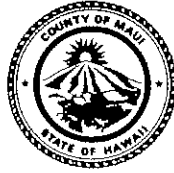


CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7741
FACSIMILE: (808) 270-7152

May 6, 2009

MEMO TO: Michael J. Molina, Chair
Committee of the Whole

FROM: Traci Fujita Villarosa *TFV*
First Deputy Corporation Counsel

SUBJECT: Resolution Authorizing the Sale of Structures at
Kapuka'ulua (formally known as Montana Beach), Paia,
Maui (COW-15)

Introduction.

The purpose of this memorandum is to respond to your memorandum, dated April 1, 2009, requesting legal advice regarding the proposed sale of structures at Kapuka'ulua, Paia, Maui (also known as Montana Beach) ("Property").

Issue posed.

Your memorandum set forth the following request:

May I please request that you respond whether the proposed sale of the structures and the proposed resolution to authorize such sale comply with the terms of the [Mutual Release and Settlement] Agreement. Please explain what, if any, constraints are imposed by the Agreement on the sale of the structures, and whether those constraints are affected by the removal of the structures from the parcel.

Discussion.

By memorandum dated February 6, 2007, from Madelyn S. D'Enbeau, Deputy Corporation Counsel, to Stan Zitnik, Executive Assistant, Office of the Mayor ("2007 Memorandum"), our Department

MEMO TO: Michael J. Molina, Chair
Committee of the Whole
DATE: May 6, 2009
Page 2

provided legal advice regarding the uses allowed of the Property under the Mutual Release and Settlement Agreement dated August 10, 2005 ("Agreement"). A copy of the 2007 Memorandum is attached hereto as Exhibit "1".

In the 2007 Memorandum, Deputy Corporation Counsel D'Enbeau stated that the terms of the Agreement do not specifically prohibit the sale and relocation of the house for use as a private residence elsewhere. She noted that Hawaii case law favors free and unrestricted use of property for all lawful purposes, and, to the extent there is doubt regarding the County's ability under the Agreement to sell and move the house (or portions thereof) for use as a private residence, such doubt should be resolved in favor of the County.¹ This continues to be our Department's position on this matter.

However, since the issuance of the 2007 Memorandum, our Department has received an e-mail communication dated March 31, 2009, from Louise Ing, Alston Hunt Floyd & Ing, attorney for Dennis and Dianne Holland, stating that the Hollands believe that selling the Property to a private party for use as a residence would breach the terms of the Agreement. A copy of the e-mail communication is attached hereto as Exhibit "2". Although our Department disagrees with this position, the Council should be aware of the different interpretations taken by the parties and the potential risk of litigation posed by such differences.

For the further information of the Council, we requested that the Department of Planning provide a summary of the land use requirements associated with use of the Property and its existing structures for purposes such as education, arts-related uses, and hospice-related uses.²

¹ Hiner v. Hoffman, 90 Hawai'i 188, 195, 977 P.2d. 878, 885 (1999) (holding that "[i]t is a well-settled rule that in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed[,] all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee").

² This portion of our memorandum is for the sole purpose of providing additional information for the Committee. We express no opinion as to the cost, feasibility, timing, or practicality of any proposed use of the existing structures at their current location. Our Department has been informed that the shoreline fronting the Property has been subject to significant seasonal

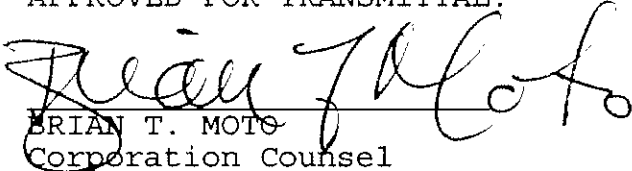
MEMO TO: Michael J. Molina, Chair
Committee of the Whole
DATE: May 6, 2009
Page 3

In response to our request, Jeffrey S. Hunt, Planning Director, transmitted a memorandum dated April 30, 2009, a copy of which is attached hereto as Exhibit "3". In brief, the Planning Director states that, after reviewing existing law and land use maps, the Department of Planning has determined that the existing land use designations³ for the Property do not allow for the types of uses contemplated by the Agreement. Such uses would require either a conditional use permit or a change in zoning. In his memorandum, the Planning Director also discusses other related requirements and procedures, including: special management area assessment and special management area permit requirements; shoreline certification requirements; compliance with shoreline setback rules; environmental assessment and environmental impact statement requirements under Chapter 343, Hawaii Revised Statutes; compliance with Chapter 19.62, Maui County Code, pertaining to flood hazard areas; and compliance with Chapter 19.36, Maui County Code, pertaining to off-street parking.

cc: Stan Zitnik, Executive Assistant
Sheri Morrison, Managing Director
Tamara Horcajo, Director of Parks and Recreation
Webpage

Attachments: Exhibits "1" - "3"

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

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erosion, and that studies prepared by the Coastal Geology Group, Department of Geology and Geophysics, University of Hawaii at Manoa, have determined that the shoreline is subject to an annual erosion hazard rate in the range of 1.5 to more than 3 feet per year.

³ As discussed in the Planning Director's April 30, 2009 memorandum, the Property is in the State Urban District, and is designated Park and Open Space in the Paia-Haiku Community Plan. The Property is zoned Urban Reserve.

CHARMAINE TAVARES
Mayor




BRIAN T. MOTO
Acting Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740

February 6, 2007

MEMORANDUM

MEMO TO: Stan Zitnik, Executive Assistant
Office of the Mayor

FROM: Madelyn S. D'Enbeau, Deputy Corporation Counsel 

SUBJECT: Allowed Uses of the Montana Beach Property (Baldwin Beach House) by County under the Mutual Release and Settlement Agreement

This memorandum is in response to your request for an opinion regarding the allowed uses of the Montana Beach property (Baldwin Beach house) by the County of Maui ("County") under the Mutual Release and Settlement Agreement ("Agreement"), dated August 10, 2005, by and among the County, Dennis and Dianne Holland ("Hollands"), and other parties. (A copy of the Agreement is attached hereto.) In particular, you inquired as to the limitations placed on the use of the house under the Agreement.

Response and analysis.

The Agreement defines the subject property as follows:

The term "Property," as used in this Agreement, shall mean that certain real property and improvements upon the real property identified as TMK (2) 2-5-005:014 HPR 001, located at 3045 Hana Highway, "Apartment A," Paia, Hawai'i 96779.¹

Regarding the uses of the property, the Agreement states:

The Parties agree to the following:

1. The County will use the Property solely for public purposes and for the benefit of the general public

¹ Agreement, at 2.

MEMO TO: Stan Zitnik, Executive Assistant
DATE: February 6, 2007
Page 2

and the following uses will receive priority in consideration among competing proposed uses (in no particular order): educational uses, art-related uses, and hospice-related uses;

2. The County will NOT re-sell the Property as a residence;
3. The County will NOT allow the Property to be used in the future for the following purposes:
 - i. For a private residence;
 - ii. For activities for private commercial benefit (except for activities that may be contracted out for the benefit of the general public).²

Having participated in the negotiation of the Agreement, it is my understanding that the Hollands did not want to be denied use of Apartment A as a residence and have the County allow someone else to use Apartment A as a residence after purchasing it. Accordingly, in negotiating the terms of the Agreement, the Hollands required the provisions recited above. However, the question of whether or not the house could be taken apart, removed from the site, and then reassembled as a residence at another site was never raised and is not specifically addressed in the Agreement.

The deed conveying the property to the County does not contain any restrictive language with respect to the use of the house.

Free and unrestricted use of property for all lawful purposes is favored. For that reason, "[i]t is a well-settled rule that in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed[,] all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee." Hiner v. Hoffman, 90 Hawai'i 188, 195, 977 P.2d 878, 885 (1999). In other words, any doubt about the meaning of the Agreement would be resolved in favor of unrestricted use by the County.

There is no doubt that the County agreed to neither resell Apartment A for use as a residence nor allow Apartment A to be used for a private residence or private commercial benefit, except for activities that may be contracted out for the benefit of the general public. (The "contracted out" provision was intended to

² Agreement, at 7-8.

MEMO TO: Stan Zitnik, Executive Assistant
DATE: February 6, 2007
Page 3

allow County to contract for art or yoga lessons, for example, as is done at some community centers.)

The terms of the Agreement do not specifically prohibit the sale and moving of the house for use as a private residence somewhere else. To the extent there is doubt regarding County's ability under the Agreement to sell and move the house (or portions thereof), we believe such doubt would be resolved in favor of the County based on the principles discussed in the Hiner case. Therefore, relocation of the house to another site for use as a residence or other purpose would not violate the Agreement. This option was available to the Hollands before they decided to sell the property to the County.

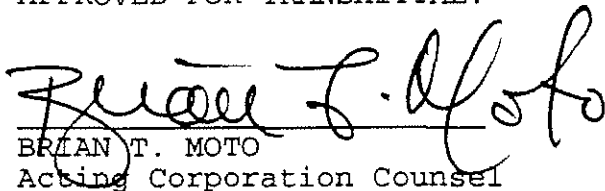
In Hiner, the Hawaii Supreme Court cautioned that free and unrestricted use of property is favored only to the extent of applicable State land use and County zoning regulations. Uses of the house at its current site that would be permitted under the Agreement may not be permitted under State land use and County community plan and zoning ordinances. In the absence of information about the specific uses contemplated for the house at its current site, we are unable to opine further.

MSD:lak

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Attachment

✓cc: Michele White, Legal Assistant

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Acting Corporation Counsel

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

This SETTLEMENT AND RELEASE AGREEMENT is dated August 10, 2005.

I. DEFINITIONS

A. AGREEMENT.

The term "Agreement" shall mean this Mutual Release and Settlement Agreement, entered into by and among the Parties.

B. PARTIES.

The term "Parties" shall mean and include the following:

1. DENNIS P. HOLLAND, as an individual and as a Trustee of the Revocable Living Trust Agreement of Dennis P. Holland, the Dennis P. Holland Revocable Living Trust, and the Dianne Holland Revocable Trust; DIANNE HOLLAND, as an individual and as a Trustee of the Revocable Living Trust Agreement of Dianne Holland, the Dianne Holland Revocable Living Trust, and the Dennis P. Holland Revocable Living Trust (collectively, "the Hollands");
2. THE COUNTY OF MAUI, JAMES H. APANA, JAMES TAKAYESU, and JOHN E. MIN (in both the capacity as individuals and in their present and/or former affiliation with the County of Maui) (collectively, "the County"); and
3. JAMES H. FOSBINDER, RHONDA MARY FOSBINDER, and IVEY FOSBINDER FOSBINDER LLC a Limited Liability Law Company (formerly known as FOSBINDER & FOSBINDER a Law Corporation) (collectively, "the Fosbinders");

Unless otherwise expressly stated in this Agreement, each party named above shall be taken and construed to include the named parties, and

as applicable in connection with this Agreement, assignees, successors, trustees, legal representatives, parent entities, subsidiaries, affiliates, divisions, present and former officers, directors, agents, employees, attorneys, and insurance companies, and other persons acting or purporting to act on its behalf. The parties specifically agree that "the County" includes its/their departments, divisions, and present and former officers, agents, employees and insurance companies.

In this Agreement, the use of one gender shall include all genders, as appropriate, and the use of the singular shall be taken to include the plural, and the use of the plural shall be taken to include the singular.

C. THE PROPERTY.

The term "Property," as used in this Agreement, shall mean that certain real property and improvements upon the real property identified as TMK (2) 2-5-005:014 HPR 001, located at 3045 Hana Highway, "Apartment A," Paia, Hawai'i 96779.

D. CLAIMS.

The term "Claims," as used in this Agreement, shall mean and refer to any and all claims of any kind or nature whatsoever, however described or presented, existing now or in the future, whether known or unknown, whether suspected or unsuspected, for damages or for other relief, which arise out of and/or relate to the Property, and as are more fully described in the following actions:

1. *Holland, et al. v. County of Maui*, CV02-0071 (United States District Court, District of Hawai'i);

2. *Holland, et al. v. Apana*, CV03-00296 (United States District Court, District of Hawai'i);

3. *Holland et al. v. Ulmer*, CV04-00470 (United States District Court, District of Hawai'i);

4. *County of Maui (Appellants) v. Hollands (Appellees)*, No. 05-15057 (D.C. No. CV03-00296 HG) (United States 9th Circuit Court of Appeals);
5. *County of Maui (Appellants) v. Hollands (Appellees)*, No. 05-15109 (D.C. No. CV02-00071 HG) (United States 9th Circuit Court of Appeals);
6. *Hollands v. Magness*, Civil No. 03-1-000150 (State of Hawai'i, 2nd Cir.);
7. *Hollands v. Maui Planning Commission*, Civil No. 04-1-00372 (State of Hawai'i, 2nd Cir.);
8. *County of Maui v. Hollands*, Civil No. 01-1-0642(3) (State of Hawai'i, 2nd Cir.);
9. *In the Matter of the Appeal of Hollands before the Board of Variances and Appeals*, BVA 03-0005;
10. *McLaughlin v. Hollands*, ML02-1-00017 (State of Hawai'i, 2nd Cir.) - Notice of Dismissal filed August 21, 2002;
11. *Sadri v. Ulmer, et al.*; Civil No. 00-1-000305 (State of Hawai'i, 2nd Cir.).

"Claims" shall also specifically include all claims for fines and/or penalties presently asserted and/or which could be asserted against the Hollands arising out of and/or related to the Property, or against the payment settlement proceeds arising out of this Agreement.

II. PURPOSE AND INTENTION

The purpose and intention of this Agreement is to settle, fully and finally, all Claims existing among and between the Parties.

III. AGREEMENTS AND CONSIDERATION

A. MUTUAL RELEASES AND DISMISSALS OF CLAIMS.

The Hollands and the County shall mutually release all Claims against and among each other. In furtherance of such mutual release, the Hollands and the County will execute dismissals with prejudice for the actions enumerated as paragraphs 1-11 in section "I.D." above in which the County is a party. The Hollands also agree to execute dismissals with prejudice for any Claims against Kurt Magness, Kurt R. Ulmer, Michael Lee Weidener, and Montana Beach LLC, but expressly reserve all claims and defenses against Asghar R. Sadri. The Hollands and the County warrant that they are the sole owners of the actions and claims that they are hereby agreeing to dismiss and release. Such dismissals shall be effectuated by way of signed stipulations, followed by appropriate orders of the court and/or other appropriate adjudicating body. The executed but unfiled stipulations shall be placed in escrow. Upon completion of the escrow transactions, the stipulations shall be filed and/or otherwise submitted to the proper adjudicating body. Additionally, the County through its Corporation Counsel, shall confirm in writing that no penalties and/or fines remain owing by the Hollands to the County as to any aspect of the Property.

The Hollands and the Fosbinders shall mutually release any and all Claims and any other claims of any kind or nature whatsoever, whether known or unknown, against and among each other, including but not limited to, claims for unpaid attorneys' fees and costs, claims under Haw. Rev. Stat. § 507-81, and claims for breach of contract, malpractice, negligence, interference with contract, and breach of fiduciary duty. The Hollands and the Fosbinders warrant that they are the sole owners of the actions and claims that they are hereby agreeing to dismiss and release.

The Fosbinders and the County shall mutually release any and all Claims and any other claims of any kind against and among each other arising out of the Property or the Fosbinders' representation of the Hollands, including but not limited to, claims for unpaid attorneys' fees and costs owed by the Hollands. The Fosbinders and the County warrant that they are the sole owners of the actions and claims that they are hereby agreeing to dismiss and release.

The Fosbinders shall release any and all Claims and any other claims of any kind arising out of the Property or the Fosbinders' representation of the Hollands, including claims for attorneys' fees and costs, against any and all former or present parties to the court actions listed in paragraphs 1-11 in section "I.D." above. The Fosbinders warrant that they are they sole owners of the actions and claims they are hereby agreeing to release.

B. SALE OF THE PROPERTY TO THE COUNTY.

The County shall pay the Hollands the sum of Four Million Five Hundred Eighty Thousand Dollars (\$4,580,000), payment to be made as follows:

1. Three Hundred Thousand Dollars (\$300,000) via a County check made payable to "Ivey Fosbinder Fosbinder LLC" to be delivered by the Title Guaranty escrow to the Fosbinders at closing ("Fosbinder Payment"). On or before August 18, 2005, at 4:30 p.m., the Fosbinders shall provide an original W-9 for said payee to the County; and

2. Four Million Two Hundred Eighty Thousand Dollars (\$4,280,000) paid as follows: (a) Two Million Dollars (\$2,000,000) via a check from the County's insurance company, Royal Sun/Alliance Insurance Company aka Royal Indemnity company, payable to "Dennis P. Holland, Dianne Holland, and Alston Hunt Floyd & Ing Client Trust Account" ("Insurance Payment"), and (b) Two Million Two Hundred Eighty Thousand

Dollars (\$2,280,000) via a check from the County payable to "Title Guaranty Escrow Services Inc." ("County Payment").

The Hollands shall transfer their ownership interests in the Property to the County via the limited warranty apartment deed attached hereto as Exhibit "A." The County shall take all necessary steps so that the foregoing checks are provided to escrow as expeditiously as possible in advance of closing. The Hollands shall endorse the check for the Insurance Payment for deposit into the Alston Hunt Floyd & Ing Client Trust Account. All proceeds from the Insurance Payment shall then be wired from the Alston Hunt Floyd & Ing Client Trust Account to the Title Guaranty escrow. The Title Guaranty escrow shall use the proceeds of the Insurance Payment and the County Payment to pay off the Hollands' first and second mortgages on the Property. Releases of the Hollands' first and second mortgages shall be recorded prior to the limited warranty apartment deed attached as Exhibit "A." The remainder of the proceeds of the Insurance Payment and the County Payment shall be paid at closing to "Dennis P. Holland, Dianne Holland, and the Alston Hunt Floyd & Ing Client Trust Account" and delivered by Title Guaranty escrow to the Hollands. The Fosbinder Payment shall be delivered by Title Guaranty escrow to the Fosbinders as described above at closing.

The parties acknowledge that Ivey Fosbinder Fosbinder LLC A Limited Liability Law Company (formerly known as Fosbinder & Fosbinder a Law Corporation) ("the Fosbinders"), filed Notices of Attorney's Charging Lien through their attorney, Lissa H. Andrews in the following cases:

1. *Holland, et al. v. County of Maui*, CV02-0071 (United States District Court, District of Hawai'i);
2. *Holland, et al. v. Apana*, CV03-00296 (United States District Court, District of Hawai'i);
3. *Holland et al. v. Ulmer*, CV04-00470 (United States District Court, District of Hawai'i);

4. *County of Maui (Appellants) v. Hollands (Appellees)*, No. 05-15057 (D.C. No. CV03-00296 HG) (United States 9th Circuit Court of Appeals);

5. *County of Maui (Appellants) v. Hollands (Appellees)*, No. 05-15109 (D.C. No. CV02-00071 HG) (United States 9th Circuit Court of Appeals);

6. *Hollands v. Magness*, Civil No. 03-1-000150 (State of Hawai'i, 2nd Cir.);

7. *Hollands v. Maui Planning Commission*, Civil No. 04-1-00372 (State of Hawai'i, 2nd Cir.) (consolidated with *Montana Beach, LLC v. Maui Planning Commission*, CV-04-1-0357(2) (State of Hawai'i, 2d Cir.), *Sadri v. Maui Planning Commission*, CV-04-1-03622 (State of Hawai'i, 2d Cir.), and *Weidener v. Maui Planning Commission*, CV-04-1-0368(2) (State of Hawai'i, 2d Cir.));

8. *County of Maui v. Hollands*, Civil No. 01-1-0642(3) (State of Hawai'i, 2nd Cir.); and

9. *Sadri v. Ulmer, et al.*; Civil No. 00-1-000305 (State of Hawai'i, 2nd Cir.).

The foregoing Notices of Attorney's Charging Lien shall be collectively referred to herein as the "Notices." The Fosbinders agree that upon execution of this Agreement by all parties, they will expeditiously withdraw or release all Notices listed above and any other Notices of Attorneys' Charging Lien in any case in which the Hollands are a party. The Fosbinders specifically agree that the County shall have no further responsibility or liability with respect to the Notices and any other Notices of Attorney's Charging Lien filed by the Fosbinders or their attorney arising out of the Fosbinders' representation of the Hollands in any matter. The County shall have no further liability or involvement in any dispute between the Hollands and the Fosbinders.

C. USE OF PROPERTY.

The Parties agree to the following:

1. The County will use the Property solely for public purposes and for the benefit of the general public and the following uses will receive

priority in consideration among competing proposed uses (in no particular order): educational uses, art-related uses, and hospice-related uses;

2. The County will NOT re-sell the Property as a residence;

3. The County will NOT allow the Property to be used in the future for the following purposes:

i. For a private residence;

ii. For activities for private commercial benefit (except for activities that may be contracted out for the benefit of the general public).

D. FEES AND COSTS.

The Parties shall bear their own attorneys' fees and costs.

IV. FURTHER UNDERSTANDINGS AND AGREEMENTS

A. INSTRUMENTS REQUIRED FOR RESOLUTION OF CLAIMS.

The Parties agree to cooperate fully in all necessary steps to effectuate each and every term of this Agreement in a timely manner, including but not limited to the execution of all appropriate documents (including without limitation, Maui County budget approvals, Administrative and Council approvals, drafting and execution of notices of dismissal of claims, and transfer documents related to the Property). Completion of such documentation shall occur by August 10, 2005.

B. WAIVERS.

No waiver of any breach of any covenant or provision contained in this Agreement shall be deemed a waiver of any preceding or succeeding breach thereof, or of any other covenant or provision herein or therein contained. No extension of time for performance of any obligation or act shall be deemed an extension of the time for performance of any other obligation or act.

C. GOOD FAITH AND MUTUAL COOPERATION.

1. The Parties agree to cooperate fully to effectuate the agreed-upon terms of this Agreement in any good faith settlement proceedings as may be required pursuant to Haw. Rev. Stat. § 663-15.5.

2. The County will not oppose the Hollands in their efforts to obtain tax credits for any difference between the current market value of the property (as blighted) and the purchase price of the Property.

3. The Hollands agree to cooperate with the County with respect to any litigation or other claim that Ashgar Sadri may make against the County relating to the Project known to the Parties as the Montana Beach Litigation.

4. The Parties will not disparage each other and will cooperate to issue a joint statement regarding the instant settlement.

D. NO PARTY DEEMED DRAFTER.

The Parties agree that no party shall be deemed the drafter of this Agreement and further, in the event that this Agreement is ever construed by a court of law, such court shall not construe this Agreement or any provision of this Agreement against any party as the drafter of the Agreement.

E. NO LIABILITY.

Each of the Parties denies any and all liability, negligence, breach of duty, breach of any agreement (except this Agreement), misconduct, violation of statute, and/or wrongdoing of any kind, character or nature whatsoever for purposes of this Agreement.

F. NO INDUCEMENT OR RELIANCE.

Except as set forth in this Agreement, no representation of fact, opinion or promise has been made by any of the Parties to any of the other Parties to induce this compromise; and no party is relying upon any statements, representations, opinions or promises made by any person or party released or their agents, employees, representatives or attorneys, concerning the nature, extent or duration of the losses, loss of profits, damages, exemplary damages, punitive damages, or other legal liability therefor, or concerning any other thing or matter. The above-stated exchange of consideration is given and received as a compromise settlement in full satisfaction of all Claims.

G. REPRESENTATION OF COMPREHENSION OF DOCUMENT.

The Parties represent that they have entered into this Agreement with full benefit and/or opportunity for independent legal counsel and advice, full knowledge of the facts and possibilities of the Claims, the litigation referenced herein, and any and all matters related thereto. The Parties have completely read this Agreement, its provisions, terms and conditions, and are fully informed as to its contents and effect. Each of the Parties fully understands and voluntarily accepts this Agreement.

H. TITLE AND HEADINGS.

Titles and headings to paragraphs and subparagraphs herein are for the purpose of convenience and reference only, and shall in no way limit, define or otherwise affect the provisions thereof.

I. AMENDMENTS.

This Agreement shall not be altered, amended, modified or otherwise changed in any respect whatsoever, except in writing, duly executed by the Parties, and the Parties acknowledge and agree that they will make no

claim at any time that this Agreement has been orally altered or modified in any respect whatsoever.

J. SEVERABILITY.

If any provision of this Agreement or the application thereof to any party or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provisions to any other party or circumstances shall not be affected thereby.

K. COUNTERPART EXECUTION AND FACSIMILE SIGNATURES.

This Agreement may be executed in any number of counterparts with the same effect as if the Parties had signed the same document. All counterparts shall be construed together and shall constitute one agreement. This Agreement may also be executed by way of facsimile signature and such signature shall be sufficient to bind the party so executing this Agreement. Such party shall thereafter promptly forward a confirming copy of such facsimile signature to the other Parties.

L. ATTORNEYS' FEES AND COSTS FOR BREACH OF AGREEMENT.

In the event of any litigation relating to matters of a breach of this Agreement, the prevailing party shall be entitled to recover costs and reasonable attorneys' fees incurred therefor.

M. GOVERNING LAW.

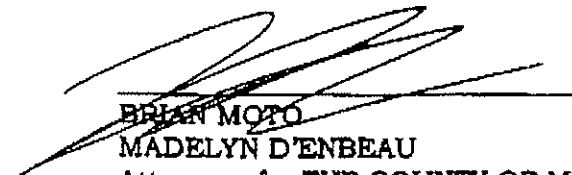
The laws of the State of Hawai'i shall be applicable to the interpretation of this Agreement and to any right or liability arising hereunder, except as to such matters which may be under the exclusive jurisdiction of federal law.

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year first above written.


APPROVED AS TO FORM:

APPROVED:

THE COUNTY OF MAUI



BRIAN MOTO
MADELYN D'ENBEAU
Attorneys for THE COUNTY OF MAUI



By Alan M. Arakawa
Its Mayor

M. GOVERNING LAW.

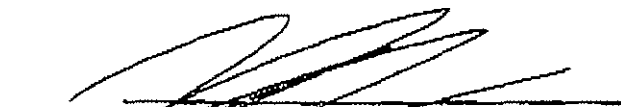
The laws of the State of Hawai'i shall be applicable to the interpretation of this Agreement and to any right or liability arising hereunder, except as to such matters which may be under the exclusive jurisdiction of federal law.


IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year first above written.

APPROVED AS TO FORM:

APPROVED:

THE COUNTY OF MAUI


BRIAN MOTO
MADELYN D'ENBEAU
Attorneys for THE COUNTY OF MAUI


By Alan M. Arakawa
Its Mayor

APPROVED AS TO FORM:

Lea Hong

PAUL ALSTON
LOUISE K. Y. ING
LEA HONG
W. ANTHONY AGUINALDO
Attorneys for Plaintiffs
DENNIS P. HOLLAND and DIANNE
HOLLAND

Lea Hong

PAUL ALSTON
LOUISE K. Y. ING
LEA HONG
W. ANTHONY AGUINALDO
Attorneys for Plaintiffs
DENNIS P. HOLLAND and DIANNE
HOLLAND

APPROVED:

Dennis Holland

DENNIS HOLLAND, as an individual and as a Trustee of the Revocable Living Trust Agreement of Dennis P. Holland, the Dennis P. Holland Revocable Living Trust, and the Dianne Holland Revocable Trust

Dianne Holland

DIANNE HOLLAND, as an individual and as a Trustee of the Revocable Living Trust Agreement of Dianne Holland, the Dianne Holland Revocable Living Trust, and the Dennis P. Holland Revocable Living Trust

APPROVED AS TO FORM:

APPROVED:



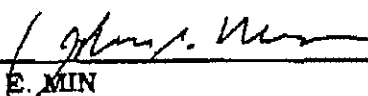
DAVID H. NAKAMURA
Attorney for Defendant
JOHN E. MIN

JOHN E. MIN

APPROVED AS TO FORM:

APPROVED:

DAVID H. NAKAMURA
Attorney for Defendant
JOHN E. MIN



JOHN E. MIN

APPROVED AS TO FORM:

APPROVED:



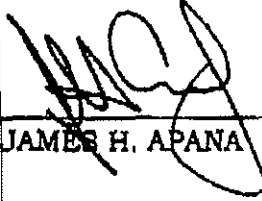
MICHAEL JAY GREEN
HOWARD GLICKSTEIN
Attorneys for Defendant
JAMES H. APANA

JAMES H. APANA

APPROVED AS TO FORM:

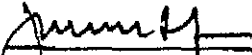
APPROVED:

MICHAEL JAY GREEN
HOWARD GLICKSTEIN
Attorneys for Defendant
JAMES H. APANA



JAMES H. APANA

APPROVED AS TO FORM:



RICHARD NAKAMURA
Attorney for Defendant
JAMES TAKAYESU


APPROVED:

JAMES TAKAYESU

APPROVED AS TO FORM:

APPROVED:

RICHARD NAKAMURA
Attorney for Defendant
JAMES TAKAYESU

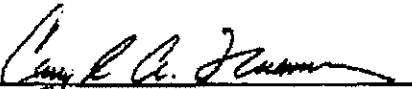


JAMES TAKAYESU

APPROVED AS TO FORM:



LISSA ANDREWS
CHERYL NAKAMURA
Attorneys for JAMES H. FOSBINDER,
RHONDA MARY FOSBINDER, IVEY
FOSBINDER FOSBINDER LLC a
Limited Liability Law Company
(formerly known as FOSBINDER &
FOSBINDER a Law Corporation)



LISSA ANDREWS
CHERYL NAKAMURA
Attorneys for JAMES H. FOSBINDER,
RHONDA MARY FOSBINDER, IVEY
FOSBINDER FOSBINDER LLC a
Limited Liability Law Company
(formerly known as FOSBINDER &
FOSBINDER a Law Corporation)

APPROVED:



JAMES H. FOSBINDER,
individually and on behalf of IVEY
FOSBINDER FOSBINDER LLC a
Limited Liability Law Company
(formerly known as FOSBINDER &
FOSBINDER a Law Corporation)



RHONDA MARY FOSBINDER,
individually and on behalf of IVEY
FOSBINDER FOSBINDER LLC a
Limited Liability Law Company
(formerly known as FOSBINDER &
FOSBINDER a Law Corporation)

STATE OF HAWAII)
) SS:
COUNTY OF MAUI)

On this _____ day of _____, 2005, before me appeared ALAN M. ARAKAWA, to me personally known, who, being by me duly sworn, did say that he is the Mayor of County of Maui, and that said instrument was signed on behalf of said City Council, and said officer acknowledged said instrument to be the free act and deed of said County.

Notary Public, State of Hawaii

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

On this _____ day of AUG 5 - 2005, 2005, before me appeared ALAN M. ARAKAWA, to me personally known, who being by me duly sworn did say that he is the Mayor of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed on behalf of said County of Maui pursuant to Section 9-18 of the Charter of the County of Maui; and the said ALAN M. ARAKAWA acknowledged the said instrument to be the free act and deed of said County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



LINDA K. TAMASHIRO
Notary Public, State of Hawaii
My commission expires: October 19, 2006

15

STATE OF MICHIGAN)
) SS:
COUNTY OF OAKLAND)

On this 6th day of August, 2005, before me personally appeared DENNIS P. HOLLAND, to me personally known, who being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.


Notary Public, State of Michigan

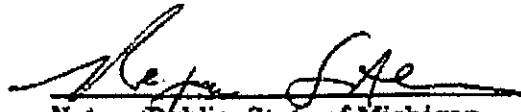
REGINA J. ALLIE
Printed Name of Notary

My commission expires: 5-4-2007

ACTING IN OAKLAND
COUNTY
REGINA J. ALLIE
Notary Public, Wayne County, MI
My Commission Expires May 4, 2007

STATE OF MICHIGAN)
) SS:
COUNTY OF OAKLAND)

On this 6th day of AUGUST, 2005, before me personally appeared DIANNE HOLLAND, to me personally known, who being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.


Notary Public, State of Michigan
REGINA J. ALLIE

Printed Name of Notary

My commission expires: 5-4-2007

ACTING IN OAKLAND COUNTY

REGINA J. ALLIE
Notary Public, Wayne County, MI
My Commission Expires May 4, 2007

STATE OF HAWAI'I)
) SS:
 COUNTY OF MAUI)

On this 9th day of August, 2005, before me personally appeared JOHN E. MIN, to me personally known, who being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

L.S.

Marguerite Ah Kee
 Notary Public, State of Hawai'i

MARGUERITE AH KEE
 Printed Name of Notary

My commission expires: 7/3/2007

STATE OF HAWAII)
) SS:
COUNTY OF MAUI)

On this 8th day of August, 2005, before me personally appeared JAMES H. APANA, to me personally known, who being by me duly sworn or affirmed, did say that such persons^{to} executed the foregoing instrument as the free act and deed of such persons^{to}, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Kay A. Ogasawara
Notary Public, State of Hawai'i

Kay A. Ogasawara

Printed Name of Notary

My commission expires: 7/1/09

LS

STATE OF HAWAII)
) SS:
 COUNTY OF MAUI)

On this 9th day of August, 2005, before me personally appeared JAMES TAKAYESU, to me personally known, who being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

L-S.

Marguerite Ah Kee
 Notary Public, State of Hawai'i

MARGUERITE AH KEE
 Printed Name of Notary

My commission expires: 7/3/2007

STATE OF HAWAI'I)
) SS:
COUNTY OF MAUI)

On this 5th day of August, 2005, before me personally appeared JAMES H. FOSBINDER, to me personally known, who being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Mary F. Madamba
Notary Public, State of Hawai'i

MARY F. MADAMBA
Printed Name of Notary

My commission expires: 9/2/2008

L.S.

STATE OF HAWAII)
) SS:
COUNTY OF MAUI)

On this 5th day of August, 2005, before me personally appeared RHONDA MARY FOEBINDER, to me personally known, who being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Mary F. Madamba
Notary Public, State of Hawaii

MARY F. MADAMBA
Printed Name of Notary

My commission expires: 9/2/2008

L.S.

From: "LOUISE ING" <LING@ahfi.com>
To: "Madelyn D'Enbeau" <madelyn.denbeau@co.maui.hi.us>
Date: 3/31/2009 11:03 PM
Subject: County of Maui/Holland - disposition of house

Dear Madelyn,

Thank you for your inquiry on March 9 about the Holland's position on the disposition of the Montana Beach house which the County of Maui purchased from them as part of a settlement agreement. It took awhile to reach the Hollands; then I was traveling last week.

You had informed me that in light of beach erosion which is threatening the house, the County is weighing the options of (A) selling the house to a private party, (B) moving it and using it for a public use or (C) demolishing it and selling the building material.

After careful consideration, the Hollands instructed me to inform you that the house should either be (A) moved and used for a public purpose" or (B) demolished, with the building materials sold at the County's option. Their position is based on the settlement agreement terms, which require that the house "will be used solely for public purposes for the benefit of the general public and that the following uses will receive priority in consideration among competing proposed uses (in no particular order): educational uses, art-related uses, and hospice related uses" and that "The County will not resell the property as a residence."

The settlement agreement further provides that "the County agrees that the property will not be used for the following: (A) A private residence; and B) Any activities for private commercial benefit except as such activities that may be contracted out for the benefit of the general public." Thus, allowing the house to be sold to a private party to move and live in it would breach the terms of the settlement agreement. These provisions were essential terms of the settlement agreement. The Hollands were willing to sell their home to the County, provided that it was used for public purposes and not sold by the County for private use.

Please contact me if you have any questions.

Sincerely,
Louise

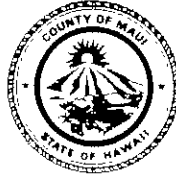
This message may contain confidential or privileged information.
If you have received this message by mistake, please destroy it and notify me immediately by email or telephone. Thank you.

EXHIBIT " 2 "

CHARMAINE TAVARES
Mayor

JEFFREY S. HUNT
Director

KATHLEEN ROSS AOKI
Deputy Director

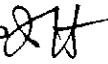


COUNTY OF MAUI
DEPARTMENT OF PLANNING

April 30, 2009

MEMORANDUM

TO: Traci Fujita Villarosa, First Deputy
Department Of Corporation Counsel

FROM: Jeffrey S. Hunt, AICP 
Planning Director

SUBJECT: **KAPUKA`ULUA (FKA MONTANA BEACH)**
TMK: 2-5-005:014

The Department of Planning (Department) is in receipt of your request to identify land use requirements to utilize the existing structures at Kapuka`ulua for public purposes such as for education, arts related uses, and hospice related uses. After reviewing the existing laws and land use maps, the Department has determined that the existing land use designations for TMK: 2-5-005:014 (Property) does not allow for this type of use. There are two (2) land use options available to the County:

1. Obtain a Conditional Use Permit; or
2. Initiate a Change in Zoning

This determination is based upon the following information:

LAND USE AND FLOODING DESIGNATIONS:

- State Land Use District: Urban
- Paia/Haiku Community Plan: Park and Open Space
- Zoning: Urban Reserve
- Special Management Area: Yes
- Flood Hazard District: VE (BFE=15')

State Land Use District

The Property is designated Urban by the State Land Use Commission. Permissible uses in the District are any use allowed by the respective Counties. Thus the use of the property for public purpose is allowed with the appropriate community plan and zoning designation.

EXHIBIT " 3 "

Community Plan

The Property is divided into two community plan designations on the Paia-Haiku Community Plan Map: Park and Open Space. Both of these community plan designations envision public purpose uses. In the Paia-Haiku Community Plan a Park designation applies to lands either developed or to be developed for recreational uses. These uses include both public and private facilities as well as active and passive facilities. An Open Space designation applies to lands located in both urban and non-urban designated lands. These lands may be inappropriate for intensive development based upon environmental, physical, or scenic constraints. Examples of areas to be included under this designation are shoreline buffer areas, drainage way, and view planes.

Zoning

The Property is zoned Urban Reserve. Upon reviewing Chapter 19.69, Urban Reserve, Maui County Code (MCC) the example uses provided as part of this request are not permitted uses in the Urban Reserve District. Permitted uses in the Urban Reserve District are:

1. One single-family dwelling per lot;
2. Uses and structures which are accessory to the single-family dwelling and located on the same lot as said dwelling. These uses and structures include, but are not limited to, carports and storage sheds, and other uses which are customary, incidental, usual, and necessary to the use of the dwelling or the land of the zoning lot.
3. One accessory dwelling; provided that the area of the zoning lot is 7,500 square feet or more; and provided further that the provisions of chapter 19.35 of this code are complied with;
4. Pasturing of animals and cultivation of crops, including, but not limited to greenhouses, flower and truck gardens, and nurseries; provided that there shall not be any retailing or transacting of business on the premises; and
5. Private, public, or quasi-public utility lines and roadways; drainage improvements; water source and distribution services, including but not limited to, water wells, reservoirs, tanks, and not more than twenty-three kilovolt public utility substation.

Further, any change in the use of the structures or the construction of additional square feet will also be subject to the off-site parking requirement of Chapter 19.36, MCC. Additional parking may be required on the Property based upon the use of the structures.

Special Management Area

The Property is located within the Special Management Area (SMA) as established by the Maui Planning Commission. A change in use or proposed improvements; such as construction, renovations, or paved parking, will require that a SMA Assessment to be submitted to the Department. Consultation with the Department will then determine whether a SMA Permit will be required.

Additionally, portions of the Property are located within the Shoreline Setback Area and are subject to the Shoreline Setback Rules. These rules further identify permitted activities and uses so as to minimize impact to the shoreline. Any proposed improvements will likely require a shoreline certification by the State of Hawaii.

Flood Hazards

The Property is located in Flood Hazard Zone VE (BFE=15') by the Flood Insurance Rate Map (FIRM) maintained by the Federal Emergency Management Agency (FEMA). Zone VE indicates an area of coastal flooding with velocity hazard (wave action) in which the base flood elevation has been determined. The base flood elevation is 15-feet.

Thus the Property is also subject to the requirements of Chapter 19.62, Flood Hazard Area, MCC. This Property is located in an area defined as a coastal high hazard area and subject to specific building and construction standards. First, the habitable portion of the structures must be elevated at the required 15-feet. Second, the space below the habitable portion of the structures can only be used for parking, storage, and access. Third, an enclosure of this space must meet the requirement of a "breakaway wall" which is a type of construction in which walls will be able to "breakaway" during high wave action, while leaving the support structures intact.

An inspection has not been conducted by the Department on the existing structures to determine whether the construction is in compliance with Chapter 19.62, MCC.

ENVIRONMENTAL ASSESSMENT

Lastly, a change in use of the property will require the County to be in compliance with Chapter 343, Environmental Impact Statements, Hawaii Revised Statutes (HRS). This may require the processing of an Environmental Assessment in addition to the other land use and regulatory requirements.

The Department is forwarding the following documents; Chapter 19.69 Urban Reserve, MCC, a map delineating the community plan designations of the Property, and a the FIRM map of the Property.

Traci Fujita Villarosa, First Deputy
April 30, 2009
Page 4

Thank you for the opportunity to provide comments. Should additional clarification be required, please contact Staff Planner Robyn Loudermilk at Ext. 7180.

Attachments

xc: Kathleen R. Aoki, Deputy Planning Director
Clayton I. Yoshida, AICP, Planning Program Administrator
Robyn L. Loudermilk, Staff Planner
Francis Cerizo, Staff Planner

JSH:RLL:bv

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