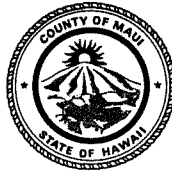


ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
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

September 26, 2011

MEMO TO: Robert Carroll, Chair
Land Use Committee

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

SUBJECT: COMMUNITY PLAN AMENDMENT, PROJECT DISTRICT PHASE I
APPROVAL, AND CHANGE IN ZONING FOR THE PULELEHUA
PROJECT (LAHAINA) (LU-65)

This memorandum is in response to your memorandum, dated September 20, 2011, requesting our Department to indicate whether it is advisable for the Land Use Committee to revise the reference to include "the successors and assigns of" Maui Land & Pineapple Company, Inc. in the conditions of zoning of the proposed bill.

I. Short Answer

It is not necessary to include the language "the successors and assigns of" in the language of the conditions of zoning in the proposed bill for a change in zoning. The unilateral agreement filed prior to first reading will ensure that the owner of the property at the time of development will be responsible for fulfilling the conditions of zoning.

II. Background

At its meeting of September 15, 2011, the Land Use Committee considered the proposed bill entitled "A BILL FOR AN ORDINANCE TO CHANGE ZONING FROM AGRICULTURAL AND INTERIM DISTRICTS TO WEST MAUI PROJECT DISTRICT 5 (PULELEHUA) FOR PROPERTY SITUATED AT MAHINAHINA, KAHANA, LAHAINA, MAUI, HAWAII". The purpose of the proposed bill is to grant a change in zoning from Agricultural and Interim Districts to West Maui Project District 5 (Pulelehua) for the subject property, to facilitate the development of a mix of residential units for all income groups, including up to 900 single-family and multi-family units with the potential for an

additional 300 ohana units; commercial uses; and civic uses, including a 13-acre school site, parks, and open space. Exhibit "C" of the proposed bill contains 17 conditions of zoning. Many of the conditions reference the developer, Maui Land & Pineapple Company, Inc.

III. The Conditions of Zoning Will Run with the Land and Be Enforceable on any Possible Future Owner of the Property

Maui County Code Section 19.510.050 reads in relevant part:

A. Prior to the enactment of an ordinance effecting any change in zoning, the county council may impose conditions upon the applicant's proposed use of the property.

....

D. Such conditions shall be set forth in a unilateral agreement running in favor of the county, acting by and through the chairman of the county council. No ordinance with conditions shall be effective until such agreement, properly executed, has been recorded with the bureau of conveyances of the State of Hawaii or the land court of the State, as the case may be, so that the conditions imposed pursuant to such agreement shall run with the land and shall bind and constitute notice to all subsequent grantees, assignees, mortgagees, lienors, and any other person who claims interest in such property. The agreement shall be properly executed and delivered to the county prior to council action on the ordinance with conditions; provided however, that the council may grant reasonable extensions in cases of practical difficulty. Such agreement shall not restrict the power of the council to rezone with or without conditions. The agreement shall be enforceable by the county, by appropriate action at law or suit in equity, against all parties and their heirs, personal representatives, successors, and assigns.

IV. Conclusion

We have reviewed the standard template for unilateral agreements attached to zoning bills, attached hereto as Exhibit "A". Paragraphs 2 and 3 of the standard unilateral agreement insure once the unilateral agreement is properly executed and filed with the Bureau of Conveyances or the Land Court of the State of Hawai'i the covenants, conditions, and restrictions contained in the unilateral agreement (which are identical to the conditions of

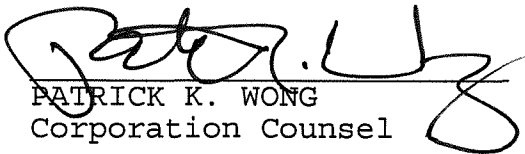
Robert Carroll, Chair
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Page 3

zoning) will run with the land and bind any future owner of the property. The following language is also in the standard unilateral agreement to sum up what is already explicitly contained in paragraphs 2 and 3 of the agreement:

AND IT IS EXPRESSLY UNDERSTOOD AND AGREED that until released in writing by the County, the conditions imposed in this Declaration shall run with the land identified hereinabove and shall bind and constitute notice to all subsequent lessees, grantees, assignees, mortgagees, lienors and any other persons who claim an interest in said land, and the County of Maui shall have the right to enforce this Declaration by appropriate action at law or suit in equity against all such persons, provided that the Declarant or its successors and assigns may at any time file a petition for the removal of the conditions and terminate this Unilateral Agreement, such petition to be processed in the same manner as petitions for change in zoning.

Our office is satisfied that the procedure and language being used in the unilateral agreement conforms to the requirements of Maui County Code Section 19.510.050 and ensures that the conditions of zoning are enforceable on any and all future owners of the property without making any changes to the conditions of zoning as they are written now.

APPROVED FOR TRANSMITTAL:


PATRICK K. WONG
Corporation Counsel

S:\ALL\Advisory\JAG\Pulelehua Conditions.wpd

JAG:ln

cc: William R. Spence, Planning Director
Ann Cua, Department of Planning
Webpage

LAND COURT SYSTEM

REGULAR SYSTEM

Return By Mail () Pickup () : To:
Office of the County Clerk
County of Maui
200 South High Street
Wailuku, Hawai`i 96793

Total Number of Pages: _____

Affects Tax Map Key (Maui) [number]

UNILATERAL AGREEMENT AND DECLARATION FOR CONDITIONAL ZONING

THIS INDENTURE, made this [number] day of [month] [year], by [applicant], [title or description of organization if applicable (i.e "a Hawai`i corporation")] whose principal place of business is located in [town, island (if applicable), state], and whose mailing address is [mailing address], hereinafter referred to as "DECLARANT", and who is the owner of that certain parcel located at [town], Maui, Hawai`i, comprised of approximately [#acres or square feet], and identified for real property tax purposes by Tax Map Key No(s). [number(s)], hereinafter referred to as "PARCEL" (or "PROPERTY").

WITNESSETH:

WHEREAS, the Council of the County of Maui, State of Hawai`i, hereinafter referred to as "Council", is considering the establishment of zoning for the Parcel, comprised of approximately [#acres or square feet], which is more particularly described in Exhibit "1", which is attached hereto and made a part hereof, and which is more particularly identified in Land Zoning Map No. [L-number], which is on file in the Office of the County Clerk of the County of Maui; and

WHEREAS, the Council recommends through its [Land Use Committee], Committee Report No. (leave blank), that said establishment of zoning be approved for passage on first reading subject to certain conditions, pursuant to Section 19.510.050, Maui County Code; and

WHEREAS, the Declarant has agreed to execute this instrument pursuant to the conditional zoning provisions of Section 19.510.050, Maui County Code;

NOW, THEREFORE, the Declarant makes the following Declaration:

1. That this Declaration is made pursuant to the provisions of Section 19.510.050, Maui County Code, relating to conditional zoning;

2. That until written release by the County of Maui, the Parcel, and all parts thereof, is and shall be held subject to the covenants, conditions and restrictions which shall be effective as to and shall run with the land as to the Parcel, from and after the recording of this Declaration with the Bureau of Conveyances or the Land Court of the State of Hawai'i, without the execution, delivery or recordation of any further deed, instrument, document, agreement, declaration, covenant or the like with respect thereto by the Declarant, the County of Maui, or any heir, devisee, executor, administrator, personal representative, successor, and assign; that the acquisition of any right, title or interest in or with respect to the Parcel by any person or persons, entity or entities, whomsoever, shall be deemed to constitute the acceptance of all of the covenants, conditions and restrictions of this Declaration by such person or persons, entity or entities; and that upon any transfer of any right, title or interest in or with respect to the Parcel the same shall be subject to, and the transferee shall assume and be bound and obligated to observe and perform all of the covenants, conditions and restrictions of this Declaration;

3. That this Declaration and all of the covenants, conditions and restrictions contained herein shall continue to be effective as to and run with the land in perpetuity, or until the Declarant notifies the appropriate County Department that any of said covenants, conditions and restrictions are satisfied by the Declarant, and the appropriate County Department verifies the satisfaction and provides a written release of the covenant, condition or restriction;

4. That the term "Declarant" and any pronoun in reference thereto, wherever used herein, shall be construed to mean the singular or the plural, the masculine or the feminine, or the neuter, and vice versa, and shall include any corporation, and shall be held to mean and include the "Declarant", the Declarant's heirs, devisees, executors, administrators, personal representatives, successors, and assigns;

5. That the Declaration shall become fully effective on the effective date of the zoning ordinance approving the establishment of [zoning district] District zoning and this Declaration shall be recorded in the Bureau of Conveyances or Land Court of the State of Hawai'i;

6. That the Declarant agrees to develop said Parcel in conformance with the conditions set forth in Exhibit "2", which is attached hereto and made a part hereof and which shall be made a part of the zoning ordinance;

7. That the conditions imposed are reasonable and rationally relate to the objective of preserving the public health, safety and general welfare and such conditions fulfill the need for the public service demands created by the proposed use;

AND IT IS EXPRESSLY UNDERSTOOD AND AGREED that until released in writing by the County, the conditions imposed in this Declaration shall run with the land identified hereinabove and shall bind and constitute notice to all subsequent lessees, grantees, assignees, mortgagees, lienors and any other persons who claim an interest in said land, and the County of Maui shall have the right to enforce this Declaration by appropriate action at law or suit in equity against all such persons, provided that the Declarant or its successors and assigns may at any time file a petition for the removal of the conditions and terminate this Unilateral Agreement, such petition to be processed in the same manner as petitions for change in zoning.

IN WITNESS WHEREOF, the undersigned has executed this Declaration the day and year first above written.

DECLARANT:

[signature]
[name]
[title if applicable]

APPROVED AS TO FORM AND LEGALITY:

JAMES A. GIROUX
Deputy Corporation Counsel
County of Maui

STATE OF _____)
)
) SS.
)
 _____)

On this _____ day of _____, 20____, before me personally appeared _____, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

[Stamp or Seal]

Notary Public, State of _____

Print Name: _____

My Commission Expires: _____

NOTARY PUBLIC CERTIFICATION

Doc. Date: _____ # Pages: _____

Notary Name: _____ Judicial Circuit: _____

Document Description: _____

[Stamp or Seal]

Notary Signature: _____

Date: _____