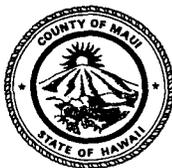


CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

July 17, 2007

MEMO TO: Bill Kauakea Medeiros
Council Member

F R O M: Edward S. Kushi, Jr.
Deputy Corporation Counsel

A handwritten signature in black ink, appearing to be "E. Kushi", written over a horizontal line.

SUBJECT: **HANA PHYSICIAN'S HOUSE** (TMK No. (2)1-3-006:004)
(PAF 07-141)

The purpose of this memorandum is to respond to questions posed in your memorandum, dated May 11, 2007, regarding "the Hana Physician's House" located at TMK No. (2) 1-3-006:004, Hana, Hawaii. Your memorandum states that, in the Fiscal Year 2008 Budget, the Council included a \$5,000 appropriation in the Human Concerns Program for "Hana Physician's House improvements", subject to a proviso that requires "that a long-term lease of at least five years for the property shall be executed for kidney dialysis."

We respond to your request of May 11, 2007, as follows:

- (1) A Board of Supervisors, as referenced in Executive Order No. 309, no longer exists, who is responsible for the management of the Hana Physician's House?

Executive Order No. 309 was issued in 1927 and signed by Wallace R. Farrington, Governor of the Territory of Hawaii, and states:

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I, Wallace R. Farrington . . . do hereby order that the following described public land be and the same is hereby set aside for public purposes, to-wit, for a site for the residence of the County Physician at Hana, Maui, to be under the control and management of the Board of Supervisors of the County of Maui.

Effective January 2, 1969, the Charter of the County of Maui established the legislative and executive branches of the County to succeed the previous Board of Supervisors. Under Article 15 of the 1969 Charter, entitled "Transitional Provisions", Section 15-6 states:

Section 15-6. Transfer of Records and Property.

All records, property and equipment whatsoever of any department which are assigned to another department by this charter, shall be transferred and delivered to the department to which said functions are so assigned.

Section 13-3 of the 1969 Charter states:

Section 13-3. Title to Property.

Except as otherwise provided by law, and except as to property acquired by the board of water supply, title to all property acquired by any department of the county shall be vested in the county.

Section 8-2.3 of the 1969 Charter, pertaining to the powers, duties, and functions of the director of finance, states, in part:

The director of finance shall be the fiscal officer of the county and shall:

. . .

13. Rent or lease county property, except property controlled by the board of water supply, and award concessions pursuant to policies established by the council.
14. Prepare and maintain a perpetual inventory of all lands owned, leased, rented or controlled by the county.

Section 8-4.3(10) of the Revised Charter of the County of Maui (1983), as amended (*i.e.*, the current Charter), also provides that

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the director of finance shall "[r]ent or lease county property and award concessions pursuant to policies established by the council."

Therefore, management of the subject property (or, at least, the rental or lease of the subject property) rests with the executive branch, specifically with the Director of Finance.

- (2) Is the use of the property under Executive Order No. 309 restricted to a residence for the County Physician, or can the property be used for other medical purposes?

Executive Order No. 309 specifically recites the public purpose as "a site for the residence of the County Physician at Hana, Maui...."

If the subject property is to be used for purposes other than a physician's residence, such as a facility for kidney dialysis, state law governing public lands requires that the approval of the Board of Land and Natural Resources be obtained.¹ Therefore, we

¹ Section 171-11, Hawaii Revised Statutes, in pertinent part, states:

Any public lands set aside by ... the governor of the Territory of Hawaii, shall be subject to the provisions of this section.

Lands while so set aside for such use or purpose ... shall be managed by the ... county ... having jurisdiction thereof, unless otherwise provided by law. Such ... county ... in managing such lands shall be authorized to exercise all of the powers vested in the board in regard to the issuance of leases, easements, licenses, revocable permits, concessions, or rights of entry covering such lands **for such use as may be consistent with the purposes for which the lands were set aside** on the same terms, conditions, and restrictions applicable to the disposition of public lands, as provided by this chapter **all such dispositions being subject to the prior approval of the board;**

Whenever portions of lands set aside for a public purpose to the various departments and agencies of the State, or to any city and county, county, or other political subdivision of the State are not presently utilized or required for the public purpose stated, the

Bill Kauakea Medeiros
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advise that, to ensure that the future use of the property conforms to state law, a petition for an order from the Board of Land and Natural Resources of the State of Hawaii be submitted pursuant to Section 171-11, Hawaii Revised Statutes.

We have not undertaken to investigate or verify the current State land use, community plan, and zoning designations for the subject property. Therefore, we do not opine at this time as to any land use or planning issues related to the proposed use of the property as a kidney dialysis facility. We recommend that the Department of Planning be consulted regarding the land use designations of the property and whether the proposed use as a kidney dialysis facility would be permissible under current law.

Further, we have not undertaken a review of any health or other related regulations pertaining to the operation of a kidney dialysis unit. Therefore, we do not opine as to the applicability or consequences of such regulations as they may pertain to the proposed use of the subject property.

- (3) May I please request that you research the current use of the property and transmit a copy of any lease agreement that the County has with the Hana Health Clinic. If a month-to-month lease agreement does exist as noted in the CDBG application, what is the process for termination of that lease?

Notwithstanding the statement set forth in the CDBG application, we have been informed by the Department of Finance that there is no current lease or license, month-to-month or otherwise, covering the subject property. Attached hereto is a copy of a February 16, 1984 "Rental Agreement and Disclosure", by and between the County and three individual police officers serving the Hana District, which month-to-month agreement has terminated.

board shall have the power, without withdrawing the order setting aside the lands, to dispose of any and all real property interest less than the fee in the portions of such lands where the disposition is for a use which is consistent or inconsistent with the purpose for which the land was set aside. (Emphases added.)

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- (4) If a formal lease agreement between the County and Hana Health Clinic does not exist, what are the legal ramifications?

If the house is not used as a physician's residence, any other use requires Board of Land and Natural Resources approval, as discussed above. Once such approval is obtained, County would then be able to proceed with award of a lease of the property, subject to the requirements and limitations of Chapter 3.40, Maui County Code, pertaining to the rental or lease of County property. As also discussed above, use of the property as a kidney dialysis facility requires a review of the property's land use entitlements and any applicable health or other related regulations.

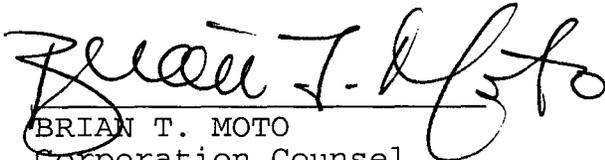
Call if further clarification or discussion is needed.

ESK:lkk

Enclosure

S:\ALL\ESK\Advisory\memo to medeiros re hana physician's house2.wpd

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

cc: Sheri Morrison, Managing Director (w/enclosure)
Kalbert Young, Director of Finance (w/enclosure)
Michele M. White, Legal Assistant, Department of Corporation
Counsel (w/enclosure)

	<u>NAME</u>	<u>AGE</u>	<u>SEX</u>	<u>SOCIAL SECURITY NUMBER</u>
1.	_____	_____	_____	_____
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____

ALL PARTIES AGREE:

1. Notice; termination of tenancy; increase in rent: In accordance with Chapter 521, H.R.S., landlord or tenant may terminate this rental agreement only upon twenty-eight (28) days notice to the other. In the event of voluntary demolition, landlord shall give tenant ninety (90) days notice to vacate. There shall be no increase in rent except upon written notice given twenty-eight (28) days preceeding the end of such tenancy.

2. Agents for service: The tenants herein hereby designate each other (excluding minors) as their duly constituted agents for service of notice, summons, or legal process for any claim or action arising out of the tenancy created herein. Service of process on any such agent so designated shall be service on the principal.

3. Assignability: This agreement is not assignable or subject to subleasing by the tenant.

LANDLORD AGREES AND DISCLOSES:

1. That he shall make available delivery possession of the described dwelling unit to the tenant on the date agreed to herein.

2. That he shall furnish to the tenant a written receipt for rents paid at the time of said payment. Cancelled checks shall constitute written receipt.

3. That the Director and/or Deputy Director of the Department of Finance, County of Maui is authorized to manage the premises.

4. That the County of Maui is the owner of said premises and the person indicated above is authorized to accept service on behalf of owner.

TENANT AGREES:

1. Rent: To pay the rent on the 1st day of each month for that month in advance without notice or demand at 200 South High Street, Wailuku, Maui, HI 96793.

2. Rental rate: \$ 900.00 per annum payable monthly at \$ 75.00 per month.

3. Daily rental rate: The daily rental rate shall be determined by dividing the applicable monthly rent by 30, regardless of the number of days in a particular month.

4. Tenant's services: The party responsible for the payment of the following services is shown below:

Yard Service	<u>Tenant</u>	Electricity	<u>Tenant</u>	Gas	<u>Tenant</u>
Water	<u>Tenant</u>	Telephone	<u>Tenant</u>		
Refuse Disposal	<u>Tenant</u>	Other	<u>Tenant</u>		

5. Failure to pay rent: If rent is not paid by the due date, the landlord or his agent may give tenant written notice that if payment is not made within 5 business days, the landlord may thereafter bring suit for possession of the rental unit, for rent due, or for any other damages suffered. The landlord or his agent may employ an attorney or collector and the tenant agrees to pay the reasonable attorney's fee, of not more than 25% of the unpaid rent, plus court costs and interest to which he may be entitled at the maximum rate permitted by law.

6. Failure to observe conditions: If the tenant shall fail substantially to perform covenants of this agreement, and shall continue to fail to perform after notification by the landlord or his agent, then the landlord may, after fifteen (15) days written notice, terminate this agreement. Tenants creating disturbance or offensive condition that cause or may cause damages or inconvenience to adjacent or neighboring persons or property will be subject to termination of this agreement.

7. Access: a. The tenant shall not unreasonably withhold his consent to the landlord to enter into the dwelling unit in order to inspect the premises; make necessary or agreed repairs, decorations, alterations, or improvements; supply services as agreed; or exhibit the dwelling unit to prospective purchasers, mortgagees, or tenants. b. The landlord shall not abuse this right of access nor use it to harass the tenant. Except in case of emergency or where impracticable to do so, the landlord shall give the tenant at least two days notice of his intent to enter and shall enter only during reasonable hours. c. The landlord shall have no other right of entry, except by court order, unless the tenant appears to have abandoned the premises. The landlord may, during any extended absence of the tenant, enter the dwelling unit as reasonably necessary for purposes of inspection, maintenance, and safe-keeping.

8. Interruption: Landlord shall not be liable to tenant for interruption of utility and other services beyond the control of the landlord, if such interruption occurs, it shall not be grounds for tenant to terminate this Rental Agreement.

9. Surrender of possession: Upon the termination of this Rental Agreement, tenant shall surrender possession of the premises in good order and condition, reasonable wear and tear expected.

10. Maintenance: That he will at his cost: (1) keep the premises in good order and in a clean, safe and sanitary condition, (2) repair damages to the premises caused by his neglect or misuse thereof, and (3) remove any congestion in the plumbing lines within the premises. If any defect in the premises are brought to tenant's attention, he shall give prompt notice thereof to landlord. (4) Comply with all provisions of any state or county code, ordinance, or regulation, the noncompliance of which would have the effect of endangering health or safety, governing maintenance, use, or appearance of that part of the premises which is occupied and used by tenant. (5) Comply with all obligations, restrictions, rules and the like of which landlord has given him ample notice, and which landlord can demonstrate are reasonably necessary for the convenience, safety and welfare of the premises and/or the protection of the landlord, other tenants, or any other person.

11. Waste or unlawful use: That he will not commit any waste, injury or damage to the premises, nor use the same for any unlawful, improper or offensive purposes.

12. Extended absences. That he will give the landlord fifteen (15) days written notice of anticipated extended absence. Tenant shall indemnify the landlord for any damages resulting from such absence in the event tenant fails to make reasonable efforts to so notify landlord of such absence.

13. Alterations: That he will not alter, add to or paint the premises, or bore any holes therein by drilling, nailing or otherwise, or fasten any furniture, equipment, appliances or shelves thereto.
14. Use: That he will use the premises only for his own abode and for no other purpose.
15. Disturbance: That he will not abuse or infringe upon the rights of others to the quiet enjoyment of their premises or of the common facilities appurtenant thereto.
16. Risk of loss: All furniture, fixtures and property shall be kept on the premises at the sole risk of tenant, and tenant will not hold landlord responsible for any damage thereto caused by theft, water, gas, fire, defective electric wiring or by or from any other cause or act of god.
17. Landlord's liability: Tenant shall defend, indemnify and hold landlord harmless from and against any and all loss or liability for death or injury to person or damage or loss to property occurring on the premises caused by the tenant or his agents and employees. Landlord shall not be liable for any failure, curtailment or interruption of any utility service. No diminution or abatement of rent shall be claimed or allowed for the failure, curtailment or interruption of any services or for inconvenience of discomfort arising from making of repairs or improvements to the premises.
18. Destruction of premises: In the event that the premises are destroyed by fire, tidal wave, earthquake, etc., or other natural disasters, not the fault of the tenant, this lease shall immediately terminate and any rent due shall be prorated accordingly.

19. Severability. If any provision of this contract is held invalid, the other provisions of this contract shall not be affected thereby. If the application of the contract or any of its provisions, to any person or circumstance is held invalid, the application of the contract and its provisions to other persons or circumstances shall not be affected thereby.

20. Homeowner's Liability Policy. Lessee shall provide and have in full force and effect during the duration of this agreement a homeowner's liability policy naming Lessor as insured.

IN WITNESS WHEREOF, the parties have executed this Rental Agreement in duplicate on the day and year written above, a copy of which, by law, shall be given to the tenant.

COUNTY OF MAUI

By *Frank Savarin*
Its Mayor

By *Henry T. C. Lee*
Its Director of Finance

By *Samuel Ah Loo*
Its Tenant Samuel Ah Loo

By *Robert Cordero*
Its Tenant Robert Cordero

By *Greg Paresa*
Its Tenant Greg Paresa

APPROVED AS TO FORM
AND LEGALITY:

David M. Gladwin
Deputy Corporation Counsel
County of Maui