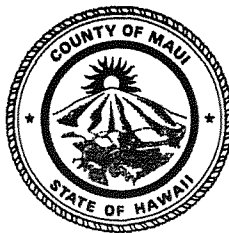


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Mayor



PATRICK K. WONG  
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EDWARD S. KUSHI  
First Deputy

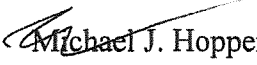
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July 1, 2014

**MEMO TO:** Michael P. Victorino  
Council Member

**FROM:**  Michael J. Hopper, Deputy Corporation Counsel

**SUBJECT:** A BILL FOR AN ORDINANCE AMENDING CHAPTER 19.510, MAUI COUNTY CODE, RELATING TO ENVIRONMENTAL ASSESSMENTS AND ENVIRONMENTAL IMPACT STATEMENTS

After reviewing the proposed bill transmitted to this office on June 18, 2014, "A BILL FOR AN ORDINANCE AMENDING CHAPTER 19.510, MAUI COUNTY CODE, RELATING TO ENVIRONMENTAL ASSESSMENTS AND ENVIRONMENTAL IMPACT STATEMENTS", we are returning same to you as we are unable to approve it as to form and legality at this time.

The proposed bill seeks to require an applicant to obtain approval of the planning director before hiring any consultant to prepare an environmental assessment ("EA") or environmental impact statement ("EIS"), and requires the planning director to approve or deny a final EA and EIS.

EAs and EIS are regulated under Hawaii Revised Statutes ("HRS") Section 343 and Hawaii Administrative Rules Section 11-200-1 et. seq. These provisions provide detailed instructions on how EAs and EIS are prepared, reviewed, and accepted.

HRS Section 343-5(e) requires an applicant to prepare an EA or EIS, provides a description of the process required in preparing the EA or EIS, and dictates which agency must accept the EA or EIS.

HRS Section 343-6 requires the State Environmental Council to adopt administrative rules governing HRS Section 343, and states:

(a) After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with chapter 91 including, but not limited to, rules that shall:

(1) Prescribe the procedures whereby a group of proposed actions may be treated by a single environmental assessment or statement;

(2) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an environmental assessment;

**(3) Prescribe procedures for the preparation of an environmental assessment;**

(4) Prescribe the contents of an environmental assessment;

(5) Prescribe procedures for informing the public of determinations that a statement is either required or not required, for informing the public of the availability of draft environmental impact statements for review and comments, and for informing the public of the acceptance or nonacceptance of the final environmental statement;

(6) Prescribe the contents of an environmental impact statement;

**(7) Prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of an environmental impact statement;**

**(8) Establish criteria to determine whether an environmental impact statement is acceptable or not; and**

(9) Prescribe procedures to appeal the nonacceptance of an environmental impact statement to the environmental council.

(b) At least one public hearing shall be held in each county prior to the final adoption, amendment, or repeal of any rule.

(emphasis added).

Michael P. Victorino, Council Member  
July 1, 2014  
Page 3

The rules set forth above have been adopted as Hawaii Administrative Rules Section 11-200-1 et. seq. (attached). Section 11-200-4, consistent with HRS Section 343-5(e), governs which entity is required to act as the accepting authority and provides guidance on resolving conflicts if multiple agencies have jurisdiction. Subchapter 7 of the rules provides detailed instructions on preparation of the EA or EIS, and Section 11-200-23 provides criteria for acceptance or non-acceptance of the EA or EIS by the accepting authority.

The proposed bill attempts to provide the planning director with the authority to accept or reject the applicant's consultant and to accept or reject an EA or EIS, whether or not the planning department is the accepting authority under HRS Section 343-5(e). It also seeks to provide a standard for acceptance of EA and EIS documents that differs from the standards in HRS 343 and the administrative rules. This is inconsistent with the above cited laws, which govern EA/EIS preparation and acceptance by statute and administrative rules. Those provisions detail the process for preparing the EA/EIS, for determining the appropriate accepting authority, and for determining the acceptability of EA/EIS documents.

If a county ordinance conflicts with state law that is of statewide concern, then it is necessarily invalid because it violates the state constitution and the state's supremacy provisions. See Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawai'i 465, 480-483, 78 P.3d 1, 16-18 (Haw. 2003); see also Marsland v. First Hawaiian Bank, 70 Haw. 126, 764 P.2d 1228 (Haw.1988)(City ordinance authorizing broader subpoena powers than allowed by State law held invalid).


There are no provisions under HRS Chapter 343, or the administrative rules adopted thereunder, that would authorize the Maui County Council to adopt the proposed ordinance. To effectuate the changes requested in the ordinance, the state legislature and environmental council would need to amend those provisions.

While your proposal cannot be approved as written, we note that the Maui County Council does have the ability to add requirements for County land use applications, such as change in zoning or community plan amendment applications, separate from and in addition to the EA or EIS documents required by HRS Chapter 343.

Please contact our office if further discussion or clarification is needed.

MJH:ma  
Enclosures  
S:\ALL\MJH\Council\Reply to Victorino Re EA EIS.doc

APPROVED FOR TRANSMITTAL:

  
PATRICK K. WONG  
Corporation Counsel