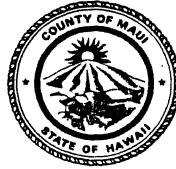


CHARMAINE TAVARES  
Mayor



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May 1, 2007

MEMO TO: Michael J. Molina, Chair  
Land Use Committee

F R O M: James A. Giroux, Deputy Corporation Counsel

SUBJECT: **CHANGE IN ZONING FOR DR. RIGGS ROBERTS (WAILUKU)**  
(LU-22)

I. Introduction.

This memorandum is in response to a memorandum, dated April 25, 2006, from Robert Carroll, Chair, Land Use Committee, requesting legal advice regarding a proposed change in zoning for property at 1883 Mill Street, Wailuku, Maui, and identified as tax map key number (2) 3-4-018:004 ("Property"). In particular, the memorandum requested advice on the following issues:

1. The Land Use Map contained in the Wailuku-Kahului Community Plan (2002) provides for a "Service Business/Single Family Residential (SBR)" category, defined as follows:

"This includes single family dwellings with small scale service and neighborhood oriented business which are primarily established in previously utilized residential dwellings or other existing structures. The business use should be compatible with the physical character of residential neighborhood."

Are there any existing zoning districts that would be consistent with an SBR Community Plan designation? If the only zoning district that would be consistent with an SBR Community Plan designation is an SBR Service Business Residential District (yet to be enacted), please so indicate.

2. If B-2 Community Business District zoning is consistent with the current Community Plan designation for the property, please advise whether there are any procedural constraints on the Committee's consideration of a Change

in Zoning to B-2 Community Business District, where the Maui Planning Commission has recommended a change to an SBR-1 Service Business Residential District. If the B-2 Community Business District is inconsistent with the current Community Plan designation, the applicant nonetheless wishes to pursue a Change in Zoning to B-2 Community Business District, and the Committee were to consider such a request, please confirm whether a Community Plan Amendment would be required, thus triggering the need for an environmental assessment.

**II. Short answer.**

In the absence of an SBR Service Business Residential District zoning ordinance, B-2 Community Business District zoning for the Property would be consistent with the Wailuku-Kahului Community Plan designation of Service Business/Single Family Residential, provided that the zoning is conditioned so as to (1) limit the permitted uses of the property to medical and professional offices, (2) require that building and parking improvements retain the residential character of the existing neighborhood, and (3) require yard setbacks consistent with those in residential districts.

**III. Background.**

In 1985, Council granted a two-year conditional permit for the operation of a medical clinic on the Property.<sup>1</sup> Subsequent time extensions of the conditional permit were granted in 1989,<sup>2</sup> 1990,<sup>3</sup> 1993,<sup>4</sup> and 1998.<sup>5</sup> The conditional permit, as amended, is valid until October 31, 2008.

In 1987, the Wailuku-Kahului Community Plan was adopted and designated the Property as Service Business/Single Family Residential (SBR).<sup>6</sup>

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<sup>1</sup> Ordinance No. 1505 (1985).

<sup>2</sup> Ordinance No. 1808 (1989).

<sup>3</sup> Ordinance No. 1963 (1990).

<sup>4</sup> Ordinance No. 2261 (1993).

<sup>5</sup> Ordinance No. 2643 (1998).

<sup>6</sup> Ordinance No. 1674 (1987), Ex. "B", at 6.

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In 1988, Dr. and Mrs. Steven Moser, Dr. Jane Kocivar, and Dr. Riggs Roberts applied for a change in zoning for the Property from R-1 Residential District to B-2 Community Business District.<sup>7</sup>

On June 21, 1988, after a public hearing on the application, the Maui Planning Commission adopted the recommendation of the Planning Department and voted to recommend approval of a change in zoning to SBR-1 Service Business/Residential District instead of the requested B-2 Community Business District. The Commission's recommendation was transmitted to the Council by letter dated January 20, 1989.

In 1989, Condition No. 2 of the conditional permit was amended to require that the applicants apply for a change in zoning to SBR-1 Service Business/Residential District rather than B-2 Commercial.<sup>8</sup> In 1990, Condition No. 2 was deleted in its entirety.<sup>9</sup>

Despite the provisions of the current Wailuku-Kahului Community Plan (2002) and the previous Wailuku-Kahului Community Plan (1987), no ordinance establishing an SBR Service Business Residential zoning district has been adopted.<sup>10</sup>

**IV. The Maui County Code Requires a Change in Zoning to Be Consistent with the Applicable Community Plan and Land Use Map.**

Section 19.510.040(A)(4), Maui County Code ("MCC"), states, in part:

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<sup>7</sup> Since the date of application, Dr. Roberts has purchased Dr. Moser's and Dr. Kocivar's interests in the Property, and Dr. Roberts is now the sole owner. Memorandum to Brian T. Moto, Corporation Counsel, from Robert Carroll, Chair, Land Use Committee (Apr. 25, 2006), at 1.

<sup>8</sup> Ordinance No. 1808 (1989).

<sup>9</sup> Ordinance No. 1963 (1990).

<sup>10</sup> County Communication No.96-246 transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING TITLE 19, MAUI COUNTY CODE, TO ESTABLISH A SERVICE BUSINESS RESIDENTIAL DISTRICT" was filed on December 18, 1998 by the Council. The Wailuku-Kahului Community Plan (2002) lists the establishment of an SBR Service Business/Residential zoning district among required implementing actions. Ordinance No. 3061 (2002), Ex."1", at 53.

4. The county council may grant a change in zoning if all of the following criteria are met:
- a. The proposed request meets the intent of the general plan and the objectives and policies of the community plans of the county,
  - b. The proposed request is consistent with the applicable community plan land use map of the county....

In zoning property, the Council may impose reasonable conditions of zoning. Section 19.510.050, MCC, states, in part:

A. Prior to the enactment of an ordinance effecting any change in zoning, the county council may impose conditions upon the applicant's proposed use of the property.

B. The conditions shall be imposed if the council finds them necessary to prevent circumstances which may be adverse to the public health, safety, convenience, and welfare. The conditions shall be reasonably conceived to mitigate the impacts emanating from the proposed land use and shall meet the following criteria:

1. That the public shall be protected from the potentially deleterious effects of the proposed use; and
2. That the need for public services created by the proposed use shall be fulfilled.

**V. Council Has Determined in Past That B-2 Community Business District Zoning (Conditional Zoning) Is Consistent with Community Plan Designations of Service Business/Single Family Residential.**

In the absence of an SBR Service Business/Single Family Residential zoning district, consideration is being given to an alternative zoning designation that meets the zoning criteria of Section 19.510.040(A)(4), MCC. Although the Maui County Code does not define the term "consistent" as it pertains to a zoning district and community plan designation, Hawaii Supreme Court decisions indicate that, where consistency between land use laws is required, only the more restricted use as between the two is authorized.<sup>11</sup>

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<sup>11</sup> See Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawai'i 465, 481-482 (2003) (citing GATRI v. Blane, 88 Hawai'i 108 (1998)) ("In reviewing the appeal, this court determined that, because the development plan had the force and effect of law, 'the development must be consistent with both the [development]

In past, the Council has reviewed and approved B-2 Community Business District conditional zoning for Wailuku properties designated Service Business/Single Family Residential in the Wailuku-Kahului Community Plan.<sup>12</sup> To ensure the compatibility of the zoning with neighboring uses and the Community Plan, Council adopted zoning conditions that, among other things: (1) limited the permitted uses to business and professional offices; (2) required that building and parking improvements retain the residential character of the existing neighborhood; and (3) imposed yard setbacks consistent with those in residential districts. In doing so, the Council concurred with findings that such conditional zoning "meets the intent of the Maui County General Plan and the objectives and policies of the Wailuku-Kahului Community Plan" and "meets the intent and purpose of the B-2 Community Business District and the subject property's Service Business/Residential designation in the Wailuku-Kahului Community Plan".<sup>13</sup>

Therefore, in the absence of an SBR Service Business Residential zoning ordinance, and in view of Council's previous findings and actions with regard to similarly situated SBR-designated properties, zoning the Property B-2 Community Business District with appropriate conditions would be consistent with the Wailuku-Kahului Community Plan designation of the Property.<sup>14</sup>

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plan and the zoning.' Because GATRI was subject to both the development plan as well as the zoning ordinance, GATRI was entitled only to the more restricted uses allowed by the development plan." (brackets in original) (citations omitted).

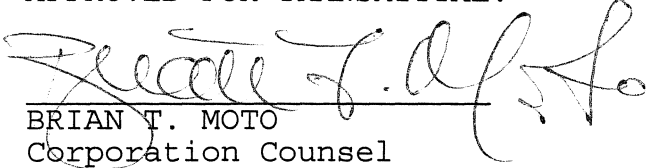
<sup>12</sup> See, e.g., Ordinance No. 2747 (1998), A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM THE R-1 RESIDENTIAL DISTRICT TO THE B-2 COMMUNITY BUSINESS DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATED AT KAILUA, WAILUKU, MAUI, HAWAII; and ORDINANCE NO. 3151 (2003), A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM R-1 RESIDENTIAL DISTRICT TO B-2 COMMUNITY BUSINESS DISTRICT (CONDITIONAL ZONING), FOR PROPERTY SITUATED AT 2112 KAOHU STREET, WAILUKU, MAUI, HAWAII.

<sup>13</sup> Comm. Rep. No. 98-226 (Dec. 8, 1998), at 2, 4.

<sup>14</sup> Former Planning Director Michael W. Foley also recommended that the Property be conditionally zoned B-2 Community Business District. See letter to Robert Carroll, Chair, and Members of the Land Use Committee, from Michael W. Foley, Planning Director (May 16, 2006).

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APPROVED FOR TRANSMITTAL:

A handwritten signature in cursive script, appearing to read "Brian T. Moto", written over a horizontal line.

BRIAN T. MOTO  
Corporation Counsel

S:\ALL\Advisory\JAG\Riggs Roberts CIZ.wpd

cc: Jeff Hunt, Director of Planning  
Colleen Suyama, Deputy Director of Planning  
Michael Hopper, Deputy Corporation Counsel  
Lawrence N.C. Ing  
Michele White, Legal Assistant