

# ***Conservation District Review Project***

## ***Preliminary Discussion Draft***

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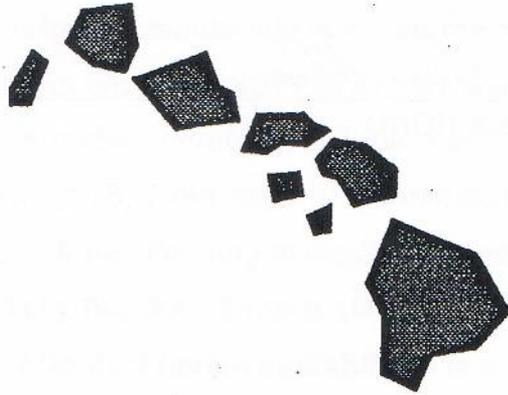


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***Prepared for  
The Department of Land and Natural Resources  
State of Hawaii***

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**EXHIBIT 1**

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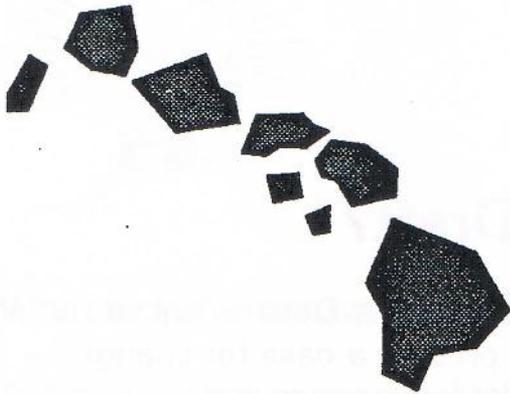
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**Conservation District Review Project:  
Project Advisory Committee Membership**

# **Conservation District Review Project**

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## **What is Hawaii's Conservation District?**

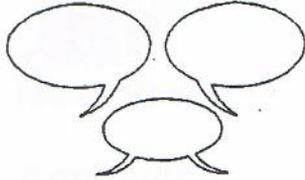
Hawaii's conservation district encompasses nearly half of the land in our island chain. This district includes the natural resources that make Hawaii unique -- scenic mountain slopes, rare and delicate ecosystems, watershed areas, submerged lands, and the famous shoreline of the islands. Many of these sensitive lands are owned by private parties.

The purpose of Hawaii's conservation district is to protect important natural resources through management and regulation of land uses. The district is managed by the state's Department of Land and Natural Resources through a combination of statutory provisions, Administrative Rules, and other regulatory procedures for permitting and enforcement.

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### Why this "Discussion Draft?"

This *Discussion Draft* has been published by the Department of Land and Natural Resources (DLNR) to present a case for change in the way Hawaii's conservation district is managed and regulated. The basis for this analysis is a 1993 public-private initiative called the Conservation District Review Project, sponsored by DLNR.

*Note to the reader: The Discussion Draft has been written to be understandable to a wide variety of people. While the input of a hard-working, broad-based Project Advisory Committee was absolutely essential to developing the content of this document, readers should view this Discussion Draft as a DLNR product and respond with their comments directly to the Department.*

### What do the acronyms used in this document stand for?

<b>BLNR</b>	Board of Land and Natural Resources
<b>CDUA</b>	Conservation District Use Application
<b>CDUP</b>	Conservation District Use Permit
<b>DLNR</b>	Department of Land and Natural Resources
<b>DOCARE</b>	DLNR's Division of Conservation and Resource Enforcement
<b>EIS</b>	Environmental Impact Statement
<b>HAR</b>	Hawaii Administrative Rules
<b>HRS</b>	Hawaii Revised Statutes
<b>LURM</b>	Land Use Regulation and Management Study (conducted by OSP)
<b>MOU</b>	Memorandum of Understanding
<b>OCEA</b>	DLNR's Office of Conservation and Environmental Affairs
<b>OSP</b>	Office of State Planning
<b>SMA</b>	Special Management Area

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### What are the conservation district subzones?

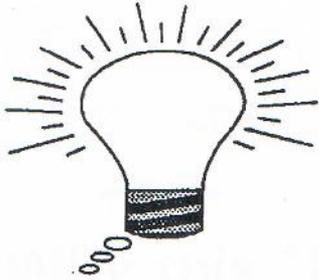
The "subzones" of the conservation district will be referred to throughout this *Discussion Draft*. In the Hawaii Administrative Rule governing the conservation district (Title 13, Chapter 2), land is divided into five smaller areas called subzones. These subzones -- and their restrictions -- have been used since 1978 to regulate the use of conservation district lands according to how much resource protection is needed.

- *The objective of the Protective Subzone is to protect natural resources in areas containing important or unique natural resources such as watersheds. Therefore, the most restrictions on land use are imposed in this subzone.*
- *The objective of the Limited Subzone is to designate areas in which natural hazards might harm humans, such as flood areas.*
- *The objective of the Resource Subzone is to develop and manage certain areas to ensure sustained use of their natural resources, such as parks, forests, and marine habitats.*
- *The objective of the General Subzone is to designate open space areas where conservation uses may not be defined but where urban use would be premature.*
- *The objective of the Special Subzone is to provide for areas with unique "developmental qualities" which complement the natural resources of the area. Examples include Sea Life Park and Hawaii Loa College.*

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## **Why this Initiative?**

### **Project purpose**

The stated purpose of the Conservation District Review Project is to:

*Develop concrete recommendations for procedural improvements in management of Hawaii's conservation district so that permitting decisions are more standardized and regulation is more predictable. Also, as applicable, recommend amendments to Chapter 183-41, Hawaii Revised Statutes, and Title 13, Chapter 2, Hawaii Administrative Rules.*

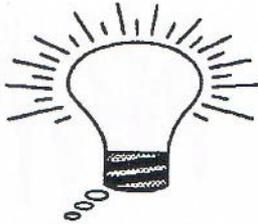
### **Project impetus**

The Conservation District Review Project was initiated by the Department of Land and Natural Resources for numerous reasons: to follow up on work begun in 1992 regarding conservation district permitting, respond to important land use initiatives of the Office of State Planning, increase collaboration with outside agencies and conservation district stakeholders, make the system more user friendly, and ensure public input.

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**Follow up on 1992 recommendations on conservation district permitting.** In late 1992, the Department of Land and Natural Resources sponsored a series of Conservation District Workshops on the permitting process in which a new dialog was begun with key stakeholders. At this time the stakeholders -- including landowners, attorneys, environmentalists, planners, public interest groups and Native Hawaiian interests -- encouraged DLNR to continue a public discussion of potential improvements.

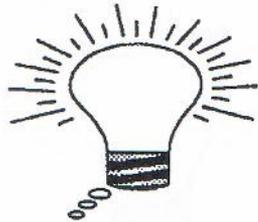
Concurrently with the workshops, a team of graduate students from the University of Hawaii's Department of Urban and Regional Planning conducted a Conservation District Permit Review. Their analysis of past conservation district permits revealed further issues in enforcement of regulations and monitoring of compliance with permit conditions.

**Respond to the Office of State Planning initiatives.** The Office of State Planning (OSP) has been conducting a review of land use district boundaries statewide for the past several years in its Five-Year Boundary Review. The outcomes of this study will impact the conservation district, particularly the recommended transfer of 78,000 acres to the conservation district -- lands that are currently in the agricultural, urban and rural land use districts.

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The Conservation District Review Project also is closely related to OSP's review of Hawaii's land use laws -- the Land Use Regulation and Management Study (LURM). Both LURM and this project seek to improve the current statutory and regulatory structure for land uses.

**Improve communications and collaboration.** The Conservation District Review Project responded to stakeholder concern that a dialog be continued by naming a broad-based Project Advisory Committee. Project staff also met with representatives of other State and County agencies on conservation district matters. These meetings resulted in face-to-face communication with DLNR and progress in identifying areas of interagency collaboration.

**Make the system more user-friendly.** Today's conservation district regulatory requirements are considered by many stakeholders to be overly complex and discretionary. Many landowners find it necessary to hire attorneys and planners to help them work their way through the system. One of the key purposes of this initiative was to decrease the complexity of the process -- for the Board of Land and Natural Resources, DLNR staff, and property owners alike.

**Ensure public input.** Another aim is to make sure that the process of change includes provision for public overview and input on decision-making. Ideally, a new system will actually *enhance* the level and quality of public participation.

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## **Who's involved?**

### **DLNR - OCEA and line divisions**

All of DLNR's line divisions were involved in this effort, particularly the Office of Conservation and Environmental Affairs. Participation included interaction in meetings and workshops and responding to written surveys. DLNR's line divisions also were involved through an inter-divisional task force on enforcement and response to earlier versions of this *Discussion Draft*.

### **The Project Advisory Committee**

Given the constructive and substantive input received from stakeholders in the 1992 Conservation District Workshops, DLNR decided to ask again for the assistance of key individuals outside the Department in defining change. Participants in the resulting public-private Project Advisory Committee are listed in the Appendix to this document.

The Project Advisory Committee divided into groups facilitated by project staff to focus on three major areas of analysis:

- **The "Right Box"** -- addressing a philosophical framework for the conservation district and a hierarchy of land use permits.
- **Enforcement, compliance and education** -- discussing a hierarchy of enforcement, plus compliance activities in concert with DLNR's

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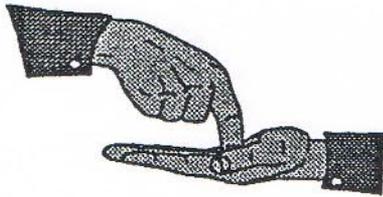
inter-divisional enforcement task force, and public information.

- **State/County agency interface** -- addressing the interactions, both current and potential, between State and County agencies on the regulation of conservation district lands. All five counties were represented, along with selected State agencies.

Although they were busy professionals from throughout the state, many Project Advisory Committee members volunteered between 25 and 35 hours of their time to the Conservation District Review Project. They attended numerous weekday meetings on Oahu and responded to written surveys. Their time represented an in-kind contribution of over \$60,000, using a conservative hourly rate and excluding travel time.

# **Conservation District Review Project**

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## **Overview of Major Issues**

Five major issues were addressed in the Conservation District Review Project.

*Note to the reader: This section provides a brief overview of each issue and directs you to more thorough discussion later in this report.*

The five issues were:

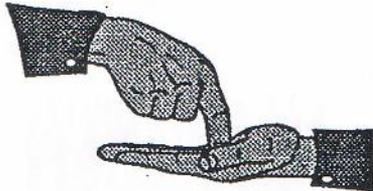
- *The "Interim Fix" versus the "Big Fix" (Pages 12 - 13)*
- *Purpose of the conservation district (Pages 14 - 16)*
- *Hierarchy of permits (Pages 17 - 30)*
- *Enforcement, compliance and education (Pages 31 - 40)*
- *State/County agency interface (Pages 41 - 44)*

### **The "Interim Fix" versus the "Big Fix"**

When they convened for the first time as a group, the Project Advisory Committee asked for definition of the parameters for change during this phase of work. It became clear that two levels of analysis were needed -- one to achieve near-term adjustments

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(the "Interim Fix") and one to achieve longer-term objectives (the "Big Fix").

## Purpose of the conservation district

The Project Advisory Committee looked at the "big picture" before delving into specific land use issues. In this process the group developed a comprehensive mission statement for the conservation district and guiding principles for regulation and management of lands.

## Hierarchy of permits

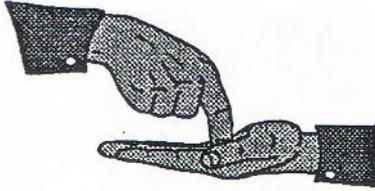
Under today's conservation district permitting process, full review by the Board of Land and Natural Resources (BLNR) would be required for a major golf course (high impact) or minor landscaping alterations (very low impact). The Project Advisory Committee explored a permit hierarchy process based on a critical review of the objectives of the conservation district's five subzones. They also examined the relative impact of a proposed use in a particular subzone.

A permit hierarchy would target uses with *limited* impacts on resources for administrative review, and uses with *more intensive* impacts for BLNR review. A permit hierarchy also avoids the piecemeal, multi-permit syndrome of the past.

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### **Enforcement, compliance and education**

Enforcement of regulations, compliance with permit conditions, and community and landowner education were key issues brought out by the 1992 Conservation District Workshops and 1992 Conservation District Permit Review. A subset of the Project Advisory Committee dedicated its efforts to these areas.

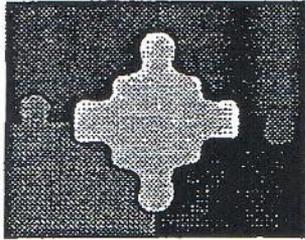
### **State/County agency interface**

State and County agencies each make regulatory decisions affecting conservation district lands. DLNR wished to spearhead discussions with agency officials aimed at opening the lines of communication and identifying areas for coordination and collaboration. Such collaborations could take the form of *Memorandums of Understanding*, where agencies agree to work together in a certain area or define specific responsibilities.

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### **Issue 1:**

## **The Interim Fix versus the Big Fix**

### **The Interim Fix (this project)**

**Project Objectives.** The Conservation District Review Project focuses on a mission statement and planning principles for the conservation district, as well as procedural, statutory and Administrative Rule changes that can be effected now.

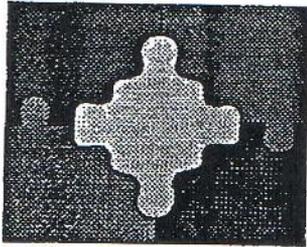
**Background on the current mapping regime.** Five subzones were established in 1978 within the conservation district: the Protective, Limited, Resource, General, and Special Subzones. In the mapping regime also instituted in 1978, parcels were assigned to a conservation district subzone designation using a "broad brush" boundary-drawing technique rather than a parcel-by-parcel review of natural resources and constraints. This resulted in the perception that numerous parcels were designated to a conservation district subzone which did not match their physical attributes.

**"Ground Truth."** By design, the Interim Fix holds in abeyance the important issue of "ground truth," or knowledge of the physical attributes of a specific parcel. To be able to accomplish the Interim Fix, it was necessary to assume that ground truth existed

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for a given parcel, i.e., its resource attributes matched the subzone objectives. This leap was made by the Project Advisory Committee only on the condition that a "Big Fix" also be discussed as a necessary follow-up to the current phase of work.

### **The Big Fix**

This future effort would include statewide inventorying and mapping of resources and constraints, reexamination of the current subzone structure and boundaries, and development of a comprehensive management plan for the conservation district.

The Big Fix recognizes that the current regulatory regime and subzone boundary system has not been reviewed since 1978 and needs reexamination in light of regulatory experience and the advent of computerized mapping and analytical technology, such as Geographic Information Systems. Due to the expected scope and cost of the Big Fix, its implementation is seen as a long-range goal and outside the scope of the Conservation District Review Project.



## **Issue 2:** **Purpose of the Conservation District**

### **Guiding principles for regulation and management**

The Project Advisory Committee took time to develop a conceptual or philosophical framework for looking at conservation district issues, called *guiding principles*. The principles included the following:

- Develop a *mission statement* to provide central focus.
- Emphasize *impact on resources and sustainability*.
- Ensure that land use decisions and mapping are *resource-based*.
- Consider *ownership and property rights*.
- Develop *hierarchies* for permits and enforcement.
- Work *within the current subzone structure* (for the Interim Fix).

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### **Developing a mission statement**

Currently, philosophical statements about conservation are spread through two Hawaii Revised Statutes (HRS) and one Hawaii Administrative Rule (HAR). In developing a mission statement for the conservation district, the following three questions were answered using key concepts from these regulations:

#### ***What is done in the conservation district?***

- Protect
- Preserve
- Conserve
- Manage to enhance the resource

#### ***What resources is it done to?***

- Watersheds and water sources
- Scenic and historic areas
- Wilderness habitats
- Open space
- Parklands and beach reserves
- Submerged lands
- Hazard areas

#### ***Why is it done?***

- Promote long-term sustainability
- Ensure judicious utilization
- Preserve scenic and open areas
- Ensure long-term enjoyment

Sources: Chapter 205, HRS; Chapter 183-41, HRS; Title 13, Chapter 2, HAR

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### Draft mission statement for the conservation district

Combining the previous concepts and principles into one sentence, the Project Advisory Committee crafted the following draft mission statement for the conservation district (emphasis added).

**"Conserve, protect and preserve the important natural resources of the State of Hawaii through appropriate use and management to promote their long-term sustainability and the public health, safety and welfare."**

Public and private ownership rights were integrated through the phrase *conserve, protect and preserve* combined with *appropriate use and management*. The concept of *long-term sustainability* means that resources can be used but not "used up." The concept of *welfare* was added to include the notion of aesthetics -- preserving Hawaii's unique natural beauty.

This mission statement for the conservation district is consistent with Hawaii's State Constitution, which states in Article XI, Section 1:

*"For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote development of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."*



## **Issue 3: Hierarchy of Permits**

### **Guiding principles for a hierarchy of permits**

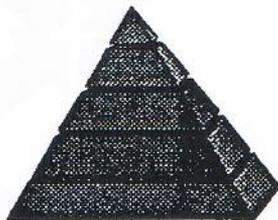
The staff of DLNR's Office of Conservation and Environmental Affairs and the Project Advisory Committee provided the following guidance for designing a hierarchy of permits for the conservation district:

- *Streamline the process -- make it more user-friendly while retaining and enhancing oversight by agencies and the public.*
- *For the Interim Fix, identify uses in current conservation district subzones.*
- *Match the level of regulatory scrutiny with the expected impact on resources.*
- *Restrict uses according to the type of resource and amount of protection needed.*
- *Ensure public input before decisions are made.*
- *Establish clear, specific, and enforceable regulations governing the conservation district.*

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### Proposed permit hierarchy

Based on these principles, a three-tier permit hierarchy was proposed for each subzone of the conservation district. Such a hierarchy assumes the proper subzone designation of a parcel according to its resources (so-called "ground truth"). The tiers in the hierarchy include *non-discretionary* Allowable Uses and two levels of *discretionary* permits: Administrative Permits and BLNR Permits.

- **Allowable Uses** - no permit required. Some uses should be "of right" and not subject to permitting.\*
- **Administrative Permits** - DLNR review. Staff would make a recommendation to the Chairperson of BLNR, who would have the authority to approve or reject an Administrative Permit.
- **BLNR Permits** - Board of Land and Natural Resources (BLNR) review. This level of oversight is due to expected significant impact or major policy implications. It would follow current procedures for public input.

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\* While there was agreement on the need for such a category, the extent of notification required of landowners for such uses is an issue under debate. It is discussed more fully in the later section entitled *The Sticky Points*.

### Permit flowchart

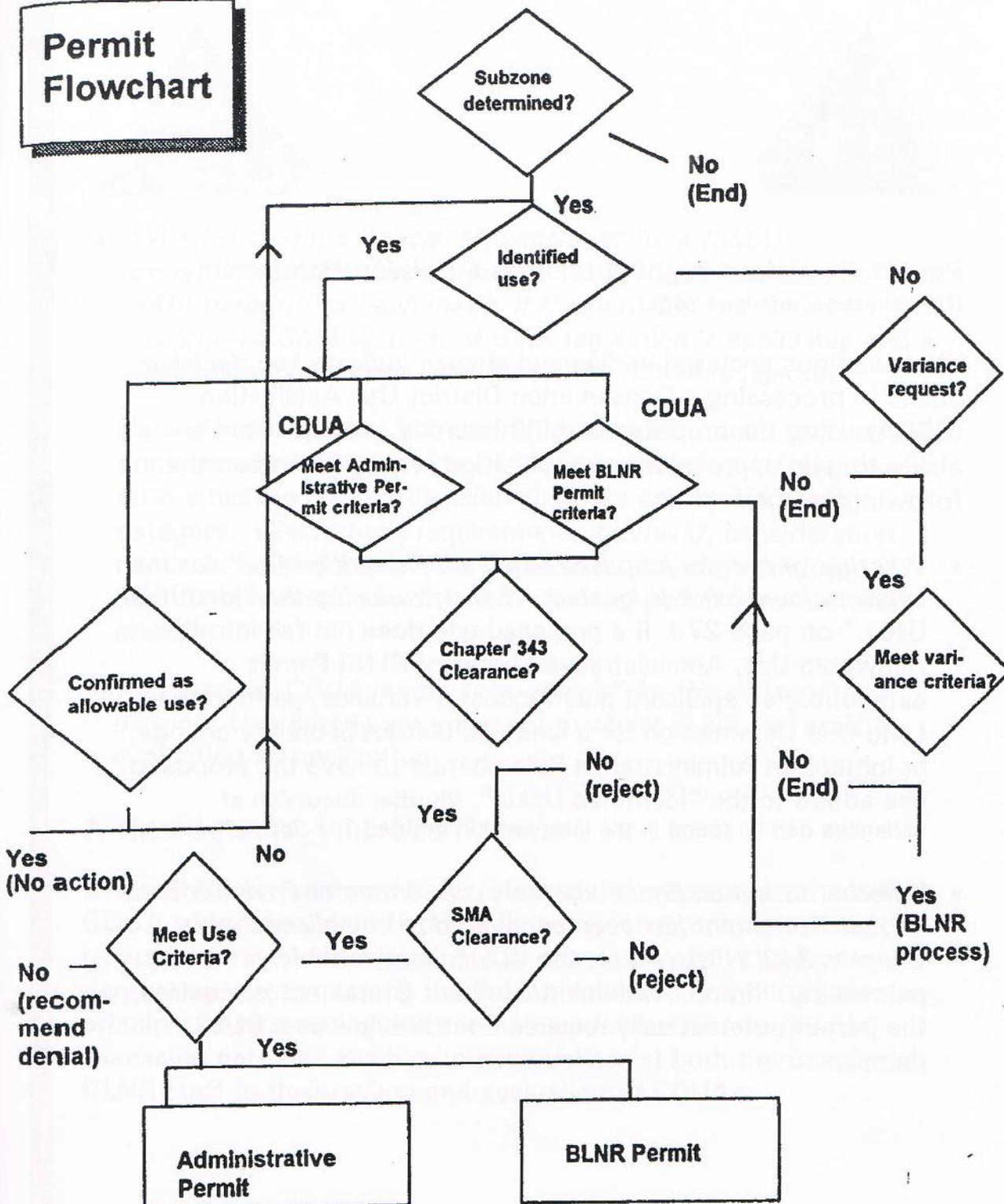
The following page shows how a Conservation District Use Application would move through the proposed hierarchical permit approval process.

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Project Proposed by Applicant

### Permit Flowchart

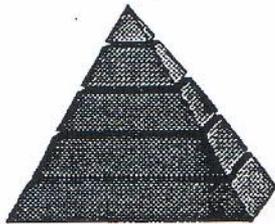


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### Permit flowchart highlights: the *Decision Points* (Flowchart on previous page)

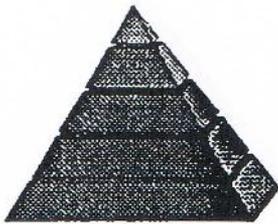
The questions enclosed in diamond shapes indicate key *decision points* in processing a Conservation District Use Application (CDUA) using the proposed permit hierarchy. An applicant's ability to gain approval for an application would depend on the following factors:

- *Whether or not the proposed use is an "Identified Use" for the subzone in which it is located.* (See *Introducing the "Identified Uses."* on page 27.) If a proposed use does not fall into the Allowable Use, Administrative Permit or BLNR Permit categories, an applicant may request a variance, petition the Land Use Commission for a land use district boundary change, or initiate an Administrative Rule change to have the proposed use added to the "Identified Uses." [Further discussion of variances can be found in the later section entitled *The Sticky Points.*]
- *Whether or not an Environmental Assessment or Environmental Impact Statement has been completed in compliance with Chapter 343, HRS.* If not, the CDUA is rejected from further processing. If an Environmental Impact Statement is required, the permit automatically requires Board review as a BLNR permit.

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- *Whether or not a Special Management Area (SMA) determination (of the requirement for a major versus minor SMA permit) has been made, if the parcel is in a County-designated SMA district. If SMA regulation is applicable and a determination has not been made, the CDUA is rejected.*

Having both Chapter 343 and SMA decisions made and impacts documented would provide DLNR with maximum information with which to make a decision about an appropriate permit category. Given these requirements, however, consideration needs to be given to shortening DLNR's existing mandatory 180-day processing and decision making period via a statutory change.

- *Whether the CDUA meets "use criteria" for the conservation district. Use criteria are proposed to assist BLNR and staff in evaluating an application.*

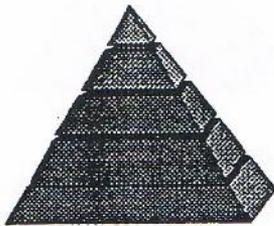
### **A final screen -- the *Use Criteria***

Once DLNR or the Board has evaluated the proposed land use in a CDUA versus the Identified Use list, evaluative criteria are needed to guide the decision to approve or deny a permit. There was general agreement among the Project Advisory Committee on the principle of introducing use criteria as a final screen or filter in assessing permits. Such criteria would assist both the Board and DLNR staff in their review and evaluation of CDUAs.

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Sample wording for use criteria could be:

1. *The proposed use will be consistent with the general purpose of the conservation district subzone or the intent and purpose of Chapter 183-41 HRS and Title 13, Chapter 2 HAR;*
2. *The proposed use neither will be materially detrimental to the public health, safety and welfare nor cause substantial adverse impact to the existing natural resources or to surrounding properties; and*
3. *The proposed use will not adversely affect similar or related existing natural resources within the surrounding area, community or region.*

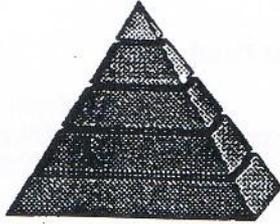
*Note to the reader: Public input, public hearing, contested case and decision appeal elements will be defined during the rulemaking process and therefore are not shown on the Permit Flowchart.*

## **Introducing the Identified Uses**

Proposed *Identified Uses* have been developed in draft for each of the Protective, Limited, Resource and General Subzones using the three-tiered hierarchy. For each subzone, uses are listed as Allowable, requiring an Administrative Permit, or requiring a BLNR Permit. The purpose of identifying such uses is to enhance predictability for landowners by limiting discretionary land use decisions.

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Identified Uses were developed as part of the Interim Fix by the project staff and Project Advisory Committee in three steps:

- **Step 1.** Review and affirmation of conservation district subzone objectives found in Title 13, Chapter 2 HAR.
- **Step 2.** Evaluation and expansion of the "permitted" uses found in the Administrative Rule, as well as language from the Chapter 343, HRS "exempt use list" and Chapter 205A, HRS, the Special Management Area statute.
- **Step 3.** Classification of uses into one of the three tiers of the proposed permit hierarchy consistent with the mission statement, guiding principles, and established subzone objectives. If uses did not meet this test, they were redefined or eliminated.

**A note on the General Subzone.** Guidelines for Identified Uses in the General Subzone are included, although this subzone is recommended for deletion from the conservation district under the State Land Use Regulation and Management study being conducted by the Office of State Planning (OSP). If OSP's proposal is adopted, there will still be a transition period during which guidelines for uses in the General Subzone will be needed.

*A note to the reader on evaluating the Identified Uses. The lists on the following pages should be viewed as a working draft and not an all-inclusive list at this point. Perhaps other uses should be considered; perhaps some need revision. Uses which should have specific performance standards and/or those which require further research are highlighted with full capital letters. Reader comments are welcome.*

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## Identified Uses: Protective Subzone

Allowable  
(no permit required)

Repair or maintenance of existing structures.

Activities involving negligible or no expansion or change of use beyond that currently existing. (NEED TO DEFINE EXPANSION AND CHANGE.)

Existing permitted use provided there is no change in the intensity of the use. (NEED TO DEFINE INTENSITY.)

Interior renovations of existing structures that do not increase density.

Maintenance and protection of vegetation, including removal of dead, deteriorated or noxious plants under an approved management plan. (NEED STANDARDS AND THRESHOLD FOR DISTURBANCE.)

Notification of activities performed according to an approved management plan. Examples include: fencing, resource management (cultural, natural [including water], recreational and utilities), and DLNR line division activities.

Programs for control of animal, plant, and marine population, to include, but not be limited to, fishing and hunting under an approved management plan.

No trespassing signs.

Land surveys with no mechanical trimming or uprooting of vegetation.

Non-consumptive, low-intensity activities that do not require disturbance of land or vegetation.

### Administrative Permit

Basic data collection, research, education and resource evaluation which requires no facilities or alteration of the natural environment.

Farming and single family residential uses on kuleana lands. (STANDARDS NEEDED.)

Construction or placement of structures accessory to existing facilities which are consistent with the objectives of the subzone. (NEED STANDARD FOR SIZE OF STRUCTURES.)

Demolition or removal of structures not located on any historic site designated as eligible for the National Register as provided in the National Historic Preservation Act of 1966, as amended, nor on the State Register or inventory per Chapter 6E, HRS. (NEED THRESHOLD.)

Restoration or operation of historic or archeologic sites listed on the national or state register, according to an approved management plan.

Establishment and operation of aquatic plant and wildlife sanctuaries and refuges, wilderness and scenic areas, including habitat improvements in projects under \_\_ acres. (NEED THRESHOLD.)

Maintenance or dredging of existing aquaculture according to an approved management plan.

Restoration of fishponds. (NEED TO DEFINE FISHPOND.)

Replacement antennas with specifications different than those already authorized, or additional antennas on existing poles or towers.

### BLNR Permit

Management plans for activities to be carried out in the Protective Subzone.

Maintenance of forests pursuant to an approved management plan (NEED STANDARDS.)

Subdivision of property. (NEED TO DEFINE SUBDIVISION AND RESTRICTIVE STANDARDS TO ENSURE CONSISTENCY WITH OBJECTIVES OF THE SUBZONE. THIS SHOULD NOT BE A "SELF-CREATED HARDSHIP.")

Grading with county permit, BLNR approval, and State Historic Preservation Division approval as applicable.

Establishment and operation of aquatic plant and wildlife sanctuaries and refuges, wilderness and scenic areas, including habitat improvements in projects over \_\_ acres. (NEED THRESHOLD.)

Projects that require an Environmental Impact Statement according to Chapter 343, HRS.

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# Conservation District Review Project

## The Discussion Draft - November 1993

Allowable (no permit required)	Identified Uses: Limited Subzone	BLNR Permit
For Limited Subzone:	Administrative Permit	BLNR Permit
Maintenance or dredging of existing aquaculture according to an approved management plan.	For Limited Subzone:	For Limited Subzone:
Growing or harvesting of forest products according to an approved management plan.	Water facilities, including source storage and transmission. (BELOW A THRESHOLD.)	Water facilities, including source storage and transmission. (BELOW A THRESHOLD.)
Basic data collection, research, education and resource evaluation which requires neither facilities nor alteration of the natural environment.	Additions and repairs to permitted erosion control structures (non-shoreline). (NEED STANDARDS AND/OR GUIDELINES FOR IMPACT ASSESSMENT.)	New utility corridors or expansion of existing.
Taro cultivation.	Minor cut, fill or grading with approved county permit and Chairperson's review of impact. (NEED MEMO OF UNDERSTANDING WITH COUNTIES. NEED STANDARD FOR "MINOR.")	Major cut, fill or grading with approved county permit and use approved by BLNR. (NEED MEMO OF UNDERSTANDING WITH THE COUNTIES. NEED STANDARD FOR "MAJOR.")
	New low power utility line improvements on existing poles. (NEED STANDARDS.)	Seawalls and shoreline structures. (NEED STANDARDS.)
	Pre-construction exploratory surveys.	New non-conforming uses on kuleana lands.
		New erosion control structures (non-shoreline) based on impact assessment.
		Management plans for activities to be carried out in Limited Subzone, with particular emphasis on the hazard aspect.
Plus uses from Protective Subzone	Plus uses from Protective Subzone	Plus uses from Protective Subzone

# Conservation District Review Project

## The Discussion Draft - November 1993

**Allowable  
(no permit required)**

**For Resource Subzone:**

Continuation of existing activities relating to cultivation or grazing.

Agricultural activities under an approved management plan.

Taro cultivation.

**Identified Uses: Resource Subzone**

**Administrative Permit**

**For Resource Subzone:**

Fish aggregating devices.

Mooring devices and aids to navigation consistent with DOBAR rules.

Cutting of individual or stand of non-native trees (NEED STANDARD FOR IMPACT SUCH AS SIX INCH DIAMETER OR PERCENT OF COVERAGE. NEED TO DEFINE "NON-NATIVE.")

Landscaping improvements including cutting of trees. (NEED MORE DETAIL SUCH AS IRRIGATION SYSTEMS, ADDITIONAL FOLIAGE, ADDITIONAL SOIL, etc.)

Additions or modifications to existing dwellings not to exceed \_\_\_ square feet. (NEED STANDARD.)

Cabins, shelters and educational facilities under \_\_\_ square feet. (NEED STANDARD.)

**BLNR Permit**

**For Resource Subzone:**

Astronomy facilities.

Artificial reefs.

Cabins, shelters and educational facilities not meeting Administrative Permit requirements.

Marine construction and dredging and or filling of submerged lands.

Management plans for activities to be carried out in Resource Subzone, including agriculture.

New telecommunications facilities.

Mining or quarries.

Single family residences. (REQUIRES DEVELOPMENT OF A "LAND USE CODE" WITH STANDARDS FOR HEIGHT, DENSITY, ETC.)

Hydroelectric facilities.

**Plus uses from Protective and Limited Subzones**

**Plus uses from Protective and Limited Subzones**

**Plus uses from Protective and Limited Subzones**

# Conservation District Review Project

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Allowable Uses  
(No Permit Required)

Identified Uses: General Subzone  
Administrative Permits

BLNR Permits

For General Subzone:

Uses promoting open space values including those with ancillary structures (for example, golf courses).

Socially necessary uses (for example, correctional facilities).

Transitional uses (transition between conservation and urban or agricultural designations).

Plus uses from Protective, Limited and Resource Subzones

Plus uses from Protective, Limited and Resource Subzones

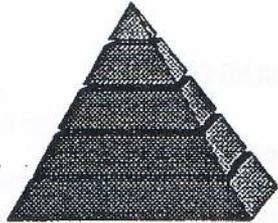
Plus uses from Protective, Limited and Resource Subzones

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Sandy Platts

# ***Conservation District Review Project***

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## **What's different about the permit hierarchy?**

The proposed permit hierarchy represents a departure from the current decision making framework in six major areas:

**Limitation of land use decisions requiring BLNR review and approval.** The proposed hierarchy focuses the attention of the Board of Land and Natural Resources on the most sensitive, high-impact, and policy-oriented land use issues pertaining to the conservation district. A review of Identified Uses in the "BLNR Permit" column on pages 24-27 shows this pattern. For example, all proposed management plans for ongoing land stewardship must receive BLNR approval. Likewise, any new single family residence and any project requiring an Environmental Impact Statement would continue to require BLNR review.

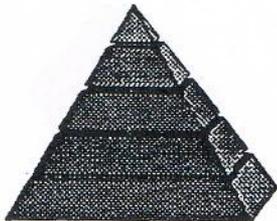
**No "permitted uses."** Title 13, Chapter 2, HAR lists "permitted uses" for each of the conservation district subzones. However, an applicant must obtain a permit to implement a permitted use. Under the proposed framework, Allowable Uses would not require a permit. They are, by definition, "of right," although notification of DLNR may be required.

**No "conditional uses."** An ongoing source of misunderstanding is the difference between so-called "conditional uses" and specific conditions that are placed on permits to ensure that proposals fulfill their specifications.

# **Conservation District Review Project**

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Conditional uses have been a source of criticism because they have allowed activities and land uses in the conservation district which are neither "permitted" nor otherwise defined in the regulations. Under the proposed framework, if a use does not meet criteria as an Allowable Use, Administrative Permit or BLNR Permit, and does not qualify for a variance, **IT IS SIMPLY NOT ALLOWED TO HAPPEN IN THE CONSERVATION DISTRICT** unless an Administrative Rule amendment or land use boundary change is effected.

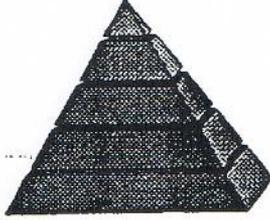
**Reliance on *management plans*.** The Identified Use lists include activities allowed under approved "management plans." A management plan is conceived as a master plan for activity in the conservation district, submitted by a landowner (public or private) and approved by the Board of Land and Natural Resources. Such a plan may specify maintenance or horticultural activities, forestry, agriculture or a specific major land use such as an astronomy complex. Once such a plan is approved, the landowner would report activities covered by the plan without applying for an individual permit for each project component.

Management plans are expected to reduce the need for direct regulation and encourage thoughtful management and stewardship of resources by landowners, including government. DLNR will have to establish parameters for development of management plans by landowners. Also needed will be criteria for assessment of plans by DLNR staff and approval by the Board of Land and Natural Resources.

# **Conservation District Review Project**

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**Elimination of "governmental use" as a permitted use.** Title 13, Chapter 2, HAR includes for all conservation district subzones a permitted use entitled "governmental use not enumerated herein where public benefit outweighs any impact on the conservation district." This provision is widely viewed by the private sector as a major loophole -- one which has resulted in some questionable land uses in sensitive resource areas.

In evaluating this rule provision, the Project Advisory Committee agreed that government should be held to the same standard as the private sector for use of important resources. Based on this premise, specific reference to "governmental use" was excluded from the Identified Uses. In practice, however, this may not have a significant impact on government's ability to use conservation lands. This is because government agencies often are held to a *higher* standard than private landowners through statutes and Administrative Rules governing their activities.

**Introduction of performance standards.** Regulation of conservation district lands would be greatly improved by the introduction of standards, where applicable. This is evident in a review of proposed Identified Uses shown on pages 24-27. The Project Advisory Committee recommended development of a "Land Use Code" for single family residences in the conservation district which would include quantitative limitations on height, density and so on. Although development and application of these and other specific standards is highly desirable, such an effort is beyond the scope of this project.



## **Issue 4: Enforcement, Compliance and Education**

### **Enforcement of regulations**

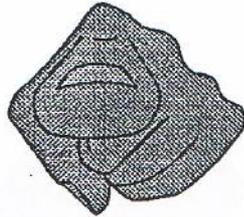
#### **Why enforce?**

Most citizens are law-abiding. However, laws and regulations that are not enforced have a tendency to lose their power to protect the public health, safety and welfare. The 1992 Conservation District Workshops and Conservation District Permit Review saw enforcement emerge as a major issue. As a workshop participant stated, "all of the laws and rules in the world don't matter if there is no will to enforce them."

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### **What is involved in an enforcement program?**

The purpose of land use enforcement is to identify illegal land use activities and bring them into compliance. Sometimes this means punishing offenders; other times it means providing a deterrent to those considering violation of conservation district regulations.

### **What's the problem with enforcement today?**

Lack of consistent DLNR enforcement of conservation district regulations and permits has been a source of ongoing criticism.

- **There is a backlog of alleged violations, with new cases being added continually.** Yet, the Department has no established, timely procedure to investigate alleged violations and prosecute offenders.
- **Applications for after-the-fact permits are common.** Their mere frequency indicates that landowners are proceeding with activities that should require permits, and betting on no detection until after construction is completed or well under way.
- **DLNR does not have sufficient staffing to perform many enforcement duties.** Such activities include routine compliance inspections to ensure that permit conditions and mitigating

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actions are implemented, as well as follow-up on alleged violations that are reported to DLNR.

- **There is a general lack of understanding of conservation district regulations on the part of landowners and the community. Therefore much of the permitting business is conducted on behalf of landowners by attorneys and planners.**
- **Under DLNR's current enforcement system, *all* violations must receive full review by the Board of Land and Natural Resources, regardless of the severity of their impact on resources. For example, cutting one tree -- and clear-cutting 10 acres -- receive the same level of attention. This crowds the Board's agenda and causes delays in processing enforcement cases.**
- **There is a need to more clearly define land use violations. From a legal standpoint, current regulations may not define what constitutes a land use violation according to Chapter 183-41, HRS. In the past, most conservation district landowners have complied with Board enforcement decisions. However, in the absence of a civil fine schedule, some enforcement decisions could be vulnerable to legal challenge.**

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- **More inter-agency coordination of enforcement is needed.** Both DLNR's Office of Conservation and Environmental Affairs (OCEA) and the Division of Conservation and Resource Enforcement (DOCARE) are responsible for enforcing conservation district regulations. Coordination between these organizations needs to be improved, as well as with County permitting and land use enforcement agencies.

### **What has DLNR done to improve enforcement?**

DLNR has recognized the need to strengthen its enforcement of current conservation district laws and rules. A first step was the organization of an inter-divisional enforcement task force, co-chaired by OCEA and DOCARE. A principal outcome of task force efforts is the proposal for a two-tiered hierarchy for enforcement review and resolution.

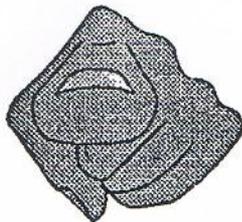
### **What else can be done?**

The following list of approaches to strengthening enforcement has been compiled from the 1992 conservation district permitting

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studies and later collaborations within DLNR and with the 1993 Project Advisory Committee.

**1. Introduce a two-tiered hierarchy of violations.** Following staff evaluation of severity, an affirmed violation would fall into one of two categories:

- **Level 1 (major violations)** - presented to BLNR for review and resolution due to their severity.
- **Level 2 (minor violations)** - reviewed by DLNR staff with a recommendation to the Chairperson of BLNR. A hearing officer may be useful in processing Level 2 violations.

New enforcement procedures would have to ensure due process for landowners and adequate public notification of enforcement decisions.

**2. Develop and gain BLNR approval for a pre-determined civil fine schedule based on the type and level of the violation.**

Adoption of a civil fine schedule is particularly important since the recent revision of Chapter 183-41, HRS, which raised the maximum civil fine from \$500 to \$2,000 per violation. There may be a need to vary fines according to the subzone in question. For example, Protective Subzone fines could be more severe than those imposed in the General Subzone.

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**3. Create a dedicated enforcement, compliance and education staff within DLNR.** A Project Advisory Committee member, representing a special interest group, offered the following written comments on this issue:

*The new enforcement procedures proposed [in this Discussion Draft] cannot instill public confidence without a commitment to fund the additional enforcement personnel essential to give effect to the new policies and, most importantly, a commitment to:*

- *Investigate promptly any substantial evidence of violations submitted to the Department by members of the public;*
- *Apprise the complainant of the status of the investigation;*
- *Institute enforcement proceedings such as fines and removal of structures when they are found to exist; and*
- *Discontinue the use of after-the-fact approvals as a substitute for timely enforcement.*

Several approaches to increased enforcement staffing within DLNR were offered during the various conservation district collaborations. One approach is to expand the existing staff of DLNR's Division of Conservation and Resource Enforcement to dedicate more resources to the conservation district. Another is to ensure that DLNR's Office of Conservation and Environmental Affairs has presence on the Neighbor Islands, where the majority of conservation district lands are located.

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Such staff presence could be either full-time or rotational.

*Note to the reader: Recommendation #3 has a substantial price tag attached, as incremental staffing is needed. If conservation district stakeholders are committed to this approach, their support and commitment to acquire the necessary legislative appropriations will be critical.*

- 4. Review the feasibility of allocating violation fines to restoration and enhancement of the conservation district.** Under current law, BLNR-imposed fines are deposited in the State's General Fund. DLNR has several existing funds which could serve as a depository for conservation district fines to be earmarked for resource management, restoration, and enhancement.
- 5. Inventory existing land uses in the conservation district and establish a land use data base aided by Geographic Information System technology.** The first step would be to identify categories of uses, for example: grandfathered, non-conforming, BLNR- or Department-approved, and potential illegal. Once such a data base was established, DLNR could consider processing after-the-fact Conservation District Use Applications (CDUAs) for those uses without permits during a limited amnesty period. After the amnesty period, the Department would limit after-the-fact Conservation District Use Applications. Daily fines might be levied on violators after they are given a reasonable amount of time to rectify an affirmed illegal land use.

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## **Compliance with Permit Conditions**

### **What is compliance?**

BLNR regularly grants Conservation District Use Permits (CDUPs) with certain conditions. The purpose of these conditions is to mitigate potential adverse impacts and protect the public health, safety and welfare. However, as with enforcement, if these conditions are not policed they may not be met as specified in the CDUP.

### **How does DLNR ensure permit compliance today?**

The Department has established a data base to track landowners' pledged start and completion dates for projects. Although DLNR's Division of Conservation and Resources and Enforcement (DOCARE) staff conducts one- and three-year inspections to ensure compliance with permit conditions, there also is a need to educate permit holders and hold them responsible for reporting compliance on specific permit conditions.

### **What else can be done?**

OCEA and DOCARE staff recognize the need to coordinate their compliance review activities more closely. This includes continually updating the permit tracking data base and making the information available to both divisions. "Piggybacking" on County building code compliance activities is also an option.

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### **Community education - who needs it?**

An education program on regulation of the conservation district needs to be aimed at private landowners, their representatives and the community. Such a program would emphasize information about the permit processing requirements for Conservation District Use Applications.

**Why educate landowners?** Permitting agencies are obligated to establish a sustained effort to inform and educate landowners about permit requirements. The importance of such a program is heightened when the permit process is as complex and technical as a Conservation District Use Application often is.

**Why educate community groups?** Community interests -- specifically community associations, Neighborhood Boards and public interest groups -- also have a stake in understanding the permitting process, particularly when several layers of government are involved in the decision-making.

**Why establish statewide coverage?** Despite the fact that most conservation district lands are located on Neighbor Islands, there is currently little opportunity for OCEA staff to make site visits to proposed projects and provide education to landowners and community groups off Oahu. Budgetary flexibility is needed to enable OCEA staff to travel to Neighbor Islands to conduct conservation district business.

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## **Community education: what else can be done?**

Three central recommendations regarding community education were developed in discussion among Project Advisory Committee members as well as State and County agency representatives:

- 1. Establish a conservation district permit process education program within DLNR.** Such a program would be administered by DLNR's Office of Conservation and Environmental Affairs with the assistance of the Department's Public Information Office.

An education program would begin with development of an easy-to-understand brochure or public information packet. This information would help people understand how permits are processed and what procedures to follow. Written information would be supplemented by informative presentations by OCEA staff at various community and civic meetings.

- 2. Redesign the existing Conservation District Permit Application (CDUA) permit application form.** This also would be aimed at increasing user-friendliness. Instructions would include a "model response" to help applicants meet certain information requirements.
- 3. Disseminate the information packets and revised CDUA forms.** Distribution would include government agencies on both State and County levels, including County Building Departments. These agencies need to become more aware of conservation district issues and regulation.

# **Conservation District Review Project**

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### **Issue 5:**

## **State/County Agency Interface**

#### **Who was involved?**

**State:** Offices of the Attorney General, Environmental Quality Control, Hawaiian Affairs, and State Planning

**All Counties:** Planning Departments and Honolulu's Department of Land Utilization

#### **What were the major outcomes?**

**New level of understanding and interaction.** Although they share regulatory responsibility for certain lands, State and County agencies have traditionally communicated about conservation district matters via written comments. However, during this project agency representatives conferred face to face on conservation district issues.

Since there are many areas of regulatory overlap, there are also many opportunities for collaboration and heightened communication. Regulation of Special Management Area (SMA) lands was of particular interest since many sensitive shoreline conservation district lands are also within the SMA.

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### **Potential *Memorandums of Understanding***

Discussion among State and County agencies yielded several solid ideas for *Memorandums of Understanding* between DLNR and each of the Counties and other selected State agencies. Such agreements would formally define certain areas of interagency interaction and collaboration, including who would do what. Key areas for *Memorandums of Understanding* included:

- *Permit coordination and agency review;*
- *Code compliance and enforcement;*
- *Comprehensive planning and shared land use data base; and*
- *Interagency, community and private landowner education and extension.*

#### **Permit coordination and agency review**

**Problem:** State and County agencies recognize the need to coordinate regulatory activities where there is overlap.

**Proposed Approach:** Develop a Memorandum of Understanding between DLNR (and pertinent State agencies) and each of the Counties describing specific collaboration on:

- Assessment of conservation district project impact and mitigation measures.

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- Coordination in processing permits where a Special Management Area permit and Conservation District Use Permit are both required.
- Coordination in compliance with Chapter 343, HRS (environmental quality control), when projects require both State and County agency approval.

### **Code compliance and enforcement**

**Problem:** The applicability of County building codes in the conservation district is not always clear in today's system. For example, all Counties but Maui require building permits in the conservation district which meet the specifications of local building and grading regulations. Although County Building Departments carry on a regular program of inspection and enforcement, they may or may not routinely monitor construction in the conservation district.

**Proposed approach:** A Memorandum of Understanding is needed between DLNR and all Counties to implement building and grading code specifications for all new structures within the conservation district. The agreement could also include enforcement of established codes by County personnel in the conservation district.

# **Conservation District Review Project**

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### **Planning coordination and data exchange**

**Problem:** The Office of State Planning (OSP), in its Land Use Regulation and Management Study, has recommended that a management plan for conservation lands be developed by DLNR. In addition, OSP's Five-Year Boundary Review contains recommendations that certain lands be placed in the conservation district. Placement of lands within appropriate conservation district subzones must be approved by the Board of Land and Natural Resources.

**Approach:** Development of any district-wide management plan will need to be coordinated with County-level land use plans. Following the Five-Year Boundary review, placement of lands in conservation district subzones will require resource mapping and coordination of electronic data bases with other State and County agencies, particularly the Office of State Planning.

### **Collaboration on community education**

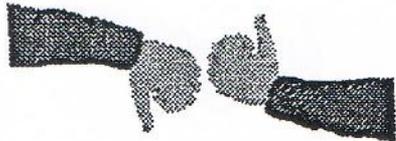
**Problem:** DLNR recognizes the need to formulate a permit and process education program among agencies, the community and private landowners.

**Approach:** Both State and County agency representatives acknowledged the need for a multi-agency education effort for landowners and the community at large. Other agencies could assist DLNR's effort to develop and disseminate materials explaining the permit process.

# **Conservation District Review Project**

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## **The "Sticky Points"**

The public-private collaboration in the Conservation District Review Project resulted in overall agreement on the approaches presented for the previous five issues. Consensus was reached on the need for change, the merits of using hierarchies to streamline key processes, and the need to do a better job of communicating with the public before permitting decisions are made. However, as with any complex set of issues, some areas remained unresolved. Strong and convincing opinions were expressed on both sides of the so-called *sticky points*, which included:

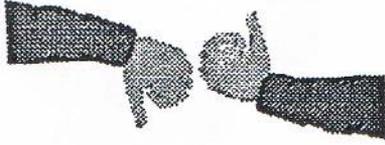
- ***Variances;***
- ***Landowner notification of intent to conduct Allowable Uses;***
- ***Placement of newly designated conservation district lands in the Protective Subzone;***
- ***Opportunities for public input on Administrative Permits; and***
- ***Citizens' right to sue landowners for alleged violations in the conservation district.***

***A note to the reader: The Department of Land and Natural Resources will evaluate the various opinions offered and formulate an appropriate position after comments are received on this Discussion Draft. In the meantime, differing perspectives are presented in this section to inform and solicit input from readers.***

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## **Sticky Point #1: Variances**

A philosophical issue was raised relative to how much trust is placed in the regulatory system. If one trusts the system, a variance should not be considered dangerous because the system will ensure that a true variance situation exists. A variance would only be granted if there is a bona fide hardship which denies the landowner all economic use of the property.

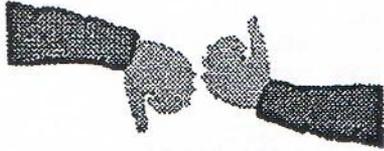
The following variance criteria for the conservation district were proposed by a member of the Project Advisory Committee:

### **Proposed criteria for variances in the conservation district**

1. There are special and unique circumstances applying to the proposed use and its location; and
2. There is clear and compelling evidence that the proposed use is for the benefit of public health and safety or that there are no other reasonable economic uses of the property; and
3. All reasonable and prudent alternatives to the proposed use are less desirable than the public interest; and
4. The variance and any conditions imposed on the use authorized by the variance shall be consistent with the intent and purpose of the subzone in which the use is located.

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**Note to the reader:** "Thumbs up" (pro) and "thumbs down" (con) arguments on variances and other sticky points are presented below, quoted from written comments provided by individuals from the Project Advisory Committee and DLNR's line divisions.

### **Thumbs Up: Variances should be allowed**

*"One can cite many examples of inappropriate variance decisions, but there are also many examples of inappropriate decisions on rules and boundary amendments. The difference is that the criteria for granting a variance can be much tougher than for rules or boundary amendments. In order to qualify for a variance, an applicant must show hardship, which is a standard that is hard to meet. Moreover, there is a substantial body of case law that would support a challenge to an inappropriate variance, whereas the inappropriateness of a rule change or boundary amendment may be more difficult to demonstrate."*

*"An amendment to the list of permitted uses in a subzone is hardly preferable to a variance for a specific case, because it would apply to a wide variety of situations and conditions for which such use might not be appropriate instead of addressing a unique circumstance. A boundary amendment may also be inappropriate in a specific case because, in order to avoid 'spot zoning' the revised boundary may have to include lands that are not directly affected by the request."*

*"At the core of the assertion that no variances should be allowed is the assumption that the existing subzone maps, or Land Use Commission maps for that matter, accurately represent the location of resources they propose to protect. If the maps were truly accurate, I could buy the point that no exceptions should be allowed. The fact is that the maps are not accurate and in the many cases only reflect general locations for resources that have not been field checked recently, if at all."*

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*"It is probable that not all legitimate uses were included [on the list of Identified Uses]. A no-variance-allowed approach appears to preclude any flexibility, and may needlessly preclude unanticipated beneficial uses."*

*"If use variances are available, perhaps they should only be available in the least restrictive subzone or subzones. In addition, the criteria for granting of a variance should be more restrictive than that contained in the draft and should be consistently adhered to in order to avoid abuse."*

**Consider a fictitious case showing why variances may be needed from a regulatory standpoint:**

*A utility company proposes to install a transmission line whose route traverses the conservation district. The corridor was selected based on a detailed study that identified public health and safety, natural resource, scenic and other factors, and route selection criteria that had gained substantial concurrence after extensive public information meetings and hearings. For the most part, the selected route avoids all areas of the conservation district where there are sensitive natural resources or significant scenic or cultural values. There is a small segment of this corridor, however, in the Protective Subzone, where two utility poles would be located. The poles can be located and installed in such a way to avoid impacts on the important resources. If the route is altered slightly to avoid the Protective Subzone entirely, the visual -- and possibly natural resource -- impact will be greater. On the other hand, if the Protective Subzone boundary is amended to exclude the pole sites, it also will remove approximately 20 acres of high quality native forest from the Protective Subzone. Generally, the utility company would not be permitted to locate a utility line corridor in the Protective Subzone, but, because of the unique circumstances in this case, and considering the relative undesirability of the alternatives, a finding of "hardship" can be supported.*