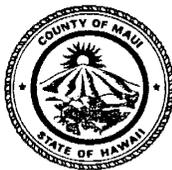


ALAN M. ARAKAWA  
Mayor



BRIAN T. MOTO  
Corporation Counsel

**DEPARTMENT OF THE CORPORATION COUNSEL**

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November 18, 2003

MEMO TO: Honorable Dain P. Kane, Chair  
Maui County Council

F R O M: Edward S. Kushi, Jr.  
Deputy Corporation Counsel

A handwritten signature in black ink, appearing to read "Edward S. Kushi, Jr.", is written over the name in the "FROM" field.

SUBJECT: **CLARIFICATION ON ABILITY TO MODIFY EXEMPTIONS OR  
CONDITIONS FOR APPROVAL ON HRS 201G APPLICATIONS  
SUBMITTED TO THE COUNCIL (PAF 03-211)**

Pursuant to your November 12, 2003 memo, you have requested our office to respond to the following inquiries:

1. Provide the authority relied upon in concluding that the project must be either approved or disapproved as submitted.
2. Consult with Honolulu's Corporation Counsel and the State Office of the Attorney General to see if some consensus can be reached.
3. If revisions are permissible, whether:
  - a. they are limited in kind to 201G-118 exemptions; and;
  - b. HCDCH and Kauaula Associates, LLC must approve of any revisions proposed by the Council within the 45-day period.
4. Whether Council approval would be limited to the specific 201G-118 exemptions requested, or would be tantamount to approval of other developer representations made in the application, regardless of whether they are set forth in the proposed resolution.

Notwithstanding the time constraints that prevented our office from more fully reviewing and discussing these issues with the aforementioned third-party agencies, we respond as follows:

**I. APPROVE OR DISAPPROVE THE PROJECT AS SUBMITTED.**

Section 201G-118, Hawaii Revised Statutes ("HRS"), in pertinent part, states:

(3) The legislative body of the county in which the project is situated shall have approved the project.

(A) The legislative body shall approve or disapprove the project by resolution within forty-five days after the corporation has submitted the preliminary plans and specifications for the project to the legislative body. If on the forty-sixth day a project is not disapproved, it shall be deemed approved by the legislative body;

(B) No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, or disapproving the plans and specifications; and

(C) The final plans and specifications for the project shall be deemed approved by the legislative body if the final plans and specifications do not substantially deviate from the preliminary plans and specifications....  
(emphasis added)

It is common practice that in reviewing legislation, the Maui County Council, through its committees and/or by the Council itself, will propose and/or impose revisions, modifications and/or conditions to the legislation, as initially submitted. However, the "fast-track" Section 201G-118, HRS, process is a creature of State legislation that provides for significant exemptions from planning, zoning, and construction standards that would otherwise apply to a development. Therefore, Section 201G-118 should be construed pursuant to the terms, conditions, and language of the statute itself.

In interpreting statutes, the fundamental starting point is the language of the statute itself. State v. Kalama, 94 Hawai'i 60 (2000). When construing a statute, the court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Coon v. City and County of Honolulu, 98 Hawai'i 233 (2002). If the language of a statute is clear and unambiguous, a court will apply the plain meaning of the

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language unless a plain meaning interpretation would lead to an absurd result or a result at odds with the legislature's intent. Makin ex rel Russell v. Hawaii, 114 F. Supp. 2d 1017 (1999). A rational, sensible, and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable. Metcalf v. Voluntary Employee's Ben. Ass'n. of Hawaii, 99 Hawai'i 53 (2002). The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality. Beneficial Hawaii, Inc. v. Kida, 96 Hawai'i 289 (2001).

Section 201G-118(a)(3)(A), HRS, states that the legislative body "shall approve or disapprove" the project. Section 201G-118, HRS, has no language explicitly providing for modification of the "preliminary plans and specifications" submitted, nor does it provide for approval in part and disapproval in part. Further, Section 201G-118(a)(3)(B), HRS, which provides the County and its officials with immunity from lawsuit, references actions taken by the County and its officials "in reviewing, approving, or disapproving the plans and specifications". Here again no explicit reference is made to the possibility of revisions, modifications, or partial approvals being made by the Council.

A cursory review of the legislative history of Section 201G-118, HRS, and Chapter 201G reveals no specific discussion that sheds light on this issue. However, Sections 201G-118(a)(3)(A) and (C), HRS, mandate that the preliminary plans and specifications be deemed the final plans and specifications if there are no substantial deviations from the preliminary plans. This implies that Section 201G-118 does not contemplate or anticipate that changes may be made by the legislative body to the preliminary plans and specifications. It also implies that a review and determination as to whether substantial deviations exist must necessarily occur after Council approval of the subject resolution.

In light of the strict and expedited 45-day time frame within which approval or disapproval must be rendered, to allow or permit revisions, modifications and/or conditions could be impracticable, and result in new and additional legal issues, such as those posed in question 3(b) of your memorandum. In particular, if modifications were made by Council to the preliminary plans and specifications as a condition of, or incident to, approval of the project, it would render questionable the status and efficacy of the prior approval granted the project by the Housing and Community Development Corporation of Hawaii ("HCDCH"). Indeed, based on the informal comments of the Deputy Attorney General, it appears that modification of the preliminary plans and specifications would necessitate another review of the project by the HCDCH. The fact that Chapter 201G, HRS, does not explicitly provide for such a possibility and complication is further support for the proposition

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that modification of project plans by the Council is not something contemplated by Section 201G-118, HRS.

Accordingly, we opine that, based on the language of the State statute and the reasons discussed above, no modifications, revisions, and/or conditions may be made to the initial submittal.

**II. CONSULTATION WITH CITY AND COUNTY OF HONOLULU CORPORATION COUNSEL AND THE STATE ATTORNEY GENERAL'S OFFICE.**

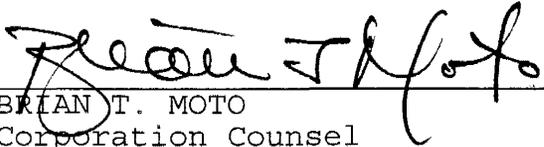
We have not had the time or opportunity to discuss these issues with the Corporation Counsel of the City and County of Honolulu. We did, however, briefly discuss this matter with the State Deputy Attorney General assigned to the HCDCH, and although he, understandably, would not formally respond to the specific inquiry as to whether modifications are permitted, he confirmed that, in the event modifications, conditions and/or revisions are proposed by Council, said changes would have to be reviewed and approved by the HCDCH Board of Directors.

**III. IF REVISIONS ARE PERMISSIBLE, ARE THEY LIMITED TO THE SPECIFIC REQUESTED EXEMPTIONS, OR TO THE PROJECT, AS A WHOLE, AS REPRESENTED AND SUBMITTED TO THE COUNCIL.**

As discussed above, the "project" to be considered is described and detailed by the preliminary plans and specifications, which plans and specifications include any requested statutory or regulatory exemptions. We opine that any and all representations incorporated in the preliminary plans and specifications submitted to Council are part and parcel of the "project."

Call if further discussion and/or clarification is needed. It is hoped that the HCDCH will be successful in obtaining a written opinion from the State Attorney General's Office for our review.

APPROVED FOR TRANSMITTAL:

  
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BRIAN T. MOTO  
Corporation Counsel  
S:\ALL\ESK\Advisory\memo to kane re puunoa.wpd