ADV.

ALAN M. ARAKAWA
Mayor

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June 28, 2005

MEMO TO: Robert Carroll, Chair
Land Use Committee

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

SUBJECT: **COMMUNITY PLAN AMENDMENT AND CHANGE IN ZONING FOR "E PAEPAE KA PUKO'A" 16-UNIT RURAL SUBDIVISION PROJECT (SPRECKELSVILLE)** (LU-8)

This memorandum is a response to your memorandum dated June 21, 2005. You requested a written response by June 28, 2005. Due to the short response time, I provide brief answers to questions 1, 3, and 4 in this memorandum.

QUESTION 1. Does the withdrawal of the subdivision application resolve outstanding issues relating to the Unilateral Agreement and any requirement that an easement for public ingress and egress be conveyed, as referenced therein? Please explain.

It is our understanding that A&B-Hawaii, Inc., filed a "Unilateral Agreement for Public Access" with the State of Hawaii Bureau of Conveyances on September 24, 1999, Doc. No. 99-154366 for tax map key numbers (2)3-8-001-003 and (2)3-8-002-008 ("Unilateral Agreement").

A relevant portion of the Unilateral Agreement states:

> WHEREAS, the County of Maui is prepared to grant final approval of the Subdivision Application, subject to Declarant's agreement to either dedicate the Roadway Parcel to the County of Maui, or grant the County of Maui a perpetual easement for ingress and egress over the Roadway Parcel, upon the terms set forth herein;...

Paragraph 4, page 3, of the Unilateral Agreement states:

> 4. That this Declaration shall become fully effective on the effective date final approval is given by the County of the Maui to the Subdivision Application and this Declaration shall be recorded in the Bureau of Conveyances or the Land Court of the State of Hawaii, as the case may be.

We are in receipt of a letter dated June 17, 2005 from the Director of Public Works and Environmental Management to A&B Properties, Inc., that states:

> On June 17, 2005, we received a request to withdrawal [sic] TMK (2)3-8-001:003 from the subject subdivision application. The proposed subdivision consisted of a consolidation of two lots and resubdivision into two lots. With the larger lot withdrawn we will no longer process this application and will consider the application as withdrawn in its entirety.

We are not aware of any response from A&B Properties to this letter, and our department has had no direct communication with representatives of A&B Properties. However, assuming that the application has been withdrawn and that the County has not given final approval to the subdivision application, the Unilateral Agreement, although filed, is not effective pursuant to paragraph 4 of the Unilateral Agreement.

We recommend that, in its review of the subject agenda item, the Land Use Committee contact A&B Properties and seek clarification of issues such as: (1) A&B Properties' intention regarding its proposed subdivision and its response to the June 17, 2005 letter; and (2) whether A&B Properties desires to convey a perpetual shoreline access easement regardless of the apparent withdrawal of its subdivision application, or whether it will be seeking to terminate and rescind the Unilateral Agreement recorded with the Bureau of Conveyances.

As discussed with the Council at its June 17, 2005 meeting, we also recommend that the Committee review the description of the public shoreline access easement described in the Unilateral Agreement and compare such description with the easement proposed by Old Stable LLC in its draft Conservation Easement with the Maui Coastal Land Trust. The Committee may want to verify whether the location, uses, and restrictions described in the two easement

documents are the same or different.[1] Our office has not undertaken such a comparison, and it is difficult for us, in the absence of survey information and maps, to independently engage in such a review at this time.

QUESTION 2. Please advise whether you approve as to form and legality the language proposed by Council member Anderson in her June 17, 2005 correspondence, proposing an amendment to Condition No. 2 of the proposed Change in Zoning bill. If you have concerns regarding the proposed language, please identify them and explain.

Council member Anderson's proposed amendment to condition number 2 reads as follows:

> That approximately 20.93 acres of environmentally sensitive areas, which include two oceanfront parcels (TMK: 3-8-002:009 and 010) and a portion of TMK 3-8-001:003, shall be dedicated in perpetuity as an open space conservation easement to a nonprofit organization, such as the Maui Coastal Land Trust. Said open space conservation easement shall provide public access (both pedestrian and vehicular) to the shoreline from Old Stable Road. Old Stable LLC shall grant a perpetual easement to the County for the public shoreline access as described in Document No. 99-154366, "Unilateral Agreement for Public Access", executed by Alexander & Baldwin, Inc., and recorded with the Bureau of Conveyances on September [16] 24, 1999. This public shoreline access easement shall allow for a full range of traditional, customary, and recreational uses of the shoreline area and shall be forwarded to the Council for acceptance by resolution prior to the issuance of any building permit. Signage announcing the public shoreline access easement shall be placed at the intersection of Old Stable Road and Hana Highway and may also be placed at other locations. The public shoreline access easement shall be maintained by Old Stable LLC or the nonprofit organization that holds the open space conservation easement. In addition, except for the public access and

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[1]For example, the A&B-Hawaii Unilateral Agreement provides that "Declarant" (*i.e.*, A&B-Hawaii, Inc.) retains "the right to relocate the easement in the future, at its sole cost and expense, to a location within Tax Map Key No. (2)3-8-1-3." This provision is not in the current version of condition no.2 of the subject zoning bill.

> parking, drainage retention basin, wetland enhancement, and dune restoration; the open space conservation easement shall remain undeveloped and in its natural state.

Among the issues associated with an easement for public shoreline access is consideration of the appropriate mechanism for imposing it as a requirement. As the A&B-Hawaii, Inc., Unilateral Agreement demonstrates, public shoreline access may in certain circumstances be addressed by requirements imposed in the administration of the subdivision process pursuant to Section 18.16.210, Maui County Code.[2] It is our understanding that Old Stable LLC may have a subdivision application pending with the Development Services Administration ("DSA"). We recommend, therefore, that the Committee inquire with DSA as to the status of Old Stable LLC's subdivision application and determine whether any shoreline access requirement will be imposed in connection with such subdivision.

Shoreline access may also be addressed through a condition in the proposed zoning ordinance. Such a condition may take a variety of forms, depending upon the intent of Council. For example, the zoning condition may require Old Stable LLC to comply with any shoreline access requirements that are or will be imposed as a condition of final subdivision approval. Alternatively, the zoning condition may seek to directly impose a shoreline access requirement by, for example, requiring conveyance of a shoreline access easement to the County of Maui or to a third party, such as the Maui Coastal Land Trust. Inasmuch as a principal of Old Stable LLC has written[3] to the Committee Chair and expressed willingness, as a condition of zoning, to voluntarily grant an access easement to either the County of Maui or to the Maui Coastal Land Trust, we do not further discuss, for purposes of this memorandum, the law of zoning conditions.

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[2]Section 18.16.210, Maui County Code, states, in part:

> Where a subdivision fronts along the shoreline or other public use or recreational areas, rights-of-way to these areas shall be created at intervals of not greater than fifteen hundred feet, except as provided below. The rights-of-way shall be dedicated for public use and shall have a minimum width of fifteen feet. The location of such rights-of-way shall be as agreed to by the subdivider and the director.

[3]Letter to Robert C. Carroll, Chair, Land Use Committee, from Henry Spencer, Old Stable LLC (June 20, 2005).

We note that, should the Council decide to require, as a condition of zoning, the conveyance of an easement or other interest in real property to the County of Maui, such conveyance will be subject to subsequent Council approval pursuant to Section 3.44.015(C), Maui County Code.[4]

In the event that the Committee decides to include a zoning condition requiring the conveyance of an easement and finds that greater specificity in identifying such easement is desirable or necessary, we recommend that the Committee include the easement's legal description as an exhibit to the conditions of zoning to be filed with the unilateral agreement accompanying the zoning bill.

QUESTION 4: Would an amendment like the one proposed by Council member Anderson require the Council to again consider the proposed Condition Change in Zoning bill on first reading, or would the Committee be able to recommend that the bill as amended be passed on second and final reading if it chose to do so?

In view of the discussion set forth above, and the possibility that the Committee and/or Council may consider various courses of action based on facts obtained through due diligence investigation, we believe it premature to address this question. Whether the proposed bill for a change in zoning requires another first reading will depend on the changes made to the bill. As discussed in previous memoranda on the subject of bill revisions, the Hawaii Supreme Court has held, as a general proposition, that a bill that undergoes changes so fundamental as to transform the bill, in effect, into a new proposal may be invalidated and required to undergo new notice and another hearing.[5] It remains to be seen whether in fact the subject bill undergoes such changes.

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[4]Section 3.44.015(C), Maui County Code, states:

> The County council may accept gifts or donations of real property or any interest in real property by the passage of a resolution, approved by a majority of its members.

[5]Carlsmith, Carlsmith, Wichman and Case v. CPB Properties, Inc., 64 Haw. 584, 645 P.2d 873 (1982).

For the information of the Committee, we enclose a copy of a November 18, 2003 memorandum that discussed the Carlsmith case and the subject of the revision of bills after first reading.

JAG:ln
cc: Michael Foley, Planning Director
Colleen Suyama, Planner V
Attachment
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APPROVED FOR TRANSMITTAL:

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November 18, 2003

MEMORANDUM

MEMO TO: G. Riki Hokama
Councilmember

FROM: Brian T. Moto
Corporation Counsel

SUBJECT: **IMPROVING THE PROCESS FOR UPDATING THE GENERAL AND COMMUNITY PLANS (PLU-6)**

Introduction.

The purpose of this memorandum is to respond to your memorandum, dated October 2, 2003, requesting legal advice relating to Bill No. 84 (2002), Draft 1 ("Bill No. 84"), and, in particular, whether the revisions made to Bill No. 84 since its passage at first reading[1] necessitate the holding of another first reading of Bill No. 84.

Short answer.

Consistent with oral advice given to the Planning and Land Use Committee on this subject matter, we are of the opinion that Bill No. 84, as revised since its first reading, is not so substantial and drastic a departure from the bill noticed for purposes of first reading as to invalidate Council's previous action and require another first reading.

Discussion and analysis.

In Carlsmith, Carlsmith, Wichman and Case v. CPB Properties, Inc., 64 Haw. 584, 645 P.2d 873 (1982), the Hawaii Supreme Court held, as a general proposition, that a bill that undergoes changes so fundamental as to transform the bill, in effect, into a new

[1]Bill No. 84 passed First Reading on December 17, 2002.

proposal may be invalidated and required to undergo new notice and another hearing.[2] In so opining, the Court did not provide any "bright line" test that might be employed in distinguishing changes that are substantial or fundamental from those which are not. Therefore, making such distinctions often involves the exercise of judgment. Nevertheless, when applying the principles outlined in Carlsmith to the facts pertaining to Bill No. 84 and its procedural history, we conclude that Bill No. 84 has not undergone alterations so substantial as to transform it into a new legislative proposal.

In particular, we note that the basic purpose and intent of Bill No. 84 has remained consistent and unchanged throughout its long history of hearings and deliberation by the Council.[3] That purpose and intent has been and remains the establishment of a revised process to update the County of Maui general plan and community plans. Bill No. 84, as passed at first reading and as currently drafted, incorporates provisions setting forth, among other things, the content of the general plan and community plans (including, for example, references to urban and rural growth areas), the formation and duties of the general plan advisory committees and community plan advisory committees, and procedures for decennial and non-decennial revisions to the general plan and community plans.

Although various changes have been incorporated in Bill No. 84 since its passage at first reading, the changes have in many cases been technical in nature and designed to ensure that the Bill furthers the Council's intent and is internally consistent and accurate.[4] In other cases, the changes have been in response to testimony received in one or more of the meetings convened on the Bill. None of the changes appear to be so substantial as to render meaningless the first reading of the Bill.[5]

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[2]Carlsmith, Carlsmith, Wichman and Case v. CPB Properties, Inc., 64 Haw. 584, 645 P.2d 873 (1982)(holding that the final action taken by the Honolulu City Council, with respect to height limitations along the Hawaii Capital District, was not so drastic a departure from the noticed proposal as to warrant the invalidation of the challenged ordinance).

[3]Council, its committees, and the planning commissions have held a considerable number of meetings on the subject matter addressed by Bill No. 84. *See* Committee Report No. 03-146, Planning and Land Use Committee, Nov. 21, 2003.

[4]*See* Committee Report No. 03-146, Planning and Land Use Committee, Nov. 21, 2003.

[5]Among the changes made to Bill No. 84 since its passage at first reading is the addition of a provision in Section

In Carlsmith, the Supreme Court observed that the object of hearings "is to afford such interested persons an opportunity to make known their views and to apprise the ... Council of their opposition to, or approval of, the proposed ordinance", and, "[w]here pertinent and relevant to the ... issue under consideration", to allow these persons to advocate or suggest alternatives to the advertised proposal.[6] The Court further stated that "[i]mplicit in this ... procedure, therefore, is the possibility that changes in the original proposal might ensue as a result of the views expressed at the hearings," and that "[a]ccordingly, such notice may not always be taken by those to whom it is addressed to be an accurate forecast of the ultimate action to be taken by the ... Council."[7]

BTM:lak

cc: Cindy Y. Young, Deputy Corporation Counsel
Dudley G. Akama, Deputy Corporation Counsel
Michael J. Foley, Director, Department of Planning
Wayne Boteilho, Deputy Director, Department of Planning
Brian Miskae, Planning Program Administrator

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2.80B.070(H) that provides that "lands re-designated for a less intensive use shall be zoned accordingly within eighteen months of adoption of the subject plan." Although this provision has been the focus of some attention, this provision, in the context of the entire bill, does not appear to be so significant as to alter the fundamental nature and purpose of Bill No. 84. Rather, it arguably calls for implementing zoning actions that, in theory at least, would occur even in the absence of such a provision. Section 46-4(a), Hawaii Revised Statutes, which grants counties zoning power, directs, in part, as follows:

> Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner.

[6]Carlsmith, 64 Haw. at 591 (1982).

[7]*Id.*