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November 5, 2003

MEMO TO: Dain P. Kane, Chair
Government Relations Committee

FROM: Traci Fujita Villarosa 
Deputy Corporation Counsel

SUBJECT: Open Space, Natural Resources, Cultural Resources,
and Scenic Views Preservation Fund (GR-17)

1. Please describe the permitted uses of monies in the Open Space, Natural Resources, Cultural Resources, and Scenic Views Preservation Fund (Section 9-19, Charter of the County of Maui; Chapter 3.88, Maui County Code). May monies from this fund be used for ongoing maintenance of property acquired by the County pursuant to Charter Section 9-19?

Both the Revised Charter of the County of Maui (1983), as amended ("Charter")¹, and Maui County Code ("MCC")² limit use of money from the Open Space, Natural Resources, Cultural Resources, and Scenic Views Preservation Fund ("Fund") to acquisition of property for land conservation purposes only.

Neither the Charter nor MCC authorize using money from the Fund for ongoing

¹ Money in the Fund "shall be utilized for **purchasing or otherwise acquiring lands or property entitlements for land conservation purposes** in the county of Maui for the following purposes: public outdoor recreation and education; preservation of historic or culturally important land areas; protection of significant habitat or ecosystems, including buffer zones; preserving forests, beaches, coastal areas and agricultural lands; protecting watershed lands to preserve water quality; conserving land for the purpose of reducing erosion, floods, landslides, and runoff; and improving disabled and public access to, and enjoyment of, public land, open space and recreational facilities." Section 9-19(1), Charter.

² Section 3.88.020(C), MCC, states: "The revenues in this fund shall not be used for any purpose except those listed in subsection A of this section." Subsection A of section 3.88.020 is identical in its statement of the purpose of the fund as section 9-19(1) of the Charter.

maintenance of property acquired for land conservation purposes. Furthermore, there was no discussion by the 2001-2002 Charter Commission, which proposed the Charter provision creating the Fund, about using money from the Fund for ongoing maintenance of property.³ Thus, neither the language of the Charter or MCC nor the intent of the 2001-2002 Charter Commission can support a conclusion that money from the Fund can be used for property maintenance purposes.

2. What other funding sources are available for ongoing maintenance of property acquired by the County pursuant to Charter Section 9-19?

This question pertains to matters primarily fiscal and financial in nature. While a comprehensive inquiry into all such possible sources is beyond the scope of this memorandum, we note that another possible source of County funds for ongoing maintenance of property acquired for land conservation purposes is the General Fund.

3. Generally, are there any relevant differences between the ways in which the County may utilize land-acquisition funds and the ways in which a nonprofit conservation organization may utilize land-acquisition funds?

The provisions in section 9-19 of the Charter and section 3.88.020, MCC, which limit the purposes for which money from the Fund may be used, apply equally to both the County and nonprofit conservation organizations alike. The draft bill amending chapter 3.88, MCC, on the other hand, would impose certain requirements and conditions applicable only to nonprofit conservation organizations when utilizing money from the Fund.

For example, the proposed bill requires nonprofit conservation organizations to submit complete grant proposals which contain information such as justification for prioritization of the acquisition, a long-term management plan, and a description of efforts to obtain non-County funding. Under the proposed bill nonprofit conservation organizations must meet three specific criteria before money from the Fund may be utilized. Finally, there are specific conditions the nonprofit conservation organization must agree to as part of the grant agreement and specific terms which must be included in the deed conveying title to the organization. These requirements are not applicable when the County directly utilizes money from the Fund.

4. Is it possible to create an endowment fund from private donations to cover these kinds of maintenance costs? If so, please describe the process.

Council may accept private donations to pay for land conservation maintenance costs

³See 2001-2002 Maui County Charter Commission Revised Final Report, pp. 32-24.

by resolution pursuant to chapter 3.56, MCC. Council may appropriate the donated money directly to the Parks Maintenance Program. If, for example, the donation was made to benefit a particular location or type of maintenance, Council could add a proviso to the appropriation indicating how the donated money may be used.

Another option would be for Council to create a special fund for maintaining property acquired for land conservation purposes. Once Council accepted a donation for this purpose by resolution, the money could be appropriated to the special fund to pay for future maintenance costs.

5. Does the conveyance of a perpetual easement to the County result in an interest in real property? If so, please describe the procedure for accepting such an interest in real property.

Easements are interests in land that are nonpossessory: they grant to A, the dominant owner, limited rights to use or to enjoy land that is lawfully possessed by B, the servient owner.⁴ A conservation easement is an interest in real property whereby the property owner gives up certain rights, such as development rights, while still maintaining ownership of the property. A conservation easement is usually granted to, and enforced by, a land conservation organization or governmental entity. A conservation easement is usually perpetual and runs with the land (i.e., is enforceable against future land owners if the property is conveyed).

The County could acquire a conservation easement in the same manner that it acquires any other interest in real property. The procedures for acquiring an interest in real property are set forth in chapter 3.44, MCC. If the conservation easement is being donated to the County, Council may accept such donation by passage of a resolution pursuant to §§ 3.44.015(C) and 3.56.030, MCC.

6. The Committee discussed the possibility of either the Mayor's Office; the Office of Economic Development; or the Community Development Block Grant office being designated as the administrator of the Open Space, Natural Resources, Cultural Resources, and Scenic Views Preservation Fund. What are the legal ramifications, if any, in relation to designating any of these agencies?

The County of Maui does not have a land management division analogous to the Land Division of the Department of Land and Natural Resources. Since the County does not have an agency specifically designated to manage land we must consider the departments currently in existence.

⁴ 4 Powell on Real Property §34.02[1] at 10 (Wolf ed., 2000).

The Community Development Block Grant ("CDBG") office and the Office of Economic Development ("OED") are part of the Office of the Mayor. The CDBG office is funded by federal CDBG funds. If CDBG Office staff were assigned the responsibility of administering the Fund, the County would have to clearly distinguish between the County funds that are used to administer the Fund and CDBG funds that are used for the CDBG program. It would not be possible to use CDBG funds or resources to administer the Fund.⁵

One possible option Council may wish to explore is having the Department of Finance ("Finance") administer the Fund. The Director of Finance is responsible for preparing and maintaining "a perpetual inventory of all lands and equipment or other personally owned, leased, rented or controlled by the county."⁶ Furthermore, the Director of Finance is responsible, among other things, for acquiring and disposing of real property.⁷

⁵It is possible, however, to give the Office of the Mayor the responsibility of administering the Fund. While there may not be any legal ramifications for doing so, there are other considerations. Because the Fund deals with land conservation, the agency that administers the Fund should have some degree of continuity. Land conservation projects are long-term. It would be helpful for administration of the Fund if staff members were experienced and familiar with land conservation projects and land management.

Historically, the majority of the Office of the Mayor staff leave each time a new mayor takes office. This means, at a minimum, the Office of the Mayor has new staff every eight years or so. This frequent turn-over of staff may not be well-suited for administration of land conservation projects which are, in reality, perpetual. Staff continuity is necessary for efficient land conservation management.

Also, the Office of the Mayor may not have anyone on staff with expertise in the area of land conservation or grant management. Without this kind of background, staff may have difficulty evaluating grant proposals and managing on-going projects.

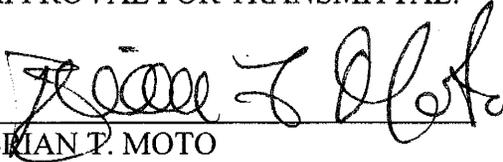
⁶ Subsection 8-4.3(11) of the Charter.

⁷ Section 8-4.3(9), Charter; chapter 3.44, MCC. Furthermore, it is my understanding that Finance has been considering for some time now the creation of a property management position within the department. Finance is currently responsible for managing several County properties which do not fall under the responsibility of another department.

Dain P. Kane
November 4, 2003
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cc: Danny Agsalog, Budget Director
Jack Kulp, Managing Director
Keith Regan, Director of Finance

APPROVAL FOR TRANSMITTAL:

A handwritten signature in black ink, appearing to read "Brian T. Moto", written over a horizontal line.

BRIAN T. MOTO
Corporation Counsel
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