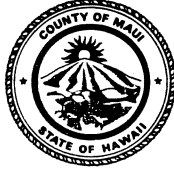


ALAN M. ARAKAWA
Mayor



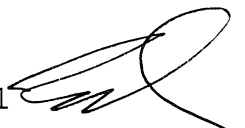
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October 22, 2004

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

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

SUBJECT: **PRESENTATION ON THE REVISED PU'UNOA VILLAGE AFFORDABLE HOUSING PROJECT; LAHAINA, MAUI (HHS-8)**

The purpose of this memorandum is to respond, in part, to your requests of October 7, 2004 and July 14, 2004, as follows:

1. **To the extent you are able to make such information public, please provide a status report on the pending litigation involving the Kauaula families' claims concerning water rights in the subject area, and the buffer zone surrounding Kauaula Stream.**

We know of two lawsuits filed by Kuleana Ku'ikahi that are relevant to your inquiry.

a. Kuleana Ku'ikahi LLC vs. County of Maui, Civil No. 02-1-0512(3) is pending before Judge Joseph Cardoza of the Circuit Court of the Second Circuit. Trial is scheduled to begin on January 10, 2005. The plaintiff alleges, among other things, that the County improperly accepted for processing a subdivision application for the Pu'unoa I subdivision. The suit alleges that County's Department of Public Works and its then-Director, David Goode, "wrongfully disregarded the recommendations and warnings of the Historic Preservation Division concerning the extremely valuable historical and cultural aspects of the lands proposed to be subdivided and gave final plat approval to the Pu'unoa I subdivision without imposing the recommended protection of a buffer zone necessary to protect the Kauaula Stream area." (Amended Complaint, ¶ 27) The complaint seeks damages, attorneys' fees, and injunctive relief.

b. Kuleana Ku'ikahi LLC v. Housing and Community Development Corporation of Hawaii, Kaua'ula Associates LLC, et al., Civil No. 04-1-0408 (2), was filed on October 7, 2004 in the Circuit Court of the Second Circuit. The plaintiff alleges, among other things, that defendant Housing and Community Development Corporation of Hawaii ("HCDCH") failed to properly discharge its obligations when it approved the Pu'unoa housing project without an Environmental Assessment ("EA") and/or an Environmental Impact Statement ("EIS"). The complaint alleges that although the Attorney General advised HCDCH of the need for an EA and/or an EIS, HCDCH wrongfully ignored this legal advice. The complaint also alleges that HCDCH and Kaua'ula Associates wrongfully interfered with a November 16, 2001 subdivision agreement, which requires that the Pu'unoa property be used only for agricultural uses. The complaint seeks damages, attorneys' fees, and injunctive relief.

- 2. Will a decision by the Council to approve the project impact, either positively or negatively, the decision that is currently pending before the State Land Use Commission (LUC) ?**

A decision by the Council (whether to approve or disapprove the project) may not directly affect the petition that is currently pending before the LUC, but there are overlapping issues. In the pending LUC proceeding, Kuleana Ku'ikahi is seeking a declaratory ruling that certain agricultural subdivisions being developed on former Pioneer Mill lands require a district boundary amendment. In a previous LUC proceeding filed by Kuleana Ku'ikahi, the County was criticized by the LUC for approving several agricultural subdivisions on Pioneer Mill land. For example, Commissioner Coppa called the County's agricultural subdivision enforcement "very lax." (Transcript of LUC hearing, June 27, at p. 66.) Commissioner Fiesta stated that "I think the Maui County did a bad job" of enforcing its agricultural ordinance. (*Id.* at 68.) Commissioners Desai, Montgomery, and Catalani also voiced matters of concern. (*Id.* at 66-70.) Commissioner Roehrig said he was "outraged" about alleged lobbying of the Governor by the developer. (*Id.* at 71.) He questioned whether the developer had pressured Maui County officials "to try to squeeze the parties into conformity with their point of view so that the Land Use Commission couldn't make a just decision. And I hope that doesn't ever happen again." (*Id.* at 72.) On June 27, 2003, the LUC adopted an Order Regarding Withdrawal of Petition for a Declaratory Order in which it summarized some of its comments and observations.

The LUC will take up the latest petition filed by Kuleana Ku'ikahi during its meetings scheduled for October 21 and 22, 2004.

- 3. If the Council approves the project and the developer then presents its petition for boundary amendment to the LUC, pursuant to Section 201G-118(a)(4) of the Hawaii Revised Statutes, will the LUC consider issues relating to water rights and native Hawaiian gathering rights in connection with the petition ?**

The LUC is required to consider native Hawaiian rights. See, e.g., Hawaii Constitution, Article XII, § 7 (pertaining to traditional and customary rights). The LUC also takes an interest in water issues. See, e.g., Lanai Co. v. Land Use Comm'n, 105 Hawai'i 296, 97 P.3d 372 (2004). However, final adjudication of water disputes generally takes place before the Commission on Water Resource Management or in the courts. The Supreme Court of the Territory of Hawaii resolved a water dispute between the Pioneer Mill and the ancestors of some of Kuleana Ku'ikahi's members in a case entitled Horner v. Kumuliili, 10 Haw. 174 (1895).

- 4. As a co-applicant, will the Housing and Community Development Corporation of Hawaii be jointly and severally liable for the developer's legal liability, if any, arising from this development ?**

It is our understanding that the HCDCH is the "sponsoring" agency for this project which, if approved, will be developed, constructed, funded, and maintained entirely by the applicant, Kaua'ula Associates, LLC. Accordingly, the project is an "assisted project", which is defined as "a project which is initiated and developed by an entity other than the corporation, and which is being provided state assistance to lower sales prices or rental rates. Such assistance may include, but is not necessarily limited to, interim and permanent financing, expedited processing of projects, seed money loans or grants, tax credits, general excise tax exemptions, and rental assistance."¹ (Emphasis added.) However, on information and in accordance with HCDCH's rules,² an eligible developer and HCDCH may enter into a development agreement, which in addition to other relevant terms and conditions, would provide and define the roles, responsibilities, indemnification, and liabilities of the respective parties.

¹ Section 15-174-2, HCDCH administrative rules.

² Section 15-174-28, HCDCH administrative rules.

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5. Response to request of June 24, 2004, relating to prioritization plan proposed by the developer.

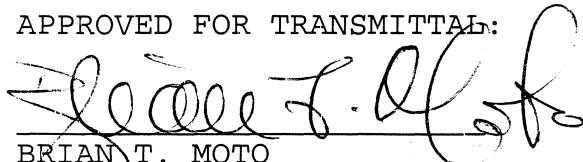
We will respond to the above-referenced request under separate cover.

Call if further clarification or discussion is needed.

ESK:ln

S:\ALL\Advisory\ESK\memo to pontanilla re HCDCH and puunoa.wpd

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

cc: Jane Lovell, Deputy Corporation Counsel
Alice Lee, Director, Department of Housing and Human Concerns