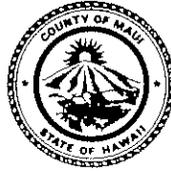


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August 27, 2010

MEMO TO: Jo Anne Johnson, Council Member

F R O M: Michael J. Hopper, Deputy Corporation Counsel

SUBJECT: LAHAINA'S ARCHITECTURAL INTEGRITY (PAF 09-138)

I. Introduction.

The purpose of this memorandum is to respond to your May 17, 2010 memorandum, in which you ask for legal advice regarding the demolition or moving of structures within the Lahaina Historic Districts.¹ After discussions with Council staff, I understand your questions to be:

1. Whether Section 19.52.050(A), Maui County Code, is contrary to any federal or Hawaii state historic preservation laws so as to prevent enforcement of that Section; and
2. Whether Section 19.52.050(A), Maui County Code, can be amended to require that the Cultural Resources Commission review and grant a permit prior to the demolition of any structure in any Maui County historic district.

While preparing this memorandum we became aware of your submission of County Communication No. 10-179, transmitting a proposed Resolution entitled, "Referring to the Lanai, Maui, and

¹ Chapter 19.52, Maui County Code, applies to "any historic district established in this article." Section 19.52.020(A), Maui County Code. The Lahaina historic districts are historic district nos. 1 and 2, as defined in Sections 19.50.010 and 19.50.020, Maui County Code. This opinion focuses solely on the demolition or moving of structures on property located within historic district nos. 1 and 2.

Molokai Planning Commissions a Draft Bill Amending Chapter 2.88, Maui County Code, Relating to the Cultural Resources Commission, and Title 19, Article III, Maui County Code, Relating to Maui County Historic Districts." On August 24, 2010, the Council adopted the Resolution.

This memorandum does not address matters relating to the Resolution or the draft bill transmitted therewith.

II. Short answers.

1. Section 19.52.050(A), Maui County Code, is not contrary to any federal or state historic preservation laws.

2. Section 19.52.050(A), Maui County Code, in conjunction with other provisions of Chapter 19.52, already prohibits the demolition or moving of structures of historic or architectural worth in the Lahaina historic districts without a permit issued by the cultural resources commission.

III. Analysis and discussion.

A. Relevant Maui County Code provisions.

Section 19.52.050, Maui County Code, states:

19.52.050 Demolition or movement of structures.

A. The demolition or moving of structures of historic or architectural worth shall be discouraged, and the commission shall not issue a certificate for demolition except when a structure is deemed a hazard to public health or safety by the superintendent or the state department of health's authorized representative. The commission may, at its own discretion, issue a certificate of approval for demolition or for moving a structure within the historic districts, but shall be guided by the following:

1. The superintendent or the state department of health deems such structure to be a hazard to public safety or health and repairs are impossible.

2. Such structure is a deterrent to major historic restoration or preservation program.

3. The retention of such structure would not be in the interest of the community as a whole.

B. For the purpose of this article, buildings and structures of historic significance shall be

deemed to be those within any historic district constructed prior to the year 1910.

Section 19.52.020, Maui County Code, states:

19.52.020 Review of plans. A. Within any historic district established in this article, the commission shall have the power to approve all plans, and the superintendent of building inspection of the county shall not issue a building permit until a certificate of approval has been issued by the historic commission.

B. Application for an appropriate permit to construct, alter, repair, move or demolish any structure, or modification of existing structures and appurtenances thereto, in the historic districts shall be made to the superintendent of building inspection, referred to in this article as the "superintendent." The superintendent shall immediately notify the chairman or acting chairman of the historic commission of the receipt of such application and shall transmit it together with accompanying plans and other information to the commission.

C. The historic commission shall meet within fifteen days [sic] after notification by the superintendent of the filing, unless otherwise mutually agreed upon by the applicant and commission, and shall review the plans according to procedures as set forth in this article.

D. The commission shall approve or disapprove such plans and, if approved, shall issue a certificate of approval, which is to be signed by the chairman and attached to the application for a building permit, and immediately transmit it to the superintendent.

E. If the commission disapproves such plans, it shall state its reasons for doing so and shall transmit a record of such action and reasons therefor in writing to the council, the superintendent and the applicant. The commission may advise the applicant what it thinks is proper if it disapproves the plans submitted. The applicant, if he so desires, may make modifications to his plans and shall have the right to resubmit his application at any time after so doing.

F. The failure of the historic commission to approve or disapprove such plans within forty-five days from the date of application for the building permit, unless otherwise mutually agreed upon by the applicant and the commission, shall be deemed to constitute approval and the superintendent shall

proceed to process the application without regard to a certificate of approval.

Section 2.88.060, Maui County Code, relating to powers and duties of the cultural resources commission states, in part:

A. The commission shall advise and assist federal, state and county government agencies in carrying out their historic preservation responsibilities.

C. The commission shall initiate, accept, review and recommend to the state historic preservation officer, historic properties nominations for inclusion on the Hawaii and national registers.

D. The commission shall maintain a system for the survey, inventory and nomination of historic properties and archaeological sites within the county, as well as a system of site monitoring, that is compatible with that of the state historic preservation office.

E. The commission shall administer the certified local government program of federal assistance for historic preservation within the county.

F. The commission shall provide design review for projects affecting any building or structure, site or district eligible for listing on the national or Hawaii register of historic places and shall request and consider the state historic preservation officers review and comment on all county undertakings, including the granting of permits. In its review, the commission shall consider the cultural significance of the site and its surroundings along with the Secretary of the United States Department of the Interior's standards for rehabilitation, as amended.

G. The commission shall develop and implement a comprehensive countywide historical preservation planning process, consistent with the state historical preservation plan, which includes the submitting of information pertaining to the state inventory of historic places to the state historic preservation officer.

H. The commission shall make recommendations to the council for the expenditure of gifts and grants accepted by the council for projects connected with the identification, rehabilitation, restoration and reconstruction of historic properties, the historic preservation planning process, and the promotion of

exhibits and other information activities in connection therewith.

- B. Section 19.52.050(A), Maui County Code, is not contrary to any federal or state historic preservation law.

Section 19.52.020(B), Maui County Code, requires a permit to "construct, alter, repair, move or demolish any structure, or [for the] modification of existing structures and appurtenances thereto" within the historic districts established by the Maui County Code.² Permit applications are reviewed, and may be granted by, the Maui County cultural resources commission.³ Section 19.52.050(A), Maui County Code, sets forth criteria for the demolition or moving of "structures of historic or architectural worth."

Section 19.52.050(B), Maui County Code, deems structures "within any historic district constructed prior to the year 1910" as being of historic significance.

I have reviewed certain federal laws related to historic preservation, including the National Historic Preservation Act (16 U.S.C. §§ 470-470x-6) ("NHPA"), and its regulations (36 C.F.R. §§ 61.1-61.11). I have also reviewed certain state laws, including Section 6E-1, Hawaii Revised Statutes, relating to the Historic Preservation Program.

To be eligible to receive federal funding under the NHPA, local governments must be certified by the state historic preservation officer.⁴ The County of Maui is currently certified as a local government qualified to receive federal funds distributed by the State of Hawaii in accordance with the NHPA. As such, the County must abide by certain requirements in the NHPA and state law to maintain its certification.

Far from being restricted by the NHPA, Chapter 19.52, Maui County Code, implements requirements of the NHPA and Chapter 6E, Hawaii Revised Statutes. For example, the NHPA requires that

² Section 12-531-19, Standards and Criteria Relating to the Duties and Authority of the Maui County Cultural Resources Commission, allows the Planning Director to approve interior or exterior alterations to buildings or structures in a historic district if the value of the alterations is less than twenty-five percent of the current assessed value of the building or structure.

³ Although Section 19.52.020, Maui County Code, refers to the "historic commission", the historic commission was replaced by the cultural resources commission by Ordinance Nos. 1941 (1990) and 2040 (1991).

⁴ 16 U.S.C. § 470a(c).

the State of Hawaii certify, among other things, that the County of Maui:

- (A) enforces appropriate State or local legislation for the designation and protection of historic properties; [and]
- (B) has established an adequate and qualified historic preservation review commission by State or local legislation.⁵

Further, 36 C.F.R. §61.6(e) states, in pertinent part:

The SHPO [State Historic Preservation Officer] must ensure that each local government satisfies the following minimum requirements as conditions for certification. Each CLG must:

- (1) Enforce appropriate State or local legislation for the designation and protection of historic properties. The State procedures must define what constitutes appropriate legislation, as long as:
 - (i) Designation provisions in such legislation include the identification and registration of properties for protection that meet criteria established by the State or the locality for significant historic and prehistoric resources within the jurisdiction of the local government;
 - (ii) Protection provisions in such legislation include a local review process under State or local law for proposed demolitions of, changes to, or other action that may affect historic properties as paragraph (e)(1)(i) of this section describes⁶

The State of Hawaii has adopted legislation authorizing counties to provide for historic preservation through legislation:

§6E-15 Regulations, special conditions or restrictions. In addition to any power or authority

⁵ 16 U.S.C. § 470a(c) (1) (A), (B) .

⁶ 36 C.F.R. § 61.6(e) (1) (2) .

of a political subdivision to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing body of any political subdivision may provide by regulations, special conditions, or restrictions for the protection, enhancement, preservation, and use of historic properties or burial sites. These regulations, special conditions, and restrictions may include appropriate and reasonable control of the use or appearance of adjacent or associated private property within the public view, or both, historic easements, preventing deterioration by wilful neglect, permitting the modification of local health and building code provisions, and transferring development rights.

In addition, the State Historic Preservation Plan for the State of Hawaii, dated November 2001, which Section 2.88.080, Maui County Code, identifies as one of the documents to be used by the cultural resources commission, states, in pertinent part:

Objective E: Support the continued use and preservation of Hawaii's historic buildings and structures.

Objective H: Expand local government participation in historic preservation activities.

H.1. Promote the adoption of local preservation ordinances and support the administration of existing ordinances.

The West Maui Community Plan, which Section 2.88.080, Maui County Code, also identifies as a document to be used by the cultural resources commission, states, in pertinent part:

Economic Activity, Objective 3, subsection e: Encourage strict compliance with the Lahaina Historic District Ordinance in order to preserve and enhance the visitor experience thus maintaining economic stability within the region.

Cultural Resources, Objective 1: Preserve and protect significant archeological, historical and cultural resources that are unique to the State of Hawaii and Island of Maui.

Cultural Resources, Objective 6: Ensure that new projects or developments address potential impacts on archaeological, historical, and cultural resources and

identify all cultural resources located within the project area as part of initial project studies.

Cultural Resources, Implementing Action 2: Enforce the provisions of the Lahaina Historic District in order to preserve the cultural integrity of Lahaina town.

Urban Design, Objective 1: Maintain the scale, building massing and architectural character of historic Lahaina town.

Further, the Design Guidelines for Front Street Improvements, dated December 1992, which is another document used as a guide by the cultural resources commission pursuant to Section 2.88.080, Maui County Code, makes the following statement regarding Front Street:

Many of the older buildings have been destroyed through natural disaster, neglect, and economic pressures. A combination of lack of concern, regulation, and education of the town's historic importance in its architectural fabric also contributed to the loss of many structures prior to the establishment of the historic district.

Therefore, Section 19.52.020, Maui County Code, requiring the cultural resources commission to review and approve plans to "construct, alter, repair, move or demolish" any structure within an historic district, and Section 19.52.050, Maui County Code, requiring the commission to evaluate requests to demolish or move "structures of historic or architectural worth" under standards stricter than those applicable to other types of historic district applications, are consistent with state and federal historic preservation laws.

C. Case law analysis.

Various court decisions have upheld the denial of requests to demolish buildings based on historic preservation laws.⁷ In several of these cases, the building owner claimed that the denial of a request to demolish a building constituted a "taking" of private property, and the government should be required to pay the fair market value of the property.

⁷ See, e.g., 900 G. Street Associates v. Dep't of Hous. and Cmty. Dev., 430 A.2d 1387 (D.C. 1981) (upholding denial of demolition request for a building); State ex rel. BSW Dev. Group v. City of Dayton, 83 Ohio St. 3d 338, 699 N.E.2d 1271 (Ohio 1998) (upholding denial of demolition permit request).

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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 that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster and that such 'regulatory takings' may be compensable under the Fifth Amendment."⁸ 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.⁹

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.¹⁰ (citations omitted).

Courts have held that the denial of a permit to demolish a building based on historic preservation laws did not deprive the owner of all economically viable uses of its property,¹¹ and,

⁸ Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005)

⁹ *Id.* at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992)).

¹⁰ *Id.* at 538-39.

¹¹ See, e.g., 900 G. Street Associates, 430 A.2d 1387 (diminishment in value did not constitute a taking where reasonable economic use remained);

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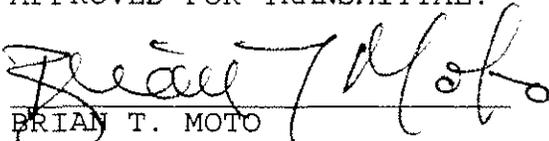
under a Penn Central analysis, that denial of a request for demolition did not constitute a "taking" of property requiring compensation.¹²

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cc: Kathleen Aoki, Planning Director
Stanley Solamillo, CRC Planner
Webpage

APPROVED FOR TRANSMITTAL:


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State ex rel. BSW Dev. Group, 83 Ohio St. 3d 338, 699 N.E.2d 1271 (no taking occurred where owner was not denied all economically viable use of property).

¹² Mount St. Scholastica, Inc. v. City of Atchison, 482 F.Supp.2d 1281, 1298 (D.Kan. 2007)(no taking found where plaintiffs retained economically viable use of the property, present use of the building was not affected, and plaintiffs had no investment backed expectations)("That plaintiff has assumed, incorrectly, that it had the property right to demolish the building for the last sixteen years, does not create a taking.").