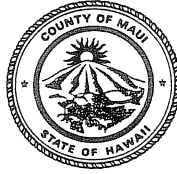


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November 15, 2005

MEMO TO: Robert Carroll, Chair
Land Use Committee

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

SUBJECT: WEST MAUI PROJECT DISTRICT 2 (KAPALUA MAUKA) (LAHAINA)
(LU-69)

Question posed.

This memorandum is in response to your memorandum, dated October 19, 2005. The memorandum asked:

1. What latitude does the Council have in revising the affordable housing conditions being proposed to, for instance, increase the number of affordable units required upward of 173 (which equates to 1 affordable unit for every 4 market-priced units), or accept land in lieu of some of the affordable units?

Analysis and discussion.

Section 19.510.050, Maui County Code, states:

A. Prior to the enactment of an ordinance effecting any change in zoning, the county council may impose conditions upon the applicant's proposed use of the property.

B. The conditions shall be imposed if the council finds them necessary to prevent circumstances which may be adverse to the public health, safety, convenience, and welfare. The conditions shall be reasonably conceived to mitigate the impacts emanating from the proposed land use and shall meet the following criteria:

1. That the public shall be protected from the potentially deleterious effects of the proposed use; and
2. That the need for public services created by the proposed use shall be fulfilled.

For the sake of brevity, and in the interest of providing a timely response, this memorandum summarizes legal principles pertaining to government-required dedications and other conditions imposed on development. We recommend that you seek further legal advice if more particular facts or issues present themselves.

Pursuant to Section 19.510.050, Maui County Code, and subject to constitutional law on the limits of government-required dedications and other development conditions, the Council may impose affordable housing conditions in connection with a change in zoning. In brief, to justify such a condition, the County must be able to show that the proposed development will cause or exacerbate a community problem (in this case, the availability of affordable housing) and that the condition imposed will help solve or address this problem. In particular, there must be an "essential nexus" between a "legitimate state interest" and the exaction required. Assuming such a nexus exists, the County must be able to show that the exaction is roughly proportional to the problems created by the development. No precise mathematical calculation is required; however, there must be some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987), Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309 (1994).

Any affordable housing condition to be imposed, whether in units or land, should be evaluated in accordance with the constitutional parameters discussed above.

Other questions posed; analysis and discussion.

- 2A. Can the State Land Use Commission effectively require Maui Land and Pine (MLP) to "develop no less than 125 affordable units as a part of its proposed Pulelehua project at Mahinahina" when the necessary approvals for Pulelehua project have not yet been obtained?

Section 205-4(g), Hawaii Revised Statutes, authorizes the Land Use Commission to approve a petition for a district boundary amendment, deny such a petition, or modify such a petition "by imposing conditions necessary to uphold the intent and spirit of this chapter [205] or the policies and criteria established

pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change."¹

Pursuant to Section 15-15-90(e), Hawaii Administrative Rules, if a boundary amendment petition is approved, the Land Use Commission must impose certain conditions, including the following:

Petitioner shall provide affordable housing opportunities for low, low-moderate, and moderate income residents of the State of Hawaii to the satisfaction of the respective county in which the land reclassified is located. The respective county shall consult with the housing and community development corporation of Hawaii prior to its approval of the petitioner's affordable housing plan. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between the petitioner and the respective county;²

In its Findings of Fact, Conclusions of Law, and Decision and Order (Docket No. A03-741), pertaining to MLP's petition for land use district boundary amendments, the Land Use Commission adopted Condition No. 1, which states:

Petitioner shall provide affordable housing opportunities for low, low-moderate and gap-group-income residents of the State of Hawai'i to the satisfaction of the County of Maui, acting in accordance with its approved affordable housing policy. The location and distribution of the affordable housing and other provisions for affordable housing shall be under such terms and conditions as may be mutually agreeable to Petitioner and the County of Maui. Notwithstanding any affordable housing provisions that may be agreed to by Petitioner and the County of Maui, Petitioner, at a minimum, shall develop no less than 125 affordable units as a part of its proposed Pulelehua project at Mahinahina.³

As written, the last sentence of Condition No. 1 is not a decision approving the proposed Pulelehua project, but a provision

¹ § 205-4(g), HRS.

² § 15-15-90(e)(7), HAR.

³ Findings of Fact, Conclusions of Law, and Decision and Order, Docket No. A03-741, Condition No. 1 (June 29, 2004).

apparently intended to specify the location of the affordable housing units required. It appears that Condition No. 1 is based on the Commission's findings that "Petitioner has demonstrated a history of providing affordable housing for its employees, and has complied with all affordable housing and employee housing requirements previously imposed as conditions of developing the existing Kapalua Resort",⁴ and that Petitioner intends to satisfy affordable housing requirements "off-site, on other lands owned by Petitioner."⁵

If, for whatever reason, MLP's applications for land use entitlements for the Pulelehua project are denied, MLP will still be bound by Condition No. 1 and other applicable conditions for purposes of its Kapalua Mauka development. In such circumstances, MLP may have to seek amendment of Condition No. 1 by submitting an appropriate petition with the Land Use Commission.

- 2B. Will the condition create an obstacle to the development of the requisite affordable housing units if the necessary approvals for Pulelehua are either delayed or unsuccessful? Does the condition restrict the County's ability to require the affordable housing units to be developed in West Maui generally as opposed to the Pulelehua project specifically?

For purposes of answering these questions, we assume that the "condition" referenced is Condition No. 1.

As discussed above, Condition No. 1 is a condition imposed by the Land Use Commission in its grant of district boundary amendments for the Kapalua Mauka development. If the necessary approvals for the Pulelehua project are delayed or denied, MLP may have to consider seeking an amendment of Condition No. 1.

Condition No. 1 does not restrict Council's power to draft and adopt an appropriate affordable housing condition in connection with the land use entitlements requested by MLP for Kapalua Mauka. Subject to constitutional limitations and Maui County Code requirements, discussed above, Council may, for purposes of crafting an affordable housing condition, consider locations other than Pulelehua.

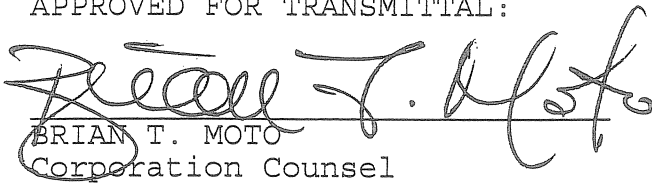
⁴Findings of Fact, Conclusions of Law, and Decision and Order, Docket No. A03-741, Finding of Fact No. 37 (June 29, 2004).

⁵Findings of Fact, Conclusions of Law, and Decision and Order, Docket No. A03-741, Finding of Fact No. 35 (June 29, 2004).

Robert Carroll, Chair
November 15, 2005
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cc: Michael Foley, Planning Director
Wayne Boteilho, Deputy Planning Director
Cindy Y. Young, Deputy Corporation Counsel

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

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