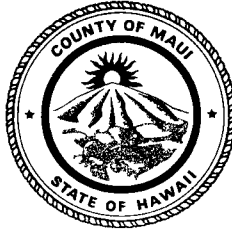


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MEMO TO: Kelly T. King, Chair  
Planning Committee

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

DATE: September 5, 2017

SUBJECT: **MOLOKAI COMMUNITY PLAN UPDATE** (PC-2)

This letter responds to the questions you raised in your correspondence dated August 30, 2017 regarding the draft Molokai Community Plan dated June 30, 2017.

**Kalaupapa**

You request advice on whether Kalaupapa is within the jurisdiction of the County of Maui, with reference to several policies contained in the draft plan. Hawaii Revised Statutes Section 326-34 states:

**County of Kalawao; governance.** (a) The county of Kalawao shall consist of that portion of the island of Molokai known as Kalaupapa, Kalawao, and Waikolu, and commonly known or designated as the Kalaupapa Settlement, and shall not be or form a portion of the County of Maui, but is constituted a county by itself. As a county it shall have only the powers especially conferred and given by sections 326-34 to 326-38 and, except as provided in those sections, none of the provisions of the Hawaii Revised Statutes regarding counties shall be deemed to refer to or shall be applicable to the county of Kalawao.

(b) The county of Kalawao shall be under the jurisdiction and control of the department of health and be governed by the laws, and rules relating to the department and the care and treatment of persons affected with Hansen's disease, except as otherwise provided by law.

This section makes clear that Kalaupapa is part of Kalawao County and is not under the jurisdiction or control of the County of Maui. As such, the effect of any community plan policy with respect to Kalaupapa would be minimal, similar to a policy regarding other areas of the State of Hawaii outside of the County of Maui.

### **Chapters 10 and 11 of the Draft Molokai Community Plan**

In my review of Chapters 10 and 11 of the draft Molokai Community Plan I note the legal issues referenced below. My review is based on legal issues only—chapters 10 and 11 should be consistent with the remainder of the plan, and the Council should agree with the policy conclusions of those chapters (as with the rest of the plan) prior to adopting the plan. As review of the plan continues there may be additional comments to add to the list below.

#### **Chapter 10**

On page 129, the plan recommends that no action should be taken on a boat ramp unless “Free Prior, and Informed Consent is Obtained” utilizing a United Nations protocol. The community plan cannot alter the existing approval process for constructing a boat ramp, which would be based on state law applicable to the applicant.

On page 136, there is a statement that 50% of kuleana land is untradeable because of unclear title. There does not appear to be a reference to the source of this information which should be provided.

On page 137, the plan creates a new 8 step permitting process based on the “eight realms of decision making” for “any permit request”. This is beyond the scope and authority of the community plan and will require an amendment to the Maui County Code.

On pages 137-138, the plan attempts to adopt the “United Nations Declaration on the Rights of Indigenous Peoples” as a “mandate that the State and County government must adhere to in making land use decisions in collaboration with native individuals and communities on Molokai.” Should the county wish to adopt a particular United Nations protocol for land use

decisions, it must do so by amendment to the county code. Action may also be required by the State of Hawaii.

## Chapter 11

There are several portions of this chapter that appear to be proposed revisions that were submitted after the initial draft, and include captions that would be used in filing documents. The captions should be removed and the proposed revisions incorporated into the overall document where appropriate.

On pages 143-144, the plan states “hunting opportunities should be limited to Molokai residents” and attempts to adopt a “Hunting Management Plan” that would dictate hunting protocols on private property. It is beyond the scope of the community plan to adopt hunting regulations on private property. Hunting throughout the state is regulated by the Department of Land and Natural Resources (see HRS chapter 183D).

On pages 145-146, the plan includes several quotations from the Molokai Dispatch newspaper. The information in the newspaper articles should be verified before including them as a basis for policies in the plan.

On page 146 there are a variety of proposed actions with respect to the privately owned water system. It should be made clear that these policies are recommended actions that relate to the owner of the private water system and not the county, which does not own or operate the system. It should also be noted that private water systems are regulated by the Public Utilities Commission and the Department of Health and not the County of Maui.

On page 147, there is a statement that the “City & County” and Molokai Ranch should share the cost of repairing Kaluakoi road. The reference to “City and County” should be changed to “County of Maui” on this page and page 155. Regarding this policy, the Department of Public Works should confirm whether the road is a county highway. If it is not then the county should not be repairing a road it does not own.

On page 149 clarify that the private landowner is responsible for all items related to the private water system.

On page 152, the plan purports to disallow fracking. This is beyond the scope of the community plan and would need to be done by appropriate state and county legislative action.

On page 153 there is proposed a “moratorium on the use of water”. The County of Maui is not authorized to adopt a moratorium on water use as the system is privately owned and regulated by the State.

On page 153 there is a proposed “permanent moratorium against the development of tourist related activities”. Should the Council wish to prohibit certain activities, it is advisable to assign the appropriate land use designations to the applicable land, and zone that land consistent with the designation along with appropriate conditions. Further, to the extent these activities are already in place they would be subject to rules related to nonconforming uses if the use is prohibited.

On page 155 there are references to the county identifying potential water sources and investigating how to provide that water for aquaculture, and providing assistance to Molokai Ranch in restoring the golf course, restaurant and buildings at Kaluakoi. As with other policy considerations throughout the plan, the Council should consider whether the policy is appropriate. This also conflicts with the moratorium on tourist related activities on page 153.

On page 155 there is a statement that taxes and fees should never increase for residents. As taxes and fees are consistent throughout the county and not specific to Molokai residents this policy cannot be implemented. On this same page there is a proposed special taxation method for Molokai residents to tie taxation to actual rather than potential use. Any method of taxation would need to be consistent throughout the county and cannot be applied solely to Molokai residents.

Starting on page 156 there is a list of items under “commercial development”. It should be clarified if this is intended to apply to commercial development only, as many sections appear to apply generally. Additionally, the subheadings under this section are inconsistent (the numbering is incorrect) and should be fixed.

Section B on page 156 proposes to alter project review requirements for various applications (though it is unclear which applications). To do this, the Maui County Code would need to be amended to specify the necessary alterations to the approval process. While this cannot be done in the community plan, the plan can designate land appropriately to indicate the desired land use. All of section B should be deleted or added to the Maui County Code under Section 19.510 or other appropriate section of the Maui County Code.

Several of the proposed development requirements in section (B)(5) on page 156, even if added to the County Code, are not appropriate mitigative measures. Specifically, the requirement to provide a title search and survey of all land within 1000 feet of the development, whether owned by the developer, does not appear to be related to the impacts of the project and the scope of the impact.

Section B(6)(a),(b) and (d) on page 157 deal with agricultural subdivisions and require amendments to titles 18 and 19 of the Maui County Code.

Section B(6)(f) state that an environmental assessment is required if a community member disagrees with an applicant on whether the project has adequately addressed various environmental concerns. This is contrary to HRS section 343 and beyond the scope of the community plan.

Section B(6)(g) and (h) deal with matters under the control of the State Historic Preservation Division and implementing these requirements is beyond scope of the community plan.

On page P. 158 there is a proposal to create a new state land use designation under HRS section 205 of "traditional". This cannot be done through a statement in the community plan as the State has the authority to designate these categories. This section and the subsequent proposals to designate lands as state land use "traditional" are beyond the scope of the community plan.

Please do not hesitate to contact me with any further questions.

APPROVED FOR TRANSMITTAL:

  
PATRICK K. WONG  
Corporation Counsel

2017-0096

PC-2 2017-09-05 Memo to Chair