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July 23, 2004

MEMO TO: Honorable Joseph Pontanilla
Chair, Housing and Human Services Committee

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

SUBJECT: **COUNCIL APPROVAL OF AFFORDABLE-HOUSING PROJECTS PROPOSED PURSUANT TO CHAPTER 201G, HAWAII REVISED STATUTES (Waikapu Affordable Housing Subdivision) HHS-4(1)**

Per your request of July 8, 2004, we respond as follows:

(1) Would such a unilateral agreement be enforceable by the County?

Yes. Our office has required and approved the following language in similar unilateral-type agreements, which would enable the County to seek judicial relief:

> "AND IT IS EXPRESSLY UNDERSTOOD AND AGREED that until released in writing by the County, the conditions imposed in this Agreement shall run with the land identified hereinabove and shall bind and constitute notice to all subsequent lessees, grantees, assignees, mortgagees, lienors and any other persons who may claim an interest in said land, and the County shall have the right to enforce this Agreement by appropriate action at law or suit in equity against all such persons."

(2) Must recordation of such a unilateral agreement occur prior to Council action on the 201G application in order to protect the County's interests, or would adequate protections be in place if recordation occurred subsequent to adoption of a resolution approving the affordable housing subdivision?

Unlike change in zoning applications wherein the Council may impose conditions to the rezoning, there is no procedure and/or

timeline with respect to a unilateral agreement being processed in conjunction with a 201G, Hawaii Revised Statutes ("HRS") application.[1]

It is of further note that, in accordance with Section 201G-118(a)(4), HRS, the applicant, in this instance, must process and secure a district boundary amendment from agricultural to urban from the State Land Use Commission, which petition filing and process generally occurs after an applicant obtains approval by the applicable county legislative body.

Based on the above, we believe:

(A) That there is no requirement in the Chapter 201G, HRS, process that a unilateral agreement be recorded before a county legislative body approves an application;

(B) That recordation of such an agreement prior to an applicant securing the State Land Use Commission district boundary amendment may be premature and, if so recorded, may need to be undone, in the event the State Land Use Commission disapproves; and

(C) That the County would be adequately protected if the subject unilateral agreement is properly executed and delivered to the County prior to the Council's action on the application and, further, that upon the applicant securing State Land Use Commission district boundary amendment approval, the holder of the agreement be instructed to record same with the Bureau of Conveyances and/or the Land Court of the State of Hawaii.

(3) To what extent, and under what authority, can the Council dictate the terms of a unilateral agreement?

As discussed above, there are no provisions, and accordingly, no formal, express authority found in Chapter 201G, HRS, with respect to a county legislative body dictating terms of a unilateral agreement, in conjunction with its review of a Section 201G-118, HRS, affordable housing project. Pursuant to Section 201G-118, HRS:

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[1]Section 19.510.050(D), Maui County Code ("MCC"), pertaining to conditional zoning, states in pertinent part:

> Such conditions shall be set forth in a unilateral agreement running in favor of the county....No ordinance with conditions shall be effective until such agreement, properly executed, has been recorded with .... The agreement shall be properly executed and delivered to the county prior to council action on the ordinance with conditions; provided however, that the council may grant reasonable extensions in cases of practical difficulty...

> (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....

However, we believe the absence of such express authority does not prevent an applicant from voluntarily executing a unilateral agreement in favor of the County, as long as the agreement does not contain any engagements, commitments or any *quid pro quo* from the County, which then would make such an agreement bilateral. See definition of unilateral and bilateral contracts; Black's Law Dictionary, Revised 4th Edition. As further discussed below, in this instance we believe the covenants, conditions, commitments, and promises to be contained in the subject agreement are unilateral, are being made solely by the applicant, and are being made without any express promise, engagement or performance from or by the County.

(4) Is the Council prohibited from making its approval contingent upon execution and recordation of a unilateral agreement that includes terms recommended by the Committee which are not contained in the project application?

For purposes of discussion and clarity, we subdivide the above query and respond as follows:

(a) Is the Council prohibited from making its approval contingent upon execution and recordation of a unilateral agreement?

Yes. As discussed above, Chapter 201G, HRS, does not authorize or provide for Council approval that is contingent upon the execution and recordation of a unilateral agreement. Requiring a unilateral agreement as a condition of approval would go beyond the scope of an approving resolution.

(b) Is it proper for the County to accept a unilateral agreement that includes terms recommended by the Committee which are not contained in the project application?

No. As we previously stated in our November 18, 2003 memorandum to Council Chair Dain Kane (copy attached), no modifications, revisions, and/or conditions may be made to an initial submittal of a 201G, HRS, application. The project to be considered is described and detailed by the preliminary plans and specifications.

As we understand the subject application, during your Committee's review, the applicant made several and various verbal representations which were intended to clarify and/or further detail the project's

preliminary plans and specifications as contained in its application dated June 2004, and received by the Council on June 28, 2004. Such clarification and/or detail included representations regarding the breakdown of the project's affordable units by annual median income and/or specific selling price, the timing or concurrency between the affordable and market-priced units, and the submission of annual, progress reports to the County. Based on said verbal representations, your Committee then requested the applicant to formally memorialize same in the form of a unilateral agreement. (Please note that even in the absence of such an agreement, the written minutes of your Committee deliberations would contain and formalize the applicant's statements and representations.) Lastly, we have been advised and are of the belief that the referenced verbal clarifications and/or details do not amount to "modifications, revisions, and/or conditions" to the initially submitted 201G, HRS, application of June 2004.

Based on the above, we affirm our position as set forth in the November 18, 2003 memo to Chair Kane that no modifications, revisions, and/or conditions should be permitted. However, based on the facts and situation in this instance, we do not believe that the terms of the requested unilateral agreement would constitute modifications, revisions and/or conditions to the application.

Call if further discussion is needed.

APPROVED FOR TRANSMITTAL:

BRIAN T. MOTO
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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

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

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

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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