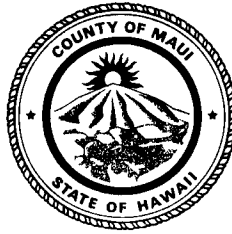


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MEMO TO: Elle Cochran, Council Member

FROM: Jeffrey Ueoka, Deputy Corporation Counsel

DATE: February 10, 2017

SUBJECT: **REQUEST FOR LEGAL OPINION REGARDING AUTHORITY OF COUNTY COUNCIL TO CONDITION AN HRS 201H APPROVAL ON MAINTAINING AFFORDABILITY OF FOR SALE UNITS IN PERPETUITY** (PAF 17-032)

We are in receipt of your "REQUEST FOR LEGAL OPINION REGARDING AUTHORITY OF COUNTY COUNCIL TO CONDITION AN HRS 201H APPROVAL ON MAINTAINING AFFORDABILITY OF FOR SALE UNITS IN PERPETUITY" dated January 31, 2017. Due to the request for an expedited response, we were unable to conduct exhaustive legal research on this matter. We are also unable to fully respond to this request as it does not specify the process by which the Council intends to implement the condition of approval nor does it include any proposed language for the condition. At this time, based on the information presented to us in the request, we do not recommend that the Council alter the requirements of Section 201H-47, Hawaii Revised Statutes ("HRS").

Generally speaking, the County of Maui is granted the authority to develop under Chapter 201H, HRS, by Section 46-15.1, HRS.¹ For those properties developed and sold pursuant to Chapter 201H, HRS, the transfer or real property is restricted for a period of 10 years.² The restriction essentially

¹ This authority is not unlimited, however for the purposes of this memorandum we will not be discussing the specific limitations of Section 46-15.1, HRS.

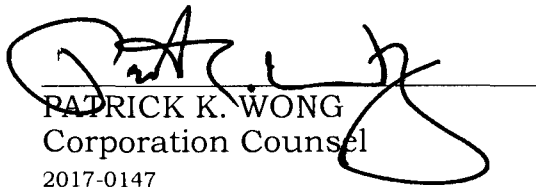
² Section 201H-47, HRS.

grants the County the first option to purchase the property at a price established by formula. We are unclear exactly what process the Council intends to utilize in order for the “twenty-five for sale units remain affordable in perpetuity,” however for the purpose of this memorandum it is our assumption that Council intends to exempt the project from the requirements of Section 201H-47, HRS, through the authority granted in Section 201H-38, HRS, and then set forth a modification to the project outlining the components of the “affordable in perpetuity” requirement.³

We would advise against this approach as the authority to grant exemptions under Section 201H-38, HRS, is limited to those, “statutes, ordinances, charter provisions, and rules of any government agency relating to **planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of dwelling units thereon** (emphasis added) [.]” It is our belief that the 10-year restriction on transfer is not related to any of the areas set forth in Section 201H-38, HRS, indicating that the County lacks the authority to grant an exemption from it. Furthermore, although your request indicates the developer of the 201H project is willing to “accept a condition requiring the twenty-five for sale units to remain affordable in perpetuity” our office is concerned that this type of change to an application has the potential to be construed as more than a “modification” as allowed for by Section 201H-38, HRS, as it is not modifying the application but instead altering one of the provisions of Chapter 201H, HRS.

We also feel it is necessary to address the statements made by staff at the Hawaii Housing and Finance Development Corporation. While we generally defer to HHFDC on matters relating to Chapter 201H, HRS, it is our opinion that the Council’s authority under Chapter 201H, HRS, is not unlimited and that the Council should follow the law when exercising its authority.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

2017-0147

2017-02-10 Memo to Cochran

³ Typically, we advise applicants to avoid requesting exemptions under Section 201H-38, HRS, for requirements of Chapter 201H, HRS.