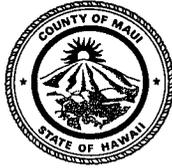


CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

**DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7742 FAX 270-7152**

February 4, 2010

MEMO TO: Bill Kauakea Medeiros, Chair
Infrastructure Management Committee

F R O M: David A. Galazin *DAG*
Deputy Corporation Counsel

SUBJECT: **BILL RELATING TO DEVELOPMENT ON STEEP TERRAIN (IM-34)**

I. INTRODUCTION

This memorandum is in response to your memorandum, dated January 15, 2010, requesting advice regarding issues raised during the Infrastructure Management Committee site inspection of January 11, 2010. Your memorandum states as follows:

At the site inspection, a testifier questioned the possibility of pursuing a district boundary amendment of nearby, privately-owned land from the Agricultural District to the Conservation District due, in part, to health and safety concerns related to development on steep terrain.

May I please request clarification on the process for reclassifying land in this manner and whether the County's pursuit of such an action, if successful, might be considered a taking? Also, please provide comment on any other legal concerns associated with this type of potential land reclassification that you might have at this time.

As your request does not identify any specific property or proposal for a district boundary amendment, the advice provided in this memorandum is general in nature only. We do not address any specific property in the vicinity of the Infrastructure Management Committee site inspection of January 11, 2010. We have not researched any land use entitlements of properties in the area, nor have we investigated any public health and safety matters alleged

during the site inspection. What follows is a general discussion of land use laws pertaining to district boundary amendments.

II. CHAPTER 205, HAWAII REVISED STATUTES ("HRS"), GOVERNS THE CLASSIFICATION AND RECLASSIFICATION OF ALL LAND IN THE STATE OF HAWAII INTO ONE OF FOUR DISTRICTS

Pursuant to HRS Chapter 205, all land in the State of Hawaii is classified into one of four major land use districts: urban, rural, agricultural, and conservation. HRS Section 205-1 establishes a State Land Use Commission ("LUC"). HRS Section 205-2 authorizes the LUC to establish district boundaries, and sets forth the criteria by which the LUC is to determine boundaries.

III. DEPENDING ON THE SIZE OF THE PARCEL TO BE RECLASSIFIED AND WHETHER IT IS DESIGNATED AS "IMPORTANT AGRICULTURAL LAND", A DISTRICT BOUNDARY AMENDMENT WOULD BE SUBJECT TO THE APPROVAL OF THE LUC OR THE COUNTY COUNCIL

HRS Section 205-3.1, pertaining to district boundary amendments, states, in part:

(a) District boundary amendments involving lands in the conservation district, land areas greater than fifteen acres, or lands delineated as important agricultural lands shall be processed by the land use commission pursuant to section 205-4.

(b) Any department or agency of the State, and department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified may petition the appropriate county land use decision-making authority of the county in which the land is situated for a change in the boundary of a district involving lands less than fifteen acres presently in the rural and urban districts and lands less than fifteen acres in the agricultural district that are not designated as important agricultural lands.

(c) District boundary amendments involving land areas of fifteen acres or less, except as provided in subsection (b), shall be determined by the appropriate county land use decision-making authority for the district and shall not require consideration by the land

use commission pursuant to section 205-4; provided that such boundary amendments and approved uses are consistent with this chapter. The appropriate county land use decision-making authority may consolidate proceedings to amend state land use district boundaries pursuant to this subsection, with county proceedings to amend the general plan, development plan, zoning of the affected land, or such other proceedings. Appropriate ordinances and rules to allow consolidation of such proceedings may be developed by the county land use decision-making authority.

Proposed district boundary amendments reviewed by the LUC must follow the procedures prescribed in HRS Chapter 205 and Title 15, Subtitle 3, Chapter 15, Hawaii Administrative Rules ("Land Use Commission Rules"). District boundary amendments reviewed by the County Council are processed pursuant to Chapter 19.68, Maui County Code ("MCC"), and require review and recommendation by the appropriate planning commission prior to consideration by the County Council.¹

Pursuant to HRS Chapter 205 and MCC Section 19.68.020, the County itself may propose a district boundary amendment; however, in a memorandum dated August 30, 2006, to G. Riki Hokama, Council Chair, from Jesse K. Souki, Deputy Corporation Counsel, regarding the Lanai City Project, our Department advised that the County Council, as a legislative body, is not a "department" or "agency", as such terms are used in HRS Chapter 205, and, therefore, cannot initiate a district boundary amendment.²

IV. RECLASSIFICATION OF LAND FROM AGRICULTURAL TO CONSERVATION IS NOT A PER SE TAKING

The Takings Clause of the Fifth Amendment to the U.S. Constitution, which applies to state government through operation of the Fourteenth Amendment, states that private property cannot "be taken for public use, without just compensation." The United States Supreme Court has recognized, however, that "government regulation of private property may, in some instances, be so

¹ We recommend that you contact the Department of Planning for further details regarding the processing of district boundary amendments.

² See Exhibit "1".

onerous that its effect is tantamount to a direct appropriation or ouster and that such 'regulatory takings' may be compensable under the Fifth Amendment."³ U. S. Supreme Court decisions identify two categories of regulatory action that will be deemed *per se* takings for Fifth Amendment purposes: (1) where government requires an owner to suffer a permanent physical invasion of property; and (2) where the regulation completely deprives an owner of "all economically beneficial us[e]" of the property.⁴

The U.S. Supreme Court has further held:

Outside these two relatively narrow categories (and the special context of land use exactions. . .), regulatory takings challenges are governed by the standards set forth in Penn Central Transp. Co. v. New York City. The Court in Penn Central acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action" - for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" - may be relevant in discerning whether a taking has occurred.⁵ (citations omitted).

HRS Section 205-2(e) states:

(e) Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife,

³ Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

⁴ *Id.* at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019).

⁵ *Id.* at 538-39.

including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and *other permitted uses not detrimental to a multiple use conservation concept.* (Emphasis added.)

A district boundary amendment, by itself, does not entail a physical invasion of property, and some economic uses are clearly permissible within lands that are classified in the Conservation District. Although certain activities that may be undertaken within the Agricultural District may be prohibited in the Conservation District, a district boundary amendment reclassifying property from the Agricultural District to the Conservation District would not constitute a *per se* taking in and of itself.

Whether such a reclassification would constitute a regulatory taking under Penn Central requires an analysis of facts and circumstances material and relevant to the reclassification, such as the economic impact of the reclassification and the extent to which the action interferes with distinct investment-backed expectations, if any. In the absence of particulars regarding a possible district boundary amendment, we cannot opine further.

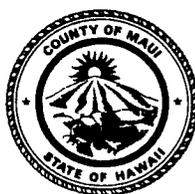
DAG:ln

cc: Jeffrey S. Hunt, Planning Director
Michael J. Hopper, Deputy Corporation Counsel
Webpage

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

ALAN M. ARAKAWA
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

August 30, 2006

MEMO TO: G. Riki Hokama
Council Chair

FROM: Jesse K. Souki *JS*
Deputy Corporation Counsel

SUBJECT: Lanai City Project (PAF 06-104)

A. Introduction.

The purpose of this memorandum is to respond to your memorandum, dated June 2, 2006, requesting legal advice regarding the "Lanai City Project," a proposed development on a 115-acre County-owned property adjacent to Lanai High and Elementary School.¹

B. Question posed.

May Council or its designated representative initiate an application for a State Land Use Commission ("LUC") district boundary amendment?

¹ This memorandum follows a memorandum to Ken Fukuoka, Director, Office of Council Services, from Traci Fujita Villarosa, First Deputy Corporation Counsel, dated May 16, 2006, regarding the appropriation of \$100,000 for expenditure by the Office of Council Services for the Lanai City Project. A copy of the memorandum is attached hereto as Exhibit "A". The May 16, 2006 memorandum was prepared on the assumption that "the purpose and intent of the proposed OCS budget appropriation is to research, prepare, and draft appropriate legislation and related documents pertinent to the rezoning of the property."

G. Riki Hokama, Chair
County Council
August 30, 2006
Page 2

C. Discussion.

1. Under the LUC Rules, Council does not have standing to initiate a district boundary amendment because it is not a person, department, or agency.

Under Section 205-4, Hawai'i Revised Statutes ("HRS"), and Section 15-15-46, Land Use Commission Rules ("LUC Rules"), Council does not have standing to initiate boundary amendments before the LUC because it is not an agency, department, or person.²

Section 205-4(a), HRS, relating to amendments to district boundaries involving land areas greater than fifteen acres, states, in relevant part:

Any department or agency of the State, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district. (Emphasis added.)

Section 15-15-46, LUC Rules, pertaining to standing to initiate boundary amendments, states:

The following persons may initiate a petition to the commission for district boundary amendment:

- (1) State departments or agencies;
- (2) County departments or agencies of the county in which the property is situated; or
- (3) Any person with a property interest in the property sought to be reclassified.
(Emphasis added.)

The LUC Rules define "agency" as each "county board, commission, department, or office authorized by law to make rules or to adjudicate contested cases, except those in

² Copies of § 205-4, HRS, and §§ 15-15-03 and 15-15-46, LUC Rules, are attached hereto as Exhibit "B".

G. Riki Hokama, Chair
County Council
August 30, 2006
Page 3

legislative or judicial branches."³ (Emphasis added.) The LUC Rules define "person" as "any individual, corporation, firm, association, partnership, society, and any ... county department or agency."⁴

As the legislative branch of county government, Council is neither an "agency", as defined in the LUC Rules, nor a "department."⁵ Consequently, Council is also not a "person" for purposes of the LUC Rules.

Therefore, Council has no standing to initiate a petition for a district boundary amendment with the LUC.

In an informal telephone conference, LUC Executive Officer Anthony J.H. Ching concurred in the foregoing conclusion, and noted that a county council has never applied for a district boundary amendment.

2. Even assuming, for the sake of argument, that the Council did have standing to initiate a district boundary amendment, procedural and practical requirements associated with LUC proceedings could prove cumbersome and awkward.

Even if the Council could initiate a district boundary amendment, Council's role as the petitioner in the LUC proceedings would pose unique challenges in light of the procedural and practical requirements of LUC review and hearing of applications.

Among other things, the LUC Rules would require that Council serve copies of the petition for district boundary amendment, as well as notice of the LUC hearing regarding the petition, on the State Office of Planning, the Lanai Planning

³ § 15-15-03, LUC Rules.

⁴ *Id.*

⁵ § 3-6, Revised Charter of the County of Maui (1983), as amended ("Charter") ("The council shall be the legislative body of the county."). Council is not a department under Article 8 of the Charter.

G. Riki Hokama, Chair
County Council
August 30, 2006
Page 4

Commission, the County Department of Planning, and all persons whose names are on a mailing list provided by the chief clerk of the LUC.⁶

No later than thirty days from the date that the district boundary amendment petition is deemed properly filed, the "county"⁷ would be required to file with the LUC a "statement of position with a summary of reasons in support or opposition, including without limitation, a statement describing the respective positions of any department within the State and county that may be impacted by the boundary amendment."⁸

Prior to the LUC hearing on the petition, Council would be required to send representatives to a prehearing conference with the other parties to identify, among other things, the relevant issues and the position of the parties, and to arrange for the exchange of exhibits, written testimony, names of witnesses, and other matters.⁹

As the petitioner, the Council would be required to send a representative or representatives to appear at the LUC hearing on the petition.¹⁰ The Department of Planning would also appear

⁶ § 205-4(c), HRS; §§ 15-15-48(a), 15-15-51(b), LUC Rules.

⁷ In the circumstances of Council as petitioner, it is unclear whether the Council or the Department of Planning, or both, would file the required statement of position on behalf of the "county".

⁸ § 15-15-55, LUC Rules (pertaining to statement of position).

⁹ § 15-15-57, LUC Rules (pertaining to prehearing conference, exchange of exhibits, and prehearing conference order).

¹⁰ § 15-15-52(a), LUC Rules ("The petitioner, the office of planning, and the county planning department within which the subject land is situated shall appear in every case as parties, and make recommendations relative to the proposed boundary change.")

G. Riki Hokama, Chair
County Council
August 30, 2006
Page 5

as a party and make recommendations relative to the proposed boundary change.¹¹ At the LUC hearing, the Council would be expected to call witnesses on its behalf and would be provided the opportunity to conduct any cross-examination of witnesses as may be required. As a party, the Department of Planning would also be able to call witnesses, typically from various County departments, to testify on matters within their respective area of expertise (for example, housing, public infrastructure, public safety, land use and zoning, and water).

At the conclusion of the evidentiary hearing, all parties (including the Council and Department of Planning) may be requested to submit proposed findings of fact, conclusions of law, and decision and order, and to file exceptions (or support) to any such proposed findings and conclusions.¹²

In reviewing a petition, the LUC usually imposes conditions "necessary to uphold the general intent and spirit of chapters 205, 205A, and 226, HRS, and to assure substantial compliance with representations made by the petitioner in seeking the boundary amendment."¹³ The Council, as petitioner, would be required to submit to the LUC a document reflecting such conditions in a form prescribed by the LUC and to record the conditions with the State Bureau of Conveyances.¹⁴

It is likely that Council would have difficulty fulfilling some of the conditions typically imposed by the LUC,¹⁵ without the cooperation and agreement of executive branch officers and

¹¹ § 205-4(d)(1), HRS; § 15-15-52(a), LUC Rules.

¹² § 15-15-85(a), LUC Rules.

¹³ § 15-15-90(a), LUC Rules.

¹⁴ § 15-15-92(a), LUC Rules.

¹⁵ See, e.g., § 15-15-90(e), LUC Rules, which sets forth twenty-four mandatory conditions for district boundary amendment petitions.

G. Riki Hokama, Chair
County Council
August 30, 2006
Page 6

agencies.¹⁶ For example, conditions may be imposed that relate to affordable housing or to sewer, water, highway, recreational, or other public infrastructure improvements. Conditions may also be imposed that require periodic reporting or the preparation of certain studies.

According to the Department of Planning, the Lanai City Project would require a community plan amendment, which entails the preparation of an environmental assessment. In the context of another land use matter, our office opined that the appropriate accepting authority for an environmental assessment prepared in connection with a Council-initiated community plan amendment would be the planning commission having jurisdiction over the subject property, not the Council or the Department of Planning.¹⁷

We also note that, under Section 7-5 of the Charter, the Mayor is vested with the power to:

11. Sign instruments requiring execution by the county, including deed and other conveyances, except those which the director of finance or other officer is authorized by this charter, ordinance or resolution, to sign.

* * *

16. Enter into bilateral and multilateral contracts with other counties, the State, or the United States for the performance of any function or activity which the county is authorized to perform.

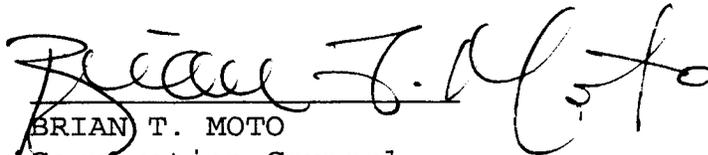
¹⁶ § 3-8(2), Charter ("Neither the council nor its members shall give orders to any county employees or county officers other than those appointed pursuant to Section 3-7 or Article 5, either publicly or privately.").

¹⁷ Memorandum to Wayne K. Nishiki, Chair, Planning and Land Use Committee, Change in Zoning and Community Plan Amendment for Fukiyo Ueoka (PLU-47), (March 1, 2004), at 8-10.

G. Riki Hokama, Chair
County Council
August 30, 2006
Page 7

Any measures taken by Council as the petitioner in a LUC district boundary amendment proceeding would have to take into account the foregoing Charter provisions.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

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cc: James A. Giroux, Deputy Corporation Counsel
Michael Foley, Planning Director
Don Couch, Deputy Planning Director
Michele White, Legal Assistant

ALAN M. ARAKAWA
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

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

May 16, 2006

MEMO TO: Ken Fukuoka, Director
Office of Council Services

FROM: Traci Fujita Villarosa *TFV*
First Deputy Corporation Counsel

SUBJECT: Lanai City Project District (PAF 06-104)

Introduction.

The purpose of this memorandum is to provide legal advice regarding the "Lanai City Project District", a proposed development on a 115-acre County-owned property. To meet your deadline an abbreviated opinion is provided herein.

Question posed.

Is there any legal objection to the Council appropriating \$100,000 for the "Lanai City Project District - planning for 115-acre County property" for expenditure by the Office of Council Services ("OCS"), or to OCS using the funds to hire a consultant to prepare an environmental assessment for this purpose?

Discussion.

No. The Maui County Code ("MCC") specifically authorizes the Council to initiate a project district development by written application to the Planning Director.¹ Funds appropriated to OCS may be used to prepare such application, including but not limited to, the hiring of a consultant.

In reaching this conclusion, we have assumed that the purpose and intent of the proposed \$100,000 OCS budget appropriation is to research, prepare, and draft appropriate legislation and related documents pertaining to the rezoning of the

¹ §19.45.040(B), MCC ("The council or the planning commission may initiate a project district development by written application to the planning director.").

EXHIBIT " A "

Mr. Ken Fukuoka
May 16, 2006
Page 2

property. Pursuant to Section 46-4, Hawaii Revised Statutes,² and Articles 3 and 4 of the Revised Charter of the County of Maui (1983), as amended ("Charter"),³ the adoption of a zoning ordinance is a legislative function that is exercised by ordinance.⁴ Pursuant to Section 8-8.6(2) of the Charter, zoning ordinances and other land use ordinances may be proposed by the council.⁵

A planner with the Department of Planning has informed us

² §46-4(a), Haw. Rev. Stat., provides, in part:

The zoning power granted herein shall be exercised by ordinance which may relate to:

...
(2) The areas in which residential uses may be regulated or prohibited;...

The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section [46-4] and any ordinance enacted in accordance with this section....

³ Articles 3 and 4 of the Charter relate to the County Council and to ordinances and resolutions, respectively.

⁴ See also McQuillin Mun. Corp. §§25.54, 25.55 (3rd ed.) ("It is fundamental that the enactment of a zoning ordinance constitutes the exercise of a legislative and governmental function. The reason upon which this principle is based is that zoning is essentially a political, rather than a judicial matter, over which the legislative authorities have, generally speaking, complete discretion....It is an exercise of legislative power residing in the state and delegated to a municipal corporation....The determination of whether or not to enact a zoning ordinance and the determination of its provisions and terms are entirely within the discretion of the municipal legislative body or other zoning legislative authority, subject to such requirements as may exist relative to study and recommendation by zoning commissions, notices, [and] hearings....")

⁵ Charter §8-8.6(2) states, in part: "Any revisions of the general plan, zoning ordinance or other land use ordinance may be proposed by the council and shall be reviewed by the appropriate planning commission as if prepared by the planning director. Any such revision shall be referred to the appropriate planning commission by resolution."

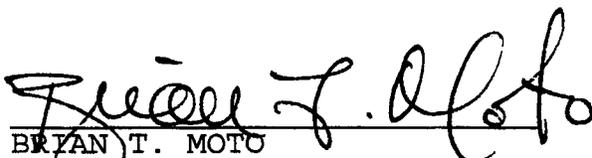
Mr. Ken Fukuoka
May 16, 2006
Page 3

that, to her knowledge, the County has never been a project district applicant and the Council has never initiated a project district development pursuant to Section 19.45.040(B), MCC. This means that precise details of the project district process with Council as the applicant are uncertain.

Also, the same planner drafted a memorandum on January 3, 2006 to the Deputy Planning Director regarding the subject property. A copy of the memorandum is attached hereto as Exhibit "A". The memorandum provides basic land use information concerning the subject property and summarizes land use requirements relating to the development of the property for housing purposes.

We recommend that the Department of Planning be consulted as to the proposed project, required land use entitlements, and zoning and other procedures to be followed.

Approved for Transmittal:


BRYAN T. MOTO
Corporation Counsel

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Enclosure (Exhibit "A")

cc: Jesse Souki, Deputy Corporation Counsel
James A. Giroux, Deputy Corporation Counsel
Michael Foley, Planning Director
Wayne Boteilho, Deputy Planning Director
Michele White, Legal Assistant

Mayor

MICHAEL W. FOLEY
Director

WAYNE A. BOTEILHO
Deputy Director



RECEIVED
CORPORATION COUNSEL

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COUNTY OF MAUI
DEPARTMENT OF PLANNING

January 3, 2006

MEMORANDUM

TO: Wayne Boteilho, Deputy Planning Director
FROM: Colleen Suyama, Staff Planner *CS*
VIA: Clayton Yoshida, AICP, Planning Program Administrator *copy*
SUBJECT: Lanai Housing Project, TMK 4-9-002:058

The basic land use information on the subject property is as follows:

- Acreage - 65 acres (housing); 50 acres (school expansion)
- State Land Use District - Agriculture
- Lanai Community Plan - Single Family (proposed housing project)
- Zoning - Interim
- Special Management Area – outside of SMA

Based on the existing land use designations, the property will require the following:

1. State District Boundary Amendment from Agricultural District to Urban District. The property is greater than 15 acres which will require processing through the State Land Use Commission pursuant to Hawaii Administrative Rules, Title 15, Subtitle 3, Chapter 15 Land Use Commission Rules.
2. A change in zoning from the Interim District to an appropriate Residential District. To maximize the number of houselots R-1 Residential District zoning is recommended, since the minimum lot area is 6,000 sq.ft. Based on a 65 acre parcel, the following single family density is projected:

43560 sq.ft./acre x 65 acres = 2,831,400 sq.ft.
 Subtract 25% of area for roads, etc. = 707,850 sq.ft.
 Developable area = 2,123,550 sq.ft.

Memorandum to:**Wayne Botellho, Deputy Planning Director****January 3, 2006****Page 2**

**Developable area / 6000 sq.ft./lot = potential lots
2,123,550 sq.ft. / 6,000 sq.ft. = 354 lots**

If more lots are desired, then the R-0 zoning district can be sought or the R-0 overlay district requirements used to reduce lot area and allow attached dwellings on common lot lines.

- 3. The residential district allows the following housing, which could be multi-family:**
 - a. Housing for the aged, operated by governmental or nonprofit organizations; provided the normal population density is not increased more than 10% (389 lots/units total).**
 - b. Housing for low and moderate income families, operated by governmental or nonprofit organizations provided the normal population density is not increased more than 10% (389 lots/units total).**
- 4. To construct higher density multi-family housing would require a Community Plan Amendment from single family residential to multi-family use. Such an amendment will require at the minimum an Environmental Assessment (EA) pursuant to Chapter 343, HRS. An EA is also required since the land is County owned and presumably county monies will be used for the housing.**

In addition to the Community Plan Amendment, the project will still require a State District Boundary Amendment and Change in Zoning (A-1 Apartment District).

- 5. The 201G process can also be utilized to eliminate the Community Plan Amendment and Change in Zoning process.**
- 6. It is recommended that a housing needs assessment be conducted to determine the type of housing needed for Lanai Island whether it should be single family lots, house and lot packages, or multi family units and the income groups and special needs groups that should be provided housing. The study should also determine whether it is rental housing or fee simple housing desired.**

Memorandum to:

Wayne Boteilho, Deputy Planning Director

January 3, 2006

Page 3

7. **The EA process should address housing needs; economic and social impacts; impacts on infrastructure such as water resources and transmission, sewers, and roadways; educational facilities; parks and recreational facilities; utilities; public services such as medical, police and fire; cultural and archaeological impacts; sensitive environmental impacts such as wetlands, flood zones, sensitive habitats, etc.; and impacts on agricultural resources. The EA should include a market study addressing housing needs and economic impact, an engineering report addressing infrastructure needs, traffic report, and archaeological and cultural survey.**

(S:\ALL\COLLEEN\LanailHousing.wpd)

§205-4 Amendments to district boundaries involving land areas greater than fifteen acres. (a) Any department or agency of the State, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district. This section applies to all petitions for changes in district boundaries of lands within conservation districts, lands designated or sought to be designated as important agricultural lands, and lands greater than fifteen acres in the agricultural, rural, and urban districts, except as provided in section 201G-118. The land use commission shall adopt rules pursuant to chapter 91 to implement section 201G-118.

(b) Upon proper filing of a petition pursuant to subsection (a) the commission shall, within not less than sixty and not more than one hundred and eighty days, conduct a hearing on the appropriate island in accordance with the provisions of sections 91-9, 91-10, 91-11, 91-12, and 91-13, as applicable.

(c) Any other provision of law to the contrary notwithstanding, notice of the hearing together with a copy of the petition shall be served on the county planning commission and the county planning department of the county in which the land is located and all persons with a property interest in the land as recorded in the county's real property tax records. In addition, notice of the hearing shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings, and public notice shall be given at least once in the county in which the land sought to be redistricted is situated as well as once statewide at least thirty days in advance of the hearing. The notice shall comply with section 91-9, shall indicate the time and place that maps showing the proposed district boundary may be inspected, and further shall inform all interested persons of their rights under subsection (e).

(d) Any other provisions of law to the contrary notwithstanding, prior to hearing of a petition the commission and its staff may view and inspect any land which is the subject of the petition.

(e) Any other provisions of law to the contrary notwithstanding, agencies and persons may intervene in the proceedings in accordance with this subsection.

(1) The petitioner, the office of planning, and the county planning department shall in every case appear as parties and make recommendations relative to the proposed boundary change.

(2) All departments and agencies of the State and of the county in which the land is situated shall be admitted as parties upon timely application for intervention.

(3) All persons who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.

(4) All other persons may apply to the commission for leave to intervene as parties. Leave to intervene shall be freely granted, provided that the commission or its hearing officer if one is appointed may deny an application to intervene when in the commission's or hearing officer's sound discretion it appears that: (A) the position of the applicant for intervention concerning the proposed change is substantially the same as the position of a party already admitted to the proceeding; and (B) the admission of additional parties will render the proceedings inefficient and unmanageable. A person whose application to intervene is denied may appeal such denial to the circuit court pursuant to section 91-14.

(5) The commission shall pursuant to chapter 91 adopt rules governing the intervention of agencies and persons under this subsection. Such rules shall without limitation establish: (A) the information to be set forth in any application for intervention; (B) time limits within which such

EXHIBIT "B"

applications shall be filed; and (C) reasonable filing fees to accompany such applications.

(f) Together with other witnesses that the commission may desire to hear at the hearing, it shall allow a representative of a citizen or a community group to testify who indicates a desire to express the view of such citizen or community group concerning the proposed boundary change.

(g) Within a period of not more than three hundred sixty-five days after the proper filing of a petition, unless otherwise ordered by a court, or unless a time extension, which shall not exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

(h) No amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17. Six affirmative votes of the commission shall be necessary for any boundary amendment under this section.

(i) Parties to proceedings to amend land use district boundaries may obtain judicial review thereof in the manner set forth in section 91-14, provided that the court may also reverse or modify a finding of the

commission if such finding appears to be contrary to the clear preponderance of the evidence.

(j) At the hearing, all parties may enter into appropriate stipulations as to findings of fact, conclusions of law, and conditions of reclassification concerning the proposed boundary change. The commission may but shall not be required to approve such stipulations based on the evidence adduced.

Westlaw.

HI ADC § 15-15-03

Haw. Admin. Rules (HAR) § 15-15-03

WCHR § 15-15-03

WEIL'S CODE OF HAWAII RULES
TITLE 15. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM
SUBTITLE 3. STATE LAND USE COMMISSION
CHAPTER 15. LAND USE COMMISSION RULES
SUBCHAPTER 1. GENERAL PROVISIONS

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Current through March 2006

§ 15-15-03. Definitions.

As used in this chapter:

"Accessory building or use" means a subordinate building or use which is incidental to and customary with a permitted use of the land.

"Agency" means each state or county board, commission, department, or office authorized by law to make rules or to adjudicate contested cases, except those in legislative or judicial branches.

"Agency hearing" refers only to a hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14, HRS.

"Agricultural park" means the same as in section 166-2, HRS.

"Building" means any structure having a roof, including, but not limited to, attached carports and similar structures.

"Chairperson" means the chairperson of the commission.

"Chief clerk" means the person who is responsible for receiving, recording, and preserving the records of all matters brought before the commission.

"Commission" means the land use commission of the State of Hawaii.

"Commissioner" means a member of the commission.

"Contested case" means a proceeding in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

"District" means an area of land, including lands underwater, established as an urban, agricultural, conservation, or rural district.

"Dwelling" means a building designed or used exclusively for single family residential occupancy, but not including house trailer multi-family unit, mobile home, hotel, or motel.

"Economic feasibility" means the degree to which the market demand for the proposed project, development, or use by the petitioner is accurately estimated and appears to be substantial enough to indicate the probability of a viable endeavor to justify the boundary amendment.

"Facsimile" means a document produced by a receiver of signals transmitted over telecommunication lines, after translating the signals, to produce a duplicate of an original document.

"Farm dwelling" means a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling.

"Filing" means the submittal of documents with the chief clerk. This definition is to be distinguished from the definition for "proper filing" for petitions to amend a district boundary.

"Hearings officer" means a person or persons duly designated and authorized by the commission to conduct proceedings on matters within the jurisdiction of the commission for purposes of taking testimony and to report the person's findings and recommendations to the commission.

"HRS" means the Hawaii Revised Statutes.

"Intervenor" means a person who properly seeks by application to intervene and is entitled to be admitted as a party in any contested case proceeding before the commission.

"Land" means all real property in the State including areas under water within the boundaries of the State.

"Lot" means a single parcel of land of record in the real property tax records of the State of Hawaii.

"Map" means the land use district boundaries maps of the commission.

"Meeting" means the convening of the commission for which a quorum is required in order to make a decision or deliberate toward a decision upon a matter over which the commission has supervision, control, jurisdiction, or advisory power.

"Party" means a person named or admitted as a party or entitled as of right to be admitted as a party in any contested case proceeding before the commission.

"Person" means any individual, corporation, firm, association, partnership, society, and any federal, state, and county department or agency.

"Petitioner" means a person who seeks permission or authorization from the commission in any matter for which the commission is authorized to grant relief.

"Planning commission" means the planning commissions of the various counties, including the city and county of Honolulu.

"Presiding officer" means any commissioner or a hearings officer duly designated as such. Unless otherwise designated, the chairperson shall be the presiding officer.

"Proceeding" means any matter brought before the commission over which the commission has jurisdiction and shall include, but not be limited to:

- (1) Petitions for district boundary amendment;
- (2) Petitions for special permit;
- (3) Proceedings for the adoption, amendment, or repeal of rules under sections 91-3 and 205-7, HRS;
- (4) Petitions for declaratory orders under section 91-8, HRS;
- (5) An investigation or review instituted or requested to be initiated by the commission; and
- (6) All other matters in the administration of chapter 205, HRS.

"Proper filing," as applied in section 205-4, HRS, means after a petition for district boundary amendment has been filed with the chief clerk, and the executive officer has made a determination that the petition conforms to the requirements of section 15-15-50 and accepts the petition for processing.

"Public institution or building" means any institution or building being used by a federal, state, or county agency for a public purpose.

"Respondent" means a person subject to any statute, rule, or order administered by the commission and upon whom an order or notice is issued by the commission instituting an agency hearing to show cause.

"Shoreline" means the same as in section 205A-1, HRS.

"Single-family dwelling" means a dwelling occupied exclusively by one family.

"State" means the State of Hawaii.

"Structure" means a constructed or erected material or combination of materials, which requires location on the ground, including, but not limited to, buildings, radio towers, sheds, storage bins, fences, and signs.

"Unauthorized ex parte communication" means private communications or arguments with members of the commission or its hearings officer as to the merits of a proceeding with a view towards influencing the outcome of the petition or proceeding.

<General Materials (GM) - References, Annotations, or Tables>

[Effective 10/27/86; Amended and Compiled 8/16/97; Compiled May 8, 2000]

(Authority: HRS §§ 205-1, 205-7)

(Implementation: HRS §§ 91-2, 205-1, 205-7)

HI ADC § 15-15-03

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WEIL'S CODE OF HAWAII RULES
TITLE 15. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM
SUBTITLE 3. STATE LAND USE COMMISSION
CHAPTER 15. LAND USE COMMISSION RULES
SUBCHAPTER 6. APPLICATION REQUIREMENTS FOR BOUNDARY AMENDMENT PETITIONS
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Current through March 2006

§ 15-15-46. Standing to initiate boundary amendments.

The following persons may initiate a petition to the commission for district boundary amendment:

- (1) State departments or agencies;
- (2) County departments or agencies of the county in which the property is situated; or
- (3) Any person with a property interest in the property sought to be reclassified.

<General Materials (GM) - References, Annotations, or Tables>

[Effective 10/27/86; Amended and Compiled 8/16/97; Compiled May 8, 2000]

(Authority: HRS § § 205-1, 205-7)

(Implementation: HRS § § 205-3.1, 205-4)

HI ADC § 15-15-46
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