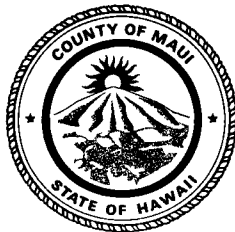


ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
Corporation Counsel

EDWARD S. KUSHI
First Deputy

LYDIA A. TODA
Risk Management Officer
Tel No (808) 270-7535
Fax No (808) 270-1761

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

MEMO TO: Elle Cochran, Council Member
County Council

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

DATE: November 1, 2017

SUBJECT: **Enforcement/Penalty for Acting in Violation of
Community or General Plans**

This correspondence is in response to your request for legal advice dated October 9, 2017 and received by our office on October 16, 2017. You request advice on various matters related to the Maui County General Plan and community plans, which I will address below.

At the outset, it is important to address the following language contained in your opinion request, in which you state: "Maui County Code 2.80B gives the General Plan 'the force and effect of law' and states that 'all agencies shall comply with the general plan, and administrative actions by agencies shall conform to the general plan.'" While the request does not provide citations to the applicable portions of 2.80B, Maui County Code ("MCC"), it appears to reference portions of sections 2.80B.010 and 2.80B.030(B), MCC. It is crucial to read these sections in their entirety, so I am including the text of those sections as follows:

2.80B.010 - Purpose and intent. The purpose and intent of this chapter is to establish an improved process to update the general plan and community plans. This chapter is designed to provide plans that clearly identify provisions that are meant to be policy guidelines and provisions that are intended to have the force and

effect of law; to implement and enforce plans through prioritization and accountability; to empower advisory committees; to place more emphasis on island-wide and inter-regional issues; to encourage more frequent updates of plans and to establish deadlines for completion; and to increase public and community participation in the planning process.

2.80B.030(B) - All agencies shall comply with the general plan, and administrative actions by agencies shall conform to the general plan, except for ministerial permits or approvals including, but not limited to, building permits, grading permits, plumbing permits, and electrical permits. All community plans, zoning ordinances, and subdivision ordinances shall conform to the general plan. Preparation of County budgets and capital improvement programs shall implement the general plan to the extent practicable. The countywide policy plan, Maui island plan, and community plans authorized in this chapter are and shall be the general plan of the County, as provided by section 8-8.5 of the revised charter of the County of Maui (1983), as amended.

For additional background, I am attaching two opinions from the Department of the Corporation Counsel dated June 29, 1999 and August 19, 1999 that outline the situations in which the general and community plans regulate land use. These opinions were codified in Maui County Code section 2.80B.030(B) above, which states that ministerial permits may be granted without review for compliance with the general plan.¹

With respect to the three questions you have raised, I am unable to provide a clear answer at this time as I do not have the specific facts surrounding each question. The general and community plans contain a variety of goals, objectives, policies, actions and land use designations, which may or may not apply with the force and effect of law in a given situation. More information is needed to answer your questions. I will provide a general response to each question to the extent possible.

1. Clarify if this applies to state agencies' operations within Maui County, as well as county agencies.

¹ See Ordinance 4175 (2014)(attached).

If the State of Hawaii is acting as a landowner and seeking a permit that requires compliance with the general and community plans by statute or ordinance then the state must comply with the general plan and applicable community plan. For example, if the State of Hawaii applies for a Special Management Area (“SMA”) Permit for a development pursuant to Hawaii Revised Statutes (“HRS”) section 205A, compliance with the general and community plans would be required pursuant to HRS section 205A-26(2)(C).

However, much of the general and community plans would not apply to the state in the same manner they would apply to the county—for instance, the state would not necessarily need to follow all of the goals, objectives and policies of the plans that guide decision making in the same manner as the county. The state would not be required to prepare its annual budget based on the general and community plans, while the County of Maui’s annual budget is to implement the community plans “to the extent practicable”².

Whether the general and community plans regulate the activities of the State of Hawaii will depend on the situation in question and more information is needed to answer your request.

2. Outline the complaint or grievance process to be followed when an agency or individual acts in direct violation of the general plan.

As discussed in the 1999 opinions attached to this response, the general and community plans have the force and effect of law in certain situations, where dictated by statute or ordinance. For instance, all subdivisions are required to be consistent with the general and community plans, and all development within a SMA is required to be consistent with the general and community plans. Should a person act in violation of these requirements, the department with jurisdiction over the applicable ordinance would be responsible for enforcement. In the case of a subdivision that is inconsistent with the general plan the Department of Public Works would have enforcement authority. In the case of a development within a SMA that is inconsistent with the general plan, the Department of Planning would have enforcement authority.

The appropriate agency to contact for enforcement of ordinances or statutes that require compliance with the general and community plans will

² Maui County Code Section 2.80B.070(F)(1).

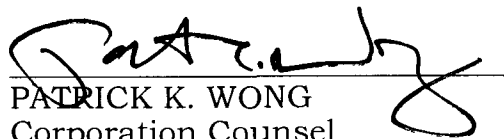
depend on the specific situation in question and more information is needed to answer your request.

3. Describe the penalties for such actions

The penalty for a violation of ordinances or statutes that require compliance with the general and community plans varies depending on the ordinance or statute. For example, civil fines of up to \$1,000 per day³ may be issued against any person who violates titles 18 or 19 of the Maui County Code, which require compliance with general and community plans in certain circumstances. The penalty for undertaking a development in a SMA without a permit, which requires compliance with the general and community plans, is up to a \$100,000 initial fine and a \$10,000 fine per day the violation continues.⁴

To determine the applicable penalty for a violation of an ordinance or statute that requires compliance with the general and community plans I would need to know the specific facts of your request. Please do not hesitate to contact me with further questions.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

2017-1281

2017-11-01 Memo to CM

³ Maui County Code Section 19.530.030.

⁴ HRS Section 205A-32.



DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE (808) 270-7740 FAX (808) 270-7152

June 29, 1999

The Honorable Dain P. Kane, Chair
Committee of the Whole
Maui County Council
200 South High Street
Wailuku, Maui, HI 96793

**RE: Effect of Community Plan Designation on Use of Property
at Makena Road/Palauea Beach (COW-27)**

Dear Mr. Kane:

This is in response to your memorandum dated June 7, 1999, requesting a legal opinion on the apparent inconsistency between the zoning and community plan designation for the parcels at Palauea Beach under consideration by the Committee of the Whole (hereinafter referred to as the "Palauea property"). This opinion addresses specifically the effect the community plan designation has on the use of the subject property.

I. Factual Background

The Palauea property is currently zoned hotel district. The current Kihei-Makena Community Plan ("KMCP"), which became effective in March 1998, designates the property as Park on the land use map. It is our understanding that the individual parcels are being marketed for sale as home sites for single family residences.

On December 4, 1996, the Council passed a resolution authorizing eminent domain proceedings for the acquisition of the subject property (which at the time was not subdivided) for park and recreational purposes. (Resolution No. 96-121). The administration has thus far not proceeded with condemnation.

On April 28, 1999, several county officials were sent a letter by Isaac Davis Hall, objecting to the issuance of building permits or water meters for any development on the Palauea property. Mr. Hall asserts that the administration is obligated to commence

Dain P. Kane, Chair
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eminent domain proceedings. Mr. Hall also argues that issuance of building permits or water meters would violate County law because section 2.80A.010.B, Maui County Code ("MCC"), requires "administrative actions by county agencies [to] conform to the provisions of the General Plan"

II. Issue Presented

Does §2.80A.010.B of the Maui County Code give the General Plan and community plans the force and effect of law, thereby prohibiting the issuance of building permits and other ministerial administrative approvals for developments which are not consistent with the community plan designation?

III. Short Answer

No, the General plan and community plans are intended to guide the decisions of County officials and do not themselves regulate the use of land. Ministerial approvals, such as the issuance of a building permit, may be issued without reference to the General Plan and applicable community plan unless an ordinance or statute specifically requires consistency therewith.

IV. Discussion

A. Applicable Rules of Statutory Construction

The issue which has been raised arises out of the language of Section 2.80A.010.B, MCC.¹ In construing the ordinance to determine the intent of the legislative body, we first look to the plain language of the ordinance itself. State v. Mahoe, 88 Haw. 181 (1998). However, this plain language rule of statutory construction does not preclude the examination of other sources

¹ In its entirety, subsection B of 2.80A.010, MCC, reads: All agencies of the county shall comply with the provisions of the general plan. All community plans, zoning ordinances, subdivision ordinances and administrative actions by county agencies shall conform to the provisions of the general plan. Preparation of county budgets and capital improvement programs shall also conform to the provisions of the general plan. The community plans authorized in this chapter are established and shall, upon adoption by the council, be part of the general plan of the county, as provided in the revised charter of the county.

Dain P. Kane, Chair
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even when such language appears clear upon perfunctory review. Crompton v. Term Corp., 83 Haw. 1 (1996).

When construing a statute, the language must be read in context of the entire statute and construed in a manner consistent with the purposes of the statute. Mathewson v. Aloha Airlines, Inc., 82 Haw. 57 (1996). Thus, the language of §2.80A.010.B must be read in context of Chapter 2.80A, MCC, as well as the Charter of County of Maui ("Charter") and §46-4, Hawaii Revised Statutes.

Finally, we must give the ordinance "[a] rational, sensible and practicable interpretation [which] is preferred to one which is unreasonable or impracticable." Keliipuleole v. Wilson, 85 Haw. 217, 221-222 (1997), quoting State v. Lobendahn, 71 Haw. 111, 112 (1989). This is because "[t]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." Keliipuleole, at 222, quoting State v. Arceo, 84 Haw. 19 (1996).

B. The Planning Framework

The power to regulate land use is granted to the counties by §46-4, Hawaii Revised Statutes ("HRS"). This provision states, in relevant part, that "[z]oning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner." (Emphasis added.) The State Legislature requires zoning to be done in accordance with an overall plan. Maui County's General Plan fulfills this mandate by guiding zoning and other decisions which affect the development of Maui County.

The Charter also makes it clear that the General Plan is intended as a guide. Section 8-8.5 of the Charter reads:

The general plan shall recognize and state the major problems and opportunities concerning the needs and the development of the county and the social, economic and environmental effects of such development and shall set forth the desired sequence, patterns and characteristics of future development.

Section 8-8.3(3) provides that it is the Planning Director's duty to "[r]ecommend revisions of the general plan at least every ten years to guide the development of the county." (Emphasis added.)

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Chapter 2.80A, MCC, provides that the community plans are part of the General Plan. §2.80A.010.B, MCC. As part of the General Plan, the individual community plans serve the same overall purpose, i.e., to guide development. Chapter 2.80A, MCC, does not indicate that the community plans are intended to implement the General Plan in a regulatory manner.

Finally, the language of the Kihei-Makena Community Plan itself is instructive. On page 1, the purpose of the KMCP is provided as follows:

The Kihei-Makena Community Plan, one of nine (9) community plans for Maui County, reflects current and anticipated conditions in the Kihei-Makena region and advances planning goals, objectives, policies, and implementation considerations to guide decision-making in the region through the year 2010. The Kihei-Makena Community Plan provides specific recommendations to address the goals, objectives, and policies contained in the General Plan, while recognizing the values and unique attributes of the Kihei-Makena areas in order to enhance the region's overall living environment.

The Maui County General Plan, first adopted in 1980 and updated in 1990, sets forth goals, directions and strategies for meeting the long-term social, economic, environmental and land use needs of the County....

The KMCP also describes the role of the community plan in the planning process:

For Maui County, the General Plan and the community plans are strategic planning documents which guide government action and decision-making...

...Implementation of the goals, objectives and policies contained in the Community Plan is defined through specific implementing actions, also set forth in each community plan. Implementation actions as well as broader policy recommendations are effectuated through various processes, including zoning, the capital improvements program, and the County budgeting process.

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This language clearly states that the role of the community plan is to guide development.² Section 2.80A.010.B, MCC, must be read in this context.

If a building permit cannot be issued because the proposed use is inconsistent with a community plan designation, in effect the community plan would be regulating the landowner's use of the property. It would be inconsistent with the above provisions to read §2.80A.010.B, MCC, as establishing the General Plan and community plans as regulatory legislation.

C. Regulation of Land Use

While the General Plan and community plans establish the desired land use patterns and guide land use decisions of County officials, the zoning actually regulates what a landowner can and cannot do on his property. Accord, Toandes Peninsula Ass'n v. Jefferson County, 648 P.2d 448 (Wash. App. 1982) ("A comprehensive plan, without regulatory implementation, does not impose restrictions upon property and does not deprive or limit the landowner of the use of property. The zoning ordinance is the primary regulatory device under the Act.") Zoning is an exercise of the police power of the County. Lum Yip Kee, Ltd. v. City and County of Honolulu, 70 Haw. 179 (1989). Thus, a landowner is subject to both criminal and administrative penalties for violations of a zoning ordinance, Chapter 19.530, MCC. The General Plan and community plans do not have the same force and effect without regulatory implementation.

The General Plan and community plans are implemented in various ways. Zoning is the primary method to effectuate these plans in the land use context. Zoning changes cannot be made by the County Council unless they are consistent with the General Plan and applicable community plans. §19.510.040, MCC. Once the zoning is in place in accord with the General Plan and community plans, all subsequent permits related to land use and property development should likewise be consistent with the General plan and community plans.

In addition to the zoning, other permitting processes also lead to the implementation of the General Plan and community plans because of specific requirements that there be consistency with these plans. Subdivisions of land are required to be consistent with the General Plan and applicable community plan. Section

² Similar language is found in all of the community plans.

Dain P. Kane, Chair
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18.04.030, MCC, provides that "[t]he director shall not approve any subdivision that does not conform to or is inconsistent with the county general plan, community plans, land use ordinances, the provisions of the Maui County Code, and other laws relating to the use of land"

Also, if the property is in the Coastal Zone Management Area, a Special Management Area ("SMA") use permit may be required before a building permit can be obtained. See §205A-22, HRS.³ Section 205A-26(2)(C), HRS, requires that a development be consistent with the county general plan and zoning before an SMA permit can be issued.

It is in this context where the General Plan and community plans have the force and effect of law. In GATRI v. Blane, 88 Haw. 108 (1998), the Hawaii Supreme Court held "that the county general plan does have the force and effect of law insofar as the statute requires that a development within the SMA must be consistent with the general plan." 88 Haw. at 114. This confirmed that a project in the SMA must be consistent with both the zoning and the general plan and the County did not have to rezone the property in order to preempt the issuance of an SMA permit.

Absent a statute or ordinance specifically requiring development to be consistent with the General Plan and community plan, however, the zoning controls what uses are permitted. Building permits, and other ministerial permits, may be issued for uses permitted by the zoning even if the uses are not consistent with the policies or land use designations set forth in the General Plan or community plan. See Toandos Peninsula, 648 P.2d at 453; Elysian Heights v. City of Los Angeles, 227 Cal. Rptr. 226, 232 (Cal.App.2 Dist. 1986) ("Once an applicant has complied with the appropriate land-use regulations, the Department of Building and Safety has no discretion to deny issuance of a permit.")

D. Practical Effect of Requiring Consistency with Community Plans.

To read §2.80A.010.B, MCC, as mandating consistency with the

³An SMA permit is not required for, inter alia, construction of a single-family residence that is not part of a larger development and that does not have a cumulative impact which may have a significant environmental or ecological effect on a special management area.

Dain P. Kane, Chair
Committee of the Whole
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community plan before building permits and other ministerial approvals can be issued would be inconsistent with the established planning and land use framework. In addition, the effects of such a reading were likely not what the County Council members had in mind when they adopted this section.

The ability of a landowner to use his land in a reasonable manner would be restricted in many ways. In the case of the Palauea property, the Park designation on the community plan would make it difficult, if not impossible, for a private landowner to make reasonable use of the property in order to receive a return on his investment if no building permits could be obtained. The County then would have to consider purchasing the property or likely be faced with an inverse condemnation claim for an unconstitutional takings. Although purchase of the property for park purposes may be desired sometime over the ten year period encompassed by the community plan, the County's time table for the acquisition of the land may be forced, even in tight financial times.

In addition to Open Space and Park designations affecting a landowner's ability to use his property, if the community plan were regulatory in nature, a similar problem would arise where there are inconsistent zoning and community plan designations. This was the case with the GATRI property where the community plan designation was Single Family and the zoning was B-R Resort Commercial. The zoning did not allow a residence and the community plan designation did not allow commercial activity. Hence, the landowner could make no use of its property. Although the County was successful in defending its community plan in GATRI v. Blane, *supra*, it was still defending an inverse condemnation lawsuit at the time the County purchased the property.

Even a landowner's ability to do minor repairs and alterations to their property would be affected if the community plan regulated land use. For instance, an owner of a residence whose property is planned for commercial use in the community plan could not obtain a permit to add a lanai to her home without a community plan amendment.

Because most landowners look at the applicable zoning when purchasing property, if the community plan were to be an added layer of regulation, the County could anticipate many requests for community plan amendments to make the community plan designation consistent with the zoning. Although this is permitted, it reverses the desired planning process which is to have the community plan guide zoning decisions.

Dain P. Kane, Chair
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Finally, the economic effects could be significant. A California court noted the effects of requiring consistency with the City of Los Angeles' general plan in addition to zoning⁴ as follows:

The trial court had before it evidence that in 1982 the City had approximately 200,000 lots which had zoning inconsistent with the applicable General Plan. If appellants' contentions were correct, no new building permits could be issued until all inconsistently-zoned lots were made to conform to the provisions of the General Plan. This would bring new construction in the City to a grinding halt and cause economic havoc. As one commentator has aptly observed, "Halting construction for the years it takes to adopt a general plan [or amend zoning ordinances] works great hardship. During those years of delay, some projects that were once economically feasible will become impracticable. Even those projects that survive the de facto moratorium will be costly to consumers if developers are able to recoup their increased land holding, construction, and borrowing costs through higher prices. For buyers priced out of the market by these delays, the loss may be irretrievable"

Elysian Heights, 227 Cal. Rptr. at 231 (citation omitted).

Reviewing §2.80A.010.B, MCC, in the context of the provisions discussed in section IV.B. above, we cannot conclude that the County Council intended for the General Plan and community plans to have such effects on land use in Maui County.

E. Administrative Actions Conforming to the General Plan.

Our reading of §2.80A.010.B, MCC, does not render meaningless the requirement that administrative actions conform to the General Plan. Administrative actions must be guided by the General Plan and the applicable community plan when the action requires the exercise of discretion. In drawing a distinction between agency actions which require the exercise of discretion and agency actions which are purely ministerial is entirely consistent with the established role of the General Plan and community plans.

⁴The City of Los Angeles is required to bring its zoning ordinances into conformity with the general plan within a specified time period. 227 Cal. Rptr. at 231.

Dain P. Kane, Chair
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The General Plan and community plans guide decision making. Ministerial actions, such as the issuance of a building permit, do not need to be guided. The Director of Public Works and Waste Management does not exercise discretion when issuing a building permit. Thus, the Director is not making a land use decision at the time a building permit is issued. A building permit is issued in response to a landowner making use of his land in a manner permitted by zoning.

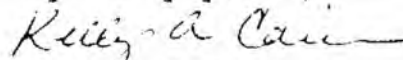
V. Conclusion

Based on the above, we advise that the General Plan and community plans do not regulate land use unless consistency therewith is specifically required by statute or ordinance. Building permits and other ministerial approvals may be issued without reference to the General Plan and community plans. Therefore, building permits and water meters for single family residences at the Palauea property may be issued unless an SMA permit is required.⁵

The reference to administrative actions in §2.80A.010.B, MCC, applies only to actions that require an exercise of discretion. However, because the language of this provision has raised the issue, we also advise that an amendment is warranted to make the intent clear. A proposed amendment is attached as Appendix "A".

If you have any questions about this matter, please feel free to contact our office at x7740.

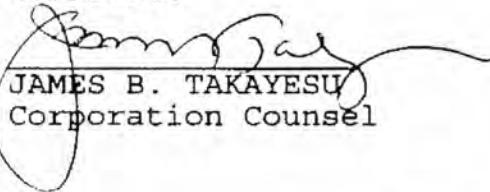
Very truly yours,



KELLY A. CAIRNS

Deputy Corporation Counsel

APPROVED:



JAMES B. TAKAYESU
Corporation Counsel

⁵Whether a single family residence at Palauea will be a development as defined by section 205A-22, HRS, will have to be determined by the Planning Department at the time the building permit applications are submitted. See footnote 3, supra.

ORDINANCE NO. _____

BILL NO. _____ (1999)

A BILL FOR AN ORDINANCE AMENDING SECTION 2.80A.010,
MAUI COUNTY CODE, RELATING TO THE GENERAL PLAN

SECTION 1. Section 2.80A.010, Maui County Code, is amended by amending subsection B to read as follows:

"B. All agencies of the county shall comply with the provisions of the general plan. All community plans, zoning ordinances, subdivision ordinances and discretionary administrative actions by county agencies shall conform to the provisions of the general plan. Preparation of county budgets and capital improvement programs shall also conform to the provisions of the general plan. The community plans authorized in this chapter are established and shall, upon adoption by the council, be part of the general plan of the county, as provided in the revised charter of the county."

SECTION 2. New material is underscored. In printing this bill, the County Clerk need not include the underscoring.

SECTION 3. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:

DRAFT

KELLY A. CAIRNS
Deputy Corporation Counsel
County of Maui

S:\CLERICAL\LJM\ORD\280A.010



JAMES B. TAKAYESL
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740 FAX (808) 270-7152

August 19, 1999

The Honorable Dain P. Kane, Chair
Committee of the Whole
Maui County Council
200 South High Street
Wailuku, Maui, HI 96793

**RE: Corporation Counsel Opinion No. 99-1: Effect of
Community Plan Designation on Use of Property at Makena
Road/Palauea Beach (COW 27)**

Dear Mr. Kane:

This is in response to your memorandum dated July 12, 1999, requesting that this office reconsider the conclusions reached in Corporation Counsel Opinion No. 99-1, dated June 29, 1999. We have carefully considered the arguments in your memorandum, as well as the comments made by Isaac Hall in his letter to you dated July 12, 1999. We nevertheless affirm the conclusion reached in Opinion 99-1 for the reasons stated therein and set forth below.

In your memorandum, you cite to a letter dated November 8, 1993, to then-Chair of the Council Planning Committee Manuel Moniz, Jr. from then-Planning Director Brian Miskae as indicative of the legislative intent of section 2.80A.010.B, Maui County Code ("MCC"). The letter references changing the existing language to "require[] compliance with the general plan rather than simply guidance." You also refer to a ramseyered version of the amended ordinance which shows that the existing language in the ordinance replaced the previous language which referenced the General Plan as a guide.

The provisions of section 2.80A.010.B, MCC, indeed make it clear that the General Plan and community plans are not simply guides that can be ignored, disregarded or minimized by County officials when making decisions and taking actions. Thus, when a capital improvement project is planned by the Office of the Mayor, when the Department of Parks and Recreation considers acquiring land for a park, or when a roadway alignment is being considered by the Department of Public Works and Waste Management, the County

Dain P. Kane, Chair
Committee of the Whole
August 19, 1999
Page 2

officials must follow the general plan and community plans. Opinion No. 99-1 did not intend to minimize this in any way.

Nevertheless, based on the analysis provided in Opinion No. 99-1 and further review of the legislative history, it is clear that section 2.80A.010.B, MCC, does not go so far as to transform the General Plan and community plans from planning documents into land use regulation.¹ If a property owner cannot get a building permit for a use permitted in the zoning district because the use is inconsistent with the community plan, then the community plan regulates land use in the same manner as zoning.

The legislative history of section 2.80A.010.B does not reveal an intent by the County Council to make the General Plan and community plans land use regulation. The language of section 2.80A.010.B, MCC, was proposed in the context of other revisions being made to chapter 2.80, MCC, the predecessor to chapter 2.80A. Originally, there was a proposal to (1) establish time limits for the planning commissions to review changes in zoning, conditional permits and other applications requiring Council approval, and (2) amend chapter 2.80, MCC, to delete the requirement that community plan amendments be processed only at the beginning of the next calendar year. See Committee Report No. 94-72, dated March 18, 1994.

After the planning commissions had reviewed the original bill and the Council Planning Committee had discussed it in committee, Planning Director Brian Miskae submitted the November 8, 1993 letter proposing additional changes to chapter 2.80, MCC. In addition to the proposed amendment to 2.80.010, MCC, he proposed (1) to delete the requirement that a student member serve on the Citizen Advisory Committee ("CAC"), (2) to establish procedures for private property owners to seek community plan amendments, and (3) to change the order of review so the CAC would review the planning director's proposals rather than the CAC presenting its recommendations to the planning director.

The discussions of the Council Planning Committee on these changes were fairly limited. However, at the meeting of January 25, 1994, there was a discussion concerning the effect of the

¹Compare the language of section 2.80A.010, MCC, with that of section 19.04.015, MCC, relating to zoning: "The purpose and intent of this comprehensive zoning article is to regulate the utilization of land in a manner encouraging orderly development in accordance with the land use directives of the Hawaii Revised Statutes, the revised charter of the county, and the general plan and the community plans of the county." (Emphasis added.)

Dain P. Kane, Chair
Committee of the Whole
August 19, 1999
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community plan on zoning. (Minutes of January 25, 1994 Meeting of the Planning Committee, pages 17 - 23. A copy of the portion of the minutes relating to this item is attached as Exhibit "A".)

Councilmember Rick Medina began the discussion by suggesting that language should be added to the ordinance which states that the zoning will take precedence over the community plan, and that future community plan designations of property should match the existing zoning. He expressed concern that if land was designated contrary to the zoning it would create inconsistencies that would interfere with the ability to obtain a Special Management Area ("SMA") permit.

Director Miskae responded that the community plans should not be limited by the existing zoning because planning was dynamic and required flexibility, and that the Charter itself contemplates revisions to the General Plan. He also informed the Council that inconsistent designations would not be a problem because the Planning Department intended to implement the community plans with an immediate comprehensive zoning package.

Several council members then expressed concern over a comprehensive zoning process that would immediately zone everything in accordance with the community plans. Councilmember Alice Lee stated she was concerned about a time line for zoning and also felt that landowners should be given proper notification prior to the Council rezoning their property. Councilmember James "Kimo" Apana echoed Lee's concerns.

The Planning Committee discussion indicates that the council members were cautious about the steps to take when legislating land use regulation. The discussion does not reflect an intent to transform the General Plan and community plans into regulatory documents. If that had been the intent of any of the council members or of Director Miskae, the above-described discussion would have been the appropriate time to emphasize the change.² Rather, the discussion evidences a general understanding that zoning is needed to implement the community plans.

²When Councilmember Medina interpreted Director Miskae's comments to mean he did not agree with the proposition that the zoning ordinances supersede the community plan designation, Director Miskae responded "I didn't say that." Director Miskae could have taken that opportunity to explain that section 2.80A.010.B would make it clear that the community plan designation was on par with the zoning designation, had he so intended.

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The legislative history also reveals that the change reflected in section 2.80A.010.B. was never reviewed by the planning commissions. At the Planning Committee meeting of January 25, 1994, the Deputy Corporation Counsel advising the Committee indicated that the changes proposed by Director Miskae necessitated sending the bill back to the planning commissions for review. The reason given, however, was not related to the new language in section 2.80A.010.B, MCC. The "major" changes proposed by Director Miskae cited were: (1) reversing the order of review of the community plans to begin with the Planning Director, followed by the CACs; (2) reducing the amount of time the CAC has to work on the proposed community plan from 180 days to 60 days; and (3) allowing private landowners to propose revisions to the community plans.

Several days after the Planning Committee meeting, by memorandum dated January 27, 1994, the Department of the Corporation Counsel withdrew the previous advice given and advised that the bill did not have to go back to the planning commissions.

Section 8-8.4 of the Charter of the County of Maui mandates that the planning commissions review the General Plan and any revisions made thereto, as well as review proposed land use ordinances and amendments. Alterations made to a proposed ordinance after the planning commissions' review which are so substantial as to amount to an entirely new proposal will be invalidated. Carlsmith, Carlsmith, Wichman and Case v. CPB Properties, Inc., 64 Haw. 584, 589-590, (1982). If the intent of section 2.80A.010.B, MCC, was to turn the General Plan and community plans into land use regulation, it was a fundamental change which should have been reviewed by the planning commissions. However, as indicated above, it does not appear that anyone contemplated that to be the meaning of section 2.80A.010.B, MCC. Our reading of this section in Opinion No. 99-1 is thus not only supported by the legislative history, but upholds the validity of the ordinance.

Finally, we reiterate that section 2.80A.010.B, MCC, must be read in the context of and in a manner that is consistent with the enabling legislation and the language within the community plans. Likewise, the language on page 43 of the Kihei-Makena Community Plan, cited by Mr. Hall (which states that "[a]ll zoning applications and/or proposed land uses and developments shall be consistent with the Land Use Map and Objectives and Policies of the Kihei-Makena Community Plan") must be read in its context and in accord with the purpose and intent specifically stated within the

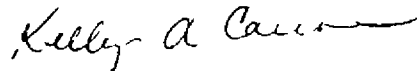
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community plan. This language does not itself make the plan regulatory.³

The legislative history of Chapter 2.80A, MCC, supports the conclusions reached in Opinion No. 99-1. Nevertheless, the response to the opinion has shown this to be a controversial issue and reinforces the need for the County Council to clarify the policy, or establish a new policy if it so chooses, once and for all. Our office will be happy to assist the Council to enact appropriate legislation.

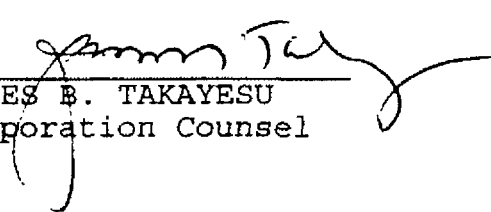
If you have any questions concerning this matter, please feel free to contact our office at x7740.

Very truly yours,



KELLY A. CAIRNS
Deputy Corporation Counsel

APPROVED:



JAMES B. TAKAYESU
Corporation Counsel

³Mr. Hall points out that only four other community plans have this language. Should these community plans be deemed regulatory while the others are not? Obviously, this language cannot be given the significance Mr. Hall suggests.

ORDINANCE NO. 4175

BILL NO. 83 (2014)

A BILL FOR AN ORDINANCE AMENDING SECTION 2.80B.030,
MAUI COUNTY CODE, TO CLARIFY THE APPLICABILITY
OF THE GENERAL PLAN TO MINISTERIAL PERMITS AND APPROVALS

SECTION 1. Purpose. The Countywide Policy Plan, Ordinance 3732 (2010), states that it is "not intended to be used in the review of applications for ministerial permits." The council finds that this intention should apply to all components of the general plan. The purpose of this ordinance is to clarify that ministerial permits and approvals are not required to comply with the general plan.

SECTION 2. Section 2.80B.030, Maui County Code, is amended by amending subsection B to read as follows:

"B. All agencies shall comply with the general plan[.], and administrative actions by agencies shall conform to the general plan, except for ministerial permits or approvals including, but not limited to, building permits, grading permits, plumbing permits, and electrical permits. [Notwithstanding any other provision, all] All community plans, zoning ordinances, and subdivision ordinances[, and administrative actions by agencies] shall conform to the general plan. Preparation of County budgets and capital improvement programs shall implement the general plan to the extent practicable. The countywide policy plan, Maui island plan, and community plans authorized in this chapter are and shall be the general plan of the County, as provided by section 8-8.5 of the [charter.] revised charter of the County of Maui (1983), as amended."

SECTION 3. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:



MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

WE HEREBY CERTIFY that the foregoing BILL NO. 83 (2014)

1. Passed FINAL READING at the meeting of the Council of the County of Maui, State of Hawaii, held on the 19th day of December, 2014, by the following vote:

Gladys C BAISA Chair	Robert CARROLL Vice-Chair	Eleanora COCHRAN	Donald G COUCH, JR	S Stacy CRIVELLO	Donald S GUZMAN	G Riki HOKAMA	Michael P VICTORINO	Michael B WHITE
Excused	Aye	Aye	Aye	Aye	Aye	Aye	Excused	Aye

2. Was transmitted to the Mayor of the County of Maui, State of Hawaii, on the 19th day of December, 2014.

DATED AT WAILUKU, MAUI, HAWAII, this 19th day of December, 2014.

ROBERT CARROLL, VICE-CHAIR
Council of the County of Maui

JOSIAH K. NISHITA, DEPUTY COUNTY CLERK
County of Maui

THE FOREGOING BILL IS HEREBY APPROVED THIS 22 DAY OF December, 2014.

ALAN M. ARAKAWA, MAYOR
County of Maui

I HEREBY CERTIFY that upon approval of the foregoing BILL by the Mayor of the County of Maui, the said BILL was designated as ORDINANCE NO. **4175** of the County of Maui, State of Hawaii.

DENNIS A. MATEO, COUNTY CLERK
County of Maui

Passed First Reading on December 5, 2014.
Effective date of Ordinance December 22, 2014

RECEIVED

2014 DEC 22 PM 2:44

OFFICE OF THE
COUNTY CLERK

I HEREBY CERTIFY that the foregoing is a true and correct copy of Ordinance No. **4175** the original of which is on file in the Office of the County Clerk, County of Maui, State of Hawaii

Dated at Wailuku, Hawaii, on

County Clerk, County of Maui