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October 8, 2012

MEMORANDUM

TO: Traci Fujita Villarosa
Deputy Director
Department of Liquor Control

FROM: Edward S. Kushi, Jr.
First Deputy Corporation Counsel

SUBJECT: Section 281-39.5(a), Hawaii Revised Statutes

A handwritten signature in black ink, appearing to be "E. Kushi, Jr.", is written over the "FROM:" line of the memorandum.

We respond to the inquiries set forth in your request of September 13, 2012 as follows:

- 1) **Whether Kihei Kalama Park is a “public playground utilized extensively by minors”?**

SHORT ANSWER: To be determined by the Liquor Commission.

For purposes of this memo, we have assumed that pursuant to the public notice requirements, the referenced parcel, Kihei Kalama Park, is within the 500 foot radius of the applicant's, Shaka Sandwich and Pizza, premises. We have further assumed that at least 40% of the registered voters or owners and/or lessees of real estate within the 500 foot radius have duly filed protests against the granting of the applicant's liquor license.

A) Section 281-39.5, Hawaii Revised Statutes

Section 281-39.5, Hawaii Revised Statutes (“HRS”), in its entirety, reads:

“281-39.5 Liquor license prohibited; where. (a) The liquor commission or agency of each county may deny or restrict the issuance of a liquor license for on-site sale and consumption by the drink to any applicant whose establishment is or would be located within five hundred feet of a

public or private elementary, intermediate, or high school, or public playground utilized extensively by minors, as determined by the liquor commission of each county; provided that the liquor commission or agency of each county shall deny the issuance of a liquor license if forty per cent of the:

- (1) Registered voters for the area within five hundred feet of the nearest point of the premises for which the license is asked; or
- (2) Owners and lessees of record of real estate and owners of record of shares in a cooperative apartment within five hundred feet of the nearest point of the premises for which the license is asked;

have duly filed or caused to be filed their protests against the granting the license. The distance of five hundred feet shall be measured from the boundary of the school or public playground to the boundary of the applicant's premises. Public or private beaches, and public or private day care centers located in or adjacent to commercial areas shall not be deemed schools or public playgrounds for purposes of this section. The provisions of this section shall not apply to establishments located within areas designated by the appropriate counties for resort purposes, or to hotel or condominium hotel liquor license applicants.

(b) This section shall apply only to the issuance of new liquor licenses for on-site sale and consumption by the drink and not to any renewal of such licenses." (emphasis added)

B) Legislative history

Section 281-39.5, HRS, was enacted in 1991 by the Hawaii State Legislature (Act 236, Section 2), and was subsequently amended in 2001 (Act 257, Section 3), and in 2007 (Act 53, Section 5).

The initial Section 281-39.5, HRS, enacted in 1991 permitted the liquor commissions to deny or restrict issuances of licenses within the referenced 500 foot radius. The 2001 amendments to Section 281-39.5, HRS, mandated denial of licenses provided the 40% protest threshold is met. The 2007 amendments merely added the reference to condominium hotels.

A complete review of the legislative history (i.e., House and Senate Standing Committee Reports, Conference Committee Reports, and floor discussions) of all acts reveals no definitive insight nor definition of what the legislature intended by use of the phrase "public playgrounds utilized extensively by minors". However, based on the qualifying and descriptive language immediately following which states ".....public playground utilized extensively by minors, as determined by the liquor commission of each county;", it is our office's opinion and position that the legislature purposely deferred such determination to the respective liquor commissions' discretion.

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B) Discussion and Conclusion

Section 281-39.5, HRS, as amended, was duly enacted by the Hawaii State Legislature. Section 08-101-48.1 of the Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui¹, which exactly mirrors the language of Section 281-39.5, HRS, is a duly promulgated administrative rule of the Department of Liquor Control for the County of Maui. If an administrative rule is not authorized by statute, the rule is void and cannot be enforced. Hyatt Corporation v. Honolulu Liquor Commission, et al, 69 Haw 238, at page 240 (1987). Further, our Hawaii Supreme Court in Hyatt stated:

“The [Hawaii State] legislature has vested unusually broad discretionary powers in the liquor commissions, and the extent of the grant of power and discretion has pertained consistently throughout the history of the Hawaii intoxicating liquor law.”²

Lastly, the Hyatt court affirmed the power and authority of a liquor commission through its statement that:

“[[It] is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.” (citations omitted)³

Applying the above principles to the specific language of the statute (Section 281-39.5, HRS) and the administrative rule (Section 08-101-48.1) with respect to the question whether Kihei Kalama Park is a “public playground utilized extensively by minors”, we opine that the decision is a factual decision to be made by the Liquor Commission, in its discretion through its investigative powers and functions. Legitimate and warranted factors to be reviewed and considered include, but should not be limited to, the size and scope of the park, the facilities available in the park which serve both minors and adults, and the extent such facilities are utilized solely or extensively by minors. Further, we advise that any such determination with respect to the subject Kihei Kalama Park would affect future situations in which similar or like determinations are required; provided, however, similar determinations for other public playgrounds should be made on a case-by-case basis.

1 Title MC-08, Subtitle 01, Chapter 101; Administrative Rules of the Department of Liquor Control (“Liquor Department Rules”).

2 Hyatt Corporation v. Honolulu Liquor Commission, et al, 69 Haw 238, at page 241 (1987).

3 *Ibid.*, at pages 242-243.

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- 2) **Whether the entire park parcel should be used in determining the five hundred foot radius for Shaka Sandwich & Pizza located at 1770 South Kihei Road, Kihei ?**

SHORT ANSWER: Yes.

With respect to the 500 foot radius, Section 281-39.5(a), HRS, simply states:

“ . . . The distance of five hundred feet shall be measured from the boundary of the school or public playground to the boundary of the applicant’s premises. . . . ”

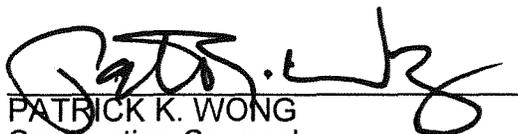
Although, unlike the specific references to “parcels” or Tax Map Key numbers which are found in the Liquor Commission’s rules regarding notification requirements⁴, Section 281-39.5 (a), HRS, does not limit nor define the extent to which an entire area of a school or public playground would be included. However, we opine that it is axiomatic that the entire area (or parcel) of a school or public playground be included, as to limit or restrict the subject area only to the area that falls within the 500 foot radius would be contrary to the practice of the Commission with respect to a condominium or apartment complex that is not totally within the subject 500 foot radius.

Accordingly, our response and advice would be to include the entire area of a parcel that falls within the 500 foot radius.

Call if further discussion and/clarification is needed.

cc: Franklyn L. Silva, Director, Department of Liquor

APPROVED FOR TRANSMITTAL:


PATRICK K. WONG
Corporation Counsel

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4 Section 08-101-39 of the Liquor Department Rules.