



DEPARTMENT OF THE CORPORATION COUNSEL
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MEMORANDUM

April 20, 2012

T O : Joseph Pontanilla, Chair
Budget and Finance Committee

F R O M: Jeffrey Ueoka, Deputy Corporation Counsel *JU*

SUBJECT: FISCAL YEAR 2013 BUDGET; REQUEST FOR LEGAL OPINION
RELATING TO PARK ASSESSMENTS AND IMPACT OF THE KONNO
DECISION (CC-4)(BF-1)

This memorandum is in response to your memorandum dated April 18, 2012 requesting our Department to provide a legal opinion to the following questions:

1. When park assessments are held in a trust-in agency account by the County, can the County refund an assessment without Council approval? (GHR)

The authority to require subdividers, as a condition of subdivision approval, to provide land in perpetuity or dedicate land for park and playground purposes is granted in Section 46-6, Hawaii Revised Statutes ("HRS"). Section 18.16.320, Maui County Code ("MCC"), relating to Parks and Playgrounds as they pertain to subdivisions, was created based on the requirements placed on the County of Maui ("County") contained in HRS §46-6.

The "park assessments" in question are provided by the subdivider in lieu of providing land or dedicating land. The subdivider is required to provide a dollar amount for each square foot of land that it would be required to provide for each lot created or dwelling constructed.¹ The "park assessments" are due and owing at the time of final subdivision approval for those projects requiring a division of land and at the time when the building permit(s) is issued for those projects where the construction of a building or buildings is proposed without further

¹MCC §18.16.320(C)

subdividing the existing parcel of land.² The procedure for the return of a park assessment when a project is not constructed was not contemplated in the Maui County Code or the Hawaii Revised Statutes.

The park assessment should be held in a "trust-in-agency" account and should not be recognized by the County until creation of the individual lot or construction of the individual unit is complete. Prior to the County recognizing the park assessment, the County can refund the assessment without approval of the Council of the County of Maui as the funds are not yet recognized by the County. Further analysis will be required should construction stop prior to the completion of a unit and the subdivider requests a refund of the park assessment.

2. Does the decision in Konno v. County of Hawaii, 85 Hawai`I 61 (1997), have any impact on the proposal to privatize the PALS (Play and Learn Sessions) Program or the Waiehu Municipal Golf Course? (GRH)

The Hawaii Supreme Court in Konno v. County of Hawaii, 85 Hawai`I 61, 937 P.2d 397 (1997), a case analyzing the privatization of public services, adopted the "Nature of Services Test". The Test provides that, "the protection of civil service laws extends to those services that have been customarily and historically provided by civil servants." *Id.* at 72, 408. The Court looked to Section 76-77, Hawaii Revised Statutes ("HRS") to define "civil service". HRS §76-77, in relevant part states:

The civil service to which this part applies comprises all positions in the public service of each county, now existing or hereafter established, and embraces all personal services performed for each county, except the following:

. . .

- (7) Positions filled by persons employed by contract where the personnel director has certified and where the certification has received the approval of the commission that the service is special or unique, is essential to the public interest, and that because of the circumstances surrounding its fulfillment, personnel to perform the service cannot be recruited through normal civil service

²HRS §46-6(b) and MCC §18.16.320(C)

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procedures; provided that no contract pursuant to this paragraph shall be for any period exceeding one year;

. . .

(10) Positions specifically exempted from this part by any other state statutes[.]

The *Konno* decision establishes the standard for analyzing the privatization of public services in the State of Hawaii and any proposal to privatize a function of the County of Maui will certainly warrant a *Konno* analysis. The application of the *Konno* decision to the proposal to privatize Play And Learn Sessions ("PALS") and the Waiehu Municipal Golf Course ("WMGC") will generate very different results as each is unique. At this time, without the specifics pertaining to the implementation of the proposal being presented to us, we are unable to determine the ramifications of the privatization the PALS program and the WMGC. That being said, we are aware of the issues and will work with the Administration to mitigate the impacts of the implementation of the proposals.

Should you have any questions or concerns, please do not hesitate to contact me.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

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