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Mayor



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November 9, 2007

MEMO TO: Michael Molina, Chair  
Land Use Committee

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

A handwritten signature in black ink, appearing to read "Brian T. Moto for".

SUBJECT: **CHANGE IN ZONING AND PROJECT DISTRICT PHASE I APPROVAL  
FOR "HONUUA'ULA/WAILEA 670" RESIDENTIAL DEVELOPMENT (LU-  
38)**

I. Introduction.

This memorandum is in response to your memorandum, dated September 18, 2007, which states, in part:

At its recessed September 17, 2007 meeting, the Land Use Committee requested that you opine whether the attached Warranty Deed dated July 24, 2007, and recorded July 25, 2007, is sufficient to demonstrate clear title for the subject property (TMK: (2) 2-1-08:056 and (2) 2-1-08:071). I would note that, in addition to the referenced Warranty Deed, the Committee received, by correspondence dated August 3, 2007, from B. Martin Luna, Esq., Carlsmith Ball LLP, a copy of the attached preliminary title report dated September 16, 2005, prepared by Title Guaranty of Hawaii, Incorporated.

Based on the attached documents, may I please request that you respond whether title for the subject property is sufficiently clear for the Committee to proceed with the applications pending before it?

Our Department has reviewed the following documents:

1. Warranty Deed dated July 24, 2007, and recorded on July 25, 2007.

2. Preliminary title report dated September 16, 2005, prepared by Title Guaranty of Hawaii, Incorporated.
3. Preliminary title report dated July 25, 2007, prepared by Title Guaranty of Hawaii, Incorporated.
4. Letter dated September 19, 2007 from Title Guaranty of Hawaii, Incorporated, to Mr. Charles Jencks.

## II. Procedural background.

Daniel K. Ide, on behalf of WCPT/GW LAND ASSOCIATES, LLC, filed the Change in Zoning and Project District Phase 1 Approval applications on June 30, 2000, and the Department of Public Works and Waste Management certified the applications as complete and ready for processing on July 10, 2000.<sup>1</sup> Revised applications were received on September 18, 2000 and the Department of Public Works and Waste Management re-certified the applications as complete on September 20, 2000.<sup>2</sup> The applications were filed pursuant to Maui County Code ("MCC") Chapter 19.510, Application and Procedures, MCC Chapter 19.90, Kihei-Makena Project District 9 (Wailea 670), and MCC Chapter 19.45, Project District Processing Regulations.<sup>3</sup>

## III. Relevant Maui County Code sections.

MCC Section 19.45.040(A)(1) states:

A. The developer of land designated as a project district on an adopted community plan may initiate a project district development of part or all of the project district by written application to the planning director. The application shall include the following:

1. Proof of ownership and, if appropriate, proof of authorization by owner;<sup>4</sup>

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<sup>1</sup> Maui Planning Department's Report to the Maui Planning Commission October 30, 2000 Meeting, at 2.

<sup>2</sup> *Id.*

<sup>3</sup> WCPT/GW LAND ASSOCIATES, LLC, subsequently sold the property to HONU'ULA PARTNERS, LLC, the current applicants.

<sup>4</sup> MCC Section 19.45.040(B) allows the council or the planning commission to also initiate a project district development "by written application to the planning director." However, there is no requirement for such an application to include any documentation of ownership. See MCC Section 19.45.040(C).

MCC Section 19.510.040(A) states, in relevant part:

A. All applications for change of zoning shall be processed as applications which require a public hearing in accordance with the procedures set forth in sections 19.510.010 and 19.510.020 of this code and the following requirements....

MCC Section 19.510.010(A)(1) states, in relevant part:

Any department or agency of the State or County or any person having a legal or equitable interest in property or a person acting as the authorized representative of the person having a legal or equitable interest in the land for which a change in zoning is sought may file an application with the appropriate planning commission by filing the application with the department of planning.

MCC Section 19.510.010(D)(1) states:

D. Content of Application. All applications shall provide the following information:

1. Documents which identify the owner of the subject parcel of land and the signature or written authorization for the application by the owner; provided, however, that this requirement shall not apply to revisions or amendments proposed by the planning director or the County council;

#### IV. Analysis and conclusion.

In Hawaii, zoning is treated as a legislative act. Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawai`i 465, 474, 78 P.3d 1, 10 (2003) ("Accordingly, we conclude that a zoning ordinance is a legislative act and is subject to the deference given legislative acts."). There is no requirement that a property have "clear title" before a municipality acts to zone property. The requirement that an application for a zoning change include evidence of ownership arises out of the Maui County Code.<sup>5</sup> The Maui County Code requires only that documentation be provided

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<sup>5</sup> In comparison, MCC Section 18.12.030(E)(13)(a) requires that final plats of subdivision applications include a "certificate signed and acknowledged by all persons vested with record title in the land subdivided...." MCC Section 18.12.040 further requires a complete title report issued by a licensed title company showing all persons vested with record title in the land subdivided.

that the applicant owns the property and not that the applicant has clear title.<sup>6</sup>

To convey real property it is generally sufficient that a seller have marketable title, which means that the seller has a good and complete chain of title, without any breaks, and can obtain title insurance.<sup>7</sup> Real property must be marketable to be insured, and title companies, with legal advice, determine whether title is good, and thus insurable, or whether the chain of title is broken. If the chain is broken, the owner will generally not be able to obtain title insurance. Most real property in Hawaii is conveyed by a warranty deed.<sup>8</sup>

In this matter the applicant has produced a warranty deed showing WCPT/GW LAND ASSOCIATES, LLC, as Grantor, and HONUA'ULA PARTNERS, LLC, as Grantee. They have also produced a preliminary title report prepared by Title Guaranty of Hawaii, Incorporated, dated July 25, 2007, which states in relevant part:

Title Guaranty of Hawaii, Incorporated, hereby reports that, subject to those matters set forth in Schedule "B" hereof, the title to the estate or interest to the land described in Schedule "C" hereof is vested in:

HONUA'ULA PARTNERS, LLC,  
A Delaware limited liability company  
as Fee Owner

The Applicant has also produced a letter from Title Guaranty of Hawaii, Incorporated, dated September 19, 2007, which reads in relevant part:

Title Guaranty of Hawaii, Incorporated hereby certifies that an examination has been made of those indices in the State of Hawaii at (a) the Offices of the Clerks of the Supreme Court and of the Circuit Court of the Judicial Circuit within which the land is located, (b) the Office of the Clerk of the District Court of the

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<sup>6</sup> Pursuant to Chapter 669, Hawaii Revised Statutes, the circuit courts of the State have jurisdiction over actions to quiet title. If the chain of title to a parcel of real property is broken, persons claiming an estate or interest in real property may file an action to quiet title and adjudicate any adverse claims.

<sup>7</sup> See Chapter 9, Hawaii Real Estate Law Manual (1997).

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

United States for the District Of Hawaii, (c) the Office of the Registrar of Conveyances, and (d) the Office of the Tax Assessor and Director of Finance of the County within which the land is located. As shown by said indices, we certify that the record title to the premises described in Exhibit "A" attached hereto, (the "Property"), is vested in Honua'ula Partners, LLC, a Delaware limited liability company, as of July 25, 2007.

Title Guaranty of Hawaii, Incorporated as agent for Talon Group, a Division of First American Title Insurance Company, confirms that on July 25, 2007, an Owners Policy of Title Insurance was issued to Honua'ula Partners, LLC, as the fee simple owner of the Property.

This letter only confirms ownership of the Property and does not set forth any easements, encumbrances or other matters that may affect the Property.

We are not aware of any judgment or court order that is inconsistent with, or contrary to, the ownership claims of Honua'ula Partners, LLC, as evidenced by the Warranty Deed and title reports discussed above. We are also not aware of any judgment or court order confirming or upholding the ownership claims asserted by Ms. Joyclynn Costa in a statement submitted by her to the Land Use Committee.<sup>9</sup>

In light of the deed and title reports submitted by the applicant, and in the absence of any court judgments or orders impairing or affecting the title asserted by the applicant, we have no reason to believe that title to the subject property is clouded. Therefore, we conclude that there are no substantive issues relating to ownership and land title that prevent the Land Use Committee from acting upon the proposed change in zoning and project district phase I approval. Indeed, we note that prior Councils and the State Land Use Commission have in past reviewed and adopted land use measures relating to the property.<sup>10</sup> We further note the general principle that zoning is concerned with

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<sup>9</sup> See "CAVEAT (Amended) By and For a Natural Person Living HuMan Being heir to the Kingdom of Hawaii - Joyclynn Costa". See also Paiko v. Boeynaems, 21 Haw. 196 (1912) ("Mere verbal assertions of ownership are not regarded as clouds upon title.")

<sup>10</sup> See, e.g., Ord. No. 2172 (1992) (Kihei-Makena Project District 9 (Wailea 670)).

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the use of land, and not primarily with its ownership or the identity of its user at any given time.<sup>11</sup>

JAG:ln

cc: Jeffrey Hunt, Planning Director  
Colleen Suyama, Deputy Planning Director  
Michael Hopper, Deputy Corporation Counsel  
Michele White, Legal Assistant

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<sup>11</sup> McQuillin Mun. Corp. § 25.07 (3<sup>rd</sup> ed.); Rathkopf's The Law of Zoning and Planning § 2:15, n.1 (2007).