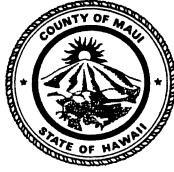


ALAN M. ARAKAWA  
Mayor

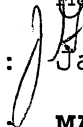


BRIAN T. MOTO  
Corporation Counsel

**DEPARTMENT OF THE CORPORATION COUNSEL**  
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TELEPHONE: (808) 270-7740 FAX 270-7152

January 12, 2005

MEMO TO: Jo Anne Johnson, Council Member  
Maui County Council

F R O M:  James A. Giroux, Deputy Corporation Counsel

SUBJECT: **MAUI'S BEST GIFT AND CRAFT FAIR, LLC, LOCATED AT 270 ALIKA PLACE, TMK: 4-6-010:025, LAHAINA, MAUI, HAWAII**

This memorandum is a response to your memorandum dated October 19, 2004 regarding the use of a Lahaina property for craft fairs.

I have received and reviewed copies of the following documents: a letter dated October 6, 2004 from Planning Director Michael Foley to Ms. Evelyn Goo; Ordinance No. 2793, Bill No. 47 (1999), A Bill for an Ordinance to Change Zoning from R-2 Residential District to B-2 Community Business District (Conditional Zoning) for Property Situated at Lahaina, Maui, Hawaii (including Exhibit "B", which lists various conditions of zoning, and Exhibit "C", Unilateral Agreement and Declaration for Conditional Zoning); a facsimile of a Notice of Warning issued to Evelyn Goo on November 15, 2004 regarding zoning violations described as: "(1) Noncompliance with Change in Zoning conditions of property, (2) Environmental Assessment required since located in Lahaina National Historic Landmark District."

My understanding is that Ms. Goo leases real property at 270 Alika Place, at the corner of Honoapiilani Highway and Lahainaluna Road. The lot has been grubbed and graded, but is otherwise undeveloped. Ms. Goo contracts with vendors to allow them to erect non-permanent structures three days a week on the property to sell products or goods. I am unaware as to the number of vendors and what these vendors are selling.

From our meeting on December 1, 2004, I will attempt to answer your question regarding Ms. Goo's options regarding the pending

enforcement action as the other issues will require more time, information and research.

The November 15, 2004 Notice of Warning states: "(1) Noncompliance with Change in Zoning conditions of property, (2) Environmental Assessment required since located in Lahaina National Historic Landmark District". A first warning, this enforcement procedure is governed by Title 19, Maui County Code, pertaining to zoning.

Section 8-8.3(6), Revised Charter of the County of Maui (1983), as amended ("Charter"), states that the planning director shall "[p]repare, administer, and enforce zoning ordinances, zoning maps and regulations and any amendments or modifications thereto."

Section 19.520.040, Maui County Code, pertaining to Appeal Procedure and Standards, states:

Pursuant to the charter of the county and in accordance with provisions of this title, the board of variance and appeals shall hear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, or building ordinances which is within the jurisdiction of the board of variances and appeals. An appeal may be granted only if the board finds one of the following:

1. That the subject decision or order was based on an erroneous finding of a material fact or erroneously applied the law;
2. That the subject decision or order was arbitrary and capricious in its application; or
3. That the subject decision or order was a manifest abuse of discretion.

Pursuant to Section 8-8.7 of the Charter<sup>1</sup> and Section 19.520.040, Maui County Code, the Board of Variances and Appeals would be the proper authority to hear and determine any appeal that

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<sup>1</sup>Charter §8-8.7 states, in part:

In accordance with such principles, conditions and procedures prescribed by the council, the board of variances and appeals shall:

- ...
2. Hear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, and building ordinances;...

may be filed from a decision or order of the planning director on a matter relating to zoning enforcement. Although an appellant may file an appeal pro se, Ms. Goo would be advised to obtain the assistance of an attorney and to follow the procedures set out in Section 19.520.020, Maui County Code, and the rules of the Board of Variances and Appeals, in the event that she seeks to appeal a notice of violation (if such a notice is in fact ever issued).

Another possible option for someone seeking to conduct a use not permitted under applicable zoning law is to apply for a variance. Section 19.520.050, Maui County Code, pertaining to variance procedure and standards, states, in part:

C. Pursuant to the charter of the county and in accordance with the provisions of this article and the procedures established in this chapter, variances from the provisions of this title may be granted by the board of variances and appeals if the board finds that due to the particular physical surroundings, shape or topographical condition of the subject property, compliance to the provisions of this chapter would result in hardship to the owner which is not mere inconvenience or economic hardship on the applicant. The board shall grant a variance if the board finds the following:

1. That there is an exceptional, unique, or unusual physical or geographical condition existing on the subject property which is not generally prevalent in the neighborhood or surrounding area and the use sought to be authorized by the variance will not alter the essential character of the neighborhood;

2. That strict compliance with the applicable provisions of this title would prevent reasonable use of the subject property; and

3. That the conditions creating a hardship were not the result of previous actions by the applicant.

D. The board of variances and appeals shall comply with the general plan and the community plan provisions of the county. The board shall not grant an application for a variance which requests a use which does not conform with the applicable community plan designation for the subject property.

E. On every application for a variance, the board of variances and appeals shall review the report submitted by the director of public works and hold a public hearing. At the close of the public hearing, the director of public works shall submit a written recommendation to the board which recommends that the board either grant, grant subject to conditions identified by the director, or deny the application for

a variance. Unless a formal, contested case hearing on the application has been approved by the board, the board shall take action on the application within not more than sixty calendar days from the date of the public hearing.

It would be advisable for Ms. Goo to seek the advice of an attorney regarding her rights, responsibilities, and options, and for any needed assistance in filing an appeal from a notice of violation or an application for a variance.

This memorandum is not meant to be a comment on the success or merits of any of these options, and is not intended to be legal advice for Ms. Goo from this office.

Ms. Goo should consult with her attorney on legal matters concerning the subject property and the Notice of Warning.

Besides being assigned to advise the Council on planning and land use matters, I am the attorney assigned to advise the Board of Variances and Appeals. In light of the pending enforcement action commenced against Ms. Goo, it is appropriate and necessary for me to limit my comments at this time to ensure a fair and objective process.

JAG:ln

S:\ALL\Advisory\JAG\Maui's Best.wpd

APPROVED FOR TRANSMITTAL:

A handwritten signature in black ink, appearing to read "Brian T. Moto", written over a horizontal line.

BRIAN T. MOTO  
Corporation Counsel