

ALAN M. ARAKAWA  
Mayor



PATRICK K. WONG  
Acting 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

March 1, 2011

MEMO TO: Robert Carroll, Chair  
Land Use Committee

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

SUBJECT: CHAPTER 201H, HAWAII REVISED STATUTES, AFFORDABLE HOUSING  
PROJECTS (LU-3)

I. Introduction

This memorandum is in response to a memorandum dated February 24, 2011, referring to a memo dated February 17, 2011 from Robert Carroll, Chair, Land Use Committee, requesting legal advice regarding application procedure as part of the Kaiwahine Village 201H affordable housing application. The memorandum asks: Does Chapter 201H, Hawaii Revised Statutes, authorize the Director of Housing and Human Concerns to submit revisions to the project's preliminary plans and specifications after they have been submitted to the Council pursuant to Section 201H-38? If so, what is the effect, if any of the Director's revisions on the Council's 45-day period to approve, approve with modification, or disapprove the project?

II. Short answer

Hawaii Revised Statutes ("HRS") Chapter 201H is intended to encourage the construction and development of affordable housing in Hawaii. Chapter 201H does not explicitly address the issue of amendments to the preliminary plans after submission to Council but before Council review. As long as the amendment is not substantive the amendment should not trigger a restart of the 45-day time period.

### III. Background

HRS 201H-38 states in relevant part:

201H-38. **Housing development; exemption from statutes, ordinances, charter provisions, and rules.** (a) The corporation may develop on behalf of the State or with an eligible developer, or may assist under a government assistance program in the development of, housing projects that shall be exempt from all statutes, ordinances, charter provisions, and rules of any government agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of dwelling units thereon; provided that:

- (1) The corporation finds the housing project is consistent with the purpose and intent of this chapter, and meets minimum requirements of health and safety;
- (2) The development of the proposed housing project does not contravene any safety standards, tariffs, or rates and fees approved by the public utilities commission for public utilities or of the various boards of water supply authorized under chapter 54;
- (3) The legislative body of the county in which the housing project is to be situated shall have approved the project with or without modifications:
  - (A) The legislative body shall approve, approve with modification, or disapprove the project by resolution within forty-five days after the corporation has submitted the **preliminary plans and specifications** for the project to the legislative body. If on the forty-sixth day a project is not disapproved, it shall be deemed approved by the legislative body;
  - (B) No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, modifying, or disapproving the plans and specifications; and
  - (C) **The final plans and specifications for the project shall be deemed approved by the legislative body if the final plans and specifications do not substantially deviate from the preliminary plans and specifications...**(emphasis added).

HRS Section 46-15.1 states in relevant part:

(a) Any law to the contrary notwithstanding, any county shall have and may exercise the same powers, subject to applicable limitations, as those granted the Hawaii housing finance and development corporation pursuant to chapter 201H insofar as those powers may be reasonably construed to be exercisable by a county for the purpose of developing, constructing, and providing low- and moderate-income housing...

(d) The provisions of this section shall be construed liberally so as to effectuate the purpose of this section in facilitating the development, construction, and provision of low- and moderate-income housing by various counties.

HRS Chapter 201H is clear that there may be changes from preliminary to final applications even in cases where the legislative body takes no action. The only guidance is that the final plan can not substantially deviate from the preliminary plan.

#### IV. Discussion

HRS Chapter 201H is silent on the issue of amending an application after submitting it to Council but before Council reviews it. Looking at the spirit and totality of HRS Chapter 201H we must see that an amendment to the applications is possible as long as it can reasonably be construed to further the purpose of HRS 201H and that it does not substantially deviate from the original application.

The Legislature has acknowledged that the complexities of the Land Use Law in Hawaii and the procedural pitfalls of processing permits can be seen as factors that hinder the development of affordable housing in Hawaii.<sup>1</sup>

However, the Council's ability to make a reasonably informed decision could be hampered if major changes were made by the applicant after submission but prior to review.

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<sup>1</sup> See Affordable Housing Task Force, Housing and Community Development Corporation of Hawaii, Report to the Twenty-Third Legislature 1-7 (Haw. 2005).

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## V. Conclusion

In this case, the original applications contained proposed exemptions that were intended to give the applicant 120 housing credits. Upon review by the Department of the Corporation Counsel and the Director of Housing and Human Concerns it was determined that the form of exemptions would not result in what the developer actually wanted.

By deleting the exemptions and creating a request for the housing credits within the developer's plans and specifications the developer met the concerns of the Department of the Corporation Counsel and the Director.

In our opinion the amendment is not substantive but one of form and legality. The amendment is not a substantial change from the original application. If the Council determines otherwise, they have the full authority to vote the project down and request a new application be submitted in order to regain the 45 day review period. At this time we advise against such action and encourage the Council to review the project on its merits.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG  
Corporation Counsel

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cc: Will Spence, Department of Planning  
Michelle McClean, Deputy Director of Planning  
Michael Hopper, Deputy Corporation Counsel  
Jo-Ann Ridao, Director of Housing and Human Concerns  
Webpage