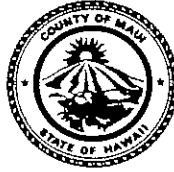


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February 6, 2006

MEMO TO: Robert Carroll, Chair  
Land Use Committee

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

SUBJECT: **CONDITIONAL PERMIT FOR "HALE HOOKIPA INN" (MAKAWAO)**  
**(LU-26); DISTRICT BOUNDARY AMENDMENT, CHANGE IN ZONING,**  
**AND CONDITIONAL PERMIT FOR "BANYAN TREE BED & BREAKFAST"**  
**(MAKAWAO) (LU-40)**

This memorandum is in response to your request for an opinion regarding the applicability of the affordable housing requirements of Chapter 2.94, Maui County Code ("MCC"), to the conditional permit applications for Hale Ho'okipa Inn and Banyan Tree Bed & Breakfast, transient vacation rentals in Makawao.

I. BACKGROUND

A. Hale Ho'okipa Inn.

The applicant, Ms. Cherie Attix, owner of Hale Ho'okipa Inn, is requesting a conditional permit to operate a four-bedroom transient vacation rental within the Frank and Theresa Gomes residence, a property listed on the State and National Register of Historic Places. The property is zoned R-3 Residential and has been in transient vacation rental use since 1996.

A four-bedroom "bed and breakfast", Hale Ho'okipa Inn does not qualify for a Bed and Breakfast Home Permit under Chapter 19.64, MCC, which requires that the owner-proprietor reside, on a full-time basis, within the main dwelling that is used for transient vacation rental purposes.<sup>1</sup> When Ms. Attix filed her application

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<sup>1</sup> §19.64.030, MCC, states, in relevant part:

she resided in a cottage on the premises. After the filing of her application, Ms. Attix purchased the adjacent property and now resides there.

B. Banyan Tree Bed & Breakfast.

The Banyan Tree Bed & Breakfast is currently in operation, using seven rooms within two structures (Resident Manager's House and the Servant's Cottage). The original application submitted by Chris Hart & Partners, on behalf of the owner, Mr. Marty Herling, was for an eight-room bed and breakfast/short-term vacation rental within the two existing structures and an addition to be constructed to the Resident Manager's House. The original application also proposed a number of special events per year limited to 50 to 75 persons, and construction of a third accessory dwelling to be used as a residence for the owner.

While the subject applications were pending before the Maui Planning Commission, Mr. and Mrs. Richard and Lynn Rasmussen ("Rasmussen's") filed a Petition to Intervene in the Land Use Commission Special Use Permit proceeding. The Rasmussen's and Mr. Herling entered into a Settlement Agreement pursuant to which Mr. Herling agreed, among other things, to the following restrictions and conditions:

1. That the property shall not be used as a venue for special events;

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Bed and breakfast homes shall be subject to the following restrictions and standards:

- C. The owner-proprietor or lessee-proprietor shall be a resident of the county and shall reside, on a full-time basis, within the single-family dwelling unit being used as the bed and breakfast home.

See also Section 19.04.040, MCC:

"Bed and breakfast home" means a use in which overnight accommodations are provided to guests for compensation, for periods of less than thirty days, in a detached single-family dwelling unit occupied by the owner-proprietor or lessee-proprietor. The home shall include bedrooms, one kitchen, and living areas used by the family occupying the home and shall include no more than six bedrooms for short-term rental, as specified within the zoning district provisions of this title.

2. That operation of the bed and breakfast complex shall be consistent with the character of the existing neighborhood;
3. That uses on the subject premises shall create no impact greater than a typical residential home in the Sunnyside neighborhood;
4. That the occupancy policy applicable to the bed and breakfast units shall be consistent with Maui County and federal standards;
5. That no exterior live amplified sound shall be permitted on the premises;
6. That guests of the bed and breakfast facility shall be required to limit the number of off-site visitors to the property, consistent with the goal of minimizing the impact of the use upon neighborhood residents;
7. That the number of guest rooms on the subject property shall be restricted to a maximum number of seven (7), with the understanding that no room for transient guests shall be contained in any future residential dwelling to be constructed on the premises;
8. That any future residential dwelling to be built on the subject property will be used for personal use of the owner/lessor of the property and shall be constructed in conformance with that section of the Maui County Code related to accessory dwellings;
9. That no portion of the accessory dwelling shall exceed 20 feet in height, regardless of the number of stories;
10. That the use of the accessory dwelling shall be limited to long-term residential use only and not less than 90 days per term;
11. That a Change in Zoning from County Interim to RU-1.0 Rural One Acre will be requested; and
12. That there shall be no future subdivision and/or horizontal property regime relative to TMK: 2-4-002:002.

Like the Hale Ho'okipa Inn described above, the Banyan Tree Bed & Breakfast does not qualify for a Bed and Breakfast Home Permit under Chapter 19.64, MCC. The owner of the Banyan Tree Bed & Breakfast lives on the property in one of the existing rooms, but desires to construct, and reside in, a detached accessory dwelling on the property. The Banyan Tree Bed & Breakfast also has more bedrooms than the total number allowed under Chapter 19.64, MCC.<sup>2</sup>

## II. APPLICABLE ORDINANCES.

Section 2.94.030(A), MCC, pertaining to County's affordable housing policy for hotel-related developments, states, in relevant part:

An applicant shall be required to construct affordable housing at a minimum of one affordable housing unit for every four apartment-hotel, hotel, or motel rooms or fraction thereof. Affordable housing requirements shall be assessed by the department of public works upon the issuance of any building permit, and shall be available for occupancy concurrent with or prior to occupancy of the apartment-hotel, hotel, or motel.

Section 2.94.020, MCC, defines "apartment-hotel" as follows:

"Apartment-hotel" means a building or portion thereof used as a hotel as defined in chapter 19, Maui County Code, and containing the combination of individual guest rooms or suites or rooms with apartments or dwelling units.

Section 2.94.020, MCC, defines "hotel" and "motel" as follows:

"Hotel" or "motel" means a transient vacation rental, **other than a bed and breakfast home**, containing lodging or dwelling units. (Emphasis added.)

Section 2.94.050, MCC, lists the following exclusions to the affordable housing policy:

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<sup>2</sup> §19.64.030(E), MCC states:

The number of bedrooms used for short-term rental in the bed and breakfast home shall be no greater than six and shall be subject to the provisions of section 19.64.050 of this chapter. The total number of guests shall be limited to two guests per bedroom.

A. The renovation or improvement of an existing apartment-hotel, hotel, or motel project in which no additional units or rooms will result;

B. The development of an apartment-hotel, hotel, or motel project, including the construction of additional units or rooms to an existing projects, [sic] subject to a prior requirement by or agreement with the county for participation in an affordable housing program, provided that such participation is verified or substantiated to be specifically applicable to the development;

C. The development of an apartment-hotel or hotel project that will contain not more than twenty units or rooms, unless it contains retail commercial uses which cater primarily to transient guests of the project or is to be operated or operates primarily as transient vacation rentals;

D. To any hotel development which has been required to provide employee or affordable housing by a planning commission decision entered prior to the effective date of the ordinance codified in this chapter. (Emphasis added.)

Section 2.94.060, MCC, pertaining to other terms and conditions, states:

If a development of more than twenty units is represented to be an apartment house, multiple-family, single-family, or two-family dwelling project, the department of public works may impose terms and conditions and occupancy on the building permits to insure that the development will be maintained for such use and not converted to another without being subject to the provisions of this chapter. (Emphasis added.)

### III. ANALYSIS.

The Supreme Court of Hawai'i has stated:

When interpreting a municipal ordinance, we apply the same rules of construction that we apply to statutes.<sup>3</sup>

The Supreme Court of Hawai'i has further stated:

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<sup>3</sup> Coon v. City and County of Honolulu, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002).

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists....

In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. This court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning.<sup>4</sup> (Citations omitted.) (Ellipsis in original.)

A. The definition of "hotel" and "motel" set forth in Chapter 2.94, MCC, excludes bed and breakfast homes.

As discussed above, Section 2.94.020, MCC, defines a "hotel" and "motel" as a transient vacation rental, other than a bed and breakfast home, containing lodging or dwelling units. Chapter 2.94, MCC, does not further define "bed and breakfast home".

Section 19.04.040, MCC, pertaining to zoning provisions and definitions, does have a definition of "bed and breakfast home".<sup>5</sup> As noted above, this definition limits the number of bedrooms being used for short-term rental to six and requires that the detached single-family dwelling unit being used as a bed and breakfast be occupied by the owner-proprietor or lessee-proprietor. However, this definition applies only for purposes of Title 19 of the Maui County Code, and does not apply to other titles, such as Title 2,

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<sup>4</sup> Kim v. Contractors License Board, 88 Hawai'i 264, 269, 965 P.2d 806, 812 (1998).

<sup>5</sup> §19.04.040, MCC.

which sets forth the affordable housing policies for hotel-related developments.<sup>6</sup>

Consequently, although a property may not meet the definition of "bed and breakfast home" under Section 19.04.040, MCC, it may still be a "bed and breakfast home" for purposes of Section 2.94.020, MCC, and, therefore, excluded from the definition of "hotel" and "motel", as used in Chapter 2.94, MCC.

Chapter 2.94, MCC, was codified in 1992, pursuant to Ordinance No. 2093. At the time of the adoption of Ordinance No. 2093, Chapter 19.64, MCC, pertaining to bed and breakfast homes and Type 1, Type 2, and Type 3 permits, had not yet been adopted. When Chapter 19.64, MCC, was codified pursuant to Ordinance No. 2609 (1997), Chapter 2.94, MCC, was not amended and the reference to "bed and breakfast home" in Section 2.94.020 remained as is. Further, unlike the definition of "apartment-hotel" in Section 2.94.020, MCC, the definition of "hotel" and "motel" in Section 2.94.020, MCC, does not cross-reference Title 19, MCC. This provides additional support for the conclusion that the term "bed and breakfast home", as used in Chapter 2.94, MCC, is not necessarily synonymous with, or identical to, the term "bed and breakfast home" as used in Title 19, MCC.

Inasmuch as the Banyan Tree Bed & Breakfast and the Hale Ho'okipa Inn involve the rental of bedrooms in single-family dwelling units and not the rental of independent, self-contained dwelling units with private kitchen and bath facilities, neither the Banyan Tree Bed & Breakfast nor the Hale Ho'okipa Inn constitute an "apartment-hotel" for purposes of Chapter 2.94, MCC.<sup>7</sup>

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<sup>6</sup> §19.04.040, MCC, pertaining to definitions, states:

When used in title 19 of this code, unless the context clearly indicates a different meaning, **for the purposes of title 19** the following words and terms shall be defined as follows: ... (Emphasis added.)

<sup>7</sup> See §19.04.040, MCC, definition of "apartment or apartment unit". ("Apartment or apartment unit" means one or more rooms with private bath and kitchen facilities comprising an independent self-contained dwelling unit in a building containing three or more dwelling units.")

- B. Despite its ambiguity, Section 2.94.050(C), MCC, can be reasonably interpreted to exclude from the affordable housing requirement hotel projects containing not more than twenty units or rooms.

As discussed above, we are of the opinion that, for purposes of Chapter 2.94, MCC, the definition of "hotel" and "motel" excludes bed and breakfast homes, and, therefore, that bed and breakfast homes are not subject to affordable housing requirements imposed under Chapter 2.94, MCC. Even assuming, for the sake of argument, that bed and breakfast homes like Hale Ho'okipa and the Banyan Tree Bed & Breakfast are "hotel" projects for purposes of Chapter 2.94, MCC, such projects are excluded under Section 2.95.050(C), MCC.

As discussed above, Section 2.94.050(C), MCC, excludes from the affordable housing policy the following:

The development of an apartment-hotel or hotel project that will contain not more than twenty units or rooms, unless it contains retail commercial uses which cater primarily to transient guests of the project or is to be operated or operates primarily as transient vacation rentals. (Emphasis added.)

The first part of subsection (C) is clear in its waiver of affordable housing requirements for hotel projects that contain not more than twenty units and do not have retail commercial uses. However, the clause, "or is to be operated or operates primarily as transient vacation rentals," adds an ambiguity.<sup>8</sup> Read literally,

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<sup>8</sup> This ambiguity was raised by Mayor Lingle at an October 9, 1991 meeting of the Planning and Economic Development Committee. The transcript reads:

The last Section on Exclusions. If you could turn to this, its 050(c). If you read it, it's not too clear what it really means and not clear what's being excluded. It says 'the development of apartment hotel or hotel that will contain not more than 20 units unless it contains retail commercial uses which cater primarily to transient guests of the project or is to be operated primarily as transient.' We don't understand what that means exactly. So we just ask for some clarification. Planning and Economic Development Committee, Tr. at 23 (October 9, 1991).

The ambiguity was also raised by the Mayor in written comments



the clause potentially renders all of subsection (C) meaningless because all "apartment-hotel" or "hotel" projects operate as transient vacation rentals, and, under Section 2.94.020, MCC, are defined as "transient vacation rental[s]".<sup>9</sup>

When construing ambiguous or unclear statutes, the Supreme Court of Hawai'i has stated:

A statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses. A rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable. The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality.<sup>10</sup> (Citations omitted.)

To avoid an interpretation of subsection (C) that renders it meaningless, the clause, "or is to be operated or operates primarily as transient vacation rentals," may be reasonably interpreted as a reference to the phrase, "retail commercial units", found earlier in the same sentence. Understood in this light, the clause in question addresses situations where retail commercial uses in small hotels are used not just for retail uses, but also as transient vacation rentals, thus potentially exceeding the twenty-room limit of subsection (C).

C. Excluding bed and breakfast homes from the affordable housing requirements imposed under Chapter 2.94, MCC, is consistent with the overall stated intent and purpose of Chapter 2.94, MCC.

The exclusion of bed and breakfast homes from the affordable housing requirement of Chapter 2.94 is supported by the stated purpose of Chapter 2.94, MCC. The affordable housing requirements imposed by Chapter 2.94 were based on a legislative finding that "hotel developments generate a substantial amount of both direct

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submitted to the Planning and Economic Development Committee regarding Bill No. 101 (1991). Comm. Rep. No. 91-302, at 6.

<sup>9</sup> §2.94.020, MCC.

<sup>10</sup> Kim v. Contractors License Bd., 88 Hawai'i 264, 270 (1998).

and indirect employment opportunities".<sup>11</sup> By contrast, bed and breakfast homes typically generate little in the way of direct employment, and are usually managed or overseen by an owner-proprietor or lessee-proprietor who resides on or near the property. In terms of its "socio-economic impacts", Hale Ho'okipa Inn has been characterized as part of a trend of "home based businesses" serving as "an alternative to traditional employment...."<sup>12</sup> In terms of its economic impact, the Banyan Tree Bed & Breakfast has been characterized by its owner as an "alternative to the highly centralized, large scale, resort tourism model...."<sup>13</sup>

Further, in adopting Chapter 2.94, MCC, the Council stated that "it is the objective of this chapter to require **apartment-hotel, hotel, and motel** developers to construct affordable housing units for addition to the countywide inventory of affordable housing."<sup>14</sup> (Emphasis added.) This statement of the ordinance's objectives does not include bed and breakfast home operators among those required to construct affordable housing units.<sup>15</sup>

As discussed in a previous memorandum of law written by our Department to your Committee, constitutional law on government-required dedications and other development conditions allows the Council to impose affordable housing requirements provided that the County is able to show that the proposed development will cause or exacerbate a community problem (in this case, affordable housing) and that the exaction is roughly proportional to the problems created by the development.<sup>16</sup> It is not at all clear that sufficient findings have been made to date to support the

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<sup>11</sup> §2.94.010(A), MCC.

<sup>12</sup> Maui Planning Department's Report to the Maui Planning Commission, February 26, 2002 Meeting, at 10;

<sup>13</sup> Maui Planning Department's Report to the Maui Planning Commission, July 24, 2001 Meeting, at 14.

<sup>14</sup> §2.94.010(B), MCC.

<sup>15</sup> See also Planning and Economic Development Committee, Tr. at 33 (October 9, 1991) (comments of Planning Director Brian Miskae, differentiating resort hotels from smaller hotels).

<sup>16</sup> See Memorandum to Robert Carroll, Chair, Land Use Committee (November 15, 2005), at 2 (citing Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987), Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309 (1994)).

imposition of affordable housing requirements of the type and scale described in Chapter 2.94, MCC, upon bed and breakfast homes. Rather, the provisions and legislative history of Chapter 2.94, MCC, indicate an intent to exempt smaller hotels (and bed and breakfast homes) from the burden of Chapter 2.94 affordable housing requirements.

- D. Excluding bed and breakfast homes from the affordable housing requirements imposed under Chapter 2.94, MCC, is consistent with Section 2.94.060, MCC, pertaining to other terms and conditions.

Section 2.94.060, MCC, (cited above) authorizes the Department of Public Works and Environmental Management to impose building permit terms and conditions that prevent residential projects consisting of more than twenty units from being converted to other uses, including, presumably, hotel uses. The authority granted under Section 2.94.060, MCC, apply, however, only in connection with developments of more than twenty units, a number consistent with Section 2.94.050(C), MCC, and its exemption from affordable housing requirements for small apartment-hotels and hotel projects.

Therefore, excluding bed and breakfast homes from affordable housing requirements for hotels is consistent with Section 2.94.060, MCC.

- E. To our knowledge, no bed and breakfast homes reviewed and approved administratively or legislatively have been subjected to affordable housing requirements under Chapter 2.94, MCC.

Based on information provided to us, no bed and breakfast home has, to date, been required to meet the affordable housing requirements imposed by Chapter 2.94, MCC. For example, O.W. Ranch, LLC, was granted a Land Use Commission Special Use Permit and a Conditional Permit to use twelve rooms for transient vacation rental use in three separate structures. The Old Wailuku Inn was granted a Bed & Breakfast Type 3 Permit for six rooms and a Conditional Permit for the use of a seventh room in the main dwelling and three bedrooms in a separate dwelling. Neither operation was the subject of an affordable housing requirement under Chapter 2.94, MCC.

It is our further understanding that the Department of Planning does not and has not interpreted Chapter 2.94, MCC, as applying to bed and breakfast homes like the Banyan Tree Bed & Breakfast and Hale Ho'okipa Inn. Ordinarily, courts will give

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deference to decisions of administrative agencies acting within the realm of their expertise.<sup>17</sup>

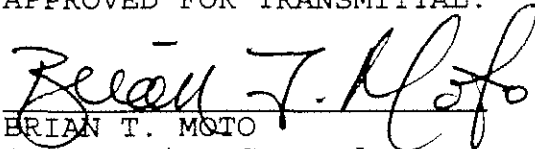
IV. CONCLUSION

Hale Ho'okipa Inn and the Banyan Tree Bed & Breakfast are not subject to the affordable housing requirements of Chapter 2.94, MCC.

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APPROVED FOR TRANSMITTAL:

  
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<sup>17</sup> Coon v. City and County of Honolulu, 98 Hawai'i 233, 245 (2002).