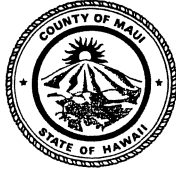


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March 29, 2005

MEMO TO: George Y. Tengan
Director, Water Supply

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

A handwritten signature in black ink, appearing to be "Ed Kushi, Jr.", is written over the name in the "FROM" field.

SUBJECT: **ISSUANCE OF WATER METER FOR A PROPERTY LOCATED IN A PREVIOUSLY APPROVED SUBDIVISION WHERE THE EXISTING WATER SYSTEM IMPROVEMENTS DO NOT MEET NOR CONFORM TO CURRENT DEPARTMENTAL STANDARDS**

Pursuant to your request of February 7, 2005, and our numerous phone and office discussions, we respond as follows.

BACKGROUND:

In the 1960's, under rules and standards then in effect, the Department of Water Supply ("DWS") accepted control and ownership of a residential subdivision water system which, under current standards and requirements as set forth in DWS rules and regulations ("DWS Rules"), would neither be approved nor accepted today ("non-conforming subdivision"). Said DWS Rules cover and concern pipeline size, as well as fire protection requirements.

It is understanding that there are many other old residential subdivisions with similar nonconforming water systems.

We have been informed that DWS interprets DWS Rules to require an owner of a vacant lot in a non-conforming subdivision to upgrade and improve the entire subdivision water system to current DWS standards before a residential water meter is issued.

QUESTION:

Is DWS' interpretation of DWS Rules in the above-referenced situation reasonable and correct?

SHORT ANSWER:

No.

DISCUSSION:

(1) CURRENT DWS RULES FOR SUBDIVISIONS

In managing the County's water resources and systems, DWS is guided by an overall purpose that states: "Preservation and maintenance of water services to existing users without undue reduction in amount of water received or services rendered must be considered in addition to the interests of persons desirous of new water services."¹

For DWS's purposes, a subdivision is defined as follows: "Improved or unimproved land or lands divided into two or more lots, parcels, sites, or other divisions of land for purposes, whether immediate or future, of sale, lease, rental, transfer of title to or interest in any or all of such parcels, and shall include resubdivision, . . ." ² (emphasis added). Subdivision water systems include: "That water system from the point of adequacy, as determined by the director or his duly authorized representative, to and within any subdivision, including mains, valves, hydrants, laterals, pumps, tanks, reservoirs, and all appurtenances necessary to provide water and fire protection for such subdivision."³ A subdivider shall install and pay for the subdivision water system, and all such systems shall be designed and located in accordance with DWS Rules.⁴ Where

¹Section 1-1, DWS Rules.

²Section 1-2, DWS Rules.

³Section 1-2, DWS Rules.

⁴Section 2-1, DWS Rules.

applicable, such water system improvements may include water storage tanks, together with fee simple title or a perpetual easement to the tank site lot,⁵ water distribution mains/pipelines and appurtenances,⁶ and fire hydrants or standpipes.⁷ Prior to acceptance and connection of a subdivision's water system to the public system, DWS inspects and approves said system, and requires the conveyance to DWS of all relevant and applicable easements and/or fee simple title to lands on which said system is situated.⁸

(2) CURRENT DWS RULES FOR WATER SERVICE, GENERALLY.

Independent of DWS Rules regarding subdivisions, Section 3-1 of the DWS Rules addresses requirements when "prospective consumers" or "developers" apply for DWS public water system service. Sections 3-1(a), (b), (c), (d), (e) and (f) mirror water system requirements found in Sections 2-1, 2-2, 2-3, and 2-4 of the DWS Rules regarding subdivisions.⁹ Based on the intended duplication of requirements and

⁵Section 2-2, DWS Rules.

⁶Section 2-3, DWS Rules.

⁷Section 2-4, DWS Rules.

⁸Section 2-11, DWS Rules.

⁹Section 3-1. General Conditions.

(a) Any prospective consumer whose premises are within service limits established by the department and adjacent to a distributing main, where pressure conditions permit, may obtain water service provided that the department has a sufficient water supply developed for domestic use and for fire protection to take on new or additional service without detriment to those already served and the consumer agrees to abide by the provisions of these rules and regulations.

(b) Where an extension of mains is necessary or where large quantities of water are required or a substantial investment is necessary to provide service, before water service may be approved, the consumer will be informed by the department as to the conditions and charges to be made for the various areas and situations such that water can be delivered in adequate quantities and pressures for

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standards, we opine that the requirements set forth in Section 3-1 of the DWS Rules apply to prospective consumers or developers of non-subdivided/stand-alone lots or properties and, therefore, do not apply to non-conforming subdivisions whose water systems were approved and accepted by DWS pursuant to its old rules and standards.

(3) RETROSPECTIVE APPLICATION OF EXISTING STANDARDS AND REQUIREMENTS TO NON-CONFORMING SUBDIVISIONS.

As discussed above, the question posed implicitly concerns DWS' attempt to retrospectively apply current infrastructure standards and requirements to vacant lots which resulted from previously approved and accepted subdivisions. Notwithstanding DWS' legitimate concerns regarding health, safety, and/or fire protection issues associated

domestic and irrigation uses under peak conditions and adequate fire protection.

(c) For all buildings, structures, and other developments not provided for under Sec.2-2, the developer shall install and pay for storage tanks, appurtenances, and pipeline from the tank to the development site in accordance with Sec. 2-2(a), (b), and (c).

(d) . . . The department will determine the location and size of all meters and service connections to its system. All service connections shall become the property of the department for operation and maintenance after installation and new connections or disconnections may be made thereto by the department at any time.

(e) Fire hydrants and necessary pipelines and appurtenances shall be installed by the developer in rural, residential, business, industrial, apartment, duplex, commercial, airport and hotel districts and standpipes and necessary pipelines in agricultural districts as required by the department for adequate fire protection; provided, however, that the foregoing shall not be applicable to the construction of the first and second dwelling unit on a premises in any district. The standard of the Insurance Services Office's Guide for Determination of Required Fire Flow shall be used as a guide in designing mains for fire flow requirements as covered in Section 14.06.030.

(f) The developer shall install, in accordance with these Rules and Regulations and Standards of the Department, and pay for the water system required for the development.

with such non-conforming subdivisions, the retrospective application of new standards and/or requirements in the subject instance would violate Section 1-3, Hawaii Revised Statutes ("HRS").¹⁰ In reviewing the applicable DWS Rules for subdivisions as well as for water service in general, we find no provision that would permit retrospective operation or application of new standards or requirements to previously approved and accepted subdivisions.

CONCLUSION:

DWS may not require an owner of a vacant lot which was created by a previous DWS approved and accepted subdivision to upgrade and improve the subdivision's water system to current, existing standards and requirements, as a condition to the issuance of a water meter for the subject lot.

In implementing the above-stated interpretation, we advise that DWS investigate and confirm the following facts, upon which our conclusions are premised:

- (a) The date of final approval of the subject subdivision;
- (b) The applicable DWS standards and requirements at the time of final subdivision approval;
- (c) Whether, prior to final subdivision approval, DWS approved the subdivision's water system improvements, and whether the subdivider properly dedicated said improvements together with fee simple title or perpetual easements to DWS; and
- (d) The differences between DWS standards and requirements at the time of final subdivision approval and current DWS standards and requirements, and the DWS rule amendments that effectuated said differences.

Lastly, we advise that, if maintaining adequate water pressure in the non-conforming subdivision's water mains is of concern to DWS and if the subject lot requesting a meter is situated at such an elevation "that it cannot be assured a dependable supply from the

¹⁰"Laws not retrospective. No law has any retrospective operation, unless otherwise expressly or obviously intended." Section 1-3, HRS.

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department's distribution system", requiring the lot owner to enter into an elevation agreement with DWS in accordance with Section 3-3 of the DWS Rules would not be unreasonable.

Call if further clarification and/or discussion is needed.

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

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cc: Alva Nakamura, Department of Water Supply, Engineering Division
Herbert Chang, Department of Water Supply, Engineering Division
Myles Fujinaka, Department of Water Supply, Engineering Division