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January 20, 2005

Honorable Robert Carroll  
Councilmember  
Maui County Council  
County of Maui  
200 South High Street  
Wailuku, Hawai'i 96793

**Re: Establishing a Police Officer Affordable  
Housing Loan Revolving Fund (PAF 02-162)**

Dear Councilman Carroll:

This office responds to your request that we review and approve a draft bill regarding the above-referenced matter.

Hawaii Revised Statutes § 46-1.5(10) prohibits a county from giving or loaning credit to, or in aid of, any person, directly or indirectly, except for a public purpose.<sup>1</sup> This section of the law was amended in 1994 to recognize the limitation of Article VII, section 4, of the Hawaii State Constitution.<sup>2</sup> Prior to the amendment, counties had the power to give or loan credit. Therefore, the County of Maui does not have the power to establish an affordable housing loan revolving fund for police officers unless there is a declaration of a public purpose.

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<sup>1</sup>HRS §46-1.5(10) states:

Except as otherwise provided, no county shall have the power to give or loan credit to, or in aid of, any person or corporation, directly or indirectly, except for a public purpose.

<sup>2</sup>Article VII, section 4, Hawaii State Constitution, provides, in part:

[N]or shall the public credit be used, directly or indirectly, except for a public purpose.

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Determining what constitutes a public purpose is generally a question for the legislature to decide.<sup>3</sup> State ex rel. Amemiya v. Anderson, 56 Haw. 566, 574, 545 P.2d 1175, 1180-81 (1976). In order for the Council to enact an ordinance authorizing loans to police officers who are first-time home buyers, there must be a declaration of a public purpose. In our conversations regarding this specific issue, you asked whether that meant the County Council, as the County's legislative body, could make such a declaration. The legislative history of the amendment to HRS §46-1.5 implies that the legislative body that would declare the public purpose would be the County Council.<sup>4</sup>

The draft of the proposed ordinance should include an explicit finding that the police officer affordable housing loan program and revolving fund serves a public purpose.

As a precaution, we note that the U.S. Department of Labor has declared that conditional loan programs violate the Fair Labor Standards Act's (FLSA) salary basis test, meaning that conditional loan recipients are not exempt from FLSA overtime provisions. The reasoning is that a loan has been determined as an advance of money with an absolute promise to repay.<sup>5</sup> If a loan program involves forgiveness that is nonpayment of a set portion of the loan for a set period of service to the employer, the loan becomes, in substance, a conditional bonus that is designed to motivate and is part of the employee's salary. Therefore, if the proposed "Police Officer Affordable Housing Loan Revolving Fund" is intended to lend up to \$10,000 to a police officer who is a first-time home buyer

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<sup>3</sup>"Though the legislature's determination is not conclusive, it is given wide discretion and should not be voided by the courts unless it is manifestly wrong, i.e. the purpose involved is clearly a private one." State ex rel. Amemiya v. Anderson, 56 Haw. at 574 (citing State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. 1975); Hawaii Housing Authority v. Schnack, 39 Haw. 543 (1952); County of Alameda v. Janssen, 16 Cal.2d 276, 281, 106 P.2d 11, 14 (1940)).

<sup>4</sup>Senate Standing Committee Report No. 2643, in 1994 Senate Journal, at 1056-57, reflects that the Government Operations, Environmental Protection and Hawaiian Programs Committee amended H.B. No. 2294 to "allow the counties to give or loan credit to private individuals or corporations for a public purpose as allowed pursuant to Article VII, Section 4, of the State Constitution." Prior to the Committee amendment, the bill proposed to take away from the counties the authority to give or loan credit.

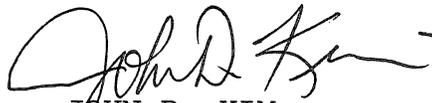
<sup>5</sup>Bankers Mortgage Co. v. Commissioner, 142 F.2d 130 (1944).

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and forgive a portion of the loan based on the number of years of service provided by the officer to the County of Maui, the loan would be treated by the Department of Labor as a conditional bonus rather than as a bona fide loan. Any police officer taking advantage of the loan program would be subject to the overtime provisions of the FLSA. In redrafting this ordinance we recommend that you not incorporate any "forgiveness" clause.

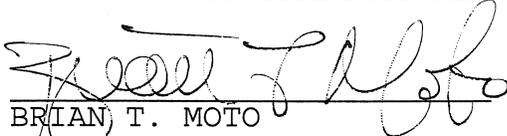
Inclusion of a "forgiveness" clause would also have implications under Chapter 89, Hawaii Revised Statutes, pertaining to collective bargaining. If the County of Maui's "Police Officer Affordable Housing Loan Revolving Fund" incorporated a "forgiveness" clause as discussed above, the treatment of a loan as a conditional bonus would have to be negotiated with the employee's exclusive representative, the State of Hawaii Organization of Police Officers. The collective bargaining law does allow the counties to enter into supplemental agreements with a bargaining unit. However, we ask that you consider that once a benefit is established, it is very difficult to take away the benefit without giving something of equal value in return.

Very truly yours,



JOHN D. KIM  
Deputy Corporation Counsel

APPROVED FOR TRANSMITTAL:



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