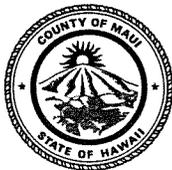


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December 20, 2012

MEMO TO: Mike White  
Council Member

F R O M: *Michael J. Hopper*, Deputy Corporation Counsel

SUBJECT: CODIFICATION OF INTERPRETATIONS OF THE LAW AFFECTING  
THE CONSTRUCTION, ALTERATION, REPAIR, AND USE OF  
BUILDINGS OR STRUCTURES IN THE COUNTY (PAF 11-223)

I am in receipt of your request for an opinion dated December 6, 2012 (attached), that raises five questions, which I will address in the order in which they were posed.

Your request references the building code in general, and Section 16.26B.105.1, Maui County Code, as the section describing when a building permit must be obtained; however, you do not reference any particular "informal interpretations of the law." As such, the responses are general in nature.

Before addressing each question posed, a brief background would assist in understanding the listed responses. Hawaii Revised Statutes ("HRS") Chapter 91 defines a "Rule" as:

[E]ach agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.<sup>1</sup>

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<sup>1</sup> HRS § 91-1(4).

Administrative rules are required to be adopted by agencies using procedures found throughout HRS Chapter 91, which include allowing public comment, public notice and a public hearing.<sup>2</sup>

The definition of "rule" in HRS 91-1(4) does not include all agency actions on all issues within its purview, and whether a given "informal interpretation" as referenced in your letter is required to be adopted as an administrative rule, or disclosed to the public, depends on exactly what "informal interpretations" are at issue and the facts surrounding each.

As stated in HRS § 91-1(4), rules do not include regulations concerning the internal management of an agency<sup>3</sup>, nor do they include intra-agency memoranda.<sup>4</sup> In addition, it is not rulemaking for an agency to make determinations on the application of laws already promulgated by the legislature to particular property owners.<sup>5</sup>

**1. What is the authority that allows the departments to develop and maintain informal interpretations of law?**

Different County departments derive their authority from various sources, and more specific information is needed to give a specific response to this question. For example, based on Section 8-5.3.1 of the Revised Charter of the County of Maui (1983), as amended, the Director of Public Works is given the authority to "[a]dminister the building, housing, and subdivision ordinances and rules adopted thereunder."

In addition, with respect to the Building Code of the County of Maui, Section 16.26B.104.1, Maui County Code authorizes the Director to "render interpretations of this code and to adopt policies and procedures in order to clarify the application of its provisions."<sup>6</sup> In administering the building code, Chapter

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<sup>2</sup> See, e.g. HRS 91-3.

<sup>3</sup> See, e.g. State v. Claunch, 111 Haw. 59, 137 P.3d 373 (2006) (Police department general order establishing authority and procedures at sobriety checkpoints was not a "rule" under HRS § 91-1(4)).

<sup>4</sup> See, e.g. Crosby v. State Department of Budget and Finance, 76 Haw. 332, 876 P.2d 1300 (1994) (Memorandum issued by Director of State DAGS to State agencies opining on the types of contracts exempt from competitive bidding, and outlining a procedure for requesting sole source approval from DAGS, was not a "rule").

<sup>5</sup> See, e.g. Town v. Land Use Commission, 55 Haw. 538, 524 P.2d 84 (1974) (State Land Use Commission determination of district boundaries based on laws adopted by the legislature did not constitute rulemaking).

<sup>6</sup> See § 16.26B.104.1.

16.26B, Maui County Code, and issuing permits thereunder, the Director is authorized and required to interpret and apply the building code to various factual scenarios.

2. Pursuant to Chapter 91, Hawaii Revised Statutes, do these informal interpretations need to be established by administrative rule or ordinance?

As stated above, whether a given "informal interpretation" as referenced in your letter is required to be adopted as an administrative rule depends on exactly what "informal interpretations" are at issue and the facts surrounding each. It is not possible to render a comprehensive opinion at this time based on the information presented.

3. If these informal interpretations need to be established by ordinance, or administrative rule through the Chapter 91, HRS, process, what is the time frame in which this needs to be done?

In general, if an ordinance or administrative rule is required for an agency to take a particular action, such ordinance/rule must be established prior to such action.

Before adopting administrative rules, an agency must provide notice for a public hearing on the rules at least thirty days in advance of such hearing, and allow for the submission of written and oral testimony.<sup>7</sup> The agency may adopt the rule at the public hearing or at a later date, and the rules must be approved by the Mayor.<sup>8</sup> After the Mayor signs the rule after agency approval, the rule is filed with the County Clerk and becomes effective ten days after such filing.<sup>9</sup>

4. In the interim, must these informal interpretations be made available to the public? For example, would the publication of informal interpretations online be acceptable?

Whether a given "informal interpretation" must be made available to the public depends on what "informal interpretations" are at issue.

HRS Chapter 92F, the Uniform Information Practices Act, governs what documents are considered government records and are open to the public, and which records are exempt from disclosure. Certain types of documents, even if they are considered government records, may not be subject to disclosure based on various exceptions provided by statute.

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<sup>7</sup> HRS § 91-3(a).

<sup>8</sup> HRS §§ 91-3(a)(2); 91-3(c).

<sup>9</sup> HRS § 91-4(b).

Among other exceptions, HRS § 92F-13 excepts from disclosure "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;" and "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure". These exceptions may include intra-agency deliberations and communications subject to the attorney-client and attorney work product privileges recognized by law.

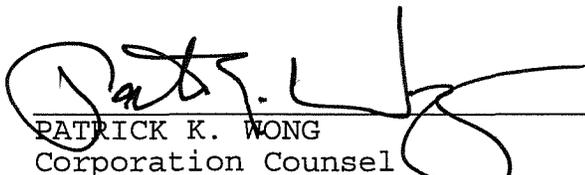
Whether a given document is considered a government record, and whether an exception applies to exempt such document from disclosure depends on the document itself. In this case, it is not possible to render an opinion at this time based on the information presented.

**5. Can departments use these informal interpretations to grant or deny a permit application?**

It is unclear which particular "informal interpretations", "departments" or "permit applications" are being referenced. The introduction to your request references the building code. As stated in the response to question one above, the Department of Public Works is empowered to administer and enforce the building code, and interpret the same. This includes considering building permit applications based on the requirements in the County Code and applying the code requirements to a variety of factual scenarios. In doing so, the Director may be required to interpret the building code as it applies to particular facts.

In general, if an applicant is denied a building permit by the Director of Public Works, Section 19.520.040, Maui County Code, allows the applicant to appeal such denial to the Board of Variances and Appeals. In such a case, the applicant would have the opportunity to challenge the Director's basis for a permit denial including the Director's interpretation of the building code.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG  
Corporation Counsel