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February 25, 2002

MEMO TO: The Honorable Alan M. Arakawa
Chair, Land Use Committee

F R O M: Richard K. Minatoya
Deputy Corporation Counsel

SUBJECT: **Request from Curtis Deweese, Sunstone Realty Partners, LLC, for a Community Plan Amendment (LU-12)**

This memorandum is made in response to your memorandum dated December 28, 2001. In your memorandum, you requested a legal opinion "indicating whether the County would likely be subject to . . . takings liability if the Council does not approve the application in favor of retaining the Park designation" and "that the opinion specify the types of economically viable activities that the property owner may engage in on the subject property if the Park designation is retained."

BRIEF ANSWER

It is our department's opinion that the County may be subject to takings liability if the Council decides to retain the current Park Community Plan designation.

ANALYSIS

It is our understanding that the factual background of the subject property is as follows:

1. The subject property was zoned Apartment District (A-2) in 1961.

2. The Community Plan was amended in 1996 to change the Community Plan designation of the subject property to Park (GC) (PK (GC)).

3. The subject property abuts the Kaanapali Golf Course but is owned by a different owner.

4. The current owner purchased the subject property from a previous owner after the Community Plan amendment, but

the Community Plan amendment was made while the previous owner owned the property.

5. The subject property is in the Special Management Area (SMA).

6. The applicant proposes a five-lot single family residential subdivision.

7. The subject property consists of 1.602 acres.

The West Maui Community Plan provides the following:

Park (PK)

This designation applies to lands developed or to be developed for recreational use. This includes all public and private active and passive parks. Golf courses are further identified as "PK (GC)" on the land use map in order to differentiate golf courses and related accessory uses from other kinds of park uses.

Further, § 19.615.050 of the Maui County Code (MCC) provides for the following permitted uses for the PK-4 Golf Course Park District:

§ 19.615.050. PK-4 golf course park district.

A. Purpose and Intent. The purpose and intent of the PK-4 golf course district is to provide golf courses in the state urban district and state agricultural district which conform to the provisions of chapter 205 of the Hawaii Revised Statutes on lands designated for park use by the community plans of the county. It is further intended that viable agricultural uses be encouraged to continue and that the use of potable groundwater for irrigation be discouraged.

B. Permitted Uses. The following uses shall be permitted within the PK-4 golf course park district; provided, that if a state special use permit is required pursuant to chapter 205 of the Hawaii Revised Statutes for parcels located in the state agricultural district such permit shall be obtained prior to any construction permit, included but not limited to, grading, grubbing, building and other construction permits being issued:

1. Principal Uses.

   a. Golf courses except for miniature golf courses, and

   b. Historic buildings, structures or sites.

2. Accessory Uses and Structures. Accessory uses and structures which include, but which are not limited to, the following:

   a. One caretaker's dwelling unit,

   b. Cart barns and other equipment, storage and maintenance facilities,

   c. One clubhouse per golf course with one snack bar, one restaurant and a pro shop for the sale and service of golf equipment and materials used for golfing purposes,

   d. Comfort and shelter stations,

   e. Golf driving ranges including instructional and practice facilities; provided, that the hours of operation and lighting of these ranges or facilities shall be restricted through conditional zoning conditions which are designed to limit the impact of the ranges and facilities on surrounding land uses,

   f. Greenhouses to maintain landscaping on the zoning lot,

   g. Off-street parking and loading,

   h. Park furniture, and

   i. Locker rooms,

   j. Other accessory and related uses and structures, customarily or traditionally associated with golf courses, including but not limited to, swimming pools, indoor and

> outdoor playing courts, meeting rooms and weight, massage and/or sauna rooms and/or facilities; provided, however, such uses and structures shall be approved by the Maui planning commission pursuant to the provisions of section 19.510.070 of this code; provided, that this provision shall not be applicable to golf course uses on the island of Molokai, and such accessory and related uses shall not be permitted.

* * * *.

In addition, MCC § 18.04.030 provides in relevant part:

> **§ 18.04.030. Administration.**
>
> This title shall be applied and administered within the framework of the county general plan, community plans, land use ordinances, the provisions of the Maui County Code and other laws relating to the use of land. The director shall not approve any subdivision that does not conform to or is inconsistent with the county general plan, community plans, land use ordinances, the provisions of the Maui County Code, and other laws relating to the use of land; * * * *.

(Emphasis added). Also, HRS § 205A-26 provides in relevant part:

> **§ 205A-26. Special management area guidelines.**
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> In implementing this part, the authority shall adopt the following guidelines for the review of developments proposed in the special management area:
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> * * *
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> (2) No development shall be approved unless the authority has first found:
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> * * *
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> (C) That the development is consistent with the county general plan and zoning. Such a finding of consistency does not preclude concurrent processing where a general plan or zoning amendment may also be required.

* * * *.

(Emphasis added). Finally, § 12-202-12 of the Maui Planning Commission Special Management Area Rules provides in relevant part:

> §12-202-12 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.
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> * * *
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> (c) Assessment applications shall be filed in accordance with the following:
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> * * *
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> (2) Any applicant seeking an assessment shall submit an application form, provided by the department, to the central coordinating agency. The application shall require the following information and documentation:
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> * * *
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> (I) The state land use district boundary designation, community plan designation, county zoning designation, and any other special designation, if applicable;
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> * * *
>
> (e) In considering the significance of potential environmental and ecological effects, the director shall evaluate:
>
> * * *
>
> (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:

* * *

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

* * *

(H) Is contrary to the state plan, county's general plan, appropriate community plans, zoning and subdivision ordinances;

* * *

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

* * *

(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.

(Emphases added).

In its recent decision in Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), the United State Supreme Court stated:

> Since [Pennsylvania Coal Co. v.] Mahon[260 U.S. 393 43 S.Ct. 158, 67 L.Ed. 322 (1922)], we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, see infra at [121 S.Ct.] 2463-2464, that a regulation which "denies all economically beneficial use of land" will require compensation under the Takings Clause. Lucas [v. South Carolina Costal Council,] 505 U.S. [1003], 1005, 112 S.Ct. 2886 [120 L.Ed.2d 798 (1992)]; see also id., at 1035, 112 S.Ct. 2886 (KENNEDY, J., concurring); Agnis v. City of Tiburon, 447 U.S. 255, 261, 100 S.Ct. 2138, 65

> L.Ed.2d 106 (1980). Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of government action. Penn Central[Transp. Co. v. City of New York, 438 U.S. 104,] 124, 98 S.Ct. 2646[, 57 L.Ed.2d 631 (1978)]. These inquiries are informed by the purpose of that Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

Palazzolo, 121 S.Ct. at 2457-2458, (bracketed material added).

With regard to this matter, the applicant needs the following zoning and community plan designations to obtain subdivision and SMA approval to complete his five-lot single family subdivision:

1. Zoning: Apartment District A-2
   Community Plan: Multi-Family Residential; or

2. Zoning: Residential District R-3
   Community Plan: Single Family Residential.

Because the above-referenced matter is only for a Community Plan amendment, merely granting the applicant a Community Plan amendment to Single Family Residential will not enable the applicant to obtain subdivision approval pursuant to MCC § 18.04.030. Moreover, the applicant cannot develop any other project unless it is golf-related because of the SMA requirement that a project must be consistent with the Community Plan.

Furthermore, the permitted uses of the PK-4 Golf Course District are set forth above, and are strictly related to Golf Course uses. However, the applicant's parcel is separate from the Kaanapali Golf Course. All golf course uses related to the Kaanapali Golf Course are on the Kaanapali Golf Course lands, which are owned by another entity. The applicant would not have any of the permitted economic uses set forth in MCC § 19.615.050 unless the use is in cooperation with the Kaanapali Golf Course or unless the owner of the Kaanapali Golf Course agrees to purchase the subject property. More importantly, the permitted uses not already provided by the Kaanapali Golf Course are questionable because the subject property is located quite a distance away from the Kaanapali Golf Course clubhouse area.

Thus, we opine that if the applicant does not obtain his requested Community Plan amendment, the County of Maui may be subject to takings liability.

The fact that the applicant represents an owner who obtained the property after the Community Plan update designated the property Park (Golf Course) may also be raised. However, the United States Supreme Court also addressed this matter in Palazzolo:

> We turn to the second asserted basis for declining to address petitioner's takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use, and to the Penn Central claim. While the first holding was couched in terms of background principles of state property law, and the second in terms of petitioner's reasonable investment-backed expectations, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.
>
> The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. See Pennsylvania Coal Co., 260 U.S., at 413, 43 S.Ct. 158 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation.

Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not by asserted by an heir or successor, and so may not be asserted at all. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself. The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken.

* * *

There is controlling precedent for our conclusion. Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were

made for lateral beach access." A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot."

It is argued that Nollan's holding was limited by the later decision in [Lucas]. In Lucas the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which "inhere in the title itself." This is so, the Court reasoned, because the landowner is constrained by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." It is asserted here that Lucas stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.

We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in Lucas, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. A law does not become a background principle for subsequent owners by enactment itself. Lucas did not overrule our holding in Nollan, which, as we have noted, is based on essential Takings Clause principles.

For reasons we discuss next, the state court will not find it necessary to explore these matters on remand in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner's claim under Penn Central. That claim is not

> barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

Palazzolo, 121 S.Ct. at 2462-2464 (emphases added, some citations omitted). Thus, the United States Supreme Court made it clear that the argument that a subsequent purchaser has "notice" is obsolete and is no longer a rule of law in this country. Accordingly, the fact that the applicant represents a subsequent purchaser has no bearing on the County of Maui's potential takings liability set forth above.

Please contact me at you have further questions or concerns.

APPROVED FOR TRANSMITTAL:

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