

CHARMAINE TAVARES  
Mayor



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May 5, 2009

**MEMORANDUM**

**T O:** Jo Anne Johnson  
Council Member

**F R O M:** Jeffrey T. Ueoka  
Deputy Corporation Counsel

A handwritten signature in black ink, appearing to read "Jeffrey Ueoka", is written over the printed name of Jeffrey T. Ueoka.

**SUBJECT:** PROPOSED AMENDMENTS TO MAUI COUNTY CODE SECTION 18.16.320  
RELATING TO PARKS AND PLAYGROUNDS FOR SUBDIVISIONS (PAF  
03-089)

This memorandum is in response to your request, dated April 2, 2009, asking that our Department review a draft bill, entitled "A Bill for an Ordinance Amending Section 18.16.320 of the Maui County Code Relating to Parks and Playgrounds", and requesting legal advice as to whether the County of Maui ("County") is able to require park dedications for time share developments.

I. Applicable statutes.

Hawaii Revised Statutes ("HRS") § 46-6 authorizes counties to require subdividers to provide land for park and playground purposes. HRS § 46-6(a) states:

Except as hereinafter provided, each county shall adopt ordinances to require a subdivider, as a condition to approval of a subdivision to provide land in perpetuity or to dedicate land for park and playground purposes, for the use of purchasers or occupants of lots or units in subdivisions. The ordinances may prescribe the instances when land shall be provided in perpetuity or dedicated, the area, location, grade, and other state of the sites

so required to be provided or dedicated. In addition thereto, such ordinances may prescribe penalties or other remedies for violation of such ordinances.

HRS § 46-6(f)(6) defines subdivision as follows:

"Subdivision" means the division of improved or unimproved land into two or more lots, parcels, sites, or other divisions of land and for the purpose, whether immediate or future, of sale, lease, rental, transfer of title to, or interest in, any or all such lots, parcels, sites, or division of land. The term includes resubdivision, and when appropriate to the context, shall relate to the land subdivided. The term also includes a building or group of buildings, other than a hotel, containing or divided into three or more dwelling units or lodging units.

HRS § 46-6(f)(2) defines a dwelling unit as "a room or rooms connected together, constituting an independent housekeeping unit for a family and containing a single kitchen." HRS § 46-6(f)(3) defines a lodging unit as "a room or rooms connected together, constituting an independent housekeeping unit for a family which does not contain any kitchen."

HRS § 46-6(e) states:

The ordinances adopted pursuant to this section may provide, where special circumstances, conditions, and needs within the respective counties so warrant, for such exemptions and exclusions as the councils of the respective counties may deem necessary or appropriate and may also prescribe the extent to and the circumstances under which the requirements therein shall or shall not be applicable to subdivisions.

Section 18.16.320, Maui County Code ("MCC"), pertaining to park and playground dedication requirements for subdivision applications, implements HRS § 46-6.<sup>1</sup> The County, in its application of MCC § 18.16.320, has not required time share

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<sup>1</sup> Each of the other counties in the State has an ordinance implementing HRS § 46-6. The ordinances are: Section 8-5, Hawaii County Code; Chapter 22, Article 7, Revised Ordinances of Honolulu; and Section 9-2.8, Kauai County Code. None specifically include time share developments in the definition of "subdivision".

developments to provide land in perpetuity or to dedicate land for park or playground purposes.

## II. Discussion.

### A. Applicable rules of statutory construction.

The Hawaii Supreme Court has held:

When construing a statute, our foremost obligation 'is to ascertain and give effect to the intention of the legislature[,] ' which 'is to be obtained primarily from the language contained in the statute itself.' In other words, '[t]he fundamental starting point for statutory interpretation is the language of the statute itself.... And where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning.'<sup>2</sup>

The Hawaii Supreme Court has also held:

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute an ambiguity exists. If the statutory language is ambiguous or doubt exists as to its meaning, "[c]ourts may take legislative history into consideration in construing a statute."<sup>3</sup>

Further, if a statute is silent as to a claimed purpose of the statute, the Court will look to the legislative history.<sup>4</sup>

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<sup>2</sup> Richardson v. City & County of Honolulu, 76 Hawai`i 46, 63, 868 P.2d 1193, 1210 (1994) (alterations in original) (citations omitted).

<sup>3</sup> Franks v. City and County of Honolulu, 74 Hawai`i 328, 335, 843 P.2d 668, 671 (1993) (alterations in original) (citations omitted).

<sup>4</sup> Allstate Insurance Co. v. Hirose, 77 Hawai`i 362, 364, 884 P.2d 1138, 1140 (1994) (citing Franks v. City and County of Honolulu, 74 Hawai`i at 335, 843 P.2d at 671).

- B. HRS § 46-6 does not explicitly authorize counties to impose park and playground dedication requirements on time share developments.

HRS § 46-6 does not clearly and explicitly authorize counties to adopt ordinances requiring time share developers, as a condition of "approval", to provide land in perpetuity or to dedicate land for park and playground purposes. Indeed, HRS § 46-6 does not reference time share units or time share developments at all.

Although HRS § 46-6(f)(6) defines "subdivision" to include "a building or group of buildings ... containing or divided into three or more dwelling units or lodging units",<sup>5</sup> it excludes hotels. HRS §46-6(f)(6) does not define "hotel"; however, it is arguable that time share units and time share plans have characteristics similar to that of hotels, a fact recognized by County zoning ordinances, which allow time share units and time share plans in the hotel district only.<sup>6</sup>

- C. The legislative history of HRS § 46-6 does not indicate that HRS § 46-6 was intended to authorize counties to treat time share units and time share developments as "subdivisions" for park and playground dedication purposes.

Inasmuch as HRS § 46-6 is silent as to time share units and developments, and because HRS § 46-6(f)(6) does not define the term "hotel" as used therein, we examine the legislative history of HRS § 46-6.

Act 140 (1970), entitled "A Bill for an Act Relating to Parks and Playgrounds for Subdivisions", amended HRS § 46-6, and HRS § 46-6 remains in substantially the same form today as so amended. Standing Committee Report No. 701-70 states that the Bill was intended to treat as a subdivision "a building or group of buildings containing three or more dwelling or lodging units in consonance with the contemporary practice of real property development where there is a concentration of people within a given

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<sup>5</sup> HRS § 46-6(f)(6).

<sup>6</sup> See Chapter 19.37, MCC, pertaining to "time sharing plans". MCC § 19.37.010(C) states that "[t]ime share units, time share plans and transient vacation rentals are allowed in the hotel district; provided, such use is explicitly and prominently authorized by the project instrument."

area."<sup>7</sup> However, the Select Committees of Oahu, Maui, Hawaii and Kauai amended the definition of "subdivision" in Senate Bill No. 1745-70 to exclude "hotels".<sup>8</sup> Standing Committee Report No. 701-70 does not elaborate on the term "hotels" as used in the Bill.

Act 140 (1970) also amended HRS § 46-6 by adding subsection (e), the purpose of which was to allow "the counties to take care of special problems peculiar to their jurisdiction."<sup>9</sup> Standing Committee Report No. 620-70 indicates that this amendment was a response to testimony that the then existing version of HRS § 46-6 was "too inflexible" and resulted in "inequity". However, in describing the types of "special problems" intended to be addressed by the amendment, Standing Committee Report No. 620-70 makes no mention of time share units or time share developments; rather, the Report identifies various technical issues confronted by counties.<sup>10</sup> Therefore, we do not believe that the legislative history of HRS § 46-6(e) supports an interpretation that allows counties to treat time share units and time share developments as "subdivisions" for park and playground dedication purposes.

### III. Conclusion.

For the reasons discussed above, we advise that HRS § 46-6 does not authorize the County to adopt an ordinance requiring time share developers to provide land for park and playground purposes. Such an ordinance requires, in our opinion, amendment of HRS § 46-6 by the Legislature.

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<sup>7</sup> 1970 House Journal, at 1140.

<sup>8</sup> *Id.*

<sup>9</sup> 1970 Senate Journal, at 1264.

<sup>10</sup> See 1970 Senate Journal, at 1262 ("Testimony before your Committee indicated that Section 46-6 in its present form is too inflexible and often results in inequity. No exemption is allowed, for example, to very small subdivisions. Moreover, technical subdivisions for financing or otherwise, but not for development into residential or apartment lots, would not be presently excluded. Furthermore, there may be situations when a combination of land and money might be more equitable than requiring only land or money in the alternative from a subdivider. The proposed amendments would authorize the counties to resolve such problems through their ordinances.").

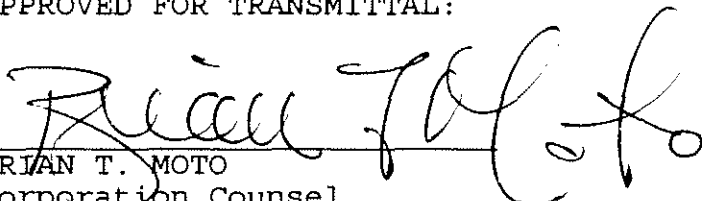
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Accordingly, our Department is returning "A Bill for an Ordinance Amending Section 18.16.320 of the Maui County Code Relating to Parks and Playgrounds" unsigned.

JTU:lk  
attachment

cc: David A. Galazin, Deputy Corporation Counsel  
Milton M. Arakawa, A.I.C.P., Director, Department of Public Works  
Michael Miyamoto, Deputy Director, Department of Public Works  
Webpage

APPROVED FOR TRANSMITTAL:



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BRIAN T. MOTO  
Corporation Counsel

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ORDINANCE NO. \_\_\_\_\_

BILL NO. \_\_\_\_\_ (2003)

A BILL FOR AN ORDINANCE AMENDING SECTION  
18.16.320 OF THE MAUI COUNTY CODE  
RELATING TO PARKS AND PLAYGROUNDS

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Section 18.16.320(A) of the Maui County Code is amended

to read as follows:

**Chapter 18.16**

**DESIGN STANDARDS**

**Sections:**

**18.16.320 Parks and playgrounds.**

**18.16.320 Parks and playgrounds.** A. For the purposes of this section, the following definitions shall apply:

“Approval” means the final approval granted to a proposed subdivision where the actual division of land into smaller parcels is sought; provided, that where construction of a building or buildings is proposed without further subdividing an existing parcel of land, the term “approval” shall refer to the issuance of the building permit.

“Council” means the Maui County council.

“County” means the County of Maui of the State of Hawaii.

“Dwelling unit” means a room or rooms connected together, constituting an independent housekeeping unit for a family and containing a single kitchen.

“Lodging unit” means a room or rooms connected together, constituting an independent housekeeping unit for a family which does not contain any kitchen.

“Parks and playgrounds” mean areas used for active or passive recreational pursuits.

“Privately owned parks and playgrounds” mean parks or playgrounds and their facilities which are not provided in perpetuity or dedicated but which are owned and maintained by or on behalf of the ultimate users of the subdivision pursuant to recorded

restrictive covenants. Where the privately owned park is a part of the lot or lots on which a building or group of buildings containing or divided into three or more dwelling units or lodging units are constructed, it shall not be required that the private park or playground meet County subdivision standards nor shall the area of the private park or playground be deducted from the area of the lot or lots for purposes of zoning or building requirements.

“Subdivider” means any person who divides land as specified under the definition of subdivision or who constructs a building or group of buildings containing or divided into three or more dwelling units,[ or] lodging units, or time share units.

“Subdivision” means the division of improved or unimproved land into two or more lots, parcels, sites, or other divisions of land and for the purpose, whether immediate or future, of sale, lease, rental, transfer of title to, or interest in, any or all such lots, parcels, sites, or division of land. The term includes resubdivision, and when appropriate to the context, shall relate to the land subdivided. The term also includes a building or group of buildings, other than a hotel, containing or divided into three or more dwelling units,[ or] lodging units, or time share units. The term includes a building or group of buildings converted from hotel to residential or time share use. The term includes dwelling units,[ or] lodging units, or time share units added to a building or group of buildings, other than a hotel, where the total number of units is three or more.

“Time share unit” means the actual and promised accommodations, and related facilities, which are the subject of a time share plan, as defined in Section 19.04.040 of the Maui County Code.

“Time share use” means the use of a time share unit.”

SECTION 2. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, bracketed material, or the underscoring.

SECTION 3. This ordinance shall take effect upon its approval.



APPROVED AS TO FORM AND LEGALITY

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Department of the Corporation Counsel  
County of Maui

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