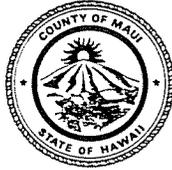


ALAN M. ARAKAWA
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI

200 SOUTH HIGH STREET

WAILUKU, MAUI, HAWAII 96793

TELEPHONE: (808) 270-7740 FAX 270-7152

April 9, 2003

MEMO TO: Honorable Alan M. Arakawa, Mayor

F R O M: Ed Kushi, Jr., Deputy Corporation Counsel 

SUBJECT: **FRIENDS OF MOKU'ULA; LEASE AND LICENSE OF COUNTY PROPERTY**

In response to your request of February 4, 2003, and Ms. Adele Rugg's request of February 11, 2003, we have reviewed our file notes and correspondence, the subject Lease and License, Resolution Nos. 00-171, and 00-172, respectively, approving the conveyances and Maui County Council minutes of the meeting that approved the Resolutions, the decision and order approving the Lease and License from the State of Hawaii Board of Land and Natural Resources, and discussed this matter with Mr. Don Couch of your office.

As we understand it, the instant issue/question is whether, in accordance with the terms and conditions of the Lease and License, the Friends of Moku'ula ("FOM") as the Lessee/Licensee can use the subject real properties to construct, maintain, and operate and/or concession out paid parking facilities, and thereafter keep the gross/net revenues derived therefrom?

SHORT ANSWER: As discussed further below, FOM may operate a parking concession **provided** that: (1) amendments to the Lease and the License are drafted to explicitly authorize FOM to operate a parking concession on the subject premises; and (2) said amendments are submitted for review by the Grants Review Committee, and for approval by the Council. We also recommend that the Board of Land and Natural Resources be informed of the amendments.

BACKGROUND:

Both the Lease and License are dated January 2, 2002. The Lease is for a term of 35 years, and covers a 2.00+ acre parcel designated as TMK (2) 4-6-007:001 (see area outlined in red on attached sketch). The License is for a term of 20 years, and covers all of TMK (2) 4-6-007:036 and a portion of TMK (2) 4-6-007:002 for a total area of 2.7+ acres (see area outlined in yellow on attached sketch).

Both properties are owned by the State of Hawaii, but conveyed to the County by separate Executive Orders, which Orders specify the public purpose as "park purposes." The Council approved the License and Lease by resolutions dated December 1, 2000, and approval of the License and Lease was obtained from the State of Hawaii Board of Land and Natural Resources ("Board") on April 21, 2001, and August 10, 2001, respectively.

At page 6 in both the License and Lease, it states:

"10. Use of Premises. That the Licensee [Lessee] shall use or allow the Premises hereby licensed [leased] to be used solely to restore and preserve Moku'ula and the ponds of Mokuhinia. Other uses shall be subject to approval in writing by the Licensor [Lessor] and the State of Hawaii through its Board of Land and Natural Resources."

Similarly, in both documents the Licensor/Lessor is defined as:

"'Licensor' ['Lessor'] shall mean and include the County of Maui, its officers, agents and assigns. Whenever the prior written consent or approval of the 'Licensor' ['Lessor'] is required in this license [lease], such consent or approval shall include, but is not limited to, the consent or approval of the Mayor, the Director of Finance, the Director of Housing and Human Concerns, and the Director of Parks and Recreation." (Section 30, B, at page 16 of the License; Section 31, B, at page 16 of the Lease.)

Although there is no specific authorization concerning a parking lot in the "Use of Premises" sections, the Lease does contain a separate provision at Section 17, beginning at page 9, which states:

"17. Lessee shall construct a parking area on the premises to replace the parking area on TMK(2) 4-6-007:por.036, which is subject to a License to Lessee. Such replacement parking area shall be at least equivalent to the area and construction of the parking area being replaced and shall comply with all applicable ordinances. Before construction, Lessee shall submit the plans and specifications to Lessor and the State of Hawaii through its Chairperson of the Board of Land and Natural Resources for their respective approval."

There is no similar or comparable section or authorization in the License concerning parking.

Honorable Alan M. Arakawa
April 9, 2003
Page 3

In approving the Lease at its August 10, 2001 meeting, the Board under "Remarks", acknowledged:

"The lease agreement will allow for the restoration of ancient royal fishponds that were covered in the early 1900's because of mosquito infestation. The subject area currently is used as a parking lot for the Malu-Ulu-o-Lele Park and will continue to be primarily a parking lot for the Friends of Moku'ula. The propose [sic] use will be consistent with the purpose of the set aside."

There is no mention or remark regarding parking in the Board's April 14, 2001 approval of the License.

In reviewing the minutes of the Council meeting of December 1, 2000, at which Resolution Nos. 00-171 and 00-172 were passed, we found no specific discussion concerning use of the premises for parking, paid and/or free, and no explicit authorization for grant of a parking concession. Rather, as discussed above, the Lease and the License reference the use of the subject premises "solely to restore and preserve Moku'ula and the ponds of Mokuhinia." The Lease and License do not address the operation by FOM of a parking concession involving the collection of parking fees from members of the public. According to the Council Budget and Finance Committee meeting minutes of January 30, 2001, and the resultant Committee Report No. 01-6 dated February 16, 2001, Council was informed by FOM (after its Lease and License had already been approved) of FOM's desire to conduct a parking concession to generate revenue for its proposed operations.

DISCUSSION:

Leases, licenses, rental, and/or concessions of County property are generally awarded in accordance with Chapter 3.40, Maui County Code ("MCC"), wherein specific bidding procedures are required. Section 3.40.030, MCC, defines "concession" as "the grant to a person of the privilege to conduct operations which are essentially retail in nature, involving the sale of goods, wares, merchandise, or services to the general public. . ." However, Section 3.40.200, MCC, specifically deems such awards that are without charge or at a charge below fair market value as grants of public property, and directs such awards to be considered pursuant to Chapter 3.36, MCC, entitled Maui County Grants Program. Section 3.36.090, MCC, states:

"3.36.090 Grants of real property. The committee shall transmit to the council any request for a grant of real property, including concessions at less than fair market value, and its recommendations with respect to the

request. The council may authorize the grant by resolution."

For State of Hawaii property set aside to a county under executive order, the county "shall be authorized to exercise all of the powers vested in the board in regard to the issuance of leases, easements, licenses, revocable permits, concessions, or rights of entry covering such lands for such use as may be consistent with the purposes for which the lands were set aside on the same terms, conditions, and restrictions applicable to the disposition of public lands, as provided by this chapter all such dispositions being subject to the prior approval of the board;..." Section 171-11, Hawaii Revised Statutes ("HRS").

Concessions awarded for State of Hawaii properties are covered under Chapter 102, HRS, entitled Concessions on Public Property. Similar to Chapter 3.40, MCC, above-referenced, specific bidding requirements are generally mandated. Section 102-2(a), HRS. Operation of a parking lot on state-owned or controlled property has been included in the definition of concessions. Section 102-1(2), HRS. However, the bidding requirements of Section 102-2(a), HRS, shall not apply to:

- "(b)
- (5) For operation of concessions set aside without any charge;
 - (9) For operation of concessions at county zoos, botanic gardens, or other county parks which are environmentally, culturally, historically, or operationally unique and are supported, by nonprofit corporations incorporated in accordance with state law solely for purposes of supporting county aims and goals of the zoo, botanic garden, or other county park and operating under agreement with the appropriate agency solely for such purposes, aims, and goals; . . ." Section 102-2(b), HRS.

SUMMARY AND CONCLUSION:

Under certain circumstances, concessions on State of Hawaii-owned property conveyed to the County by executive order, including operation of a parking lot, may be permitted without complying with strict bidding procedures. Chapter 102, HRS, and Chapter 3.40, MCC. Such concessions, pursuant to a lease or license of County property without charge or for less than fair market value, are deemed grants. Chapters 3.40, and 3.36, MCC. Such leases and licenses must be approved by the State of Hawaii Board of Land and Natural Resources, and the Maui County Council. Section 171-11,

Honorable Alan M. Arakawa
April 9, 2003
Page 5

HRS, and Section 3.36.090, MCC. The subject Lease and License in favor of FOM were approved by both entities. Although the Lease allows a parking lot on TMK (2) 4-6-007:001, which parking lot is intended to replace the existing lot on TMK(2) 4-6-007: portion 036, neither the Lease nor the License explicitly granted to FOM a parking lot concession to be operated on the licensed or leased premises.

Based on the above, we conclude that the following issues and matters must be addressed and completed before the commencement of any parking concession by FOM:

A. FOM should submit to County information clarifying the following:

1. The time frame/duration of the location of the parking concession on the licensed premises (i.e., TMK 4-6-007:036 and portion 002).
2. The time/frame duration of the relocation of said parking concession to the leased premises (i.e., TMK 4-6-007:001).
3. As represented to the Council, the accommodation and logistics thereof of not charging parking to park users.

B. To formally document the proposed parking concession and obtain required approvals, amendments to the Lease and License should be drafted and submitted for review by the Grants Review Committee and for approval by the Council by resolution.

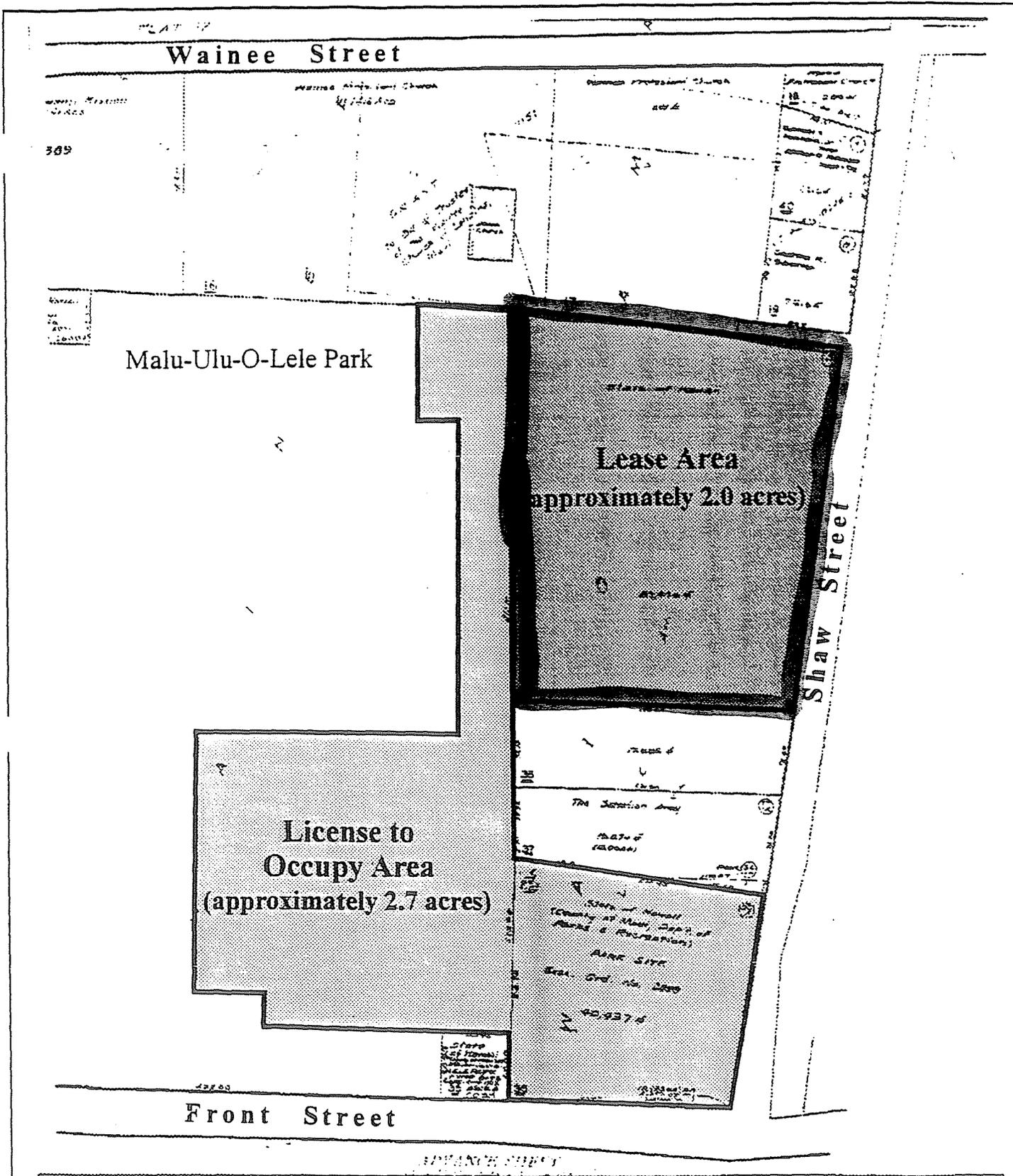
Further, the State of Hawaii Board of Land and Natural Resources should be informed of the proposed parking lot concession.

Call if further discussion/clarification is needed. We apologize for the length of this memo, however, we believed a full and reflective review was warranted.

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel



Source: County of Maui

Figure 3

Replace Parking Lot at TMK

NOT TO SCALE

(2)4-6-07:01, pors. 02 and 36

Lease and License of Occupation Areas

