

DEPARTMENT OF THE CORPORATION COUNSEL

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November 15, 2004

MEMO TO: Michael J. Molina, Chair
Public Works and Traffic Committee

F R O M: Cindy Y. Young, Deputy Corporation Counsel
Cindy Y. Young

SUBJECT: ~~Work Exempt from~~ Permit (Temporary Tents) (PWT-32)

This responds to your memorandum dated March 30, 2004 requesting an opinion responding to the following questions:

1. Would the granting of an exemption to non-profit organizations, without granting an exemption to for-profit organizations, present any legal problems?
2. For purposes of exempting temporary tents from building permit requirements, is it more legally appropriate to establish size restrictions in lieu of identifying non-profit organizations?
3. What is the potential County liability for allowing the installation of temporary tents that are exempted from building permit requirements on public or private property?

I. Discussion

A. Differentiating Between Non-Profit Organizations and For-Profit Organizations

Generally, an ordinance which differentiates or classifies in any way must be reasonable in its classifications. A treatise on municipal law discusses the subject of reasonable classifications as follows:

To be reasonable and valid, an ordinance must be fair, impartial, and uniform in its operation. Although reasonableness is consistent with a reasonable classification of the subjects upon which it operates or the objects of its enactment, an ordinance cannot

Michael J. Molina, Chair
Public Works and Traffic Committee
November 15, 2004
Page 2

unreasonably discriminate nor vest discretion in enforcement officers without a reasonable standard or guide to govern them.

...
The Supreme Court of the United States has always permitted great freedom in the application of the principle of classification, and has declared: "The specific regulation for one kind of business, which may be necessary for the protection of the public, can never be a just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." Accordingly, municipalities may classify persons according to their business and may apply different rules to different classes, where persons engaged in the same business are treated alike under the same conditions.

...
Strictly speaking, no general rule applies to classification for legislation; however, generally the purposes for classifications determine whether the differences are reasonable and valid. The difference which will support class legislation must be such that the nature of things furnishes a reasonable basis for separate laws and regulations.

McQuillin Mun. Corp., §§ 18:8, 18:9 (3d ed.).

It is our understanding that the exemption from the building permit requirement for temporary tents for non-profit organization events was proposed to streamline the permitting process for community events and activities that are of short duration. See Public Works and Traffic Committee Minutes of March 22, 2004. The draft bill currently defines a non-profit organization as "an entity which complies with section 501(c) of the Internal Revenue Code and any other requirements under federal, State and County law regulating the conduct of charitable or nonprofit organizations." See proposed bill entitled, "A Bill for an Ordinance Amending Section 16.26.106.2, Maui County Code, Pertaining to Work Exempt from Permit". Such a differentiation between non-profit organizations and for-profit organizations appears to be a rational classification based upon community and public benefit.

The proposed bill is analogous to other ordinances, such as those relating to park activities, that distinguish activities

organized and sponsored by non-profit entities from those organized and sponsored for the purpose of carrying on a profit-making enterprise.¹

B. Size Restrictions in Lieu of Identifying Non-Profit Organizations

The determination of whether a classification based upon tent size is more appropriate than a classification based upon non-profit status for purposes of exemption from building permit requirements is primarily a policy decision. See section I(A). Generally speaking, a building permit exemption based either upon tent size or non-profit status is legally permissible provided there is a reasonable basis for such an exemption. See section IA.

C. Potential County Liability for Exempting Temporary Tents from Building Permit Requirements

The following discussion regarding potential County liability for the exemption of temporary tents from building permit requirements is general in nature and is not intended to substitute for a case-by-case analysis by our office if circumstances warrant. Our analysis is based upon the current language of the proposed bill. See Exhibit 1.

1. Exempting Temporary Tents for Events Sponsored by Non-Profit Organizations

Generally, a municipal corporation is immune from liability for harm arising out of a municipality's exercise of legislative functions, where the decision in question involves a policy judgment by a body with governmental discretion, not simply a routine decision made by an employee in the course of day-to-day activities.² Among the reasons underlying this limited municipal immunity is the principle that courts should not pass judgment on

¹See, e.g., §§ 13.04.020, 13.04.030, 13.04.080, Maui County Code.

²See McQuillin Mun. Corp. § 53.04.10 (3d ed.); see also McQuillin Mun. Corp. § 53.22.10 ("When applied to issues of public safety, a distinction must be drawn between completely failing to address the issue, and addressing the issue, but in doing so making a possibly incorrect decision. The failure to consider or address the issue is not immune, but considering an issue and making an improper decision is immune.").

policies and decisions of the other branches of government.³

At present, although Chapter 662, Hawaii Revised Statutes, (the State Tort Liability Act), provides the State immunity from liability for claims based upon the exercise or failure to exercise a discretionary function,⁴ counties do not fall within the ambit of Chapter 662.⁵ Consequently, it is unclear as to whether and in what circumstances a Hawaii court will recognize discretionary function immunity for a county defendant.

Although there is no Hawaii case directly addressing the liability of a county with regard to the regulation of temporary structures, Hawaii case law does provide that the counties are not intended to be insurers of safety. In Cootey v. Sun Investment, Inc., 68 Haw. 480, 718 P.2d 1086 (1986), the Hawaii Supreme court held that the County of Hawaii had no duty to plaintiffs, whose house and lot were flooded, to ensure that the development of an adjoining subdivision, approved by the County, would not create any risk of flooding of plaintiffs' property.⁶ The Court observed that, in determining whether there is a duty owed by a county to those who have suffered injury, a court must balance the policy considerations supporting recovery by the injured party against those favoring a limitation of the county's liability.⁷ The Court further stated that "[o]ur system of separate but equal branches of government demands restraint on the part of the courts from

³McQuillin Mun. Corp. § 53.04.10 (3d ed.).

⁴§ 662-15(1), Hawaii Revised Statutes.

⁵Kahale v. City and County of Honolulu, 104 Hawai'i 341, 346-347, 90 P.3d 233, 238-239 (2004).

⁶In Cootey, the Hawaii Supreme Court stated:

The permit process by which the County approves or disapproves the development of a proposed subdivision reflects an effort by government to require the developer to meet his responsibilities under the subdivision rules, regulations, and laws. We hold that the primary responsibility of providing an adequate and safe development rests with Sun Investment, the developer, and not with the County.

Cootey, 68 Haw. at 485, 718 P.2d at 1091.

⁷Cootey, 68 Haw. at 484, 718 P.2d at 1090.

Michael J. Molina, Chair
Public Works and Traffic Committee
November 15, 2004
Page 5

reordering priorities and forcing reallocation of resources upon the other branches which make policy decisions in this regard."⁸

2. Exempting Temporary Tents Erected in County Parks

The Hawaii Supreme Court has held that a county must exercise reasonable care in the maintenance of its parks and in the supervision of their use by the public. Petersen v. City and County of Honolulu, 53 Haw. 440, 496 P.2d 4 (1972) (Plaintiff sued the city for injuries resulting from stepping on hot coals in a barbeque pit at a city park); Kamau v. County of Hawaii, 1957 WL 10597 (Hawaii Terr.) ("We therefore hold that it is the duty of the County of Hawaii to use ordinary care to keep the parks in a reasonably safe condition for the public rightfully using them regardless of the fact that no charge is made for the same ..."). The duty of care imposed requires a county to act as a reasonable person would in the face of reasonably foreseeable risks.⁹

Should you have any further questions, please do not hesitate to contact this office.

cc: Traci F. Villarosa, First Deputy Corporation Counsel
Jane E. Lovell, Deputy Corporation Counsel

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Enclosures
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APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

⁸Cootey, 68 Haw. at 485, 718 P.2d at 1090-1091.

⁹Petersen v. City and County of Honolulu, 496 P.2d 4, 7, 53 Haw. 440, 442 (1972).

ORDINANCE NO. _____

BILL NO. _____ (2004)

A BILL FOR AN ORDINANCE AMENDING
SECTION 16.26.106.2, MAUI COUNTY CODE,
PERTAINING TO WORK EXEMPT FROM PERMIT

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The purpose of this ordinance is to exempt from building permit requirements the installation of temporary tents for events on property owned by or under the control of the County and administered by the Department of Parks and Recreation that continue no more than seventy-two hours."

SECTION 2. Chapter 16.26, Maui County Code, is amended by amending section 16.26.106.2, to read as follows:

"106.2 Work Exempt from Permit. A building permit shall not be required for the following:

1. One-story detached accessory buildings used as tool storage shed, playhouses, and similar uses, provided the floor area does not exceed 120 square feet (11.15 m²).

2. Fences, including walls, not over 6 feet (1829 mm) high when measured from the lowest grade to the top of the fence or wall.

3. Oil derricks.

4. Movable cases, counters, and partitions not over five feet 9 inches (1753 mm) high.

5. Retaining walls which do not have more than three feet of retainage between the finish grade on each side of the wall and not greater than 6 feet in total height measured from the lowest grade to the top of the wall, unless supporting a surcharge or impounding Class I, II or III-A liquids.

6. Water tanks supported directly upon grade if the capacity does not exceed 5,000 gallons (18927 L) and the ratio of height to diameter or width does not exceed 2:1.

7. Platforms, walks and driveways not more than 30 inches (762 mm) above grade and not over any basement or story below.

8. Painting, papering, installation of floor covering and similar finish work, including cabinet work and installation of shelves.

9. Temporary motion picture, television and theater stage sets and scenery and temporary exhibits.

10. Window awnings supported by an exterior wall of Group R, Division 3, and Group U Occupancies when projecting not more than 54 inches (1372 mm).

11. Prefabricated swimming pools accessory to a Group R, Division 3 Occupancy in which the pools walls are entirely above the adjacent grade and if the capacity does not exceed 5,000 gallons (18927 L).

12. Work performed for any federal or state governmental agency when exemption is specifically requested in writing by that governmental agency.

13. Site work on property, included but not limited to, sidewalks, curbs, parking lots, planter boxes.

14. Street light standards, utility poles, not including wireless telecommunication towers, television antennas or satellite dishes.

15. Reroofing with the same or similar material for Group R, Division 3, and Group U Occupancies.

16. Agricultural buildings less than 200 square feet in floor area.

17. Repairs which involve only the replacement of component parts or existing work with similar materials for the purpose of maintenance, do not cost, in the aggregate over \$2,000 in any 12-month period for Group R, Division 3, and Group U Occupancies, \$5,000 in all other occupancies, and does not affect any electrical, plumbing or mechanical installations. Repairs exempt from permit requirements shall not include any addition, change or modification in the type of construction, in the means of egress or of any permanent fixtures or equipment.

18. Television and radio antennas accessory to a Group R, Division 3 Occupancy.

19. Temporary construction toolsheds, fences, and jobsite offices on same property where construction is occurring under a valid building permit.

20. Construction equipment used for work authorized by a valid permit or for work exempted from permit requirements.

21. Playground equipment, including but not limited to, swings, merry-go-rounds, slides, jungle gyms, goals, chain-link fences, baseball backstops, dugouts.

22. Temporary tents or other coverings used for private family parties or camping.

23. Temporary tents or other coverings for [other] uses other than private family parties or camping[,]; provided, that the temporary tents and other coverings shall be:

(A) ~~[removed]~~ Removed daily and erected only between the hours of six a.m. to six p.m.; or

(B) Erected on property owned by or under the control of the County and administered by the Department of Parks and Recreation and removed within seventy-two hours of the time of the installation of the tents or other coverings.

~~[23.]~~ 24. Work located in a right-of-way maintained by any federal, state, or county governmental agency.

~~[24.]~~ 25. Work by an electric or telecommunication utility operating under a franchise or charter granted by the State of Hawaii; provided, that the work which is not regulated by the Public Utilities Commission of the State of Hawaii shall be subject to the provisions of this Code. If the utility claims an exemption under this provision, the utility shall have the burden of demonstrating to the satisfaction of the Building Official that the work is regulated by the Public Utilities Commission.

~~[25.]~~ 26. Electrical, plumbing and mechanical equipment.

~~[26.]~~ 27. Motor vehicles with a valid certificate of registration.

Unless otherwise exempted by the appropriate plumbing or electrical codes, separate plumbing and electrical permits will be required for the above-mentioned exempted work.

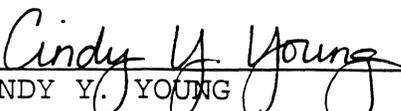
Exemption from the permit requirements of this code shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of this code or any other laws or ordinances of this jurisdiction."

SECTION 3. Material to be repealed is bracketed. New material is underscored. In printing this ordinance, the County

Clerk need not include the brackets, the bracketed material or the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:


CINDY Y. YOUNG
Deputy Corporation Counsel
County of Maui

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