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February 10, 2005

MEMO TO: Alice L. Lee, Director
Department of Housing and Human Concerns

ATTENTION: Edwin Okubo, Administrator
Housing Division

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

S U B J E C T: **HELANI GARDENS SUBDIVISION II HOUSING PROJECT; SECTION
201G-118, HAWAII REVISED STATUTES PROCESSING;
EXEMPTION FROM WATER SYSTEM DEVELOPMENT FEES**

Responding to your inquiry of December 15, 2004, whether the Maui County Council in reviewing a resolution to approve a Section 201G-118, Hawaii Revised Statutes ("HRS") housing project may exempt the project from paying Water System Development Fees, we answer in the negative.

1. Statutory Language

Prior to July 1, 1998, the relevant HRS section read as follows:

201G-118 Housing development; exemption from statutes, ordinances, charter provisions, rules. (a) The corporation may develop, on behalf of the State or with an eligible developer, or may assist under a government assistance program in the development of, housing projects which shall be exempt from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of units thereon; provided that:

(2) The development of the proposed project does not contravene any safety standards or tariffs approved by the public utilities commission for public utilities; . . .

Pursuant to Act 212, the 1998 Hawaii State Legislature, in addition to housekeeping and other miscellaneous provisions, amended the relevant Section 201G-118(a)(2), HRS, to read as follows:

(2) The development of the proposed project does not contravene any safety standards [or], tariffs, or rates and fees approved by the public utilities commission for public utilities[;] or the various boards of water supply authorized under chapter 54; . . .

In reviewing the legislative history of the 1998 amendment, we found that Senate Standing Committee Report No. 2223 referenced an opinion from the State Attorney General's office as cause for the amendment to Section 201G-118(a)(2), HRS¹. In summary, the Attorney General opined that, although a semi-autonomous board of water supply would be encompassed within the term "any governmental agency", water development fees are clearly not encompassed in planning, zoning and construction standards. The Attorney General further opined that, "[o]n its face, section 201E-210² does not exempt HFDC housing developments from rules of the county boards of water supply", and the specific "language of section 201E-210 exempting such housing developments from statutes and rules . . . does not mention or include water facility fees." The Attorney General concluded that "section 201E-210 does not exempt housing developments of the Housing Finance and Development Corporation from compliance with the rules of the various county water boards."

2. County of Maui's Water System Development Fees.

Prior to December 5, 2002, the Board of Water Supply of the County of Maui ("Water Board"), in its semi-autonomous status, had the authority, through adoption of rules and regulations, to establish rates and charges for furnishing water.³ Accordingly, rates, fees and

¹Opinion No. 96-02 dated August 9, 1996, addressed to Donald K. W. Lau, Chairman, Board of Directors of the Housing Finance and Development Corporation (copy attached).

²Section 201E-210 is the predecessor statutory section to Section 201G-118, HRS.

³Prior to its amendment in 2002, Section 8-11.4(3) of the Revised Charter of the County of Maui (1983), as amended, read as follows:

Section 8-11.4 Powers, Duties and Functions. The board of water supply shall:

3. . . . Adopt rules and regulations which shall have the force

charges for water service could be found in the Water Board's rules and regulations, specifically, Section 16-7-4 for Water Service Rates for general and agricultural water consumers, Section 16-7-5 for Monthly Service Charges by meter size, Section 16-7-6 for Fire Water Service Rates, Section 16-7-7 for Temporary Meter Charges, and Section 16-108-3 for Water System Development Fees.

Pursuant to the charter amendments approved in the 2002 General Election, effective December 5, 2002, the Water Board lost its semi-autonomous status, and specifically, with respect to rates, fees and charges, has an advisory and recommendation role.⁴ Currently, all such rates, fees and charges are reviewed and approved by the Maui County Council, and set forth and listed in the annual budget ordinance.⁵ Once said rates, fees and charges are set and established by ordinance, the assessment of said rates, fees and charges is implemented by the department of water supply in accordance with existing Water Board rules and regulations.

3. Legislature's Reference to Chapter 54, HRS, in its 1998 Amendment to Section 201G-118(a)(2), HRS.

As discussed, Section 201G-118(a)(2), HRS, was amended in 1998 to read as follows:

and effect of law relating to the management, control, operation, preservation and protection of the water works of the county, as well as the establishment and adjustment of rates and charges for furnishing water; . . .

⁴Applicable provisions of the charter as revised by the 2002 amendments:

Section 8-11.3. Board of Water Supply.

. . . The board of water supply shall act as advisor to the director of the department of water supply, the mayor and the council in all matters concerning the county's water system.

Section 8-11.4. Powers, Duties and Functions. The board of water supply shall:

. . .
2. Recommend the establishment and adjustment of rates and charges for furnishing water; such rates and charges shall be submitted to the mayor for review and approval. If approved by the mayor, proposed rates and charges shall be submitted to the council for enactment by ordinance.

⁵Ordinance No. 3192, Bill No. 38 (2004), Draft 1, Appendix B, beginning at page 39 thereof.

(2) The development of the proposed project does not contravene any safety standards, tariffs, or rates and fees approved by the public utilities commission for public utilities or the various boards of water supply authorized under chapter 54; . . .

At the time of the 1998 amendment, the Water Board was a "semi-autonomous" board subject to the provisions of Chapter 54, HRS. We are informed that the water boards of all other jurisdictions (*i.e.*, City and County of Honolulu, County of Kauai, and County of Hawaii) were also semi-autonomous. As discussed, only as of December 5, 2002 has Maui's Water Board lost its semi-autonomous status. Based on the above, a fair assumption would be that the language used by the 1998 Legislature was shaped by the fact that all county boards of water supply in Hawaii were, at that time, "authorized under chapter 54", HRS. However, there is no indication that the Legislature intended that water-related fees be eligible for exemption in the event that a county changed the degree of autonomy enjoyed by its board of water supply.⁶

The Water Board's reduced autonomy notwithstanding, the Attorney General's analysis remains applicable and persuasive. It remains true today, as it was in 1996, that exemptions to state laws "are not lightly inferred"⁷ and "should be strictly, but reasonably, construed."⁸ It also remains true that "all doubts should be resolved in favor of the general provision, rather than the exception."⁹

⁶The Hawaii Supreme Court has held that county charter provisions relating directly to the organization and structure of county government (such as those relating to the organization and structure of the department of water supply) supersede conflicting state statutes. See HGEA v. County of Maui, 59 Haw. 65 (1978).

⁷Att'y Gen. Op. No. 96-02, at 2 (quoting State v. Russell, 62 Haw. 474, 480, 617 P.2d 84, 88 (1980) ("It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed. (citations omitted) One who claims the benefit of such an exception has the burden of bringing himself clearly within it.")).

⁸*Id.* (quoting State v. Christensen, 137 P.2d 512, 518 (Wash. 1943)).

⁹*Id.*

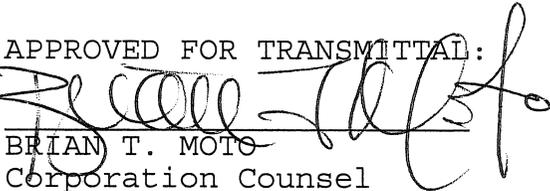
Further, words of Section 201G-118(a), HRS, should "be given their usual meaning"¹⁰ and should be "understood in their most known and usual signification, ... their general or popular use or meaning."¹¹ Section 201G-118(a) does not explicitly exempt housing projects from water system development fees or rules of a county board of water supply. The language in Section 201G-118(a) exempting projects from statutes and rules "relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of units thereon" does not mention or include water system development fees. Water system development fees are "clearly not encompassed in zoning and construction standards", and "the word 'planning' refers to the development and general plans of the counties, and not to the rules of water boards."¹²

As observed by the Attorney General, "[i]t is a rule of statutory construction that the express mention of one thing in a statute implies the exclusion of what is not mentioned."¹³ The Legislature, by limiting the list of Section 201G-118(a) exemptions to certain types of statutes, ordinances, and rules, excluded other types of statutes, ordinances, and rules, such as those relating to water system development fees.

4. Conclusion.

Based on the statutory language of Section 201G-118(a), HRS, its legislative history, the historical background that prompted the 1998 amendment thereto, the 1996 Attorney General's opinion, and notwithstanding the current status of the Maui Water Board, we opine that the Maui County Council may not grant exemptions from the payment of water system development fees to Section 201G-118, HRS, applicants.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

cc: George Y. Tengan, Director, Department of Water Supply

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¹⁰Id., at 3.

¹¹Id., at 3 (quoting HRS §1-14).

¹²Id., at 3-4.

¹³Id., at 4 (citing Carter v. Gear, 16 Haw. 242 (1904); Welsh v. Campbell, 42 Haw. 490, 494 (1958)).

BENJAMIN J. CAYETANO
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JOHN W. ANDERSON
FIRST DEPUTY ATTORNEY GENERAL

August 9, 1996

Mr. Donald K. W. Lau, Chairman
Board of Directors
Housing Finance and Development
Corporation
677 Queen Street, Suite 300
Honolulu, Hawaii 96813

Dear Mr. Lau:

Re: Applicability of Section 201E-210, Hawaii Revised
Statutes, to Water System Development Fees

In a letter dated November 27, 1995, Mr. David Craddick of the County of Maui Board of Water Supply questioned the use of section 201E-210, Haw. Rev. Stat., to exempt housing projects from the payment of water system development fees. According to Mr. Craddick, there are "differing legal opinions" among the counties regarding the application of section 201E-210. Subsequently, we received a request from your planning branch for our advice.

Section 201E-210, Haw. Rev. Stat., permits either the Housing Finance and Development Corporation (HFDC) or the counties (through section 46-15.1, Haw. Rev. Stat.) to obtain exemptions from various specified governmental requirements related to the development of housing on an expedited basis. The section 201E-210 exemption reads:

(a) The corporation may develop, on behalf of the State or with an eligible developer, or may assist under a government assistance program in the development of housing projects which shall be exempt from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of units thereon;

Certain conditions under section 201E-210 also must be met:

- (1) The project must meet minimum health and safety requirements and be consistent with the purposes of chapter 201E, Haw. Rev. Stat.;
- (2) No safety standards or tariffs for public utilities may be violated;
- (3) The project must be approved or deemed approved by the county council; and
- (4) Any boundary change must be submitted to the land use commission and either be approved or deemed approved.

Assuming the conditions are met, the project could be exempt from the rules of any governmental agency. A semi-autonomous board of water supply would be encompassed within the term "any governmental agency." The issue to resolve then is whether water system development fees adopted under the rules of a board of water supply are rules relating to "planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of units" to which the section 201E-210 exemption applies.

Exemptions to state laws are not lightly inferred. As the Hawaii Supreme Court stated, "It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed" and the one "who claims the benefits of such an exception has the burden of bringing himself clearly within it." State v. Russell, 62 Haw. 474, 480, 617 P.2d 84, 88 (1980). Such "exceptions, generally, should be strictly, but reasonably, construed; that they extend only so far as their language warrants; and all doubts should be resolved in favor of the general provision, rather than the exception." State v. Christensen, 137 P.2d 512, 518 (Wash. 1943).

Additionally, in construing a statute, we must give effect to the legislative intent. See In re Tax Appeal of Hawaiian Telephone Co., 61 Haw. 572, 577, 608 P.2d 383, 387 (1980); Keller v. Thompson, 56 Haw. 183, 189, 532 P.2d 664 (1975); 2A Norman J. Singer, Sutherland Statutory Construction § 45.05 (5th ed. rev. 1992). Weight must also be given to the interpretation of the statute by the agency charged with

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administering the statute. See, e.g., Noverola-Bolaina v. Immigration & Naturalization Service, 395 F.2d 131, 136 (9th Cir. 1968); Chun v. Employees' Retirement System, 61 Haw. 596, 602, 607 P.2d 415, 419 (1980); 2B Norman J. Singer, Sutherland Statutory Construction § 49.05 (5th ed. rev. 1992).

On its face, section 201E-210 does not exempt HFDC housing developments from rules of the county boards of water supply. The language of section 201E-210 exempting such housing developments from statutes and rules "relating to planning, zoning, construction standards for subdivisions, development and improvement of land" does not mention or include water facility fees. The words of section 201E-210 must be given their usual meaning. Section 1-4, Haw. Rev. Stat., states that the "words of a law are generally to be understood in their most known and usual signification, . . . their general or popular use or meaning."

While the phrase "planning, zoning and construction standards" is not defined in the statute, some guidance to its meaning may be found in legislative history. The exemptions in section 201E-210 are based on those previously found in sections 359A-4 and 359G-4.1 which arose in Act 105, 1970 Haw. Sess. Laws 190 and Act 225, 1976 Haw. Sess. Laws 556, respectively. Act 105 created the housing development program within the Hawaii Housing Authority. Act 105's preamble cited "a critical shortage of housing units for lower and middle income residents" in the State of Hawaii. Act 105 gave the Hawaii Housing Authority the power to adopt rules that "shall have the force and effect of law and shall supersede . . . all other inconsistent laws, ordinances, and rules and regulations relating to the use, zoning, planning, and development of land." 1970 Haw. Sess. Laws at 193. Act 225 authorized the development of housing projects "which shall be exempt from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to zoning and construction standards for subdivisions, development and improvement of land and the construction and sale of homes . . .". 1976 Haw. Sess. Laws at 563-64.

Water development fees are clearly not encompassed in zoning and construction standards. The term "planning" was added to the exemptions stated in section 359G-4.1(a) by Act 279, 1984 Haw. Sess. Laws 651. In reporting on the bill that was subsequently enacted as Act 279, the Committee on Conference said:

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The purpose of this bill is to amend Section 359G-4.1, Hawaii Revised Statutes, to permit the Hawaii Housing Authority ("HHA"), on behalf of the State or in partnership, to develop housing projects which are exempt from development and general plans adopted by the various counties.

S. Conf. Comm. Rep. No. 47-84, Hawaii S.J. 926 (reg. sess. 1984); H. Conf. Comm. Rep. No. 43-84, Hawaii H.J. 739 (reg. sess. 1984). Thus the word "planning" refers to the development and general plans of the counties, and not to the rules of water boards. The purpose of this exemption is "to provide an expedited process for government-assisted housing projects." Id. Those exemptions expressly relate to the production, development, construction and zoning of housing.

By limiting the exemptions to only certain types of statutes, and not to others, the Legislature intended HFDC housing projects to be subject to and comply with other laws. It is a rule of statutory construction that the express mention of one thing in a statute implies the exclusion of what is not mentioned. See Carter v. Gear, 16 Haw. 242 (1904), aff'd, 197 U.S. 348 (1905); Welsh v. Campbell, 42 Haw. 490, 494 (1958).

Based on the above discussion, we conclude that section 201E-210 does not exempt housing developments of the Housing Finance and Development Corporation from compliance with the rules of the various county water boards. We believe that legislative amendment of section 201E-210 would be required to provide such an exemption.

Very truly yours,


Celia L. Jacoby
Deputy Attorney General

APPROVED:


Margery S. Bronster
Attorney General

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Op. No. 96-02