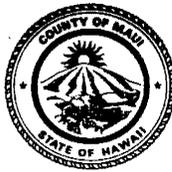


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November 18, 2003

MEMORANDUM

MEMO TO: G. Riki Hokama
Councilmember

FROM: Brian T. Moto
Corporation Counsel

A handwritten signature in black ink, appearing to read "Brian T. Moto", is written over the typed name in the "FROM" field.

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

Introduction.

The purpose of this memorandum is to respond to your memorandum, dated October 2, 2003, requesting legal advice relating to Bill No. 84 (2002), Draft 1 ("Bill No. 84"), and, in particular, whether the revisions made to Bill No. 84 since its passage at first reading¹ necessitate the holding of another first reading of Bill No. 84.

Short answer.

Consistent with oral advice given to the Planning and Land Use Committee on this subject matter, we are of the opinion that Bill No. 84, as revised since its first reading, is not so substantial and drastic a departure from the bill noticed for purposes of first reading as to invalidate Council's previous action and require another first reading.

Discussion and analysis.

In Carlsmith, Carlsmith, Wichman and Case v. CPB Properties, Inc., 64 Haw. 584, 645 P.2d 873 (1982), the Hawaii Supreme Court held, as a general proposition, that a bill that undergoes changes so fundamental as to transform the bill, in effect, into a new

¹Bill No. 84 passed First Reading on December 17, 2002.

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proposal may be invalidated and required to undergo new notice and another hearing.² In so opining, the Court did not provide any "bright line" test that might be employed in distinguishing changes that are substantial or fundamental from those which are not. Therefore, making such distinctions often involves the exercise of judgment. Nevertheless, when applying the principles outlined in Carlsmith to the facts pertaining to Bill No. 84 and its procedural history, we conclude that Bill No. 84 has not undergone alterations so substantial as to transform it into a new legislative proposal.

In particular, we note that the basic purpose and intent of Bill No. 84 has remained consistent and unchanged throughout its long history of hearings and deliberation by the Council.³ That purpose and intent has been and remains the establishment of a revised process to update the County of Maui general plan and community plans. Bill No. 84, as passed at first reading and as currently drafted, incorporates provisions setting forth, among other things, the content of the general plan and community plans (including, for example, references to urban and rural growth areas), the formation and duties of the general plan advisory committees and community plan advisory committees, and procedures for decennial and non-decennial revisions to the general plan and community plans.

Although various changes have been incorporated in Bill No. 84 since its passage at first reading, the changes have in many cases been technical in nature and designed to ensure that the Bill furthers the Council's intent and is internally consistent and accurate.⁴ In other cases, the changes have been in response to testimony received in one or more of the meetings convened on the Bill. None of the changes appear to be so substantial as to render meaningless the first reading of the Bill.⁵

²Carlsmith, Carlsmith, Wichman and Case v. CPB Properties, Inc., 64 Haw. 584, 645 P.2d 873 (1982) (holding that the final action taken by the Honolulu City Council, with respect to height limitations along the Hawaii Capital District, was not so drastic a departure from the noticed proposal as to warrant the invalidation of the challenged ordinance).

³Council, its committees, and the planning commissions have held a considerable number of meetings on the subject matter addressed by Bill No. 84. See Committee Report No. 03-146, Planning and Land Use Committee, Nov. 21, 2003.

⁴See Committee Report No. 03-146, Planning and Land Use Committee, Nov. 21, 2003.

⁵Among the changes made to Bill No. 84 since its passage at first reading is the addition of a provision in Section

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In Carlsmith, the Supreme Court observed that the object of hearings "is to afford such interested persons an opportunity to make known their views and to apprise the ... Council of their opposition to, or approval of, the proposed ordinance", and, "[w]here pertinent and relevant to the ... issue under consideration", to allow these persons to advocate or suggest alternatives to the advertised proposal.⁶ The Court further stated that "[i]mplicit in this ... procedure, therefore, is the possibility that changes in the original proposal might ensue as a result of the views expressed at the hearings," and that "[a]ccordingly, such notice may not always be taken by those to whom it is addressed to be an accurate forecast of the ultimate action to be taken by the ... Council."⁷

BTM:lak

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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2.80B.070(H) that provides that "lands re-designated for a less intensive use shall be zoned accordingly within eighteen months of adoption of the subject plan." Although this provision has been the focus of some attention, this provision, in the context of the entire bill, does not appear to be so significant as to alter the fundamental nature and purpose of Bill No. 84. Rather, it arguably calls for implementing zoning actions that, in theory at least, would occur even in the absence of such a provision. Section 46-4(a), Hawaii Revised Statutes, which grants counties zoning power, directs, in part, as follows:

Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner.

⁶Carlsmith, 64 Haw. at 591 (1982).

⁷*Id.*