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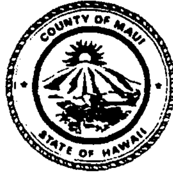

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September 23, 2002

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MEMORANDUM

TO: Honorable Jo Anne Johnson, Chair
Parks and Recreation Committee

FROM: Edward S. Kushi, Jr., Deputy Corporation Counsel

SUBJECT: **DRAFT RESOLUTION AND BILL RELATING TO A COMMUNITY PLAN LAND USE AMENDMENT AT HALE O LONO HARBOR ON MOLOKAI (PR-6)**

We respond to your memo of September 10, 2002, and the questions posed as follows:

1) **May the Council place a community plan land use designation upon land within the State Conservation District ?** Yes.

We initially note that community plan "designation" is to be distinguished from the County's zoning and/or other land use processes/procedures.

It is clear that the districting or classification of land into any one of four categories (i.e., urban, rural, agricultural or conservation) is within the sole jurisdiction of the State Land Use Commission pursuant to Chapter 205, Hawaii Revised Statutes ("HRS"), unless delegated to county land use decision-making authorities in accordance with Section 205-3.1, HRS. However, conservation district property is further excluded from the delegation section. Section 205-3.1(3), HRS.

As noted in your September 10, 2002 memo, Section 205-2(a), HRS, does provide that the State Land Use Commission ("SLUC") "....shall give consideration to the master plan or general plan of the county." when establishing and/or changing district boundaries.

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A review of Chapter 205, HRS, reveals no stated prohibition against any county from processing a "master/general/community" plan designation for property in the State conservation district. However, it is equally clear that the counties have no power, authority or jurisdiction with regards to zoning of State conservation district property, said power, authority and jurisdiction being specifically delegated to the State Department of Land and Natural Resources, as set forth in Chapter 183-C, HRS. See Section 205-5, HRS. A copy of said Chapter 183-C, HRS is attached for reference which, upon review, sets forth a comprehensive and total scheme concerning land use for and in State conservation district property.

Lastly, it should also be noted that development of or on conservation district property within the designated special management area ("SMA")boundaries, notwithstanding State Department of Land and Natural Resources jurisdiction, is subject to the county's SMA review and permit processes. Such being the case, there is the requirement that approval of a "development" be consistent with the zoning and community plan designation of a subject property.

Accordingly, notwithstanding the Council's authority to "designate" conservation district property, the County has no authority to "zone" such property. A possible dilemma may occur with respect to an SMA application involving conservation district property wherein the consistency requirement cannot be met. Therefore, we CAUTION that any community plan designation proposed for conservation district property be consistent with the guidelines and criteria set forth in Chapter 205, HRS, and adopted by the SLUC in districting State conservation land.

2) **May the Council place community plan land use designations on lands *makai* of the shoreline ?** Yes.

All lands and marine waters seaward ("makai") of the "shoreline" as defined in Section 205A-1, HRS, belong to the State of Hawaii, are deemed to be within the State conservation district, and are regulated by the State Department of Land and Natural Resources. Chapters 171, 187-A, 190, 190-D, HRS. If the once submerged land has accreted so that the "shoreline" has extended makai, a private adjoining or littoral landowner may petition the Land Court of the State of Hawaii, or file a quiet title action in Circuit Court to acquire title to said accreted land, provided it is proved by a preponderance of the evidence that the accretion is natural and permanent (at least 20 years). Sections 501-33, and 669-1(e), HRS. Reclamation and disposition of submerged public lands which may or may not have been "filled" are treated in

Section 171-53, HRS, and in accordance therewith fall under the jurisdiction of the State Department of Land and Natural Resources.

The situation remains that submerged lands and/or once-submerged lands (i.e., via accretion or fill) are still in the State conservation district, and therefore our analysis, as set forth above, applies, to-wit: that the County may "designate" but not "zone", and that any such designation should be consistent with the guidelines and criteria used by the SLUC in districting conservation property pursuant to Chapter 205, HRS.

Call if further discussion and/or clarification is needed.

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APPROVED FOR TRANSMITTAL:

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