/08] (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-29, 205A-30)

§12-402-14 Special management area minor permit procedures. (a) If it has been determined that the proposed action requires a special management area minor permit, the assessment application submitted pursuant to section 12-402-12 may be deemed the minor permit application. The director shall approve, approve with conditions, or deny such permit in accordance with the

guidelines in HRS section 205A-26, as amended. Any final decision shall be transmitted to the applicant in writing.

(b) The director shall notify the commission, at the commission's next regularly scheduled meeting, of the issuance by the director 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 development authorized by the permit, and the location and purpose of the development. [Eff. January 30, 1994] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-26, 205A-29, 205A-30)

§12-402-15 Special management area use permit procedures.

(a) Any person whose proposed development 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 shall require:

- (1) All information and documentation required pursuant to section 12-402-12, excluding valuation of the development;
- (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 land on which the proposed development is to occur;
- (3) An administrative fee as established in the County budget; and
- (4) Any other relevant information and documentation required by the director.

(b) Upon review of the application for completeness, the central coordinating agency shall refer the application to the director. For purposes of central coordinating agency review, completeness means all required documents have been filed.

(c) Upon receipt of the application from the central coordinating agency, the director shall review the application based on the policies, objectives, and guidelines as provided in sections 12-402-10 and 12-402-11 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 for agency transmittal until the director is satisfied that the application has addressed the policies, objectives and guidelines.

(d) 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 HRS chapter 205A, as amended.

(e) The applicant shall be required to present the proposed development, if applicable, to the urban design review board and to the cultural resources commission 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 HRS chapter 205A, as amended.

(f) Upon receipt of final agency comments, the application shall be deemed complete by the director and shall be scheduled for public hearing.

(g) The commission shall approve a special management area use permit, subject to terms and conditions as permitted in HRS sections 205A-26(1) and 205A-26(3), as amended, if it finds the criteria set forth in HRS sections 205A-26(2) and 205A-26(3) have been met.

(h) 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. [Eff. January 30, 1994]
(Auth: HRS §§91-2, 91-4.2, 205A-26, 205A-27, 205A-29)
(Imp: HRS §§205A-4, 205A-26, 205A-28, 205A-29)

§12-402-16 Special management area emergency permit procedures. (a) Any person seeking a special management area emergency permit shall file an application with the director. The application, provided by the department, shall require:

- (1) Identification of the applicant along with documentation of ownership and authorization by the owners of the property on which the proposed action is to occur;
- (2) The tax map key number(s) of the property 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;
- (4) A written statement of the emergency or imminent and substantial harm to the public health, safety, or welfare;
- (5) The most current shoreline survey, if available;
- (6) Photographs or VHS format video tape identifying the emergency at the affected area and shoreline property boundaries; and
- (7) Any other relevant information requested by the director.

(b) The director may waive the filing of a written application where the applicant demonstrates to the satisfaction of the director that imminent danger and substantial harm to a habitable structure would result from the delay in filing a written application. After approval of an oral request, the director shall issue a written permit, 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 and telephone number;
- (4) Tax map key number (if available);
- (5) Statement of the imminent danger posed and the substantial harm that would occur to the habitable structure if the permit were not granted; and
- (6) The permitted temporary solution.

(c) 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 solution be removed.

(d) Except as provided in section 12-402-16(e) the director shall issue a special management area emergency permit where:

- (1) The director finds the criteria set forth in HRS sections 205A-22 and 205A-30, as amended, have been met;
- (2) In the event of impending or presently occurring disaster, the mayor has waived the requirements of sections 12-402-12, 12-402-14, or 12-402-15; 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 §§12-402-12, 12-402-14, or 12-402-15.

(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 date for the permit, not to exceed one hundred eighty days, and set a time limitation within which the applicant shall apply for a permit pursuant to sections 12-402-14 or 12-402-15.

(h) The director shall submit reports of all determinations regarding emergency permits to the commission for review at the next regular meeting after the permit has been issued. 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 section 12-402-16(d). The applicant shall be informed of his right to appeal pursuant to chapter 91, HRS, as amended. [Eff. January 30, 1994] (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§91-2, 91-14, 205A-30)

§12-402-17 Amendments to permit terms, conditions, and time stipulations. (a) 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 or delete any terms, conditions or time stipulations placed upon such permit.

(b) Any person seeking to amend or delete a permit condition 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 or deleted;
- (2) If an extension of a time stipulation is requested, the length of time extension desired;
- (3) The reasons for the requested amendment or deletion;
- (4) A public hearing and notice fee as established in the County budget; and
- (5) 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 the permit shall be given pursuant to the procedures set forth in section 12-402-13. 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.

(d) 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 12-402-13. The commission shall conduct a hearing in accordance with the procedures set forth in its rules.

(e) Findings of fact, conclusions of law, and decision and order for any special management area use permit application seeking to amend or delete permit terms, conditions, and time stipulations 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 12-402-11.

[Eff. January 30, 1994] (Auth: HRS §§91-2, 205A-29,
205A-30) (Imp: HRS §§205A-26, 205A-29)

§§12-402-18 to 20 Reserved.

SUBCHAPTER 3

PROCEDURES TO ADOPT SPECIAL MANAGEMENT AREA RULES; DECLARATORY RULINGS; AND ADOPTION AND AMENDMENT OF BOUNDARIES AND MAPS

§12-402-21 Petition and procedures to adopt, amend, or repeal special management area rules; declaratory rulings. The commission may adopt, amend, or repeal any of its rules by following the procedures outlined in its rules of practice and procedure section 12-401-92. Any interested person may petition the commission for a declaratory order as to applicability of any statutory provision or of any rule or order of the department or the commission pursuant to the commission's rules of practice and procedure section 12-401-93. [Eff. January 30, 1994] (Auth: HRS §91-2) (Imp: HRS §§91-3, 91-4, 91-6, 91-7)

§12-402-22 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.

(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 (2/3) vote of its total membership, may direct the director to initiate a comprehensive review and amendments to the special management area boundaries.

(d) 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 the proposed amendments to the commission.

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. 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) 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 office of planning, the commission shall render a final decision and issue a written order and 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. January 30, 1994] (Auth: HRS §91-2)

§12-402-23 Enforcement. (a) The department shall enforce these rules, except as otherwise provided herein.

(b) Any development that has not received a required special management area emergency permit, minor permit, or use permit pursuant to this chapter, or that has not complied with conditions established with such a permit, shall be removed, or the violation shall be corrected by immediate application for, and subsequent granting of, an appropriate permit, or shall be remedied by other means as determined by the director. No other state or county permit or approval shall be construed as a special management area permit or approval pursuant to this chapter.

(c) Where the shoreline is affected by an artificial structure that has not been authorized by permits required by law, and if any part of the structure is on private property, the development shall be construed to be entirely within the special management area for enforcement purposes and shall be removed or the violation otherwise corrected. [Eff 1/8/10] (Auth: HRS §§205A-28, 205A-29, 205A-32) (Imp: HRS §§205A-28, 205A-29)

§12-402-24 Issuance of notice of violation and order. (a) The landowner or the alleged violator, or both, shall be notified by the department by certified or registered mail of an alleged violation of this chapter, any permit issued pursuant thereto, or any condition of a special management area permit. If notice by registered or certified mail is not made because of the refusal to accept service, or the director is unable to ascertain the address of the land owner or alleged violator after reasonable and diligent inquiry, notice may be given by publication at least once in each of two successive weeks in a newspaper of general circulation. The notice of violation and order shall include the provision of law or permit or order violated, the nature of the violation, and the remedy(ies) available. The notice of violation and order may require one or more of the following:

- (1) That the violation cease;
- (2) That the development be removed;
- (3) That a civil fine not exceeding \$100,000 per violation be paid; and
- (4) That a civil fine not exceeding \$10,000 per day for each day in which the violation persists be paid.

(b) The notice of violation and order shall state that the order shall become final thirty days after the date of its mailing, unless a notice of appeal is filed with the commission within said thirty days pursuant to subchapter 4 of these rules. Nothing in this section shall prevent the landowner or violator from seeking to negotiate a settlement or resolve a dispute. [Eff 1/8/10] (Auth: HRS §§205A-28, 205A-29, 205A-32, 205A-33) (Imp: HRS §§205A-28, 205A-29)

§12-402-25 Negotiated settlement of notice of violation and order. If the violator seeks a negotiated settlement with the department, the commission may stay any hearing during the period of negotiations. The department, in consultation with the corporation counsel, may negotiate a settlement agreement with the landowner or, if appropriate, the violator, that provides for cure of the violation, payment of a fine, and inspection of the parcel by the department. The proposed settlement shall be forwarded to the commission for approval or disapproval. [Eff 1/8/10] (Auth: HRS §§205A-28, 205A-29, 205A-32, 205A-33) (Imp: HRS §§205A-28, 205A-29)

§12-402-26 Civil actions. (a) The department, in consultation with 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 chapter.

(b) Nothing in this chapter shall prohibit the department, through the corporation counsel, from filing a motion or other civil action with a court of law. [Eff 1/8/10] (Auth: HRS §§205A-28, 205A-29, 205A-32, 205A-33) (Imp: HRS §§205A-28, 205A-29)

§12-402-27 Penalties. Any person who violates any provision of these rules shall be liable for an initial civil fine not exceeding \$100,000 per violation and a civil fine not exceeding \$10,000 per day for each day in which the violation persists. A civil fine may be imposed by the department after an opportunity for a hearing under chapter 91, Hawaii Revised Statutes, as amended, unless said hearing is otherwise waived. A special management area permit application submitted after an applicant has initiated a development or been cited for a violation shall not stay any order to pay civil fines. [Eff 1/8/10] (Auth: HRS §205A-32) (Imp: HRS §§205A-22, 205A-26, 205A-28, 205A-29, 205A-30, 205A-33)

§12-402-28 Enforcement of conditions, representations, or commitments; order to show cause.

(a) The commission, on its own motion, may issue an order to show cause, or the director or any party or interested person may file a petition with the commission for an order to show cause, upon a showing that there has been a failure to perform a condition, representation, or commitment on the part of a permit holder or a person whose proposed action was determined to be exempt from the requirements of this chapter pursuant to section 12-402-13.1. The director, party, or person filing the petition shall serve a copy of the petition for an order to show cause upon the permit holder or the person whose proposed action was determined to be exempt, as the case may be. The petition for order to show cause shall state:

- (1) The interest of the petitioner;
- (2) The permit in question;

- (3) The condition, representation, or commitment that has not been performed or satisfied;
- (4) Concisely and with particularity the facts, supported by an affidavit, giving rise to a belief that a condition, representation, or commitment has not been performed or satisfied;
- (5) A description and a map of the property affected;
- (6) The specific relief requested; and
- (7) Any other information that the commission requires for an adequate investigation into the matter.

(b) The commission may reject any petition that is incomplete, inaccurate, or fails to comply with the rules of the commission. The rejected petition shall be returned to the petitioner.

(c) The commission may request the assistance of the director and department staff in the investigation of any alleged breach of a condition, representation, or commitment.

(d) Whenever the commission has reason to believe that there has been a failure to perform according to conditions imposed, or representations or commitments made, the commission shall issue and serve upon the party or person bound by the conditions, representations, or commitments, an order to show cause why the permit should not be revoked, amended, or modified, or why the proposed action should not be deemed to be a development, as the case may be. The commission shall serve the order to show cause in writing at least thirty days before the hearing. The order to show cause shall include:

- (1) A statement of the date, time, place, and nature of the hearing;
- (2) A description and a map of the property to be affected;
- (3) A statement of the legal authority under which the hearing is to be held;
- (4) The sections of the statutes, ordinances, or rules involved; and
- (5) A statement that any party may retain counsel if the party so desires.

(e) The commission shall conduct a hearing on an order to show cause in accordance with the requirements of subchapter 4 of these rules, where applicable. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and

informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default. [Eff 1/8/10] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §§91-9, 91-9.5)

SUBCHAPTER 4

HEARINGS ON APPEALS OF NOTICES OF VIOLATION AND ON ORDERS TO SHOW CAUSE

§12-402-29 Purpose. This subchapter governs procedures before the commission for the hearing of appeals of notices of violation and orders to show cause. These procedures may be modified or waived by the parties with the consent of the chairperson. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-30 Parties. The director and the parties served shall be parties to the proceedings. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-31 Contents of the notice of appeal from notice of violation. The notice of appeal shall:

- (1) Identify the party or parties taking the appeal;
- (2) Designate the notice of violation appealed from, and provide a copy of the notice of violation attached as an exhibit;
- (3) Have affixed to it proof that service of the notice of appeal was made on all parties to the appeal. Administrative staff for the commission shall permit a notice of appeal to be filed without the proof of service, but the person who filed the notice of appeal shall file the proof of service within seven days after the filing of the notice of appeal;
- (4) A concise statement setting forth the nature of the appeal, the facts material to consideration of the appeal presented, the alleged error committed by the director, and any relevant statutes, ordinances, or administrative rules pertaining to the matter under appeal;
- (5) Appeals from a notice of violation shall provide the following information:
 - (A) Documents identifying the owner of the subject parcel of land;

- (B) Owner's name, address and, if available, telephone numbers;
- (C) Agent's name, address and telephone numbers, if applicable;
- (D) Tax map key number of the parcel and its street address, if available; and
- (E) Map identifying the site, adjacent roadway, and landmarks. [Eff 1/8/10] (Auth: Charter §8-8.4.4) (Imp: Charter §8-8.4.4)

§12-402-32 Service of the notice of appeal. The alleged violator shall serve a file-marked copy of the appeal in accordance with section 12-401-21, rules of practice and procedure for the Lanai planning commission. [Eff 1/8/10] (Auth: Charter §§8-8.4.4, 13-2.15) (Imp: Charter §8-8.4.4)

§12-402-33 Notice of hearing. The commission shall give written notice of hearing to all parties in accordance with section 12-401-21, rules of practice and procedure for the Lanai planning commission or in accordance with Hawaii Revised Statutes section 91-9.5(b). [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §§91-9, 91-9.5)

§12-402-34 Record. (a) For the purpose of commission decisions, the record shall include:

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

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

(c) No matters outside the record shall be considered by the commission in making its decision

except as provided in this chapter. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-35 Hearing procedure. Unless otherwise stipulated by the parties, and subject to orders of the commission, which may alter the sequence of presentation of a case when necessary, hearings under this subchapter shall proceed as follows:

- (1) The director may make an opening statement. The other party may also make an opening statement, either immediately after the director's statement or at the beginning of the other party's case.
- (2) After the opening statement or statements, the director shall produce the evidence in support of the director's case;
- (3) The other party may then produce the evidence in support of the party's case;
- (4) The parties may then respectively offer rebutting evidence only; and
- (5) When the presentation of evidence is concluded, the director may present final arguments, followed by the other party, and then the director in rebuttal, which shall be limited to matters raised in the other party's final argument. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-36 Failure to appear. In the event of a party's failure to appear before the commission after proper notice has been served upon the party, or when a party or a party's representative leaves the hearing while the hearing is in progress, the commission may proceed with such hearing without the party's presence. Failure of a party or a party's representative to appear before the commission after proper notice has been served, or the unauthorized departure of a party or a party's representative during a hearing, shall constitute waiver of a party's right to be heard in person or through counsel and of the party's right to present evidence and argument. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-37 Failure of witness to appear. In the event of a witness' failure to appear before the commission to testify as a witness after being subpoenaed, the commission may continue the hearing and request that a contempt citation be issued by the circuit court to compel such witness to appear before the commission. [Eff 1/8/10] (Auth: HRS §91-2; Charter §§8-8.4.4, 13-2.10) (Imp: HRS §91-9)

§12-402-38 Evidence. (a) The admissibility of evidence at a hearing shall not be governed by the laws of evidence. Irrelevant, immaterial, or unduly repetitious material shall not be admitted into evidence. The commission shall give effect to the rules of privilege recognized by law.

(b) Each party may conduct such cross-examination as may be required for a full and true disclosure of facts.

(c) When objections are made to the admission or exclusion of evidence, the grounds for the objection shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken. The chair shall rule on the admissibility of evidence.

(d) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.

(e) Exhibits shall conform to the provisions of sections 12-401-20(b) and 12-401-20(c), rules of practice and procedure for the Lanai planning commission, where applicable, and shall be filed with the commission.

(f) Documentary evidence may be received in the form of copies, provided that, upon request, all other parties to the proceeding shall be given an opportunity to compare the copy with the original. If the original is not available, a copy may still be admissible, but the non-availability of the original and the reasons therefore may be considered by the commission when considering the weight of the documentary evidence.

(g) The commission may take notice of facts not subject to reasonable dispute in that they are either generally known within the County or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and generally recognized technical or scientific facts. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-39 Disclosure. (a) Any party may, by written demand, timely filed with the commission, and served upon any other party, request of any other party to the proceeding, the full disclosure of:

- (1) The identity of all witnesses to be called by the other party, unless prohibited by law;
- (2) All exhibits, including, but not limited to copies of documents, photographs, and other tangible evidence to be introduced by the other party at the hearing.

(b) All demands for disclosure shall continue in effect for the duration of the proceeding and the party to whom the demand is directed shall be under a continuing duty to disclose the information requested when it becomes available.

(c) The information requested shall be disclosed to the requesting party at least seven days before the hearing. Failure to comply with disclosure requirements may result in the exclusion of evidence subject to the disclosure request. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-40 Discovery. No depositions, interrogatories, or requests for production of documents shall be allowed. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-41 Limiting testimony. To avoid unnecessary cumulative evidence, the chair may limit the number of witnesses and the time for testimony upon a particular issue. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-42 Removal from proceeding. Any person or persons who willfully disrupts a hearing or otherwise compromises the conduct of the hearing shall be removed from the hearing room. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-43 Co-counsel. Where a party is represented by more than one counsel, they may allocate witnesses between them, but only one counsel for a party may examine or cross-examine a witness or state any

objections or make closing arguments. [Eff 1/8/10]
(Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-44 Subpoenas. Requests for the issuance of subpoenas requiring the attendance of witnesses shall be presented to the chair in writing, and shall state the reasons why the testimony is material and relevant.

Requests for the issuance of subpoenas shall be presented to the chair not less than ten calendar days before the scheduled hearing, unless otherwise ordered.

No subpoena shall be issued unless the requesting party has complied with this section and gives the name and address of the witness. [Eff 1/8/10] (Auth: HRS §91-2; Charter §§8-8.4.4, 13-2.10) (Imp: HRS §§91-9, 92-16)

§12-402-45 Fees and mileage. Witnesses summoned by subpoena shall be paid the same fees and mileage as are paid witnesses in circuit courts of the State of Hawaii, and such fees and mileage shall be paid by the party requesting the subpoena. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §92-16)

§12-402-46 Oath. Witnesses shall be placed under oath or affirmation before testifying. [Eff 1/8/10] (Auth: HRS §91-2; Charter §§8-8.4.4, 13-2.10) (Imp: HRS §92-16)

§12-402-47 Joint or consolidated appeals. If two or more parties are entitled to appeal from a decision or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal and thereafter proceed on appeal as a single appellant. Appeals 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, if the consolidation will be conducive to the proper dispatch of business and to the ends of justice and will not unduly delay the proceedings. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-2)

§12-402-48 Substitution of parties. Upon motion and for good cause, the commission may order substitution of parties, except that in the case of death of a party, substitution may be ordered without the filing of a motion. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-2)

§12-402-49 Transcripts. Should any of the parties request transcripts or appeal the decision of the commission, the commission shall fairly allocate the transcription costs between the parties. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-50 Correction of transcript. Motions to correct a transcript shall be filed within seven working days after receipt of the transcript unless otherwise directed and shall be served on all parties. Such motions shall certify the date when the transcript was received. If no objections are received within ten days after date of service, the transcript will, upon approval of the commission, be changed to reflect such corrections. If objections are received, the motion will be acted upon with due consideration to the stenographic transcript of the hearing. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-2)

§12-402-51 Submission of proposed findings. A proceeding shall stand submitted for decision by the commission after the taking of evidence, and the presentation of such oral argument as may have been allowed. A party to the proceeding may submit to the commission proposed findings of fact, conclusions of law, and decision and order within ten days of the close of the hearing and shall serve copies of said proposals on all parties. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-2)

§12-402-52 Standard of review for appeals of notices of violation. Unless otherwise provided by law, the commission may affirm the notice of violation or the commission may reverse the notice of violation if the substantial rights of the appellant may have been prejudiced because the notice of violation is:

- (1) Based on a clearly erroneous finding 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 1/8/10] (Auth: HRS §91-10; Charter §§8-8.4.4, 13-2.15) (Imp: HRS §91-10; Charter §§8-8.4.4, 13-2.15)

§12-402-53 Order to show cause proceedings, revocation or modification of conditions, orders, or permit. If the commission finds by a preponderance of the evidence that there has been a failure to perform a condition, representation, or commitment on the part of the permit holder, the commission may revoke, amend, or modify the permit, or allow the permit holder a reasonable opportunity to correct or remedy the failure. [Eff 1/8/10] (Auth: HRS §§91-2, 91-9; Charter §§8-8.4.4, 13-2.15) (Imp: HRS §§91-2, 91-9; Charter §§8-8.4.4, 13-2.15)

§12-402-54 Issuance of decision and order. (a) Every decision and order adverse to a party to the proceeding shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the commission shall incorporate in its decision a ruling that addresses such findings. Such decisions and orders shall be rendered within forty-five calendar days from the close of oral argument by the parties.

(b) If the commission affirms the notice of violation issued by the director, the appellant shall pay any penalty imposed by the director at the office of the department within ten calendar days of the receipt of the commission's findings of fact, conclusions of law, decision and order. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-12)

§12-402-55 Reconsideration of decision and order. The decision and order of the commission shall be final and no motions for reconsideration will be accepted by the commission. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-9)

§12-402-56 Service of decisions and orders. Decisions and orders shall be served by mailing certified copies to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy thereof. When a party to an application proceeding has appeared by a representative, service upon the representative or counsel shall be deemed to be service upon the party. [Eff 1/8/10] (Auth: HRS §91-2; Charter §8-8.4.4) (Imp: HRS §91-12)

§12-402-57 Appeals; record. (a) Any party aggrieved by the final decision and order of the commission may seek judicial review in accordance with section 91-14, Hawaii Revised Statutes. Any order to stay the enforcement of the commission's decision shall be by an order of the circuit court pursuant to section 91-14, Hawaii Revised Statutes.

(b) Any party requesting judicial review shall serve a copy of the request upon the commission and all other parties in accordance with the Hawaii Rules of Civil Procedure.

(c) Unless the commission has been notified in writing of a party's request for judicial review within the time permitted for requesting judicial review, the commission, after the time for requesting judicial review has passed, may cause exhibits to be returned to the party introducing the exhibits or if the party does not wish their return, order the disposal or destruction of the exhibits.

(d) The department may dispose of or destroy any evidence submitted unless notified in writing of a party's request for judicial review within the time permitted for requesting judicial review, and may return any exhibit after the time for requesting judicial review has passed or order its disposal or destruction if the party does not wish its return, the party cannot be contacted, or if it is impractical or illegal to return such evidence to the party. [Eff 1/8/10] (Auth: HRS §§91-2, 91-9, 91-14; Charter §8-8.4.4) (Imp: HRS §91-9)