

DEPARTMENT OF THE CORPORATION COUNSEL

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July 2, 2003

MEMO TO: Michael W. Foley, Director
Department of Planning

FROM: Cindy Y. Young, Deputy Corporation Counsel *cyy*

SUBJECT: **WHETHER WRITTEN WARNINGS ARE REQUIRED PRIOR TO ASSESSMENT
OF FINES FOR SPECIAL MANAGEMENT AREA AND SHORELINE
SETBACK VIOLATIONS**

This is in response to your requests for a legal opinion regarding whether the Department of Planning may issue a notice of violation and assess a fine for violation of special management area and shoreline setback laws without first issuing a prior written warning of such violation.¹ It is our understanding that the Department of Planning has been under the impression that three written warnings are required prior to issuing a notice of violation and order pursuant to §§ 12-202-23 and 12-202-25, Special Management Area Rules for the Maui Planning Commission ("SMA Rules"), and § 12-5-15, Rules of the Maui Planning Commission Relating to the Shoreline Area of the Islands of Kahoolawe, Lanai, and Maui ("Shoreline Rules").²

¹A written request for legal advice regarding the number of warnings necessary to impose fines for SMA violations was submitted to our office by memorandum dated May 12, 2003. A verbal request for legal advice regarding the number of warnings necessary to impose fines for shoreline setback violations was made by Matthew Niles.

²The rules of the Maui Planning Commission Relating to the Shoreline Area of the Islands of Kahoolawe, Lanai, and Maui were adopted in 1990, before the Revised Charter of the County of Maui was amended to establish a Lanai Planning Commission. The Lanai Planning Commission has adopted its own shoreline rules (Chapter 403). The Maui Planning Commission is currently reviewing a revised set of shoreline rules.

I. RELEVANT STATUTES AND ADMINISTRATIVE RULES

Hawaii Revised Statutes

Hawaii Revised Statutes ("HRS") § 205A-32 states:

Penalties. (a) Any person who violates any provision of part II³ or part III⁴ shall be liable as follows:

- (1) For a civil fine not to exceed \$100,000; or
- (2) For the cost of returning the affected environment or ecology within the coastal management area to the condition existing before the violation.

(b) In addition to any other penalties, any person who is violating any provision of part II or part III shall be liable for a civil fine not to exceed \$10,000 a day for each day in which such violation persists.

(c) Any civil fine or other penalty provided under this section may be imposed by the circuit court or may be imposed by the department⁵ after an opportunity for a hearing under chapter 91. Imposition of a civil fine shall not be a prerequisite to any civil fine or other injunctive relief ordered by the circuit court.

SMA Rules

SMA Rules § 12-202-23 states, in part:

Enforcement. (a) The appropriate enforcement agency as designated by the County Charter shall enforce these rules, except as otherwise provided herein.

(b) Any development pursuant to section 205A-22,

³ "Part II" refers to the part in HRS Chapter 205A which provides protection to designated special management areas and requires permits for developments proposed in special management areas.

⁴ "Part III" refers to the part in HRS chapter 205A which provides protection to designated shoreline areas and prohibits structures and the mining of a shoreline area, subject to limited exceptions.

⁵ "Department" is defined as "the **planning department in the counties of Kauai, Maui, and Hawaii**, and the department of land utilization in the city and county of Honolulu, or other appropriate agency as designated by the county councils." HRS §205A-22 (emphasis added).

HRS, as amended, that has not received a required special management area emergency permit, minor permit, or use permit pursuant to this part or complied with conditions established with such a permit, shall be removed or the violation shall be corrected by immediate application for and subsequent granting of the appropriate permit or other means as determined by the director. No other state or county permit or approval shall be construed as special management area permit approval pursuant to this part.

...

(d) Issuance of notice of violation and order.

(1) The landowner or the alleged violator, or both, shall be notified by the enforcement agency by certified or registered mail of an alleged violation of this rule, any permit issued pursuant thereto, or any condition of a special management area permit approval. The notice of violation and order shall include, but not be limited to, the specific section of this rule which has been violated, the nature of the violation, and the remedy(ies) available. The notice of violation and order may also require that the violative activity cease, or that the violative development be removed; that a civil fine be paid not to exceed \$10,000 per violation; and that a civil fine be paid not to exceed \$1,000 per day for each day in which the violation persists, in addition to the foregoing and any other penalties.

SMA Rules § 12-202-25 states:

Penalties. Any person who violates any provision of these [special management area] rules shall be liable for an initial civil fine not to exceed \$10,000 per violation and maximum daily fine of \$1,000 in addition to any other penalties until the violation is corrected. A civil fine may be imposed by the [planning] department after an opportunity for a hearing under chapter 91, HRS, as amended, unless said hearing is otherwise waived. A special management area permit application submitted subsequent to an applicant's having completed the development or having been cited for the activity or construction without having obtained special management area approval, shall not stay any order to pay civil fines.

Shoreline Rules

Shoreline Rules § 12-5-15 provides:

Penalties. Any person who violates any provision of these [shoreline setback area] rules shall be subject to

the penalties provided for in Chapter 205A-32, HRS.

II. ANALYSIS

The Hawaii Revised Statutes, SMA Rules, and Shoreline Rules do not require the issuance of written warnings before assessing a fine for a violation of HRS Chapter 205A and/or the SMA Rules and Shoreline Rules.

Although HRS § 46-1.5(24)(A) has been interpreted by this office to require at least two warnings before imposing a fine for a violation of a county ordinance or rule, HRS § 46-1.5(24)(A) is inapplicable with regard to enforcement actions taken under HRS Chapter 205A or rules adopted thereunder.⁶ HRS § 205A-32 provides independent statutory authority to impose civil fines for violations of parts II and III of HRS Chapter 205A. Neither HRS § 205A-32 nor the SMA Rules and Shoreline Rules require written warnings before the assessment of a fine for a violation of HRS Chapter 205A and/or the SMA Rules and Shoreline Rules.

Further, in the context of HRS Chapter 205A enforcement actions, due process does not require a warning to be given before the issuance of a notice of violation and assessment of a civil fine.⁷ Under HRS Chapter 205A, SMA Rules, and Shoreline Rules,

⁶HRS § 46-1.5(24)(A) states:

Each county may impose fines, in addition to criminal penalties, for any violation of county ordinances or rules after reasonable notice and requests to correct or cease the violation have been made upon the violator. Any civil fine may be administratively imposed after an opportunity for a hearing under chapter 91. Such a proceeding shall not be a prerequisite for any civil fine or injunctive relief ordered by the circuit court.

⁷See Price v. Zoning Board of Appeals of City and County of Honolulu, 77 Hawai'i 168, 883 P.2d 629 (1994) (holding that landowners' due process rights were not violated when director of city's department of land utilization assessed fines for violation of zoning ordinance prior to contested case hearing); Bruno v. District of Columbia Bd. of Appeals and Review, 665 A.2d 202 (D.C. 1995).

We note further that HRS § 205A-32 was amended in 2001 by adding subsection (a)(2) relating to liability for "the cost of returning the affected environment or ecology within the coastal management area to the condition existing before the violation." Subsection (a)(2) does not require that a property owner be

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property owners and others are provided adequate notice that a fine may be assessed concurrently with the issuance of the notice of violation.⁸

III. CONCLUSION

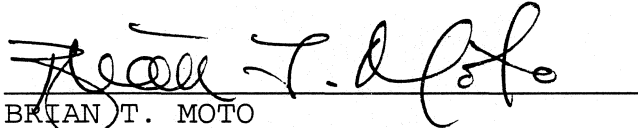
Based on the foregoing analysis, it is this office's opinion that no warning is required to be provided before the Department issues a notice of violation and assesses a civil fine under HRS Chapter 205A and the SMA Rules and Shoreline Rules.

CYY:ko

cc: Wayne Boteilho, Deputy Director
Aaron Shinmoto, Administrator
Gregory J. Garneau, First Deputy Corporation Counsel
Madelyn S. D'Enbeau, Deputy Corporation Counsel
Matthew Niles, Planner

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APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

provided an opportunity to abate a violation before a civil fine is assessed; rather, it calls for the assessment of a civil fine so that environmental remediation may occur.

⁸This memorandum assumes, of course, that other aspects of administrative due process are observed by the Department in its enforcement actions. In particular, we assume that alleged violators are in fact served with notices of violations and that such notices accurately and adequately inform an alleged violator of the statute or rule being violated, the nature of the violation, and the dates and times of the alleged violations. We also assume that alleged violators are provided with an opportunity for a hearing under HRS Chapter 91.