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May 14, 2003

MEMO TO: Gilbert S. Coloma-Agaran, Director  
Department of Public Works and Environmental  
Management

Michael W. Foley, Director  
Department of Planning

F R O M: Blaine J. Kobayashi, Deputy Corporation Counsel

SUBJECT: PROCESSING OF SUBDIVISION AGREEMENTS (AGRICULTURAL USE)  
AND CONDITIONAL WAIVER OF FARM DWELLING AGREEMENTS

The purpose of this memorandum is to clarify which department of the County of Maui is responsible for the processing of subdivision agreements (agricultural use) and conditional waivers of farm dwelling agreements submitted pursuant to section 205-4.5, Hawaii Revised Statutes ("HRS"). It is this office's understanding that the Department of Public Works and Environmental Management's Development Services Administration currently processes these agreements.

I. RELEVANT STATUTES

HRS § 205-4.5(a) states:

(a) Within the agricultural district all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:

- (1) Cultivation of crops, including but not limited to flowers, vegetables, foliage, fruits, forage, and timber;
- (2) Game and fish propagation;

(3) Raising of livestock, including but not limited to poultry, bees, fish, or other animal or aquatic life that are propagated for economic or personal use;

(4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;

Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

(5) Public institutions and buildings which are necessary for agricultural practices;

(6) Public and private open area types of recreational uses including day camps, picnic grounds, parks, and riding stables, but not including dragstrips, airports, drive-in theaters, golf course, golf driving ranges, country clubs, and overnight camps;

(7) Public, private, and quasi-public utility lines and roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, or treatment plants, or corporation yards, or other like structures.

(8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest;

(9) Roadside stands for the sale of agricultural products grown on the premises;

(10) Buildings and uses, including but not limited to mills, storage, and processing facilities, maintenance facilities, and vehicle and equipment storage areas that are normally considered directly accessory to the abovementioned uses and are permitted under section 205-2(d);

(11) Agricultural parks; or

(12) Wind energy facilities, including the appurtenances associated with the production and transmission of wind generated energy; provided that such facilities and appurtenances are compatible with agriculture uses and cause minimal adverse impact on agricultural land.

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HRS § 205-4.5(b) states, in pertinent part:

Uses not expressly permitted in subsection (a) shall be prohibited. . . . Any other law to the contrary notwithstanding, no subdivision of land within the agricultural district with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be approved by a county unless the said A and B lands within the subdivision **shall be made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity.**<sup>1</sup>

Any deed, lease, agreement of sale, mortgage, or other instrument of conveyance covering any land within the agricultural subdivision **shall expressly contain the restriction on uses and the condition as prescribed in this section which restriction and condition shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district.** . . .

(Emphasis added).

HRS § 205-4.5(b), however, requires a conditional waiver of the encumbrance requirement when it jeopardizes the owner or lessee from obtaining mortgage financing. HRS § 205-4.5(b) states, in relevant part:

If the foregoing requirement of encumbrances running with the land jeopardizes the owner or lessee from obtaining mortgage financing from any of the mortgage lending agencies set forth hereinbelow, and said requirement is the sole reason for failure to obtain mortgage financing, then **such requirement of encumbrances shall, insofar as such mortgage financing is so jeopardized, be conditionally waived by the appropriate county enforcement officer;** provided that such

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<sup>1</sup>The restriction on uses referenced in the statute is the Department of Public Works and Environmental Management's subdivision agreement (agricultural uses). This agreement is a standard form document processed by the department and is required for all subdivisions within the agricultural district. The applicant is required to execute and record the agreement with the Bureau of Conveyances for the State of Hawaii prior to the department granting final subdivision approval.

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conditional waiver shall thereafter become effective only in the event that the property is subjected to foreclosure proceedings by the mortgage lender. . .

(Emphasis added).<sup>2</sup>

Although "appropriate county enforcement officer" is not defined in the statute, HRS § 205-12 states that:

The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county . . . the condition relating to agricultural districts under section 205-4.5 . . . .

(Emphasis added).

## II. THE REVISED CHARTER OF THE COUNTY OF MAUI (1983)

### A. Pre-1996 Charter

Prior to the adoption of the 1996 Charter amendments, Section 8-5.3 of the Revised Charter of the County of Maui (1983) ("Charter") provided that:

The director of public works and waste management shall:

1. **Administer** the building and housing codes, subdivision and zoning ordinances and rules adopted thereunder . . . .

(Emphasis added).<sup>3</sup>

### B. 1996 Amendment

In 1996, however, the responsibility of administering zoning ordinances was transferred from the director of public works and

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<sup>2</sup>The conditional waiver referenced in the statute is the Department of Public Works and Environmental Management's conditional waiver of farm dwelling agreement. This agreement is a standard form document processed by the department. The applicant is required to execute and record the agreement with the Bureau of Conveyances for the State of Hawaii.

<sup>3</sup>In 2002, the department of public works and waste management was renamed the department of public works and environmental management. See Section 8-5.1 of the 2003 edition of the Charter.

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waste management to the planning director by an amendment to Section 8-8.3 of the Charter that provided as follows:

The planning director shall:

\* \* \*

(4) Prepare and **administer zoning ordinances, zoning maps and regulations and any amendments or modifications thereto.**

\* \* \*

(Emphasis added).

### C. 2002 Amendment

In 2002, Section 8-8.3 of the Charter was again amended. Section 8-8.3 of the Charter now states:

The planning director shall:

\* \* \*

6. Prepare, administer, **and enforce** zoning ordinances, zoning maps and regulations and any amendments or modifications thereto.

\* \* \*

(Emphasis added).

### III. CONCLUSION

Based on the foregoing, it is this office's opinion that the planning director is the "appropriate county enforcement officer" pursuant to HRS §§ 205-4.5(b) and 205-12. Accordingly, responsibility for the processing of subdivision agreements (agricultural use) and conditional waivers of farm dwelling agreements should be transferred from the Department of Public Works and Environmental Management's Development Services Administration to the Department of Planning.

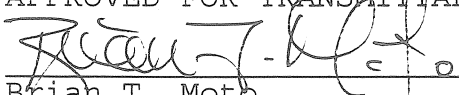
Should you have any further questions, please do not hesitate to contact this office.

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cc: Mayor Alan M. Arakawa  
Jack Kulp, Managing Director

APPROVED FOR TRANSMITTAL:

  
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Brian T. Moto  
Corporation Counsel