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October 23, 2003

The Honorable Dain P. Kane, Council Chair
Maui County Council
200 S. High Street
Wailuku, Hawaii 96793

The Honorable Robert Carroll, Chair
Committee of the Whole
County of Maui
200 S. High Street
Wailuku, Hawaii 96793

**RE: 9TH CIRCUIT OPINION ON LEGISLATIVE IMMUNITY IN
KAAHUMANU CASE (PAF 03-019)**

Dear Council Chair Kane and Chair Carroll:

Introduction.

The purpose of this memorandum is to respond to questions posed in two memoranda: the first dated February 10, 2003 from Council member Carroll; and the second dated April 15, 2003 from Council Chair Kane. Because both memoranda present questions and issues relating to conditional permits and the opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in Kaahumanu v. County of Maui, 315 F.3d 1215 (9th Cir. 2003) ("Kaahumanu"), we have consolidated our responses in this memorandum.

Procedural history of Kaahumanu case.

Plaintiffs in the Kaahumanu case brought suit after the Maui County Council ("Council") voted to deny Ms. Sandra Barker a conditional permit to operate a commercial wedding business on beach-front property zoned A-1 apartment district. Plaintiffs Sandra Barker, her corporation, Double S Inc., dba A Romantic Maui Wedding, Laki Kaahumanu, a pastor who performs wedding ceremonies, and his church, Harvest Chapel Church of God, sued council members in their individual and official capacities under 42 USCA § 1983, alleging that the denial of Barker's application was a deprivation of their rights under the First, Fifth, and Fourteenth Amendments

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of the United States Constitution and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc.

The County moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims against the council members in their individual and official capacities. The County argued that the individual-capacity claims were barred by legislative immunity and that the official-capacity claims were duplicative of the claims against the County of Maui. The U.S. District Court for the District of Hawaii denied the motion to dismiss the individual-capacity claims on the ground of legislative immunity but granted the motion to dismiss the official-capacity claims. The County appealed the denial of legislative immunity and the denial was upheld by the U.S. Court of Appeals, Ninth Circuit.

On April 25, 2003, County filed a Motion for Partial Summary Judgment on various grounds, including the ground that the Council members are entitled to qualified immunity¹ for their administrative acts. By Order filed on June 19, 2003, the U.S. District Court granted County's Motion for Partial Summary Judgment with respect to the issue of qualified immunity. In its decision, the Court found that "the facts alleged do not show that the Maui County Council members' conduct violated a constitutional right or the RLUIPA, or that the rights alleged were 'clearly established' at the time Plaintiff Barker's CUP application was denied."²

Summary of Ninth Circuit decision relating to legislative immunity.

In its decision relating to legislative immunity ("Ninth Circuit decision"), the Ninth Circuit observed that the United States Supreme Court has long held state and regional legislators absolutely immune from liability under § 1983 for their legislative

¹"The doctrine of qualified immunity shields public officials performing discretionary functions from personal liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Order Granting Defendants' Motion for Partial Summary Judgment and Denying Defendant J. Kalani English's Motion to Dismiss, p. 19.

²Order Granting Defendants' Motion for Partial Summary Judgment and Denying Defendant J. Kalani English's Motion to Dismiss, p. 72.

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acts and has extended this immunity to local legislators.³ However, the Ninth Circuit also observed that "not all governmental acts by a local legislature are necessarily legislative in nature" and that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."⁴ Further, the Ninth Circuit stated that "[t]he burden of proof in establishing absolute immunity is on the individual asserting it."⁵

The Ninth Circuit decision reiterated the four factors that federal courts have considered in deciding whether an action is legislative (rather than administrative or executive):

1. Whether the act involves *ad hoc* decision making, or the formulation of policy;
2. Whether the act applies to a few individuals, or to the public at large;
3. Whether the act is formally legislative in character; and
4. Whether it bears all the hallmarks of traditional legislation.⁶

(1) Ad hoc decision making. In considering the first factor, the court determined that the Council's decision denying Ms. Barker's application was *ad hoc*. The court concluded:

The decision was taken based on the circumstances of the particular case and did not effectuate policy or create

³Kaahumanu, 315 F.3d at 1219 (citing, among other cases, Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998)).

⁴Kaahumanu, 315 F.3d at 1219 (quoting Cinevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th Cir. 1984)), and Bogan, 523 U.S. at 54.

⁵Kaahumanu, 315 F.3d at 1220 (quoting Trevino v. Gates, 23 F.3d 1480, 1482 (9th Cir. 1994)).

⁶The Ninth Circuit recognized that the factors are not mutually exclusive, but related, particularly with respect to the determination of whether an act is *ad hoc*. Kaahumanu, 315 F.3d at 1220 n.4. *Ad hoc* is a Latin phrase meaning "for this". Something is *ad hoc* when it is formed for a particular purpose. Black's Law Dictionary, Seventh Edition (1999).

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a binding rule of conduct. Typically, a zoning ordinance establishes a rule of general application, but here the ordinance would have affected only a single permit and a single parcel of land....Enactment of the ordinance would not have created a new category of expressly permitted or special uses and therefore did not modify or supersede the policies contained in the existing comprehensive zoning ordinance....[G]ranted or denying a CUP constitutes *ad hoc* administration of the existing zoning ordinance rather than the formulation of policy....In other words, the Council is carrying out, not changing, the policies embodied in the comprehensive zoning ordinance when it grants or denies a CUP.⁷

(2) Whether the act applies to a few individuals, or to the public at large. The court observed that "when the act in question applies to a few individuals rather than the public at large, legislative immunity is disfavored."⁸ Given the facts before it, the court held that the decision to enact or reject an ordinance granting a conditional permit affected only the applicant and not the public at large.⁹

The court was careful to state, however, that it was not holding "that anything short of a comprehensive zoning ordinance is administrative rather than legislative"; rather, the court noted that "[t]he question here is one of degree and we conclude simply that the very limited impact of the conditional use permit at issue

⁷Kaahumanu, 315 F.3d at 1220-1221. In reaching its conclusion, the court rejected County's argument that because the Council's decision to reject a conditional permit involved the exercise of considerable discretion it was not *ad hoc*. The court observed that, although the Council does have some discretion, such discretion, under the Maui County Code, is not complete. The court also rejected County's argument that, because the granting of a conditional permit ultimately involves the reformulation and enactment of zoning policy in derogation of the County's comprehensive zoning ordinance, the decision was not *ad hoc*. Rather, the court characterized the decision as "an individualized determination" and held that the mere fact that the Council has retained the authority to grant conditional permits does not necessarily imply that granting such permits involves policy-making. Kaahumanu, 315 F.3d at 1222.

⁸Kaahumanu, 315 F.3d at 1222.

⁹*Id.*

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here weighs against absolute immunity."¹⁰ The court included in its opinion cites to cases that affirm that, in certain circumstances at least, bills affecting an individual or a narrowly defined group of individuals or only one parcel of land may nevertheless be legislative.¹¹

(3) Whether the act is formally legislative in character. Although the court recognized that the conditional permit procedure was formally legislative in character, the court held that this fact does not in itself decide the matter of legislative immunity. The court stated that it "must look beyond the formal character of the act to see whether it 'contain[s] matter which is properly to be regarded as legislative in its character and effect.'"¹²

(4) Whether the act bears all the hallmarks of traditional legislation. The court determined that, because the decision not to grant the conditional permit was *ad hoc* and not one of policy, it did not bear all the hallmarks of traditional legislation.¹³

¹⁰*Id.*

¹¹See Kaahumanu, 315 F.3d at 1222 (citing Cinevision Corp., 745 F.2d at 579 ("Congress, as well as many state and local legislatures, may enact private, or other, bills that affect an individual or a narrowly defined group of individuals. We cannot say that such activities are not legislative.")). See also Kaahumanu, 315 F.3d at 1222, n.7 (distinguishing Biblia Abierta v. Banks, 129 F.3d 899 (7th Cir. 1997) (ordinance affecting two parcels of land but which by its terms applied equally "to all current and future owners of the property"); Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994) (holding that down-zoning of 38-acre parcel involving 322 apartment units and some commercial use and which raised concerns about traffic, wetlands, public works, and fire prevention was a broad policy decision); and Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993) (holding that city council members were immune from suit in down-zoning 8.5-acre parcel to more restrictive business classification)).

¹²Kaahumanu, 315 F.3d at 1223 (quoting Cinevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th Cir. 1984)).

¹³Kaahumanu, 315 F.3d at 1223-24.

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Analysis of the Questions Posed.

First Question: Does the court's (i.e., Ninth Circuit's) decision mean that Council members are not entitled to absolute legislative immunity when acting on any Conditional Permit application?

The Ninth Circuit decision does materially increase the possibility that a court, when adjudicating legislative immunity issues in litigation pertaining to a conditional permit application, would deny legislative immunity on the grounds that County's conditional permit decisions are *ad hoc*, affect only the applicants, do not bear all the hallmarks of traditional legislation, and, despite the formally legislative character of the conditional permit process, is administrative in nature.¹⁴ The risk of such an outcome would appear most likely in the context of a conditional permit for a single, small parcel of land involving only localized, limited impacts and not serious public policy concerns. However, inasmuch as the court considered the question to be "one of degree", the Ninth Circuit decision does not necessarily mean that the council members would never be entitled to legislative immunity when taking action on a conditional permit application.

The Ninth Circuit decision relating to legislative immunity did not address the application of the doctrine of qualified immunity.¹⁵ The issue of qualified immunity was addressed by the U.S. District Court in deciding a County Motion for Partial Summary Judgment. Therefore, the Ninth Circuit decision does not necessarily mean that Council members will not be entitled to *qualified* immunity in litigation arising out of conditional permits. Indeed, as discussed above in the procedural history of the Kaahumanu case, the U.S. District Court did in fact determine that the defendants were entitled to qualified immunity.

When determining whether County officers are entitled to qualified immunity, a court will first inquire whether, viewed in the light most favorable to plaintiffs, the facts show that County

¹⁴Kaahumanu, 315 F.3d at 1224.

¹⁵"We have no occasion to address whether the doctrine of qualified immunity applies in this case, nor do we opine on the merits of plaintiffs' claims." Kaahumanu, 315 F.3d at 1224 n.8.

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officers violated one of plaintiffs' constitutional rights.¹⁶ The court will then inquire whether the constitutional right was clearly established.¹⁷

Second Question: Are Council members entitled to absolute legislative immunity when acting on a change in zoning or other individual land use applications?

The Kaahumanu case does not address the issue of changes in zoning. In fact, the Ninth Circuit specifically stated: "We do not hold, however, that anything short of a comprehensive zoning ordinance is administrative rather than legislative." The court also noted that the Maui County Code itself distinguishes "between a conditional use permit and an actual 'change of zoning'".¹⁸

There is no controlling precedent in the Ninth Circuit on the question of legislative immunity with respect to changes in zoning. However, courts in other circuits have held that legislators are entitled to immunity for such decisions. For example, in Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1392 (11th Cir.1993), the Eleventh Circuit held that "even...decisions about which zoning classifications should be applied to a specific parcel of land are legislative actions." The Ninth Circuit did not disagree with the holding in the Corn case but distinguished it on the basis that Corn involved a change in zoning rather than a conditional use permit.¹⁹

Third Question: What procedural changes can the Council enact to minimize the members' liability exposure? For instance, should land-use ordinances and committee reports contain recitals describing the Council's intentions? If so, what should be contained in the recitals?

With respect to the issue of legislative immunity, it does not appear that there are many "procedural" changes that can be made to the existing conditional permit process that might make it more likely for a court to grant legislative immunity to named

¹⁶Order Granting Defendants' Motion for Partial Summary Judgment and Denying Defendant J. Kalani English's Motion to Dismiss, pp. 21-22.

¹⁷*Id.*

¹⁸Kaahumanu, 315 F.3d at 1222.

¹⁹Kaahumanu, 315 F.3d at 1223 n.7.

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individual defendants. As discussed above, the U.S. Court of Appeals has already held, based on the facts set forth before it in the Kaahumanu case, that a Council decision to grant or reject an ordinance granting a conditional permit is made on a case-by-case basis, does not apply to the public at large in Maui County, and is *ad hoc* rather than one of policy. To alter a court's characterization of County's conditional permit process, significant changes would, at a minimum, appear to be necessary to the conditional permit process. Such changes would have to be material enough so as to allow a court to conclude that Council's consideration of conditional permits is a legislative, and not administrative or executive, act based on the four-factor test discussed above.

It is possible, for example, though far from certain, that a court might reach a different conclusion regarding legislative immunity if the conditional permit ordinance were amended to provide that conditional permits are to be processed and acted upon only during specified periods of time and as part of a collective package of such proposals. Under such reformed procedures, it might then be possible for the County to argue that its conditional permits are part of a comprehensive land use policy determination involving multiple parties and properties and implicating larger public interests affecting the county as a whole and not just a few individuals. However, it is difficult at this time to ascertain the likelihood of success of such an argument and procedure.

With respect to the issue of qualified immunity, a court's analysis will be dependent upon the facts and circumstances of the case presented, particularly those facts relevant to the inquiry of whether a County officer's conduct violated a constitutional right and whether it would have been clear to a reasonable officer that the officer's conduct was unlawful in the situation confronted. The exact procedures used by the Council in acting upon a conditional permit application are facts that may be considered relevant by a court as part of its inquiry. In the case of a plaintiff alleging a violation of procedural due process rights, a court will inquire whether the plaintiff has a protected property interest in its application and whether the County denied this property interest without the process due under the circumstances. Facts that show that the plaintiff received adequate notice and a hearing at a meaningful time and in a meaningful manner are facts that will be considered for purposes of such an inquiry.²⁰

²⁰Order Granting Defendants' Motion for Partial Summary Judgment and Denying Defendant J. Kalani English's Motion to Dismiss, pp. 43-52.

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Consequently, assuming that Council continues to review conditional permit applications, procedures that ensure that applicants receive adequate notice of meetings and actions relating to their applications, and which also ensure that applicants are afforded opportunities to be heard, will help to buttress County's position on qualified immunity for its officers.²¹ In those circumstances where an applicant for a conditional permit asserts rights under the free exercise of religion clause of the First Amendment or under RLUIPA, Council should consult with Corporation Counsel for further legal advice on the review of the application.²²

Fourth Question: Do you advise the Council to repeal Chapter 19.40, Maui County Code, "Conditional Permits"? Please explain.

The repeal of Chapter 19.40, Maui County Code, as well as other possible actions, are matters involving the exercise of legislative discretion and involve the consideration of many issues of policy and the balancing of various interests. Although we do not opine on such policy considerations, we do opine that the County is under no legal obligation to provide "conditional permits". The conditional permit process "provide(s) the opportunity to consider establishing uses not specifically permitted within a given use zone where the proposed use is similar, related or compatible to those permitted uses and which has some special impact or uniqueness such that its affect on the surrounding environment cannot be determined in advance of the use being proposed for a particular location."²³ However, this objective is not mandated and could be achieved in other ways.

²¹See Sandy Beach Defense Fund v. City Council, 70 Haw. 361 (1989) (holding that, while City Council's approval of SMA use permit application was a non-legislative act because it administered a law already in existence, the City Council, as the legislative branch of the county, was not subject to the procedural requirements of Hawaii Administrative Procedure Act (Chapter 91, Hawaii Revised Statutes) when acting in either a legislative or non-legislative capacity).

²²See Hale O Kaula Church v. Maui Planning Comm'n, 229 F.Supp.2d 1056, 1073 (holding that Maui County may not deny a special use permit to plaintiffs to operate a church if doing so imposes a "substantial burden" on plaintiffs' free exercise of religion, unless the County demonstrates a compelling interest and denying the permit would be the least restrictive means of reaching that goal).

²³§19.40.010, Maui County Code.

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For example, uses that are similar, related or compatible to permitted uses could be added as special uses to specified zoning districts and made subject to the special use permit process set forth in section 19.510.070, Maui County Code.²⁴ Further, hardship cases could apply for a variance.²⁵ In short, the County is not required to provide a conditional permit process.

The subject of alternatives to the conditional permit process, and the advantages and disadvantages associated with such alternatives, is a subject matter that, due to its complexity and scope, is best addressed outside of this memorandum. Our department is available to advise the Council should it or one of its committees consider legislative proposals.

²⁴Under §19.510.070, Maui County Code, the appropriate planning commission reviews a request for a special use and, after a public hearing, may issue a special use permit for such use if the commission finds that certain criteria have been met.

²⁵Section 8-8.7, Revised Charter of the County of Maui (1983), as amended, states, in part:

In accordance with such principles, conditions and procedures prescribed by the council, the board of variances and appeals shall:

1. Hear and determine applications for variances from the strict application of any zoning, subdivision or building ordinances. The board shall hold a public hearing prior to ruling on a variance application and shall issue findings of fact and conclusions of law on decisions granting or denying variance applications.

Section 19.520.050(C), Maui County Code, states, in part:

Pursuant to the charter of the county and in accordance with the provisions of this article and the procedures established in this chapter, variances from the provisions of this title [19] may be granted by the board of variances and appeals if the board finds that due to the particular physical surroundings, shape or topographical condition of the subject property, compliance to the provisions of this chapter would result in hardship to the owner which is not mere inconvenience or economic hardship on the applicant.

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Fifth Question: What impact would the repeal of Chapter 19.40 have on current conditional permits and pending conditional permit applications?

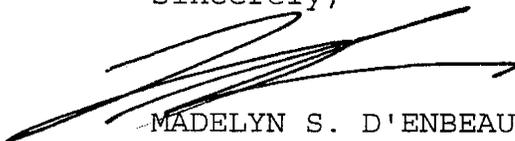
The exact consequences of a repeal of Chapter 19.40, Maui County Code, will depend upon the specific terms and provisions of any ordinance effecting such repeal and any measures to provide alternate or substitute procedures. The comments set forth below are therefore general in nature. Further advice may be rendered, when, and if, legislation repealing Chapter 19.40, Maui County Code, is actually considered by the Council or one of its committees.

Depending upon the effective date of a repeal of Chapter 19.40, Maui County Code, and any transition rules associated with such a repeal, it is possible that pending conditional permit applications could not be considered by the Council. A pending application is not a property interest. A landowner does not have a vested interest in a particular use of his or her property until he or she has obtained the last discretionary permit required.²⁶

Current conditional permits would remain in effect but could no longer be modified, amended or extended. Section 19.40.090, Maui County Code, provides for conditional permits to be extended if application is made 90 days prior to expiration. Section 19.40.080, Maui County Code, allows planning commissions to consider requests for changes in conditions placed on conditional permits and also provides for revocation of the permit in certain circumstances. If Chapter 19.40, Maui County Code, were repealed in its entirety, those provisions would be eliminated as a consequence of such a repeal.

The Council could, however, retain those portions of Chapter 19.40, Maui County Code, that apply to existing conditional permits.

Sincerely,



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Deputy Corporation Counsel

MSD:lak

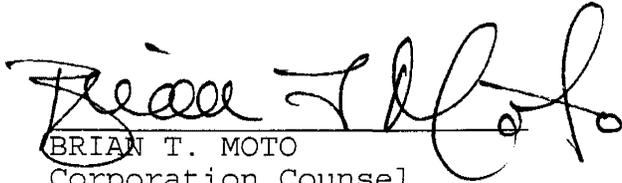
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²⁶County of Kauai v. Pacific Standard Life Insurance Company
65 Haw. 318, 653 P.2d 766 (Haw. 1982) (usually referred to as the
"Nukolii" case).

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cc: Mayor Alan M. Arakawa
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