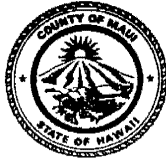


ALAN M. ARAKAWA
Mayor



BRIAN T. MOTO
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November 17, 2003

MEMO TO: Dain P. Kane
Council Chair

FROM: Brian T. Moto
Corporation Counsel *Brian T. Moto*

SUBJECT: **IMPROVING THE PROCESS FOR UPDATING THE GENERAL AND
COMMUNITY PLANS (PLU-6)**

The purpose of this memorandum is to respond to questions posed in your memorandum, dated October 10, 2003, relating to Bill No. 84 (2002), Draft 1 (updated 11-12-03), pertaining to the general and community plan process. A copy of your memorandum is attached hereto for convenience.

This memorandum briefly addresses the questions posed in the order submitted.

Response to Question 1 (pertaining generally to non-decennial general plan amendments proposed by a person).

As reflected in the version of Bill No. 84 dated "11-12-03", the time restriction provisions pertaining to non-decennial general plan amendments proposed by a person (i.e., those provisions limiting the submission of non-decennial amendments to July of each year and prohibiting such amendments within three years after the enactment of a decennial general plan revision) have been revised to clarify that the general plan referred to in said provisions is the general plan to be adopted under proposed Chapter 2.80B, Maui County Code, and not the plan entitled, "The General Plan of the County of Maui 1990 Update", with an effective date of September 27, 1991 (the "1991 General Plan").

In particular, Section 2.80B.060(B) has been revised to state in pertinent part as follows:

B. Non-decennial amendments to the general plan enacted pursuant to 2.80B.050 may be proposed by a person during July of each year, provided that such amendments shall

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Council Chair

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not be accepted within three years after the enactment of a decennial revision to the general plan pursuant to section 2.80B.050. (Emphasis added.)

Therefore, under Section 2.80B.060(B) as revised, the time restrictions of Section 2.80B.060(B) apply only to non-decennial amendments to the general plan adopted pursuant to proposed Chapter 2.80B, Maui County Code, and not to amendments to the 1991 General Plan. Persons seeking amendment of the 1991 General Plan would not be subject to the time restrictions of Section 2.80B.060(B).¹

Response to Question 2 (pertaining generally to the rezoning of lands upon the adoption of a community plan).

As reflected in the "11-12-03" version of Bill No. 84, the provisions pertaining to the rezoning of lands after the adoption of a community plan have been revised to clarify that said provisions apply only to community plans adopted pursuant to proposed Chapter 2.80B, Maui County Code, and not to existing community plans, and only to those lands re-designated for a less intensive use in the community plans adopted pursuant to Section 2.80B.090.

In particular, Section 2.80B.070(H) has been revised to state in pertinent part as follows:

H. Upon the adoption of a community plan pursuant to section 2.80B.090, lands re-designated for a less intensive use shall be zoned accordingly within eighteen months of adoption of the subject plan. If zoning is not adopted within the specified period, a parcel may be developed pursuant to applicable laws. (Emphasis added.)

The rezoning provided for in Section 2.80B.070(H) is not "automatic" in the sense of being accomplished solely as a result of the adoption of a community plan pursuant to Section 2.80B.090. Any such rezoning would presumably occur as a consequence of a bill or bills prepared and proposed by the planning director or the Council in accordance with applicable provisions of Chapter 8 of

¹We note that, while it has not been uncommon for persons to seek community plan amendments from time to time, persons rarely, if ever, have sought amendments to the 1991 General Plan.

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the Revised Charter of the County of Maui (1983), as amended,² and Chapter 19.510, Maui County Code.³ The precise consequences of such rezoning measures and any analysis of "takings" claims, if any, associated with such measures will depend upon the relevant and material facts and circumstances and law existing at the time of the rezoning. Any such rezoning measures are at present hypothetical. In the absence of specific facts and circumstances, it is difficult and premature to opine on the legal consequences of any rezoning that might occur pursuant to Section 2.80B.070(H).⁴

Response to Question 3 (generally pertaining to non-decennial community plan amendments proposed by a person).

As reflected in the version of Bill No. 84 dated "11-12-03", the time restriction provisions pertaining to non-decennial community plan amendments proposed by a person (*i.e.*, those provisions limiting the submission of non-decennial amendments to July of each year and prohibiting such amendments within three years (five years in the case of Moloka'i) after the enactment of a decennial community plan revision) have been revised to clarify

²Charter §§ 8-8.3, 8-8.4, and 8-8.6 set forth provisions generally pertaining to preparation and review of zoning ordinances.

³§ 19.510.040, Maui County Code, sets forth procedures for changes of zoning.

⁴For a general discussion on rezoning, see, for example, Eugene McQuillin, *The Law of Municipal Corporations* § 25.93 (3d ed. 2000) ("Rezoning as well as original zoning is subject to the legislative discretion of the city council or other zoning authority, and courts will not interfere therewith except for abuse clear beyond dispute. If the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. In other words, if rezoning has some rational and necessary connection with the peace, good order, health, safety, morals or general welfare of the community the zoning change must be upheld. But the legislative body must act in good faith and cannot act arbitrarily or capriciously; and a rezoning measure will be set aside if it is unreasonable or confiscatory, or discriminatory. Furthermore, a rezoning measure should be in accord with the comprehensive zoning plan."). See also, Anderson's *American Law of Zoning* §§ 4.26-4.28 (Kenneth H. Young ed., 1996).

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Council Chair
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that the community plans referred to are the community plans adopted under proposed Chapter 2.80B, Maui County Code, and not the existing community plans identified in Chapter 2.80A, Maui County Code.

In particular, Section 2.80B.110(A) has been revised to state as follows:

A. Non-decennial amendments to any community plan enacted pursuant to 2.80B.090, except the Moloka'i community plan, may be proposed by a person during July of each year, provided that such amendments shall not be accepted within three years after the enactment of the community plan pursuant to section 2.80B.090. Non-decennial amendments to the Moloka'i community plan enacted pursuant to 2.80B.090 may be proposed by a person during July of each year, provided that such amendments shall not be accepted within five years after the enactment of a decennial revision to the community plan pursuant to section 2.80B.090. (Emphasis added.)

Therefore, under Section 2.80B.110(A) as revised, the time restrictions of Section 2.80B.110(A) apply only to non-decennial amendments to community plans adopted pursuant to proposed Chapter 2.80B, Maui County Code, and not to amendments to existing community plans. Persons seeking amendment of existing community plans would not be subject to the time restrictions of Section 2.80B.110(A).

BTM:lak

Attachment

cc: Cindy Y. Young, Deputy Corporation Counsel
Dudley G. Akama, Deputy Corporation Counsel
Michael J. Foley, Director, Department of Planning
Wayne Boteilho, Deputy Director, Department of Planning
Brian Miskae, Planning Program Administrator

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Council Chair
Dain P. Kane

Vice-Chair
Robert Carroll

Council Members
G. Riki Hokama
Jo Anne Johnson
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200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793

Director of Council Services
Ken Fukuoka

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October 10, 2003

MEMO TO: Mr. Brian T. Moto
Corporation Counsel

F R O M: Dain P. Kane, *DPK*
Council Chair

SUBJECT: **IMPROVING THE PROCESS FOR UPDATING THE
GENERAL AND COMMUNITY PLANS (PLU-6)**

As you are aware, Bill 84 was approved by the Planning and Land Use Committee on September 30, 2003, and will now be scheduled on the Council's agenda for second and final reading. Although unanimously passed, a few councilmembers supported the bill "with reservations" because of their concerns for certain amendments to the bill. Their concerns centered on those amendments - made for the first time at the committee meetings of September 23 and 30 - that essentially: (1) left the Council and the public with little, if any, time to carefully review and analyze their potential implications; and, (2) may have been adopted without opportunity for public testimony.

It has long been my practice to review and consider all available facts before passing legislation. It is also my firm belief that elected officials have a duty to be truthful to the public, and to inform them of all foreseeable results - both positive and negative - prior to adopting legislation. And, while supporting Bill 84, I believe that it would be irresponsible, if not negligent, to pass this bill on second and final reading without first having the following questions addressed and answered.

Accordingly, may I request that responses to the following questions be transmitted to my office by October 24, 2003? As my decision regarding Bill 84 hinges upon clarification of these issues, please contact me, or my executive assistant, Jock M. Yamaguchi (ext. 8010) if any additional time to respond is necessary.

QUESTION NO. 1:

If Bill 84 were to be passed on second and final reading, when would individuals be able to seek non-decennial amendments to the general plan pursuant to Section 2.80B.060?

JUSTIFICATION:

Section 2.80B.060, as amended, ("Non-decennial amendments to the general plan") provides that "non-decennial amendments to the general plan may be proposed by any person during July in each calendar year provided that such amendments shall not be accepted within three years after the enactment of the general plan." (emphasis added)

Section 2.80B.120 ("Existing general plan and the community plans"), was amended to state that "until revised or amended pursuant to this chapter, the general plan and the current community plan for each community plan district shall be in full force and effect." (emphasis added).

However, **Section 4** of Bill 84 provides, in relevant part: "This ordinance shall take effect upon its approval." (emphasis added).

Accordingly, if Bill 84 is adopted as currently drafted:

- (a) Here, what general plan is the section referring to: (i) The general plan previously enacted, and in full force and effect? Or, (ii) The enactment of the next general plan? According to Section 2.80B.060, non-decennial amendments shall not be accepted within three years "after enactment of the general plan?"
- (b) In other words, will individuals be able to seek non-decennial amendments to the general plan at the present time and until the current general plan (which remains in full force and effect pursuant to Section 2.80B.120) is revised pursuant to Section 2.80B.040)?

- (c) Or, will individuals be precluded from seeking non-decennial amendments to the general plan for three years following approval of this ordinance (Section 4)?

QUESTION NO. 2:

- (A) If Bill 84 were to be passed on second and final reading would lands designated for a less intensive use be "automatically down zoned" (pursuant to Section 2.80B.070), according to community plan designation and upon adoption of the community plan?
- (B) If the answer to Question No. 2 (A) is "yes", then would this subject the county to "takings" claims?
- (C) Notwithstanding any "takings" issues, if the answer to Question No. 2 (A) is "yes", then:
 - (i) Who or what agency would be responsible for enforcement of this requirement (down zoning of lands)?
 - (ii) Who and how would the landowner impacted by this provision be notified of any down zoning?
 - (iii) How many lands is the county anticipating to be impacted by this requirement? (How many lands would be down zoned?)
 - (iv) What impact, if any, will this provision have upon county revenues? (Will there be an anticipated loss in revenue due to the down grading?)
 - (v) Assuming that the planning director will be responsible for enforcement of this requirement (down zoning of lands), does the director have sufficient resources to effectively enforce this provision (down zoning of lands) within the eighteen month time period?

JUSTIFICATION:

Section 2.80B.070, as amended, ("Community plans") provides, in relevant part:

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- I. Upon the adoption of a community plan, lands designated for a less intensive use shall be zoned accordingly within eighteen months of adoption of the subject plan. If zoning is not adopted within the specified period, a parcel may be developed pursuant to applicable laws.

QUESTION NO. 3:

If Bill 84 were to be passed on second and final reading and lands designated for a less intensive use were not "automatically down zoned" within 180 days (pursuant to Section 2.80B.070), would individuals be able to seek non-decennial amendments to the general plan pursuant to Section 2.80B.060, and non-decennial amendments to the community plans pursuant to Section 2.80B.110?

Specifically,

- (a) Would individuals be able to seek non-decennial amendments to the community plan(s) until the current community plan(s) (which remain in full force and effect pursuant to Section 2.80B.120) are revised pursuant to Section 2.80B.080?
- (b) Or, will individuals be precluded from seeking non-decennial amendments to the community plan(s) for three years (or, five years for Moloka'i) following approval of this ordinance pursuant to Section 4?

JUSTIFICATION:

Section 2.80B.060, as amended, ("Non-decennial amendments to the general plan") provides that "non-decennial amendments to the general plan may be proposed by any person during July in each calendar year provided that such amendments shall not be accepted within three years after the enactment of the general plan." (emphasis added)

Section 2.80B.110, as amended, ("Non-decennial amendments to community plans proposed by a person.") A. Non-decennial

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amendments to any community plan, except the Molokai Community Plan, proposed by a person shall be accepted for processing once every year during July, provided that such amendments shall not be accepted within three years after the enactment of the community plan. Non-decennial amendments to the Molokai Community Plan shall be accepted until five years after enactment of the Molokai Community Plan pursuant to section 2.80B.090 and shall thereafter be accepted for processing once every year during July. (emphasis added)

2.80B.120 ("Existing general plan and the community plans"), was amended to state that "until revised or amended pursuant to this chapter, the general plan and the current community plan for each community plan district shall be in full force and effect." (emphasis added).

However, **Section 4** of Bill 84 also provides, in relevant part: "This ordinance shall take effect upon its approval." (emphasis added).