

COUNCIL OF THE COUNTY OF MAUI
**HOUSING AND HUMAN SERVICES
COMMITTEE**

November 23, 2004

**Committee
Report No.**

04-200
As Amended

NOTE: The committee report was amended by the Council at its meeting on November 23, 2004 as follows: 1) by making corrections to pages 2 and 3; and 2) by deleting the bracketed material and underscoring the new material in the recommendation. This committee report was then adopted as amended.

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Housing and Human Services Committee, having met on November 4, 2004 and November 5, 2004, makes reference to County Communication No. 03-139, from Councilmember Wayne K. Nishiki, relating to Council approval of proposed affordable-housing projects pursuant to Chapter 201G, Hawaii Revised Statutes (HRS).

Your Committee notes that HRS Section 201G-118 requires that the Council approve or disapprove proposed affordable housing projects by resolution within 45 days after the preliminary plans and specifications for the proposed project have been submitted to the Council; otherwise, the proposed project shall automatically be deemed approved.

Your Committee further notes that the Pu`unoa Affordable Housing Project (the proposed project) is being proposed jointly by Kaua`ula Associates (the applicant) and the State Housing and Community Development Corporation of Hawaii (HCDCH). The proposed project would provide 160 affordable-housing units, priced between 60 and 140 percent of median income for the island of Maui, and 108 market-priced units. The proposed project would be located on 54 acres mauka of the Puamana condominium community in West Maui, identified for real property tax purposes as Tax Map Key Nos. (2) 4-7-002:004, 005, and 007. The 45-day deadline for Council approval or disapproval of the proposed project expires on November 24, 2004. The proposed project includes exemptions from various laws, including certain provisions of the West Maui

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Community Plan (Ordinance No. 2476), agricultural district zoning (Chapter 19.30A, Maui County Code), off-street parking and loading (Chapter 19.36, Maui County Code), and the subdivision ordinance (Title 18, Maui County Code).

Your Committee further notes that HRS Chapter 201G housing applications are typically supported by the County Administration. In this instance, however, the applicant is partnering with the HCDCH, a State agency.

Your Committee also notes that the Council adopted Resolution No. 03-177, entitled "DISAPPROVING THE PU'UNOA AFFORDABLE HOUSING PROJECT PURSUANT TO SECTION 201G-118, HAWAII REVISED STATUTES", on December 9, 2003. The purpose of Resolution No. 03-177 was to disapprove a prior version of the proposed project.

Your Committee further notes that it reported on the applicant's June 28, 2004 presentation regarding the proposed project by Committee Report No. 04-116, adopted by the Council on July 27, 2004.

By correspondence dated October 6, 2004 and received on October 11, 2004, the HCDCH transmitted two bound volumes entitled "Pu'unoa Village Resubmittal Application for Development pursuant to Section 201G-118, Hawai'i Revised Statutes" and a related "For Action" report (collectively, the application) to the Council. According to the application, the HCDCH Board of Directors approved the proposed project, subject to the denial of exemptions noted in Exhibit "B" and other terms and conditions, on September 28, 2004.

By correspondence dated October 20, 2004, the Chair of your Committee transmitted various correspondence arising from the presentation referenced in Committee Report No. 04-116.

By correspondence dated October 20, 2004, the Chair of your Committee transmitted the following:

1. A *Maui News* article, dated October 14, 2004, entitled "Lawsuit claims state housing agency action in error on Pu'unoa". According to the article, a lawsuit filed by Native Hawaiian families alleges that an environmental assessment (EA) should have been

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obtained prior to the HCDCH Board's approval of the proposed project.

2. A legal complaint filed on October 7, 2004, in Kuleana Ku`ikahi, LLC v. Housing and Community Development Corporation of Hawaii, Kaua`ula Associates, LLC, et al., Civil No. 04-1-0408(2), Circuit Court of the Second Circuit, State of Hawaii. The complaint's first count alleges that, by failing to obtain an EA, the applicant and the HCDCH "failed to properly discharge their obligations to ensure that the proposed Project meets minimal standards regarding health and safety".
3. Correspondence dated August 18, 2004, from the State Department of the Attorney General, opining that the HCDCH's approval of the proposed project without obtaining an EA "presents significant risks".
4. Correspondence dated October 30, 2003, from the Department of the Corporation Counsel, regarding legal issues related to a prior version of the proposed project and transmitting correspondence dated September 22, 2003, from the State Department of the Attorney General, regarding a possible EA requirement.

By correspondence dated October 20, 2004, the Chair of your Committee transmitted to the Corporation Counsel copies of two draft resolutions prepared by the applicant, requesting that proposed resolutions, approved as to form and legality, be provided to your Committee.

By correspondence dated October 20, 2004, the Chair of your Committee requested that representatives of the HCDCH and the State Department of Transportation (State DOT) attend the meeting planned for November 4, 2004 (noting it would likely be recessed until November 5, 2004), and be prepared to comment on the application and respond to relevant questions.

By correspondence dated October 22, 2004, the Chair of your Committee transmitted a partial response from the Department of the Corporation Counsel to requests dated July 14, 2004 and October 7, 2004, in connection with the presentation referenced in Committee Report No. 04-116.

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By correspondence dated October 27, 2004, the Chair of your Committee requested that the HCDCH confirm that the list of proposed exemptions prepared by the applicant accurately reflects those that were approved by the HCDCH Board on September 28, 2004.

By correspondence dated October 27, 2004, the Chair of your Committee requested that the State DOT provide a copy of the list of exemptions from EA requirements and the applicant's "proposal to install a sewer lateral connecting to the County of Maui's sewer line", referenced in correspondence dated June 16, 2004, to Smith Development from the District Engineer, Maui District, Highways Division, State DOT.

Your Committee notes that the applicant is affiliated with KRS Development, Inc., which has as its sole officer and agent Kent R. Smith. For purposes of this application, Smith Development is considered applicant's representative.

By correspondence dated October 28, 2004, the Department of the Corporation Counsel transmitted proposed resolutions entitled, "APPROVING THE PU'UNOA AFFORDABLE HOUSING PROJECT PURSUANT TO SECTION 201G-118, HAWAII REVISED STATUTES" and "DISAPPROVING THE PU'UNOA AFFORDABLE HOUSING PROJECT PURSUANT TO SECTION 201G-118, HAWAII REVISED STATUTES", respectively, approved as to form and legality. The purpose of the first proposed resolution is to approve the proposed project, which includes exemptions from various laws, including certain provisions of the West Maui Community Plan (Ordinance No. 2476), agricultural district zoning (Chapter 19.30A, Maui County Code), off-street parking and loading (Chapter 19.36, Maui County Code), and the subdivision ordinance (Title 18, Maui County Code). The purpose of the second proposed resolution is to disapprove the proposed project.

By correspondence dated October 28, 2004, the Chair of your Committee requested that Smith Development provide information regarding the size and pathway of the proposed connection to the County wastewater system.

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By correspondence dated October 28, 2004, the Chair of your Committee informed the State DOT that the meeting time on November 4, 2004, had been changed.

By correspondence dated October 29, 2004, the Chair of your Committee requested that the Corporation Counsel respond to questions relating to the impact of a pending lawsuit, the proposed exemptions from otherwise applicable laws, alternative components presented in the application, the possible need for an EA, and the permissibility of applicant-administered affordable units.

By correspondence dated October 29, 2004, Michele McLean, Land Use Planner, Smith Development, transmitted the following documents: (1) correspondence dated August 9, 2004, from the Director of Public Works and Environmental Management, relating to an evaluation of proposed wastewater flows into County wastewater facilities; and (2) correspondence dated August 31, 2004, from Thomas D. Welch, Jr., attorney for the applicant, relating to the possible EA requirement.

By correspondence dated November 1, 2004, the Chair of your Committee transmitted correspondence dated October 29, 2004, from the District Engineer, Maui District, Highways Division, State DOT, transmitting the following documents:

1. "COMPREHENSIVE EXEMPTION LIST FOR THE STATE OF HAWAII DEPARTMENT OF TRANSPORTATION AMENDED, NOVEMBER 15, 2000"; and
2. Correspondence dated May 28, 2004, from David C. Goode, Vice President, Development Operations, Smith Development, regarding the use of a State right-of-way for installation of a proposed sewer line.

By correspondence dated November 1, 2004, the Chair of your Committee transmitted to the Corporation Counsel correspondence dated October 29, 2004, from Michele McLean, Land Use Planner, Smith Development, regarding the possible EA requirement.

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By correspondence dated November 1, 2004, the HCDCH Executive Director confirmed that the list of proposed exemptions prepared by the applicant accurately reflects the exemptions approved by the HCDCH Board on September 28, 2004.

By correspondence dated November 2, 2004, Michele McLean, Land Use Planner, Smith Development, responded to questions relating to the size and placement of the proposed sewer line connecting the proposed project to the County wastewater system.

By correspondence dated November 3, 2004, the Planning Director transmitted a document entitled "MAUI PLANNING DEPARTMENT'S REPORT TO THE HOUSING AND HUMAN SERVICES COMMITTEE OF THE MAUI COUNTY COUNCIL NOVEMBER 4, 2004".

By correspondence dated November 4, 2004, the Department of the Corporation Counsel responded to the October 29, 2004 request.

Your Committee is in receipt of written testimony from 52 people in support of the proposed project. Your Committee is also in receipt of testimony from one person and a petition containing 14 signatures in opposition to the proposed project.

At its meeting of November 4, 2004, your Committee met with the Planning Director; the Director of Public Works and Environmental Management; the Director of Water Supply; the Fire Chief; the Housing Division Administrator, Department of Housing and Human Concerns; a Police Captain, Department of Police; a Deputy Corporation Counsel; Kent Smith, President and Chief Executive Officer, Smith Development; Michele McLean, Land Use Planner, Smith Development; David C. Goode, Vice President, Development Operations, Smith Development; and Jack Naiditch, Esq., counsel for Smith Development.

Your Committee received public testimony from 43 people in support of and 19 people in opposition to the proposed project. One person expressed general concerns over divisiveness within the community and delays in addressing affordable housing needs.

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Your Committee also received written testimony from six people. Two supported the proposed project, and four opposed the proposed project.

Supporters of the proposed project almost uniformly noted the pressing need and desire for affordable housing on Maui, particularly in West Maui. Various supporters also stated the following related concerns: (1) the high cost of rentals in the area relative to the purchase prices at Pu`unoa; (2) delays in delivery on other affordable-housing units; (3) a need to focus infrastructure resources on homes, not hotels; (4) the absence of public funding required for the proposed project; (5) the applicant's revisions to the proposed project to address safety issues; and (6) the proposed project's high-quality design.

Opponents of the proposed project raised the following objections: (1) the proposed project raises health and safety concerns, particularly with respect to traffic and subdivision access; (2) a State-administered HRS Chapter 201G project deprives the County of local control; (3) the requested approvals overlap with issues in ongoing litigation and have the potential to increase damages; (4) under the Constitution, eligibility for the lottery is broad, and affordable homes would not be limited to those living and working on the West side; (5) an EA should have been obtained; (6) the proposed project is otherwise good, but in a bad location; (7) the proposed project is dividing the community, and wise planning considers impacts on the entire community; (8) the proposed project is an inappropriate use of agricultural lands; (9) Kauaula Stream should be revered, and issues relating to the stream buffer need to be resolved; (10) desperation for affordable housing does not justify disregarding the Kauaula families; and (11) the proposed project ignores the West Maui Community Plan.

Your Committee recessed its meeting until November 5, 2004.

At its meeting of November 5, 2004, your Committee met with the Mayor; the Director of Housing and Human Concerns; the Planning Director; the Director of Public Works and Environmental Management; the Fire Chief; the Corporation Counsel; a Deputy Corporation Counsel; the Executive Director, HCDCH; two Project Coordinators, HCDCH; a Construction Engineer/Assistant District Engineer, Maui District, Highways Division, State DOT; Kent Smith, President and Chief Executive Officer, Smith Development; Michele McLean, Land Use Planner, Smith Development; David C. Goode, Vice President, Development Operations, Smith Development; Jack Naiditch, Esq., counsel for Smith

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Development; and Neal Kasamoto, Senior Transportation Engineer, and Ivan Nakatsuka, Chief Environmental Engineer, Austin, Tsutsumi & Associates, Inc., the applicant's engineering consultants.

Your Committee received public testimony from five people in opposition to the proposed project. The testifiers variously noted the following bases for their opposition: (1) questions about clear title for the subject property; (2) the cultural significance of the area; (3) disregard for the 300-yard buffer from Kauaula Stream requested by the State Historic Preservation Division; (4) public safety; (5) location; and (6) community divisiveness.

Your Committee also received written testimony from seven people, six in opposition to and one in support of the proposed project.

Mr. Smith noted that the applicant had been asked to revise the proposed project after the Council disapproved it last year. He said comments and criticisms have been considered and incorporated into project revisions as much as possible.

Ms. McLean provided your Committee with a computer-generated slide show on the proposed project, addressing community outreach conducted since December 2003 and outlining changes to the original proposal. Revisions to the proposed project include: (1) an increase in the number of homes from 254 to 268; (2) an increase in the percentage of affordable homes from 50 percent to 60 percent; (3) incorporation of a ten-year buyback provision; (4) an expansion of the affordability range, to start at 60 percent of the United States Housing and Urban Development (HUD) median income for Maui residents; (5) replacing five mixed-use sites with one commercial building; (6) installation of solar water heaters in the affordable homes; (7) connection to the County, rather than a private, wastewater system; (8) confirmation that water supplied by Launiupoko Water Company would consist entirely of well water, without reliance on stream or surface water; (9) an increase in the Kauaula Stream buffer from 20 feet to 60 feet; (10) the use of a cane haul road to the south of the subdivision; and (11) the widening of subdivision roadways. Ms. McLean further noted that the applicant would pay \$1.24 million to the State Department of Education for public schools in West Maui.

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In addition, Ms. McLean provided your Committee with a comparison of the proposed project and the Waikapu Affordable Housing Subdivision proposed by Spencer Homes, Inc., which the Council approved by Resolution No. 04-116 on August 6, 2004. She emphasized that the applicant would like the proposed project to be evaluated according to the same standards used to evaluate the Waikapu Affordable Housing Subdivision.

The HCDCH Executive Director provided a historical perspective on HRS Chapter 201G and an overview of the agency's evaluation of the proposed project. Based on conceptual plans, the HCDCH staff reviewed and found the proposed project consistent with the requirements of HRS Chapter 201G and with minimum health and safety standards. The HCDCH will enter into a development agreement with the applicant based on more detailed plans. The Executive Director stated that the HCDCH respects the responding agencies' comments on the proposed project. Based on "home rule" principles, the Board voted to move the proposed project forward to the County to allow the Council to approve or disapprove the proposed project.

The HCDCH Executive Director informed your Committee that the HCDCH Board does not have the ability to waive or exempt an EA requirement, and that the courts are the final authority on the question of whether an EA is required. As a strong supporter of affordable housing, the HCDCH Board believes that it is fulfilling the HCDCH's mission by approving the proposed project. The HCDCH Board also believes that fast-track consideration is necessary to meet affordable-housing needs.

An HCDCH Project Coordinator responded to questions regarding buyback provisions designed to prevent the conversion of affordable units to market units for ten years.

A Construction Engineer/Assistant District Engineer, Maui District, Highways Division, State DOT, advised that Honoapiilani Highway (which would provide access to the proposed project) is at a poor level of roadway service, with backups on the highway between Shaw Street in Lahaina and Luniupoko. She outlined anticipated highway projects in the area and responded to questions concerning area traffic flow, vehicular accidents, and roadway service level. The State DOT considered whether an EA would be required for the following aspects of the proposed project: (1) auxiliary lanes associated with an

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intersection connection; and (2) an 8- to 10-inch sewer lateral connection within the State right-of-way. After review, the State DOT granted exemptions from EA requirements.

Your Committee discussed the manner in which the State DOT had applied the EA exemptions.

Mr. Kasamoto gave an overview of the proposed project's traffic study. He said the study evaluated the development of the proposed project's single-family homes and resulting trip generations. The consultant anticipates the roadway service level for Honoapiilani Highway will remain at "E" once the proposed project is developed.

Mr. Nakatsuka, who was involved in the original design of a private wastewater system, informed your Committee that the preferred alternative for connecting to the County wastewater system is to run the transmission line through the State right-of-way. In response to questions posed by the Deputy Corporation Counsel, he stated that the pump station would be privately owned and, therefore, would not need to conform to County standards.

The Director of Housing and Human Concerns informed your Committee that the Department had no comments on the proposed project.

The Planning Director summarized the Department of Planning's report submitted on November 3, 2004. The Department's main objection is location, primarily with respect to traffic and safety concerns. The Planning Director expressed the view that the transmission line connecting the subdivision to the County wastewater treatment plant is a trigger for an EA, as are the proposed roadway improvements. According to the Planning Director, the application could not be considered a substitute for an EA, as it does not meet all applicable requirements, including mitigation measures for impacts.

The Department of Planning disputes the completeness of the traffic report because it does not include a cumulative analysis of other projects in West Maui, an analysis of the cane haul road as a mitigation measure, or other mitigation measures.

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The Planning Director gave an overview of other proposed affordable housing projects within the County, 12 of which are in West Maui, and five of which are under construction.

The Planning Director noted that the Department does not consider a 60-foot buffer from Kauaula Stream to be adequate.

The Planning Director commented on the comparison of the proposed project and the Waikapu Affordable Housing Subdivision. He informed your Committee that the Department originally recommended an EA for the Waikapu Affordable Housing Subdivision. According to the Director, the proposal for the Waikapu Affordable Housing Subdivision was later modified to avoid EA triggers.

The Mayor opined that, because of the different circumstances, it is inappropriate to compare the proposed project to the Waikapu Affordable Housing Subdivision.

The Fire Chief commented that the subdivision roadways have been modified to increase the smallest roadways to 33-foot right-of-ways. Although the applicant expresses the desire to have flexibility in constructing narrower roadways, the Department of Fire and Public Safety's position is that 32 feet is the minimum allowable width to accommodate fire operations apparatus.

The Director of Public Works and Environmental Management informed your Committee that his Department's comments are attached to the report submitted by the Planning Director on November 3, 2004. The Department offered the following comments: (1) County standards should be followed for any infrastructure that will be dedicated to the County; and (2) in the lower portion of the proposed project, some drainage basins are in an area planned for use as part of the first phase of the Lahaina Watershed Flood Control Project.

The Deputy Corporation Counsel summarized the Department's recommendations concerning the possible need for an EA, as set forth in its correspondence dated November 4, 2004. He informed your Committee that two events were potential triggers—the proposed highway improvements and the sewer line connection. The Department did not thoroughly examine the highway trigger, but did review the sewer line connection and the exemption being relied

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upon by the State DOT. The Department of the Corporation Counsel's opinion is that the exemption is intended for small equipment and facilities, and would not apply to a project of this scope. He further opined that the County and its officials have immunity under HRS Subsection 201G-118(a)(3)(B) ("No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, or disapproving the plans and specifications"). Moreover, the Council cannot require, prepare, or accept an EA; those powers are exclusive to executive-branch agencies under HRS Chapter 343.

The Deputy Corporation Counsel informed your Committee that additional time might be helpful in more thoroughly reviewing issues relating to the possible need for an EA. Your Committee requested that the Department of the Corporation Counsel contact State agencies and the applicant, as necessary, to enhance its review of the EA issue, then supplement its response.

Mr. Naiditch summarized the applicant's position concerning the possible need for an EA. Once an agency determination is made that a project is exempt from EA requirements, no one short of the courts has a right to force an EA, according to Mr. Naiditch. He noted that both the HCDCH and State DOT chose not to require an EA.

Noting that the applicant had represented that adequate information is contained in the application for it to substitute as an EA, your Committee requested that the applicant highlight the relevant information to demonstrate this point.

Mr. Smith said that if a court requires an EA, he would need to consider whether he would continue to pursue the proposed project.

Mr. Goode noted that critical comments about the proposed project made by the Planning Director and the Mayor focused on traffic concerns. He emphasized that highway improvements to be implemented concurrently with the proposed project would improve the level of roadway service.

Your Committee voted to recommend that both proposed resolutions be forwarded to the Council for consideration.

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Your Housing and Human Services Committee RECOMMENDS [the following:

1. That Resolution No. _____, attached hereto, entitled "APPROVING THE PU'UNOA AFFORDABLE HOUSING PROJECT PURSUANT TO SECTION 201G-118, HAWAII REVISED STATUTES", be FORWARDED to the Council for consideration; and
2. That] that Resolution No. _____, attached hereto, entitled "DISAPPROVING THE PU'UNOA AFFORDABLE HOUSING PROJECT PURSUANT TO SECTION 201G-118, HAWAII REVISED STATUTES", be [FORWARDED to the Council for consideration] ADOPTED.

Adoption of this report is respectfully requested.

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JOSEPH PONTANILLA Chair

JO ANNE JOHNSON Member

MICHAEL J. MOLINA Vice-Chair

DANNY A. MATEO Member

ROBERT CARROLL Member