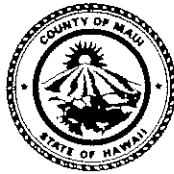


CHARMAINE TAVARES
Mayor




BRIAN T. MOTO
Corporation Counsel

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

October 15, 2010

MEMO TO: Gladys C. Baisa, Chair
~~Land~~ Use Committee

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

SUBJECT: **DISTRICT BOUNDARY AMENDMENT FOR A TWO-LOT SUBDIVISION FOR PINE STATE LIMITED (MAKENA) (LU-16)**

I. Introduction.

This memorandum is in response to your memorandum, dated August 26, 2010, requesting legal advice regarding a request from Pine State Limited for a district boundary amendment from Agriculture to Urban for a two-lot subdivision on approximately 1.38 acres located at Lot 3, Makena-Keoneoio Road, Makena, Maui, Hawaii (TMK: (2) 2-1-005:117) ("Property").

Your memorandum requested advice on the following issues:

1. May the Committee and then the Council consider a revised proposed bill to amend the State land use district classification from Agricultural to Rural at this juncture (assuming such a bill is appropriately posted on meeting agendas), or must such a proposal first be reviewed by the Maui Planning Commission pursuant to Sections 8-8.4 and 8-8.6 of the Revised Charter of the County of Maui (1983), as amended? Does your answer depend on whether the proposal is requested by the landowner-applicant or the Council (or its Committee)?
2. Also, please advise whether any documents other than a revised proposed bill (and accompanying District Boundary Amendment map) would be needed to properly pursue such an alternative. For instance, would the Committee need to obtain an amended application?

3. Finally, if the Committee may consider a revised proposed bill to amend the State land use district classification to Rural at this juncture, please transmit an appropriate proposed bill. Alternatively, if the proposal must first be reviewed by the Maui Planning Commission, please transmit an appropriate proposed resolution, if one is needed.

II. Background.

By applications dated November 9, 2007, Pine State Limited applied for a community plan amendment from Single-Family to Rural, a district boundary amendment from Agricultural to Rural, and a change in zoning from Interim to RU-0.5 Rural District.

Pine State Limited prepared a draft Environmental Assessment ("Draft EA") for the community plan amendment, as required by Chapter 343, Hawaii Revised Statutes. The Maui Planning Commission reviewed the Draft EA at a meeting on July 8, 2008. Action on the Draft EA was deferred pending receipt of further information.

On July 14, 2008, the Department of Planning informed Pine State Limited that the property was zoned R-3 Residential district, not Interim.¹ Pine State Limited withdrew its application for a community plan amendment and change in zoning, withdrew its Draft EA, and amended its district boundary amendment application to request an Urban, rather than Rural, designation.²

In compliance with Maui County Code ("MCC") §§19.68.020 and 19.510.020, pertaining to district boundary amendment applications and applications requiring a public hearing, respectively, Pine State Limited published a notice of public hearing, along with a site location map, on September 23 and 30, 2008 and October 7, 8, and 13, 2008 in The Maui News.³ The notice of public hearing stated that the Maui Planning Commission would conduct a public hearing for a district boundary amendment from Agricultural to Urban for Ke Kani Kai on October 14, 2008.

¹ See letter to Jeffrey S. Hunt, Director, from Gregory D. Kaufman, Authorized Agent, Pine State Ltd. (July 14, 2008), at 1.

² *Id.*; letter to Gregory D. Kaufman from Jeffrey S. Hunt, Director (July 23, 2008).

³ Letter to Paul Fasi, Planner, from Gregory D. Kaufman, Authorized Agent, Pine State Ltd. (Oct. 13, 2008).

Gladys C. Baisa, Chair
Land Use Committee
October 15, 2010
Page 3

On September 8, 2008, Pine State Limited delivered, by U.S. certified mail, copies of a notice to owners and lessees of properties within five hundred feet of the Property.⁴ The notice stated that Pine State Limited had applied for a State land use district boundary amendment for the Property from Agricultural to Urban, and that the public hearing would be on October 14, 2008 before the Maui Planning Commission.

The September 23, 2008 Maui Planning Commission agenda listed, among other matters, the following agenda item:

PINE STATE LIMITED requesting a State Land Use District Boundary Amendment from Agricultural to Urban for Ke Kani Kai, a proposed 2-lot subdivision and associated infrastructure improvements at Lot 3 Makena, Keoneoio Road, TMK: 2-1-005:117, Makena, Island of Maui....
Public hearing is rescheduled to the October 14, 2008 meeting because the applicant did not complete the notification requirements.

The October 14, 2008 Maui Planning Commission agenda listed, among other matters, the following agenda item:

PINE STATE LIMITED requesting a State Land Use District Boundary Amendment from Agricultural to Urban for Ke Kani Kai, a proposed 2-lot subdivision and associated infrastructure improvements at Lot 3 Makena, Keoneoio Road, TMK: 2-1-005:117, Makena, Island of Maui.

In connection with the Pine State Limited application, the Department of Planning prepared and submitted a document entitled, "Maui Planning Department's Report to the Maui Planning Commission, October 14, 2008". In its Report, the Department of Planning described the district boundary amendment as being from Agricultural to Urban.⁵ Appended to the Report were written comments from various government agencies and a utility company, all predicated, however, on Pine State Limited's original

⁴ Notarized Affidavit of Mailing by Gregory D. Kaufman, Agent, Pine State Ltd. (Sept. 8, 2008).

⁵ Maui Planning Department's Report to the Maui Planning Commission (Oct. 14, 2008), at 3-4.

Gladys C. Baisa, Chair
Land Use Committee
October 15, 2010
Page 4

applications for a community plan amendment to Rural, a change in zoning to RU-0.5, and a district boundary amendment to Rural.⁶

In connection with the Pine State Limited application, the Department of Planning also prepared and submitted a document entitled, "Maui Planning Department's Recommendation to the Maui Planning Commission, October 14, 2008". In its Recommendation, the Department of Planning stated as follows:

The Maui Planning Department recommends that the Maui Planning Commission recommend approval to the Maui County Council of the Land Use District Boundary Amendment from Agricultural to Urban.⁷

The October 14, 2008 Maui Planning Commission agenda also listed as an agenda item the following:

LANCE COLLINS attorney for LINDA MCDONALD, submitting a Petition to Intervene dated September 30, 2008 on the request by PINE STATE LIMITED for a State Land Use District Boundary Amendment from Agricultural to Urban for Ke Kani Kai, a proposed 2-lot subdivision and associated infrastructure improvements at Lot 3 Makena, Keoneoio Road, TMK: 2-1-005:117, Makena, Island of Maui.

At its October 14, 2008 meeting, the Maui Planning Commission voted to deny McDonald's Petition to Intervene on the grounds that Commission review of a State land use district boundary amendment is not a contested case and "does not avail itself to an intervention."⁸ The Commission also voted to recommend approval of the district boundary amendment to Urban, with conditions.⁹

The August 18, 2010 agenda of the Land Use Committee listed agenda item LU-16 as "District Boundary Amendment for a Two-Lot Subdivision for Pine State Limited (Makena)", and referenced "County Communication No. 09-103, from the Planning Director, transmitting a proposed bill to grant a request from Pine State

⁶ *Id.*, Ex. 1-8.

⁷ Maui Planning Department's Recommendation to the Maui Planning Commission (Oct. 14, 2008), at 3.

⁸ Minutes of the Maui Planning Commission Meeting of October 14, 2008, at 44.

⁹ *Id.* at 80.

Gladys C. Baisa, Chair
Land Use Committee
October 15, 2010
Page 5

Limited for a District Boundary Amendment from Agricultural to Urban...."

Your memorandum states the following regarding the August 18, 2010 Land Use Committee meeting:

At the meeting, the Committee was informed that the applicant was considering whether to request a District Boundary Amendment to Rural rather than Urban. Representatives from the Department of Planning advised that they would support a Rural designation. They noted that Ordinance No. 3760, relating to subdivision "consistency," took effect on August 12, 2010, and that the legislation would allow the County to conclude that a Rural designation would be consistent with the existing Single-Family Community Plan designation and R-3 Residential District zoning; therefore, a change to the Urban designation would not be necessary.

The Committee expressed interest in considering a Rural designation, but questioned whether it had the ability to do so. The Committee noted that the attached proposed bill already contained certain conditions mimicking County rural standards (for instance, limiting lot size to a minimum of one-half acre, requiring rural setbacks, and exempting the landowner from improving any portion of Makena-Keoneoio Road to urban standards.) The Committee further noted that the proposed bill posted on its meeting agenda did not provide notice of a proposed Rural designation. The Committee requested an opinion from ... [Corporation Counsel] on its ability to proceed, then deferred the matter.

Information regarding the current and proposed land use designations of the Property is summarized in the following table:

	Current Designation	Designations in Original Application (withdrawn)	Designations per Pending Application	Designations per Committee Discussion
State Land Use District	Agriculture	Rural	Urban	Rural
Community Plan	Single Family	Rural	Single Family	Single Family
Zoning	R-3 Residential	RU-0.5	R-3 Residential	R-3 Residential

III. Applicable Statutes and Ordinances.

Hawaii Revised Statutes ("HRS") §205-3.1 authorizes the "appropriate county land use decision-making authority" to determine district boundary amendments involving land areas of fifteen acres or less, except lands that are in the conservation district and lands delineated as important agricultural lands. HRS §205-3.1(c) states in relevant part:

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.

MCC §19.68.020(A), pertaining to applications for district boundary amendments, states:

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 such person with a legal or equitable interest in the land for which a boundary change/reclassification is sought may file an application with the appropriate planning commission of the county by filing the application with the county planning department.

MCC §19.68.020(B)(6) requires that the application for district boundary amendment include "[a] description of the boundary change/reclassification being requested".

MCC §19.68.020(C) requires that the applicant "give notice of the application to those on record as the owners and lessees of real property located within five hundred feet of the real property which is the subject of the application..." MCC §19.68.020(C) also requires the applicant to publish "a copy of the notice in a newspaper of general circulation in the county, once a week for three consecutive weeks prior to any public hearing." MCC §19.68.020(C) states further that "notice shall be considered validly given upon compliance with the mailing provision herein and upon publication of notice...."

MCC §19.68.030(A) requires the appropriate planning commission to "serve a copy of the application upon the state land use commission and the state department of planning and economic development and ... [to] notify these agencies of the time and place of the public hearing provided for in this section."

MCC § 19.68.030(B) states:

The appropriate planning commission shall thereupon conduct a public hearing on the application for the requested reclassification/boundary change, notice of which shall be published in a newspaper of general circulation in the county at least thirty days prior to the date of the hearing so noticed. At least six days prior to any planning commission hearing or meeting on the application for the requested reclassification/boundary change, the planning director shall transmit his analyses and recommendations to the appropriate planning commission and shall make such documentation available for public review. After completion of the hearing, the appropriate planning commission shall submit to the county council a report with such recommendations as the facts may warrant,

Gladys C. Baisa, Chair
Land Use Committee
October 15, 2010
Page 8

together with a transcript of the hearing or a summary of the evidence and testimony taken.¹⁰

IV. Analysis.

The Hawaii Revised Statutes and Maui County Code are silent on the subject of when or how an application for a district boundary amendment can be changed after having been filed and been made the subject of mailed and published notices and a public hearing. However, a review of district boundary amendment application requirements leads to the conclusion that, if an applicant wants to request a classification different from that specified in the application, the applicant must file an amended application to be reviewed by the Maui Planning Commission. Alternatively, the Council may, pursuant to §8-8.6(2), Revised Charter of the County of Maui, as amended ("Charter"), initiate its own proposal for an ordinance to reclassify the property.¹¹

In this case, the original application for a district boundary amendment to Rural was amended, at the request of Pine State Limited, to specify Urban. There is no application for a district boundary amendment to Rural at this time. As discussed above, MCC §19.68.020(B)(6) requires that an application for district boundary amendment include "[a] description of the boundary change/reclassification being requested".

MCC §19.68.020(C) requires that an applicant for a district boundary amendment notify neighboring property owners of the proposed district boundary amendment. Although Pine State Limited did so, the notice served on neighbors specified Urban, not Rural.

¹⁰ See also MCC §19.510.020(A)(6)(a) ("Except as provided in section 19.510.020A.7, after holding a public hearing, the planning commission ... [f]or applications which require final action by the County council, shall transmit its findings, conclusions, and recommendations to the County council, the applicant, public agencies, and all interested parties....").

¹¹ 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.

Gladys C. Baisa, Chair
Land Use Committee
October 15, 2010
Page 9

MCC §19.68.020(C) also requires that the applicant publish a copy of the notice of application for district boundary amendment in a newspaper of general circulation once a week for three consecutive weeks prior to the public hearing on the application. Although Pine State Limited did so, the notice published in The Maui News specified Urban, not Rural.

MCC §19.68.030(A) requires planning commissions to serve a copy of the district boundary amendment application upon the state land use commission and the state department of planning and economic development. Assuming such copies were indeed served, those agencies were informed that the requested classification was Urban, not Rural.

MCC §19.68.030(B) requires planning commissions to conduct a public hearing on district boundary amendment applications. Although the Maui Planning Commission did so, its September 23, 2008 and October 14, 2008 agendas stated that the requested district boundary classification was Urban, not Rural.

MCC §19.68.030(B) requires the planning director to "transmit his analyses and recommendations to the appropriate planning commission and ... make such documentation available for public review." In accordance with MCC §19.68.030(B), the planning director described the district boundary amendment as being from Agricultural to Urban, not Rural. Moreover, the planning director recommended that the Maui Planning Commission recommend approval of a district boundary amendment to Urban, not Rural.

To our knowledge, the planning director and Department of Planning have not prepared a written analysis and recommendation regarding a Rural State land use classification for the Property while maintaining its Single Family community plan designation and R-3 Residential district zoning.

At the August 18, 2010 Land Use Committee meeting, representatives of the Department of Planning expressed support for a Rural designation and referenced Ordinance No. 3760 (2010). However, Ordinance No. 3760 (2010) is an ordinance addressing the issue of consistency of land use designations for **subdivision** purposes only.¹² Ordinance No. 3760 (2010) does not modify or

¹² Ordinance No. 3760 (2010) is entitled, "A Bill for an Ordinance Amending Chapter 18.04, Maui County Code, Pertaining to Subdivision General Provisions". Ordinance No. 3760 (2010) sunsets two years from its effective date of August 12, 2010.

Gladys C. Baisa, Chair
Land Use Committee
October 15, 2010
Page 10

repeal any criteria or procedures applicable to the determination of consistency for zoning or special management area purposes.¹³

To our knowledge, the Department of Public Works, which administers County's subdivision laws,¹⁴ has not formally reviewed, or prepared written comments on, a subdivision of the Property under a scenario in which its State land use classification is Rural, its community plan designation Single Family, and its zoning R-3 Residential.

There are no provisions in the Hawaii Revised Statutes or Maui County Code explicitly authorizing, or otherwise providing for, an impromptu change in the State land use classification sought by an applicant after Department of Planning and planning commission review of the application, and a public hearing on the application, have already occurred.

V. Conclusion.

Therefore, in view of the analysis set forth above, we advise that, if the Council desires to initiate a bill for a district boundary amendment reclassifying the Property from Agricultural to Rural, such a bill be first reviewed by the Maui Planning Commission pursuant to a Council resolution adopted under Charter §8-8.6(2).

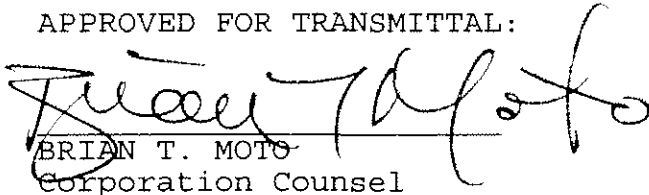
If, however, as stated in your memorandum, the applicant, Pine State Limited, is "considering whether to request" a district boundary amendment to Rural, rather than Urban, and, in fact, decides to do so, we believe that an amended application for the desired district boundary amendment would be required, and that the amended application would be subject to the procedures and other requirements of MCC Chapter 19.68 and MCC §19.510.020, pertaining to district boundary amendments and applications that require a public hearing, respectively.

¹³ See, e.g., §46-4, Haw. Rev. Stat. (requiring that zoning "be accomplished within the framework of a long-range, comprehensive general plan"); §205A-26, Haw. Rev. Stat. (requiring that development proposed in special management areas be "consistent with the county general plan and zoning").

¹⁴ Charter §§8-5.3(1), (2).

Gladys C. Baisa, Chair
Land Use Committee
October 15, 2010
Page 11

APPROVED FOR TRANSMITTAL:

A handwritten signature in cursive script, appearing to read "Brian T. Moto". The signature is written in black ink and is positioned above the typed name and title.

BRIAN T. MOTO
Corporation Counsel

S:\ALL\Advisory\JAG\Pine State ltd DBA.wpd

cc: Kathleen Ross Aoki, Planning Director
Ann Cua, Deputy Director of Planning
Clayton Yoshida, Planning Program Administrator
Paul Fasi, Planner, Department of Planning
Michael Hopper, Deputy Corporation Counsel
Gregory D. Kaufman, Authorized Agent, Pine State Limited
Webpage