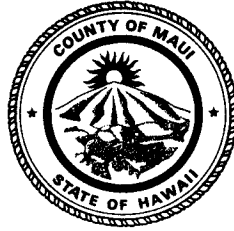


ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
Corporation Counsel

EDWARD S. KUSHI
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LYDIA A. TODA
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OFFICE OF THE
COUNTY COUNSEL

2014 OCT 31 PM 9:27

RECEIVED

October 31, 2014

MEMO TO: Donald G. Couch, Jr., Chair
Planning Committee

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

SUBJECT: Amending Chapter 2.80B, Maui County Code, relating to
General and Community Plans (PC-56)

Attached is the proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING SECTION 2.80B.030, MAUI COUNTY CODE, TO CLARIFY THE APPLICABILITY OF THE GENERAL PLAN TO MINISTERIAL PERMITS AND APPROVALS," approved as to form and legality.

If you have any questions or concerns, please feel free to call me.

MJH:ma
Enclosures

✓

ORDINANCE NO. _____

BILL NO. _____ (2014)

A BILL FOR AN ORDINANCE AMENDING SECTION 2.80B.030,
MAUI COUNTY CODE, TO CLARIFY THE APPLICABILITY
OF THE GENERAL PLAN TO MINISTERIAL PERMITS AND APPROVALS

SECTION 1. Purpose. The Countywide Policy Plan, Ordinance 3732 (2010), states that it is "not intended to be used in the review of applications for ministerial permits." The council finds that this intention should apply to all components of the general plan. The purpose of this ordinance is to clarify that ministerial permits and approvals are not required to comply with the general plan.


SECTION 2. Section 2.80B.030, Maui County Code, is amended by amending subsection B to read as follows:

"B. All agencies shall comply with the general plan[.], and administrative actions by agencies shall conform to the general plan, except for ministerial permits or approvals including, but not limited to, building permits, grading permits, plumbing permits, and electrical permits. [Notwithstanding any other provision, all] All community plans, zoning ordinances, and subdivision ordinances[, and administrative actions by agencies] shall conform to the general plan. Preparation of County budgets and capital improvement programs shall implement the general plan to the extent practicable. The countywide policy plan, Maui island plan, and community plans authorized in this chapter are and shall be the general plan of the County, as provided by section 8-8.5 of the [charter.] revised charter of the County of Maui (1983), as amended."

SECTION 3. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:

A handwritten signature in black ink, appearing to read 'M. J. Hopper', written over a horizontal line.

MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

ALAN M. ARAKAWA
Mayor

WILLIAM R. SPENCE
Director

MICHELE CHOUTEAU McLEAN
Deputy Director



COUNTY OF MAUI
DEPARTMENT OF PLANNING

July 11, 2014

RECEIVED
2014 JUL 11 PM 2:58
OFFICE OF THE MAYOR

RECEIVED
2014 JUL 16 AM 10:34
OFFICE OF THE
COUNTY CLERK

Honorable Alan Arakawa
Mayor, County of Maui
200 South High Street
Wailuku, Hawaii 96793

For Transmittal to:

Honorable Gladys Coelho Baisa, Chair
Maui County Council
200 South High Street
Wailuku, Hawaii 96793

APPROVED FOR TRANSMITTAL
Gladys Coelho Baisa 7/16/14
Mayor Date

Dear Chair Baisa:

SUBJECT: BILL TO CLARIFY SECTION 2.80B.030 OF THE MAUI COUNTY CODE

The Department of Planning (Department) is transmitting a proposed bill for consideration by the Maui County Council. The bill would amend §2.80B.030 of the Maui County Code (MCC).

The bill seeks to codify how Maui County has consistently interpreted and applied our general and community plans since their original adoption. As outlined in the enclosed Corporation Counsel opinions, the plans are primarily used as guidance documents in discretionary decision making; but they are not applicable to ministerial actions unless explicitly required by the MCC.

For clarity, discretionary actions take place when an official body or agency exercises some deliberative judgment or choice in coming to a decision. An example would be when one of our planning commissions makes a decision to approve or deny a special use permit; and in an approval, decide what conditions may be applicable. The planning commission looks to the community plan for guidance in their decision making.

In contrast, ministerial actions are where there is little or no discretion exercised in the performance of a government function. Examples would be in the processing of building, electrical, or plumbing permits. Construction plans either meet building codes and zoning standards or not; there is no deliberation for granting or denying these permits and the community plans are not applicable.

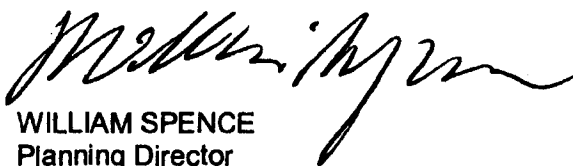
COUNTY COMMUNICATION NO. 14-202

Honorable Gladys Coelho Baisa, Chair
July 11, 2014
Page 2

It is notable that there are some sections of the MCC that specifically require conformity or consistency with the plans. Examples would be various sections of Title 18, Subdivision, or when the Council grants zoning as from (MCC 19.510). The proposed bill would not modify these requirements or other sections of the MCC where the Council may find it necessary to make similar requirements.

Thank you for your consideration of this matter. Should further clarification be necessary, please feel free to transmit your questions to the Department via transmittal through the Office of the Mayor.

Sincerely, -



WILLIAM SPENCE
Planning Director

Attachments

xc: Michele McLean, Deputy Planning Director
John F. Summers, Planning Program Administrator
John Rapacz, Planning Program Administrator

WRS:atw

General File

S:\ALL\Wil\280B030 Amendment Transmittal 071114.doc

ORDINANCE NO. ____

BILL NO. ____ (2013)

A BILL FOR AN ORDINANCE TO AMEND CHAPTER 2.80B OF THE
MAUI COUNTY CODE, PERTAINING TO GENERAL AND COMMUNITY PLANS

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI

SECTION 1. Purpose. The council finds that it is desirable to further the Purpose and Intent of the Maui County Code, 2.80B to "clearly identify provisions that are meant to be policy guidelines and provisions that are intended to have the force and effect of law" by clarifying which types of agency actions are to comply with the General Plan. It is the practice of Maui County to apply the general plan where discretionary actions are required, but not to apply the general plan where ministerial actions are required.

SECTION 2. Section 2.80B.020, Maui County Code, is amended by adding the following definition:

"Discretionary" or "Discretionary action" means an action involving an exercise of judgment and choice, not an implementation of a hard-and-fast rule.

SECTION 3. Section 2.80B.030, Maui County Code, is amended by amending subsection B to read as follows:

B. All discretionary actions by agencies shall comply with the general plan. Notwithstanding any other provision, all community plans, zoning ordinances, subdivision ordinances, and discretionary administrative actions by agencies shall conform to the general plan. Preparation of County budgets and capital improvement programs shall implement the general plan to the extent practicable. The countywide policy plan, Maui island plan, and community plans authorized in this chapter are and shall be the general plan of the County, as provided by section 8-8.5 of the charter.

SECTION 4. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material or the underscoring.

SECTION 5. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:

MICHAEL HOPPER
Deputy Corporation Counsel
County of Maui

JAMES "KIMO" APANA
Mayor



JAMES B. TAKAYESU
Corporation Counsel

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June 29, 1999

The Honorable Dain P. Kane, Chair
Committee of the Whole
Maui County Council
200 South High Street
Wailuku, Maui, HI 96793

RE: **Effect of Community Plan Designation on Use of Property
at Makena Road/Palauea Beach (COW-27)**

Dear Mr. Kane:

This is in response to your memorandum dated June 7, 1999, requesting a legal opinion on the apparent inconsistency between the zoning and community plan designation for the parcels at Palauea Beach under consideration by the Committee of the Whole (hereinafter referred to as the "Palauea property"). This opinion addresses specifically the effect the community plan designation has on the use of the subject property.

I. Factual Background

The Palauea property is currently zoned hotel district. The current Kihei-Makena Community Plan ("KMCP"), which became effective in March 1998, designates the property as Park on the land use map. It is our understanding that the individual parcels are being marketed for sale as home sites for single family residences.

On December 4, 1996, the Council passed a resolution authorizing eminent domain proceedings for the acquisition of the subject property (which at the time was not subdivided) for park and recreational purposes. (Resolution No. 96-121). The administration has thus far not proceeded with condemnation.

On April 28, 1999, several county officials were sent a letter by Isaac Davis Hall, objecting to the issuance of building permits or water meters for any development on the Palauea property. Mr. Hall asserts that the administration is obligated to commence

Dain P. Kane, Chair
Committee of the Whole
June 28, 1999
Page 2

eminent domain proceedings. Mr. Hall also argues that issuance of building permits or water meters would violate County law because section 2.80A.010.B, Maui County Code ("MCC"), requires "administrative actions by county agencies [to] conform to the provisions of the General Plan"

II. Issue Presented

Does §2.80A.010.B of the Maui County Code give the General Plan and community plans the force and effect of law, thereby prohibiting the issuance of building permits and other ministerial administrative approvals for developments which are not consistent with the community plan designation?

III. Short Answer

No, the General plan and community plans are intended to guide the decisions of County officials and do not themselves regulate the use of land. Ministerial approvals, such as the issuance of a building permit, may be issued without reference to the General Plan and applicable community plan unless an ordinance or statute specifically requires consistency therewith.

IV. Discussion

A. Applicable Rules of Statutory Construction

The issue which has been raised arises out of the language of Section 2.80A.010.B, MCC.¹ In construing the ordinance to determine the intent of the legislative body, we first look to the plain language of the ordinance itself. State v. Mahoe, 88 Haw. 181 (1998). However, this plain language rule of statutory construction does not preclude the examination of other sources

¹ In its entirety, subsection B of 2.80A.010, MCC, reads: All agencies of the county shall comply with the provisions of the general plan. All community plans, zoning ordinances, subdivision ordinances and administrative actions by county agencies shall conform to the provisions of the general plan. Preparation of county budgets and capital improvement programs shall also conform to the provisions of the general plan. The community plans authorized in this chapter are established and shall, upon adoption by the council, be part of the general plan of the county, as provided in the revised charter of the county.

Dain P. Kane, Chair
Committee of the Whole
June 28, 1999
Page 3

even when such language appears clear upon perfunctory review. Crompton v. Term Corp., 83 Haw. 1 (1996).

When construing a statute, the language must be read in context of the entire statute and construed in a manner consistent with the purposes of the statute. Mathewson v. Aloha Airlines, Inc., 82 Haw. 57 (1996). Thus, the language of §2.80A.010.B must be read in context of Chapter 2.80A, MCC, as well as the Charter of County of Maui ("Charter") and §46-4, Hawaii Revised Statutes.

Finally, we must give the ordinance "[a] rational, sensible and practicable interpretation [which] is preferred to one which is unreasonable or impracticable." Keliipuleole v. Wilson, 85 Haw. 217, 221-222 (1997), quoting State v. Lobendahn, 71 Haw. 111, 112 (1989). This is because "[t]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." Keliipuleole, at 222, quoting State v. Arceo, 84 Haw. 19 (1996).

B. The Planning Framework

The power to regulate land use is granted to the counties by §46-4, Hawaii Revised Statutes ("HRS"). This provision states, in relevant part, that "[z]oning 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." (Emphasis added.) The State Legislature requires zoning to be done in accordance with an overall plan. Maui County's General Plan fulfills this mandate by guiding zoning and other decisions which affect the development of Maui County.

The Charter also makes it clear that the General Plan is intended as a guide. Section 8-8.5 of the Charter reads:

The general plan shall recognize and state the major problems and opportunities concerning the needs and the development of the county and the social, economic and environmental effects of such development and shall set forth the desired sequence, patterns and characteristics of future development.

Section 8-8.3(3) provides that it is the Planning Director's duty to "[r]ecommend revisions of the general plan at least every ten years to guide the development of the county." (Emphasis added.)

Dain P. Kane, Chair
Committee of the Whole
June 28, 1999
Page 4

Chapter 2.80A, MCC, provides that the community plans are part of the General Plan. §2.80A.010.B, MCC. As part of the General Plan, the individual community plans serve the same overall purpose, i.e., to guide development. Chapter 2.80A, MCC, does not indicate that the community plans are intended to implement the General Plan in a regulatory manner.

Finally, the language of the Kihei-Makena Community Plan itself is instructive. On page 1, the purpose of the KMCP is provided as follows:

The Kihei-Makena Community Plan, one of nine (9) community plans for Maui County, reflects current and anticipated conditions in the Kihei-Makena region and advances planning goals, objectives, policies, and implementation considerations to guide decision-making in the region through the year 2010. The Kihei-Makena Community Plan provides specific recommendations to address the goals, objectives, and policies contained in the General Plan, while recognizing the values and unique attributes of the Kihei-Makena areas in order to enhance the region's overall living environment.

The Maui County General Plan, first adopted in 1980 and updated in 1990, sets forth goals, directions and strategies for meeting the long-term social, economic, environmental and land use needs of the County....

The KMCP also describes the role of the community plan in the planning process:

For Maui County, the General Plan and the community plans are strategic planning documents which guide government action and decision-making...

...Implementation of the goals, objectives and policies contained in the Community Plan is defined through specific implementing actions, also set forth in each community plan. Implementation actions as well as broader policy recommendations are effectuated through various processes, including zoning, the capital improvements program, and the County budgeting process.

Dain P. Kane, Chair
Committee of the Whole
June 28, 1999
Page 5

This language clearly states that the role of the community plan is to guide development.² Section 2.80A.010.B, MCC, must be read in this context.

If a building permit cannot be issued because the proposed use is inconsistent with a community plan designation, in effect the community plan would be regulating the landowner's use of the property. It would be inconsistent with the above provisions to read §2.80A.010.B, MCC, as establishing the General Plan and community plans as regulatory legislation.

C. Regulation of Land Use

While the General Plan and community plans establish the desired land use patterns and guide land use decisions of County officials, the zoning actually regulates what a landowner can and cannot do on his property. Accord, Toandes Peninsula Ass'n v. Jefferson County, 648 P.2d 448 (Wash. App. 1982) ("A comprehensive plan, without regulatory implementation, does not impose restrictions upon property and does not deprive or limit the landowner of the use of property. The zoning ordinance is the primary regulatory device under the Act.") Zoning is an exercise of the police power of the County. Lum Yip Kee, Ltd. v. City and County of Honolulu, 70 Haw. 179 (1989). Thus, a landowner is subject to both criminal and administrative penalties for violations of a zoning ordinance, Chapter 19.530, MCC. The General Plan and community plans do not have the same force and effect without regulatory implementation.

The General Plan and community plans are implemented in various ways. Zoning is the primary method to effectuate these plans in the land use context. Zoning changes cannot be made by the County Council unless they are consistent with the General Plan and applicable community plans. §19.510.040, MCC. Once the zoning is in place in accord with the General Plan and community plans, all subsequent permits related to land use and property development should likewise be consistent with the General plan and community plans.

In addition to the zoning, other permitting processes also lead to the implementation of the General Plan and community plans because of specific requirements that there be consistency with these plans. Subdivisions of land are required to be consistent with the General Plan and applicable community plan. Section

² Similar language is found in all of the community plans.

Dain P. Kane, Chair
Committee of the Whole
June 28, 1999
Page 6

18.04.030, MCC, provides that "[t]he director shall not approve any subdivision that does not conform to or is inconsistent with the county general plan, community plans, land use ordinances, the provisions of the Maui County Code, and other laws relating to the use of land"

Also, if the property is in the Coastal Zone Management Area, a Special Management Area ("SMA") use permit may be required before a building permit can be obtained. See §205A-22, HRS.³ Section 205A-26(2)(C), HRS, requires that a development be consistent with the county general plan and zoning before an SMA permit can be issued.

It is in this context where the General Plan and community plans have the force and effect of law. In GATRI v. Blane, 88 Haw. 108 (1998), the Hawaii Supreme Court held "that the county general plan does have the force and effect of law insofar as the statute requires that a development within the SMA must be consistent with the general plan." 88 Haw. at 114. This confirmed that a project in the SMA must be consistent with both the zoning and the general plan and the County did not have to rezone the property in order to preempt the issuance of an SMA permit.

Absent a statute or ordinance specifically requiring development to be consistent with the General Plan and community plan, however, the zoning controls what uses are permitted. Building permits, and other ministerial permits, may be issued for uses permitted by the zoning even if the uses are not consistent with the policies or land use designations set forth in the General Plan or community plan. See Toandos Peninsula, 648 P.2d at 453; Elysian Heights v. City of Los Angeles, 227 Cal. Rptr. 226, 232 (Cal.App.2 Dist. 1986) ("Once an applicant has complied with the appropriate land-use regulations, the Department of Building and Safety has no discretion to deny issuance of a permit.")

D. Practical Effect of Requiring Consistency with Community Plans.

To read §2.80A.010.B, MCC, as mandating consistency with the

³An SMA permit is not required for, inter alia, construction of a single-family residence that is not part of a larger development and that does not have a cumulative impact which may have a significant environmental or ecological effect on a special management area.

Dain P. Kane, Chair.
Committee of the Whole
June 28, 1999
Page 7

community plan before building permits and other ministerial approvals can be issued would be inconsistent with the established planning and land use framework. In addition, the effects of such a reading were likely not what the County Council members had in mind when they adopted this section.

The ability of a landowner to use his land in a reasonable manner would be restricted in many ways. In the case of the Palaeua property, the Park designation on the community plan would make it difficult, if not impossible, for a private landowner to make reasonable use of the property in order to receive a return on his investment if no building permits could be obtained. The County then would have to consider purchasing the property or likely be faced with an inverse condemnation claim for an unconstitutional takings. Although purchase of the property for park purposes may be desired sometime over the ten year period encompassed by the community plan, the County's time table for the acquisition of the land may be forced, even in tight financial times.

In addition to Open Space and Park designations affecting a landowner's ability to use his property, if the community plan were regulatory in nature, a similar problem would arise where there are inconsistent zoning and community plan designations. This was the case with the GATRI property where the community plan designation was Single Family and the zoning was B-R Resort Commercial. The zoning did not allow a residence and the community plan designation did not allow commercial activity. Hence, the landowner could make no use of its property. Although the County was successful in defending its community plan in GATRI v. Blane, supra, it was still defending an inverse condemnation lawsuit at the time the County purchased the property.

Even a landowner's ability to do minor repairs and alterations to their property would be affected if the community plan regulated land use. For instance, an owner of a residence whose property is planned for commercial use in the community plan could not obtain a permit to add a lanai to her home without a community plan amendment.

Because most landowners look at the applicable zoning when purchasing property, if the community plan were to be an added layer of regulation, the County could anticipate many requests for community plan amendments to make the community plan designation consistent with the zoning. Although this is permitted, it reverses the desired planning process which is to have the community plan guide zoning decisions.

Dain P. Kane, Chair
Committee of the Whole
June 28, 1999
Page 8

Finally, the economic effects could be significant. A California court noted the effects of requiring consistency with the City of Los Angeles' general plan in addition to zoning⁴ as follows:

The trial court had before it evidence that in 1982 the City had approximately 200,000 lots which had zoning inconsistent with the applicable General Plan. If appellants' contentions were correct, no new building permits could be issued until all inconsistently-zoned lots were made to conform to the provisions of the General Plan. This would bring new construction in the City to a grinding halt and cause economic havoc. As one commentator has aptly observed, "Halting construction for the years it takes to adopt a general plan [or amend zoning ordinances] works great hardship. During those years of delay, some projects that were once economically feasible will become impracticable. Even those projects that survive the de facto moratorium will be costly to consumers if developers are able to recoup their increased land holding, construction, and borrowing costs through higher prices. For buyers priced out of the market by these delays, the loss may be irretrievable"

Elysian Heights, 227 Cal. Rptr. at 231 (citation omitted).

Reviewing §2.80A.010.B, MCC, in the context of the provisions discussed in section IV.B. above, we cannot conclude that the County Council intended for the General Plan and community plans to have such effects on land use in Maui County.

E. Administrative Actions Conforming to the General Plan.

Our reading of §2.80A.010.B, MCC, does not render meaningless the requirement that administrative actions conform to the General Plan. Administrative actions must be guided by the General Plan and the applicable community plan when the action requires the exercise of discretion. In drawing a distinction between agency actions which require the exercise of discretion and agency actions which are purely ministerial is entirely consistent with the established role of the General Plan and community plans.

⁴The City of Los Angeles is required to bring its zoning ordinances into conformity with the general plan within a specified time period. 227 Cal. Rptr. at 231.

Dain P. Kane, Chair
Committee of the Whole
June 28, 1999
Page 9

The General Plan and community plans guide decision making. Ministerial actions, such as the issuance of a building permit, do not need to be guided. The Director of Public Works and Waste Management does not exercise discretion when issuing a building permit. Thus, the Director is not making a land use decision at the time a building permit is issued. A building permit is issued in response to a landowner making use of his land in a manner permitted by zoning.

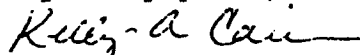
V. Conclusion

Based on the above, we advise that the General Plan and community plans do not regulate land use unless consistency therewith is specifically required by statute or ordinance. Building permits and other ministerial approvals may be issued without reference to the General Plan and community plans. Therefore, building permits and water meters for single family residences at the Palauea property may be issued unless an SMA permit is required.⁵

The reference to administrative actions in §2.80A.010.B, MCC, applies only to actions that require an exercise of discretion. However, because the language of this provision has raised the issue, we also advise that an amendment is warranted to make the intent clear. A proposed amendment is attached as Appendix "A".

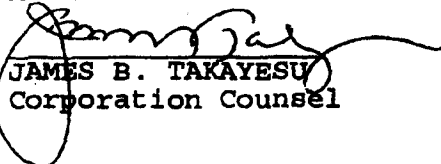
If you have any questions about this matter, please feel free to contact our office at x7740.

Very truly yours,



KELLY A. CAIRNS
Deputy Corporation Counsel

APPROVED:



JAMES B. TAKAYESU
Corporation Counsel

⁵Whether a single family residence at Palauea will be a development as defined by section 205A-22, HRS, will have to be determined by the Planning Department at the time the building permit applications are submitted. See footnote 3, supra.

ORDINANCE NO. _____

BILL NO. _____ (1999)

A BILL FOR AN ORDINANCE AMENDING SECTION 2.80A.010,
MAUI COUNTY CODE, RELATING TO THE GENERAL PLAN

SECTION 1. Section 2.80A.010, Maui County Code, is amended by
amending subsection B to read as follows:

"B. All agencies of the county shall comply with the provisions of the general plan. All community plans, zoning ordinances, subdivision ordinances and discretionary administrative actions by county agencies shall conform to the provisions of the general plan. Preparation of county budgets and capital improvement programs shall also conform to the provisions of the general plan. The community plans authorized in this chapter are established and shall, upon adoption by the council, be part of the general plan of the county, as provided in the revised charter of the county."

SECTION 2. New material is underscored. In printing this bill, the County Clerk need not include the underscoring.

SECTION 3. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:

DRAFT

KELLY A. CAIRNS
Deputy Corporation Counsel
County of Maui

S:\CLERICAL\LDN\ORD\280A.010

APPENDIX "A"

JAMES "KIMO" APANA
Mayor



JAMES B. TAKAYESU
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740 FAX (808) 270-7152

August 19, 1999

The Honorable Dain P. Kane, Chair
Committee of the Whole
Maui County Council
200 South High Street
Wailuku, Maui, HI 96793

RE: Corporation Counsel Opinion No. 99-1: Effect of
Community Plan Designation on Use of Property at Makena
Road/Palauea Beach (COW 27)

Dear Mr. Kane:

This is in response to your memorandum dated July 12, 1999, requesting that this office reconsider the conclusions reached in Corporation Counsel Opinion No. 99-1, dated June 29, 1999. We have carefully considered the arguments in your memorandum, as well as the comments made by Isaac Hall in his letter to you dated July 12, 1999. We nevertheless affirm the conclusion reached in Opinion 99-1 for the reasons stated therein and set forth below.

In your memorandum, you cite to a letter dated November 8, 1993, to then-Chair of the Council Planning Committee Manuel Moniz, Jr. from then-Planning Director Brian Miskae as indicative of the legislative intent of section 2.80A.010.B, Maui County Code ("MCC"). The letter references changing the existing language to "require[] compliance with the general plan rather than simply guidance." You also refer to a ramseyered version of the amended ordinance which shows that the existing language in the ordinance replaced the previous language which referenced the General Plan as a guide.

The provisions of section 2.80A.010.B, MCC, indeed make it clear that the General Plan and community plans are not simply guides that can be ignored, disregarded or minimized by County officials when making decisions and taking actions. Thus, when a capital improvement project is planned by the Office of the Mayor, when the Department of Parks and Recreation considers acquiring land for a park, or when a roadway alignment is being considered by the Department of Public Works and Waste Management, the County

Dain P. Kane, Chair
Committee of the Whole
August 19, 1999
Page 2

officials must follow the general plan and community plans. Opinion No. 99-1 did not intend to minimize this in any way.

Nevertheless, based on the analysis provided in Opinion No. 99-1 and further review of the legislative history, it is clear that section 2.80A.010.B, MCC, does not go so far as to transform the General Plan and community plans from planning documents into land use regulation.¹ If a property owner cannot get a building permit for a use permitted in the zoning district because the use is inconsistent with the community plan, then the community plan regulates land use in the same manner as zoning.

The legislative history of section 2.80A.010.B does not reveal an intent by the County Council to make the General Plan and community plans land use regulation. The language of section 2.80A.010.B, MCC, was proposed in the context of other revisions being made to chapter 2.80, MCC, the predecessor to chapter 2.80A. Originally, there was a proposal to (1) establish time limits for the planning commissions to review changes in zoning, conditional permits and other applications requiring Council approval, and (2) amend chapter 2.80, MCC, to delete the requirement that community plan amendments be processed only at the beginning of the next calendar year. See Committee Report No. 94-72, dated March 18, 1994.

After the planning commissions had reviewed the original bill and the Council Planning Committee had discussed it in committee, Planning Director Brian Miskae submitted the November 8, 1993 letter proposing additional changes to chapter 2.80, MCC. In addition to the proposed amendment to 2.80.010, MCC, he proposed (1) to delete the requirement that a student member serve on the Citizen Advisory Committee ("CAC"), (2) to establish procedures for private property owners to seek community plan amendments, and (3) to change the order of review so the CAC would review the planning director's proposals rather than the CAC presenting its recommendations to the planning director.

The discussions of the Council Planning Committee on these changes were fairly limited. However, at the meeting of January 25, 1994, there was a discussion concerning the effect of the

¹Compare the language of section 2.80A.010, MCC, with that of section 19.04.015, MCC, relating to zoning: "The purpose and intent of this comprehensive zoning article is to regulate the utilization of land in a manner encouraging orderly development in accordance with the land use directives of the Hawaii Revised Statutes, the revised charter of the county, and the general plan and the community plans of the county." (Emphasis added.)

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community plan on zoning. (Minutes of January 25, 1994 Meeting of the Planning Committee, pages 17 - 23. A copy of the portion of the minutes relating to this item is attached as Exhibit "A".)

Councilmember Rick Medina began the discussion by suggesting that language should be added to the ordinance which states that the zoning will take precedence over the community plan, and that future community plan designations of property should match the existing zoning. He expressed concern that if land was designated contrary to the zoning it would create inconsistencies that would interfere with the ability to obtain a Special Management Area ("SMA") permit.

Director Miskae responded that the community plans should not be limited by the existing zoning because planning was dynamic and required flexibility, and that the Charter itself contemplates revisions to the General Plan. He also informed the Council that inconsistent designations would not be a problem because the Planning Department intended to implement the community plans with an immediate comprehensive zoning package.

Several council members then expressed concern over a comprehensive zoning process that would immediately zone everything in accordance with the community plans. Councilmember Alice Lee stated she was concerned about a time line for zoning and also felt that landowners should be given proper notification prior to the Council rezoning their property. Councilmember James "Kimo" Apana echoed Lee's concerns.

The Planning Committee discussion indicates that the council members were cautious about the steps to take when legislating land use regulation. The discussion does not reflect an intent to transform the General Plan and community plans into regulatory documents. If that had been the intent of any of the council members or of Director Miskae, the above-described discussion would have been the appropriate time to emphasize the change.² Rather, the discussion evidences a general understanding that zoning is needed to implement the community plans.

²When Councilmember Medina interpreted Director Miskae's comments to mean he did not agree with the proposition that the zoning ordinances supersede the community plan designation, Director Miskae responded "I didn't say that." Director Miskae could have taken that opportunity to explain that section 2.80A.010.B would make it clear that the community plan designation was on par with the zoning designation, had he so intended.

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The legislative history also reveals that the change reflected in section 2.80A.010.B. was never reviewed by the planning commissions. At the Planning Committee meeting of January 25, 1994, the Deputy Corporation Counsel advising the Committee indicated that the changes proposed by Director Miskae necessitated sending the bill back to the planning commissions for review. The reason given, however, was not related to the new language in section 2.80A.010.B, MCC. The "major" changes proposed by Director Miskae cited were: (1) reversing the order of review of the community plans to begin with the Planning Director, followed by the CACs; (2) reducing the amount of time the CAC has to work on the proposed community plan from 180 days to 60 days; and (3) allowing private landowners to propose revisions to the community plans.

Several days after the Planning Committee meeting, by memorandum dated January 27, 1994, the Department of the Corporation Counsel withdrew the previous advice given and advised that the bill did not have to go back to the planning commissions.

Section 8-8.4 of the Charter of the County of Maui mandates that the planning commissions review the General Plan and any revisions made thereto, as well as review proposed land use ordinances and amendments. Alterations made to a proposed ordinance after the planning commissions' review which are so substantial as to amount to an entirely new proposal will be invalidated. Carlsmith, Carlsmith, Wichman and Case v. CPB Properties, Inc., 64 Haw. 584, 589-590, (1982). If the intent of section 2.80A.010.B, MCC, was to turn the General Plan and community plans into land use regulation, it was a fundamental change which should have been reviewed by the planning commissions. However, as indicated above, it does not appear that anyone contemplated that to be the meaning of section 2.80A.010.B, MCC. Our reading of this section in Opinion No. 99-1 is thus not only supported by the legislative history, but upholds the validity of the ordinance.

Finally, we reiterate that section 2.80A.010.B, MCC, must be read in the context of and in a manner that is consistent with the enabling legislation and the language within the community plans. Likewise, the language on page 43 of the Kihei-Makena Community Plan, cited by Mr. Hall (which states that "[a]ll zoning applications and/or proposed land uses and developments shall be consistent with the Land Use Map and Objectives and Policies of the Kihei-Makena Community Plan") must be read in its context and in accord with the purpose and intent specifically stated within the

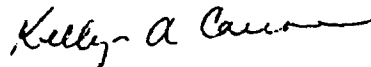
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community plan. This language does not itself make the plan regulatory.³

The legislative history of Chapter 2.80A, MCC, supports the conclusions reached in Opinion No. 99-1. Nevertheless, the response to the opinion has shown this to be a controversial issue and reinforces the need for the County Council to clarify the policy, or establish a new policy if it so chooses, once and for all. Our office will be happy to assist the Council to enact appropriate legislation.

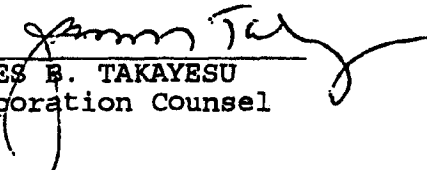
If you have any questions concerning this matter, please feel free to contact our office at x7740.

Very truly yours,



KELLY A. CAIRNS
Deputy Corporation Counsel

APPROVED:



JAMES B. TAKAYESU
Corporation Counsel

³Mr. Hall points out that only four other community plans have this language. Should these community plans be deemed regulatory while the others are not? Obviously, this language cannot be given the significance Mr. Hall suggests.

MINUTES

PLANNING COMMITTEE

Council Chambers

January 25, 1994

CONVENE: 9:05 a.m.

PRESENT: Councilmember Manuel Moniz, Jr., Chair
Councilmember James H. Apana, Jr., Member
Councilmember B. Lynn Britton, Member (ar. 10:03)
Councilmember Patrick S. Kawano, Member (lv. 10:45)
Councilmember Alice L. Lee, Member (ar. 9:07)
Councilmember Rick Medina, Member (ar. 9:09; lv. 11:03)
Councilmember Thomas P. Morrow, Member (ar. 9:08)
Councilmember Dennis Y. Nakamura, Member

EXCUSED: Councilmember Goro Hokama, Vice-Chair

STAFF: Myles H. Inokuma, Legislative Analyst
Tammy M. Diaz, Committee Secretary

ADMIN.: Charles Jencks, Deputy Director of Public Works and Waste Management
Brian Miskae, Planning Director
Gary Zakian, Deputy Corporation Counsel

OTHERS: Item 21: Anthony Ranken
Item 24: Michael E. Baker, Na Ala Hele Advisory Council
Joe Bertram, III, Bikeways Maui
Donald H. Brandes, Maui Greenways
Steven J. Kikuchi, Maui Greenways
Item 28: Pastor Edward Asato, Grace Bible Church-Maui
Item 34: Paul L. Horikawa, Esq.
Pablo Baysa
Debra A. Hipolito
Marvin Hipolito
Bruce Lee, Engineer
Item 35: Edward B. Santos, President, E&B Plumbing, Inc.

PRESS: Brian Perry, The Maui News

EXHIBIT "A"

conditional basis and they kind of restrict it on revocable permits, and I think that was the, more or less the guidelines that was given placed on revocable permits instead of long-term lease.

COUNCILMEMBER MORROW: Thank you, Mr. Chairman.

COUNCILMEMBER APANA: Move to approve.

COUNCILMEMBER KAWANO: Second.

CHAIR MONIZ: Discussion? If not, all those in favor. Contrary. Carried.

VOTE:	AYES:	COUNCILMEMBERS APANA, KAWANO, LEE, MEDINA, MORROW, NAKAMURA, AND CHAIR MONIZ
	NOES:	NONE
	EXC.:	COUNCILMEMBER BRITTON AND VICE-CHAIR HOKAMA

MOTION CARRIED

ACTION: FIRST READING AND FILE

ITEM 21: PROPOSED BILL PERTAINING TO REVISIONS AND AMENDMENTS TO COMMUNITY PLANS AND APPLICATIONS WHICH REQUIRE A PUBLIC HEARING (Resolution No. 93-47, C.C. 93-383, Bill No. 68 (1993), and Miscellaneous Communication dated 10/01/93)

Item 21, relating to a bill that establishes deadlines for review of land use matters. Myles.

MR. INOKUMA: Thank you, Mr. Chair. The intent of this bill is to have change in zoning and conditional zoning applications reviewed by the planning commissions within 90 days and community plan amendments, district boundary amendments, and project districts within 120 days.

Section 2.80.060 presently requires the Planning Director to hold community plan amendments for a year before processing them. The intent was to review all community plan amendments at the same time to allow for a comprehensive look at all proposed changes in a particular community plan. The provisions, however, have hampered nonprofit organizations in receiving a community plan amendment, especially when their funding is for a limited time.

The Planning Director has submitted a revised bill which incorporates the process to allow a property owner to apply for a community plan amendment. According to the

Planning Department, under our current laws, only the County Council and the Planning Director may initiate community plan amendments. Under the Planning Department's proposed bill, a property owner would be allowed to apply for a community plan amendment using a procedure similar to the change in zoning application.

The Corporation Counsel has revised the Planning Director's bill into a bill which is contained in the binders.

CHAIR MONIZ: Before, you know, the Chair goes through any questions from Public Works, Planning, and Corporate Counsel, I'd like to say that the efforts of the Planning Department and the Planning Committee came up with a better working condition, and I'd just like to say that I appreciate the fact that the contributions of the Planning Department has made the bill what we consider better. Brian, thank you very much. Any questions from Public Works?

MR. JENCKS: No comment.

CHAIR MONIZ: Planning?

MR. MISKAE: Not at this time, Mr. Chairman.

CHAIR MONIZ: Okay, Corp. Counsel?

MR. ZAKIAN: Just a note, Mr. Chair. In the cover letter, dated January 18, 1994, I did attach a copy of a stricken-out and redlined bill so that the Committee can see pretty easily the changes that were made to the Planning Department's draft that you submitted for our approval. Other than that, no comments.

CHAIR MONIZ: Anyone to testify on this matter?

MR. INOKUMA: Mr. Chairman, we have not received any requests to testify.

MR. RANKEN: Yeah, I'd like to testify.

CHAIR MONIZ: Okay, go ahead. You know this is not within the policy, but we'll give you the opportunity.

MR. RANKEN: Well, but I was told that the hearing would be at 9:30, but thank you.

CHAIR MONIZ: Okay.

MR. RANKEN: Mr. Chairman, Members of the Council, I would like to reinforce Chairman Moniz's comments that the Planning Department, especially, and also the Corporation

Counsel have done a very good job making some needed changes with this bill. What I really see has happened here is they've taken the experience of the community plan provision process, which I was an observer of the work of the CACs, and identify the problems that occurred there and really use this opportunity to propose some modifications of that procedures. And I would like to, on behalf of the organization of Maui Tomorrow, which discussed this at its last board meeting, I would like to say that we support these changes that have been made to the way that the community, citizens advisory committees function.

I do want to still reiterate my opposition to certain sections of this bill as stated in my written testimony, which I submitted to this Committee, and what I really see . . . the part that I object to specifically is the idea of doing away completely with the once a year review of proposed amendments to the community plan. What I essentially think this bill is doing at the same time is it makes some very good changes to the law. What I think it's also doing is because of this concern about nonprofit groups not getting their community plan amendments fast enough, you're throwing out the baby with the bath water here. We do want to provide a technique, a method for prompt approval of community plan amendments where it's needed for nonprofit groups where there's some great public benefit involved that we don't want to wait a year. But in general, I think that the current system, which was only enacted a couple of years ago, is a good one and that it does bring up your garden variety changes to the community plan all at the same time so that the Council can look at the overall impact of those changes, can look at how they relate to each other, and, most importantly in my view, so that the public has one time when they know it's time to review community plan changes, that this is going to come up, they are informed of it, and members of the community who are trying in general to keep tabs on the status of the community plan and the planning process, those members of the community can know, okay, now's the time of year when all these changes, proposed changes are published. Now is the time when we can take a look at these. It will also help nonprofit organizations, such as mine, become involved in that process and get constructive input to the Council. If you undue what was done a couple of years ago and say that these amendments to the community plans can just be taken up whenever it suits a developer or a landowner, then you are going back on this beneficial change and you're making it harder for the public to track the process. You're making it harder for yourselves to look at the overall impact or cumulative impact.

So what I'd like to suggest . . . I know this bill's been kicking around for a while and some good changes have been made and you probably all would like to act on this, but what I'd like to suggest is that keep some of the good changes that have been made, but send it back once more to the Corporation Counsel and ask them to draft something along the lines that the Honolulu uses for these community plan changes because they do provide for a once a year review of community plan amendments and they also provide for exceptions. I'm not saying . . .

MR. INOKUMA: Three minutes.

MR. RANKEN: Okay. Okay, I'm not saying the exact exceptions would apply on Maui. You might want to take a fresh look at that, but the point is to take care of emergency situations, but not throw out the whole idea of a once a year review. Thank you.

CHAIR MONIZ: Okay. Before we ask any questions of the directors here--Tony, you want to stay there? You know, we reviewed everything and, as stated in here, the provisions has hampered nonprofit organizations in receiving a community plan amendment especially when their funding is for a limited time. I don't know if you're aware of it, but last year there was only two requests. Now, keeping it for one year does hurt the small people. So I don't think what we're doing here will hurt anyone, and if in the future conditions have changed, this body will review and make changes accordingly. But at this point in time, I don't think we want to hurt the small people again, and, you know, nonprofit organizations, such as this thing, has been hurting them. So, like I said, if the changes are necessary in the future, we will review it. But at this point in time, I don't think what we're doing hurts anyone. I think it benefits the people of Maui. Any questions from Public Works?

MR. JENCKS: No comment.

CHAIR MONIZ: Planning?

MR. MISKAE: I have no questions, Mr. Chairman.

CHAIR MONIZ: Corp. Counsel?

MR. ZAKIAN: No.

CHAIR MONIZ: Members of the Council? Alice.

COUNCILMEMBER LEE: Questions for some of the department people, if he's finished. Okay. I just wanted to ask again did you say that there have been only two instances where there have been community plan amendment applications last year?

CHAIR MONIZ: We got that. Myles investigated that.

MR. INOKUMA: Yes, just two and not in the same community plan region.

COUNCILMEMBER LEE: Okay. Which . . . who were they? Do you know?

MR. INOKUMA: One was Armitage out in Makawao and the one, another one was out in Hana.

COUNCILMEMBER LEE: Okay. Then, my other question is so basically these were two individuals? They're not necessarily big developers? I believe Brian mentioned that the process for application will pattern, be patterned like the zoning application process, right? Didn't you say that?

MR. MISKAE: Very similar, Mr. Chairman.

COUNCILMEMBER LEE: But is it in the bill that it's going to follow that same procedure?

MR. MISKAE: The procedure is set out in the bill itself.

COUNCILMEMBER LEE: It is.

MR. MISKAE: Yes.

COUNCILMEMBER LEE: There must be references to sections because I don't see it spelled out.

MR. MISKAE: On page 5. The State, or any individual or legally cognizable entity—that's a good one, Gary—may file an application for a community plan revision. All applications shall include the following, and it goes 1 through 9. Documents identifying the owner, owner's name and address, agent's name, tax map key location . . .

CHAIR MONIZ: Brian, just a moment. Alice, you want to come take a look at what page?

MR. MISKAE: It's the last thing under no. 21. It's a bill that Gary prepared and signed. The very last document under Agenda Item 21.

COUNCILMEMBER LEE: The reason why I ask that is because I wanted to make sure that only the owner can apply for a community plan amendment rather than, you know, someone else who doesn't have an interest in the property.

MR. MISKAE: The first item is a document which identifies the owner of the subject parcel of land and written authorization for the application by the owner. So basically the owner would have to authorize the application if it wasn't the owner making the application.

COUNCILMEMBER LEE: Okay. I just wanted to be clear and sure about that. Thank you.

MR. MISKAE: Gary has characterized . . . it has a legally cognizable entity, which could be a corporation, it could be a hui, it could be a partnership, it could be anyone, but it has to have the owner's authorization . . . whoever it is.

COUNCILMEMBER LEE: All right. Thank you.

CHAIR MONIZ: Any more questions from Members of the Council? Mr. Medina.

COUNCILMEMBER MEDINA: Mr. Chairman, I was just wondering. I think first off, I think we should view amendments to the community plans whenever they come in. Because if you set aside a period to review those things, if the person gets in just after the deadline date, they have to wait a year possibly to get this thing reviewed. So I would think any limitation is not going to hurt the community because if it's a controversial amendment, I'm sure people are going to know about it.

One of the things I was concerned about is the difference between a zoning ordinance and a community plan designation. I've heard that often times the CACs have decided to designate land which is contrary to what the zoning says, in which case if the plan is adopted that way, then the property owner, if they happen to be in an SMA area, cannot get an SMA permit because the land use designation is different from the zoning. So should some mention be made in the development of a community plan that a zoning ordinance take precedence over the community plan designation, and that if a zoning ordinance does exist, that the designation of that property will be the same as the zoning ordinance?

MR. MISKAE: Mr. Chairman, I would like to address that, first of all, from a planning perspective, and then maybe Mr. Zakian can address it from a legal perspective. From a planning perspective, it would be our intentions to implement the community plans as adopted by this Council by applying zoning consistent with the designations that you decide you want on the community plans so there won't be the problem of inconsistency.

COUNCILMEMBER MEDINA: I'm talking about existing zoning ordinance.

MR. MISKAE: Well, . . .

COUNCILMEMBER MEDINA: For example, say . . .

MR. MISKAE: . . . as I say, . . .

COUNCILMEMBER MEDINA: Yeah.

MR. MISKAE: . . . as this Committee proceeds through the process of adopting the revisions to the community plans, which many of them have been transmitted to the Council at this time, once you've adopted the community plans, my Department is geared up to present to you almost immediately a comprehensive zoning process which brings the zoning consistent with the community plan designations that you will adopt by ordinance. So that the problem that exists now with respect to inconsistencies will not occur after we finish this process. So I'm not sure that an interim measure saying that

zoning prevails over community plans would be really necessary because the process that you and my Department will undertake should erase that or should correct that problem.

COUNCILMEMBER MEDINA: Yeah. See, once a zoning ordinance is adopted, then the County would stand behind that land use decision. In this case, if a person gets a zoning ordinance, it doesn't mean that several years down the road they are guaranteed that they can use that particular land for that zoning that was given. Because if the whim of the public at that time changes, then the person who bought that land may be in jeopardy because they will not be able to use the land as it was zoned and as it was purchased. Somewhere along the line I think we have . . . when we make a decision to zone property, that that's the way it has to be.

MR. MISKAE: Well . . .

COUNCILMEMBER MEDINA: That one . . . in one period the community agreed that the zoning should be given. Several years down the road new people will come in and they change the designation or the land use zoning ordinance. They want to change it to something else. So at that time I think the integrity of the County is jeopardized or compromised if they yield to the whim of the public at that time.

MR. MISKAE: Well, Mr. Chairman, if I could respond. The County Charter requires that at least every ten years the . . .

COUNCILMEMBER MEDINA: Pardon me.

MR. MISKAE: The County Charter requires that at least every ten years the Planning Director recommend revisions to the General Plan. The reason for this is because conditions change now.

COUNCILMEMBER MEDINA: Yeah. Okay, now that's why . . .

MR. MISKAE: Those revisions . . .

COUNCILMEMBER MEDINA: See, the General Plan . . .

MR. MISKAE: But those revisions have to be adopted by this Council.

COUNCILMEMBER MEDINA: Yeah.

MR. MISKAE: So this Council really guides the land uses, not the public.

COUNCILMEMBER MEDINA: So what you're saying . . . yeah, Brian, what you're saying is that you don't agree that the zoning ordinance supersedes the land use, the community plan designation.

MR. MISKAE: I didn't say that. What I said was is that the community plan and the zoning should be consistent with one another, and that's up to this Council to decide.

COUNCILMEMBER MEDINA: Yeah. So we should know what properties have been zoned so that when the plan comes to us and if the designation is different from the existing zoning, we should know about that because it should be . . . we should consider that when we finally designate that plot of land for whatever designation we think it should be designated. But because I feel that the zoning ordinance is the thing that people buy property on and they pay taxes on, that you take away this use and later on after they paid the taxes and paid the price for the zoning, you've created a liability for us if we want to change the designation. So why should we jeopardize ourselves with an added liability down the road when we make a zoning change? Once we adopt that zoning change, that should be it.

MR. MISKAE: That's strictly up to the Council as to how they want to decide. That could be one of the factors in your community plan revision . . .

COUNCILMEMBER MEDINA: So what you're saying is that you don't think that what I'm saying is correct?

MR. MISKAE: I guess what I'm saying is is that planning is dynamic, things do change, conditions do change, and . . .

COUNCILMEMBER MEDINA: But I think . . .

MR. MISKAE: . . . this Council has to remain flexible in that respect.

COUNCILMEMBER MEDINA: Yeah. Yeah. I think when we talk about vested right in the property, I think that's what gives that person the right to use the property maybe for what it was zoned for, see. Now, I think the Supreme Court has ruled that the zoning ordinance supersedes the County or the community plan. Now, if that's so, then why shouldn't that be articulated within this ordinance?

MR. MISKAE: I don't know whether the Supreme Court has ruled at all in that respect.

COUNCILMEMBER MEDINA: Yeah, I think there was a case in . . . I don't know, maybe Gary knows, that the Supreme Court ruled that the zoning ordinance superseded the community plan and, therefore, the owner could proceed to build whatever they wanted to build in accordance with that zone. But there must be someplace where the County is held accountable for what it does, and . . .

CHAIR MONIZ: Rick.

COUNCILMEMBER MEDINA: . . . I think the zoning ordinance is it.

CHAIR MONIZ: Yeah. If I may, and correct me if I'm wrong, both Brian and Corp. Counsel, is shouldn't this be addressed at the community plans instead of this bill?

MR. MISKAE: Well, I think what Councilmember Medina's suggesting is that once this Council passes a zoning ordinance, it's etched in concrete and that the zoning should never, ever, ever change. And I guess what I'm saying is that because the Charter talks about revisions to the General Plan, it's recognized that planning does change, conditions do change, and there has to be some flexibility. Certainly if in fact an individual can prove a vested, you know, value or vested right in a particular piece of property, maybe there could be some case made in that respect. But . . .

COUNCILMEMBER MEDINA: Yeah.

MR. MISKAE: . . . you have to remain flexible in the land use planning.

COUNCILMEMBER MEDINA: Yeah. I think the flexibility of it is is that supposing this land that GATRI wants to develop is zoned park and the people wanted to change it to business, the zoning would supersede the community plan and the zoning would remain the superior document that designates the use of that land. So nobody would change it.

MR. MISKAE: Well, if . . .

COUNCILMEMBER MEDINA: See, if it was the whim of the public at the time, I think, to use . . .

MR. MISKAE: Let me give you an example, Councilmember Medina.

COUNCILMEMBER MEDINA: Yeah.

MR. MISKAE: If—I'm not going to say if—when the Council considers the revisions to the community plans that are going to be coming to you very shortly, you're going to designate lands to certain land uses - single family, multi-family. Immediately following that, we will provide to you a comprehensive zoning package which essentially then brings the zoning in consistency with the community plan. So where it says SF, we will provide to you zoning maps which provides for R-1, R-2, R-3. In other words, we're going to lock in those designations that you're going to adopt in the revisions to the community plans. If what you're saying is that the zoning then prevails, there would be no point in ever looking at the community plans again.

COUNCILMEMBER MEDINA: No, no, no. Not every parcel of land has zoning.

MR. MISKAE: Well, they will have when we're through with this process.

COUNCILMEMBER MEDINA: No, I don't agree with that. I think we should zone each parcel as it comes into the Council. But we should not zone every parcel . . .

MR. MISKAE: You cannot do that.

COUNCILMEMBER MEDINA: . . . as you adopt the community plan. If you adopt the zoning at the same time you adopt the community plan, you can get rid of the planning commission and the Council, which might not be a bad idea, but you have to give the Council and the planning commission and the Planning Department an opportunity to agree or disagree on the land use designation in the community plan. So each individual owner would come in at the proper time maybe when they want to and ask for a zoning change or not. But if you're saying that once we adopt the community plan we adopt the zoning, I disagree with that.

MR. MISKAE: We will be presenting to you a comprehensive zoning package for your consideration which will bring land use into consistency with the adopted community plans.

COUNCILMEMBER MEDINA: I don't understand what you mean by that comprehensive zoning. Well, what . . . Try to simplify that for me. What do you mean by that, huh?

CHAIR MONIZ: Can you simplify it for him? I . . .

COUNCILMEMBER MEDINA: You understand what he said, Mr. Chairman?

CHAIR MONIZ: I think so. But you want to get rid of the Council and the Planning Department. So I don't think . . . maybe we don't need to define it for you.

COUNCILMEMBER MEDINA: No, no, no, no. I'm saying that if that's what he wants to do, you might as well get rid of us and the Planning Committee, but . . .

CHAIR MONIZ: Can you put it in more simple terms, Brian? Is it . . .

MR. MISKAE: What we intend to do is to submit to you a comprehensive zoning package which zones land for the use in the near term to a specific land use designation - R-1, R-2, B-2, B-1, L, you know, light industrial, heavy industrial. Additional lands that are contained within the community plans which will be for medium term use will utilize the urban reserve designation. Now, if someone wants to change land from urban reserve to R-1, R-2, whatever, then they would have to come to this Council. So it's a

two-tiered proposition and we will be introducing a third-tier as well, which will be future growth reserve, which we'll learn about as we come through the community plan process. But it's part of the growth management strategy. So this Council obviously will have full control over what happens with land use and, therefore, you will have a much better opportunity to adjust your capital improvement programs as well, knowing what to expect as time goes on.

COUNCILMEMBER MEDINA: One more question. If a property is designated single family, what your package will do is designate it R-1, R-2, or R-3 instead?

MR. MISKAE: Or maybe urban reserve. And not designate, zone.

COUNCILMEMBER MEDINA: Now, you're going to make that decision that it's going to be urban reserve or the specific land, zoning changes?

MR. MISKAE: You will make that decision. I will only provide a recommendation.

COUNCILMEMBER MEDINA: Well . . . even before the owner comes in to ask us for R-1, R-2, R-3?

MR. MISKAE: That's correct.

COUNCILMEMBER MEDINA: I don't agree with that.

CHAIR MONIZ: Lynn. Alice.

COUNCILMEMBER LEE: Okay. I'll be very interested to see your proposal because there are two areas that I'm very concerned about with the comprehensive zoning plan, and that would be a timeline and the second part of that would be notification. I agree with you that land use should be flexible and that the zoning should not necessarily be considered etched in concrete because, as you said, conditions do change. But I'm really concerned about a timeline. I'm concerned that we give zoning . . . like in the recent past where we gave zoning in the '60s, a lot of hotel zoning, and everybody decides to build at the same time in the '80s, creating a huge impact on our infrastructure. I'm very concerned about that. I don't think people should be given zoning indefinitely. So timeline is a very important aspect to consider.

And, secondly, comprehensive zoning to me raises another issue of notification. For instance, what if I'm a farmer and I have my land in agriculture, and all of a sudden I find part of it in business and, you know, residential - R-1, R-2, R-3, whatever it is. Then there may be some serious tax consequences to myself, and I'm not really sure how you're going to handle that. But I don't believe the Council, the planning

commission, or anybody should be dictating to the individual landowners how to use their land until they're ready, you know, to propose something to the Council. So those are my two areas of concern, and I hope, you know, when you do present your proposal those areas are taken into consideration.

CHAIR MONIZ: I think . . .

MR. MISKAE: But, Mr. Chairman, with all due respect, I didn't say it was going to be easy, but . . .

CHAIR MONIZ: I think, Alice, in answer to that, I think when it comes to us we have the right to change, and I agree with you. I think some time restrictions and other information, you know, to the public should be available to them. I think when it's submitted, we have that right to make changes necessarily. So we've got that opportunity and we've got a recourse. Any more questions from—Kimo.

COUNCILMEMBER APANA: I just wanted to say same like Alice. I was worried about upgrading people's property without them knowing and they have to pay taxes, and, secondly, downgrading people's property after they invested money in it. I cannot see how we can downgrade somebody's property without them having a say because they've been paying property taxes at that zoning for several years. We might be in liability, like Rick said.

MR. MISKAE: I think that the examples of downzoning will be very, very minimal in this respect. Very minimal. I think, for the most part, the comprehensive zoning that we would recommend would simply recognize existing uses, and the chances of having a farmer, for example, end up with business or industrial zoning, I don't think would be the case unless he actually wanted it. Otherwise, he would likely end up with an urban reserve designation which wouldn't, shouldn't affect his taxes at all.

COUNCILMEMBER APANA: One last question. After we finish this community update plans and everything and say we designate this area single family, that means we're giving them the community plan and zoning at the same time?

MR. MISKAE: No.

COUNCILMEMBER APANA: So can they just build automatic?

MR. MISKAE: No, it would not be simultaneously. Once you've adopted the community plans, we would present to you a comprehensive zoning package following that.

COUNCILMEMBER APANA: Okay. Say we adopt that one, we adopt both of them?

MR. MISKAE: If you adopted, for example, the community plan, SF, single family, and we presented to you a comprehensive zoning package that zoned the land to R-1, the answer is yes they could come in and apply for a subdivision through the Department of Public Works.

COUNCILMEMBER APANA: Without coming through the Council?

MR. MISKAE: That's correct.

COUNCILMEMBER APANA: And what if we gave away ten of these zones in Kahului and they all ten decide to build at the same time?

MR. MISKAE: Well, that's what the managed and directed growth strategy is all about. Probably you wouldn't give away ten, you might give away two and the other eight would be urban reserve. So they'd have to come back to this Council to change it from urban reserve to R-1.

COUNCILMEMBER APANA: But wouldn't it be easier we give it to the project, the affordable projects that are already on line? What if we give away out two and they don't move on it?

MR. MISKAE: Well, this is another subject that we need to discuss, and that's a use it or lose it proposition, but these are all things that will be part of our discussion with respect to this comprehensive zoning package. As I said to Councilmember Lee, it's not going to be easy, but it's something we have to address because we can't end up with a 30-year zoning or a 30-year old zoning. It's just caused us too much trouble, and we've got interim district over a good portion of the County too that we can't continue to use either.

COUNCILMEMBER APANA: Okay. Mr. Chairman, move to approve.

CHAIR MONIZ: Uh, wait. We . . . was it--somebody wanted some legal opinion? Did anybody . . .

COUNCILMEMBER KAWANO: Second.

CHAIR MONIZ: Anyway . . .

MR. MISKAE: I think Councilmember Medina wanted to talk about vesting, and that's why I wanted to defer that to Gary.

COUNCILMEMBER MEDINA: Yeah. That would be the only consideration I would have in this bill is whether or not there should be some mention of the zoning ordinance in the bill, a consideration for that zoning ordinance. Because I don't agree with your

comprehensive plan to designate properties R-1, R-2, R-3, and further to designate properties urban reserve. I think the Planning Department is getting a bit to godlike in their Administration of land uses here when you start developing things like that. And I think that's the danger of land use planning is that sometimes we get too almighty and maybe we make mistakes that way. Granted, planning should be flexible, but also planning should contain some integrity within it so that people who do invest and have a vested interest in the community do get what they think they bought. This is the only way I think you can build understanding and confidence in the community. But if you're going to change things by whim, and according to where the wind is blowing, you going run into difficulties down the road. So I say with caution, I say now you got to be cautious about this whole process, and what we did in the past maybe got overdeveloped in a two-year period. But in the last 30 years, I think the comprehensive planning that this County did was excellent, but you cannot control the economy. Brian, if you tell me you can control the economy, I think you know more than a hell of a lot of people in this State because you're going to start doing that in your zoning, by in the reflection of your zoning, you think you can control the economy. If you can, though . . . gees, if you can come up with a plan, I give you credit. But . . .

MR. MISKAE: I hope we can come up with a plan that's acceptable to this Council.

COUNCILMEMBER MEDINA: Well, I'll tell you, us guys . . . many of us not going know.

COUNCILMEMBER APANA: Move for the second time.

COUNCILMEMBER KAWANO: Second. *-(CHANGE TAPE)-*

CHAIR MONIZ: . . . recommends that the revised bill pass first reading. That's the motion.

COUNCILMEMBER LEE: I believe the planning commission had a public hearing on it, didn't they?

MR. MISKAE: Well, the planning commission had a public hearing on a very small part of this exercise. There's been massive changes to this, but if the Council wishes to accept this as just a revised bill, I guess it's up to Corp. Counsel to advise us to whether or not it has to go back through the planning commissions again. I'm not sure what the Chair's direction is on this.

CHAIR MONIZ: I'm recommending that the revised bill be passed on first reading. Corp. Counsel.

MR. ZAKIAN: Mr. Chair, I believe the request for the planning commission initially to review was simply to review the change requiring 90-day and 120-day period for transmittal. The changes that have been proposed in this bill basically is a repeal of Chapter 2.80, as it presently exists, adoption of a new Chapter 2.80A. There is a change in the way

the community advisory . . . I'm sorry, the citizen advisory committee reviews the revised community plans. Presently, as it exists, uh, the citizen advisory committee gives its input, the Planning Department kinds of facilitates that whole process. The Planning Department then receives that and the Director prepares its report. The Director can take that out for public hearing if he wants to or an informational session. Then the commission holds a public hearing and all three recommendations would be forwarded, I believe, to the Council.

This revision is going to have the Planning Director prepare proposed revisions, then it would go to the CAC. So they have something concrete to work with, as opposed to the way it presently exists where the CAC makes its proposals, then it goes to the Director. In the revised bill, the . . . once the CAC makes its recommendations, then the Director's proposal as well as the CAC's proposal goes to the planning commission. They will then come up with whatever recommendation they would have and then all of that would go to the Council.

One of the key differences, I believe, is the amount of time the CAC has to work with the Planning Department's proposed revision. Right now, I believe, it's 180 days in which they get together and discuss and make a report. In the proposed revision, the citizen advisory committee would only have 60 days within which to make its review. However, there is a provision in this bill that the Planning Department's proposed revisions would have to be made available to the public for a period of time before the CACs even get started so that there's adequate opportunity for public review, public thought, things of that nature. So that's one fairly major change that's in here.

The other change that is in this revised bill is simply explicit provisions for entities other than the County Planning Department or County Council to make revisions. So those are the two biggest changes that I would say exist between the presently existing Chapter 2.80 and this bill for a new Chapter 2.80A.

CHAIR MONIZ: So what is your recommendation? After all of that, what are you saying? We can approve it here on first reading as revised or do we have to go back to Planning?

MR. ZAKIAN: I understand the Chair's position is that you would like to have it go out for approval on first reading. Given the fact that there are a number of other changes, I might suggest that it might be prudent to get the planning commissions' input on this.

CHAIR MONIZ: Recess.

RECESS: 9:55 a.m.

RECONVENE: 10:03 a.m.

Okay, we're going to give Gary a few minutes to write up a motion for us as to what should be done, properly done. Uh . . .

COUNCILMEMBER APANA: I withdraw my motion.

CHAIR MONIZ: Okay.

COUNCILMEMBER KAWANO: I withdraw. Mr. Chairman, I just want to recognize we have another Councilwoman here today, this morning.

COUNCILMEMBER BRITTON: Thank you.

CHAIR MONIZ: Welcome back, Lynn. You can talk?

COUNCILMEMBER BRITTON: Somewhat.

CHAIR MONIZ: Okay. What we'd like to do—are you ready? Okay. Okay, Gary.

MR. ZAKIAN: Mr. Chair and Committee Members, um, I apologize. I did not anticipate this question coming up sooner. However, given the fact that what went out to the planning commissions were simply recommendations for a rather simple amendment to Chapter 2.80 and 19.510 relating to the time within which reports are to be transmitted from the commission to the Council, the present structure of the bill is an entire repeal of Chapter 2.80 and adoption of a new Chapter 2.80A. The item with regard to Chapter 19.510 doesn't, hasn't changed. Uh, but based on the changes that have been made here, it would be our Office's recommendation that this be resubmitted to the respective planning commissions, get the public input from Molokai, Lanai, Maui, and then have it sent back to this . . . to this, to the Council and to the Committee for their consideration. So that would be our Office's recommendation.

CHAIR MONIZ: Okay.

COUNCILMEMBER LEE: So move.

CHAIR MONIZ: It's been moved.

COUNCILMEMBER KAWANO: Second.

CHAIR MONIZ: Seconded. No discussion?

COUNCILMEMBER MEDINA: Mr. Chairman.

CHAIR MONIZ: Yes, Mr. Medina.

COUNCILMEMBER MEDINA: I wanted to question the number of members that serve on this committee. As I read this thing—I don't know if I'm reading it correctly—but it says the Council will appoint 9 and the Mayor will appoint 4, but the CAC is supposed to be comprised of 14 members. Who is the 14th member?

MR. ZAKIAN: The 14th member, Mr. Medina, was a student member.

COUNCILMEMBER MEDINA: Yeah. Where is that? Is that located in the . . .

MR. ZAKIAN: No, that's been deleted. The reason that was deleted is the legislative history with regard to the student member . . .

COUNCILMEMBER MEDINA: Well, anyway, Gary, where is it located that we have 14 then? Under sub-paragraph (b) 2.80A.040 . . .

MR. ZAKIAN: Oh, I'm sorry. That is a typo.

COUNCILMEMBER MEDINA: Okay. So we have only 13 then?

MR. ZAKIAN: It should be 13. Yes, I stand corrected.

COUNCILMEMBER MEDINA: I see. So the Council wants to stand behind the fact that the Mayor still can appoint 4 people and the Council appoints 9, but we give the Administration the power to appoint 4? We still want that? That's a question I have. The other thing is that the first meeting of the CAC should begin, not at the whim of the Planning Director, but it should begin, I think, when the CAC members are appointed. When they are officially appointed, then shortly thereafter the Planning Director must convene the CAC for their first meeting because the 60 days does not run until the first meeting takes place. But you don't convene them until you're ready, so you can convene them at whatever time you feel is right for you. So I think that should be more explicit, Mr. Chairman, that the Planning Director must convene the first meeting of the CAC within a certain number of days after they have been appointed. The question of when these people became seated and when they began did not give us the proper time as to how many days they would have to work thereafter. So when does the 60 days begin after the first meeting, but the first meeting should begin at a certain time, then I think that would alleviate some of the problems that we had. Now, in this process where you're going to have the CAC develop their, the revisions within 60 days, is there anything here that says how many days the planning commission has to review the amendments of the CAC?

MR. INOKUMA: Mr. Medina, we have another bill coming up after this which addresses this.

CHAIR MONIZ: We have another bill coming up. That's your next bill on the agenda.

COUNCILMEMBER MEDINA: This is different? I see. Okay. But anyway, Mr. Chairman, I'm glad the motion was changed that they would review this thing so that we have more time to understand what we're adopting here as to whether or not we're giving the Administration the upper hand and the Council losing control over this whole process.

CHAIR MONIZ: Tom.

COUNCILMEMBER MORROW: I just have one comment. I'm also very glad they're going to review it. By having sat through a lot of the CAC meetings in their different districts, I have a serious concern of dropping 180 days to 60 days because none of the CACs really had a lot of time. They were all rushed at the end to finish. Molokai is in an extension. So to go from 180 to 60, I think, might be a little drastic in the time allowed for the community for input, and we might want to look at that further. Like I say, having sat in the meetings and the frustration of the people trying to do it, I agree with the new process, but maybe we can give the community a little bit more time in their review process. So, thank you.

CHAIR MONIZ: Any more discussion? Alice.

COUNCILMEMBER LEE: I just want to say that I think this proposed bill has a lot of possibilities, good possibilities and opportunities for the CACs because they'll probably need less time if given a plan to work with from the beginning. To try and come up with a plan from scratch, I can see them needing 180 days and longer, but if they have a plan to begin with, it will make their work a lot easier and a lot more focused. Thank you.

CHAIR MONIZ: I agree. Any more discussion?

COUNCILMEMBER KAWANO: Mr. Chairman.

CHAIR MONIZ: Mr. Kawano.

COUNCILMEMBER KAWANO: I would have to agree, and although Alice is stealing a lot of my punch lines today, I agree because I even approached the Planning Director as far as that goes, too. Even when we review some of this thing, you know, I feel the same way that the . . . I believe the planning commission would speed up their system if they knew or they had a plan as far as that goes. Because I believe the planning knows what comes up in the different district and what they were looking for. I think that's the kind of information that the CAC committee really missed, and starting from scratch, I think they need more time if you're just going to start from scratch. Thank you.

CHAIR MONIZ: Thank you.

COUNCILMEMBER MORROW: Mr. Chairman.

CHAIR MONIZ: Yes, Mr. Morrow.

COUNCILMEMBER MORROW: One other comment. I agree with Alice and Pat on that. There's no question it would be less time with a plan in front of them, but, you know, 90 days, 120 days, you know, to get all the public testimony in . . . I don't know, 60 days just seems fast.

CHAIR MONIZ: Well, you know, as Molokai did, they can request for an extension. But I think, as indicated by both Alice and Pat, things might be a little different and, if necessary, they can always request for an extension, but I think we'd like to expedite things, set a more stringent time restrictions on it. Any more discussion? Okay, if not, all those in favor, aye. Contrary. Okay.

VOTE: **AYES:** **COUNCILMEMBERS APANA, BRITTON, KAWANO, LEE,
MEDINA, MORROW, NAKAMURA, AND CHAIR MONIZ**
 NOES: **NONE**
 EXC.: **VICE-CHAIR HOKAMA**

MOTION CARRIED

ACTION: ADOPTION

ITEM 24: REQUEST BY THE MAUI COUNTY NA ALA HELE ADVISORY COUNCIL TO CONDUCT A WORKSHOP RELATING TO TRAILS AND ACCESS SYSTEM PROJECTS ON MAUI (C.C. 93-509)

I would like to take the—instead of taking Item 36, I'd like to take Item 24 only for one purpose. We're going to take one testimony and then—is that what you want, Tom?

COUNCILMEMBER MORROW: Yeah. Mike Baker had requested that from the State because he has to go with the Land Board in a few minutes.

CHAIR MONIZ: Okay. We're going to take a witness right now on Item 24.

COUNCIL MEMBERS VOICED NO OBJECTIONS.

Okay, thank you.

COUNCILMEMBER MORROW: No, I have no objection. Thank you.

CHAIR MONIZ: Can you state your name and your position, and you've got three minutes. So can you finish in three minutes?

Council Chair
Gladys C. Baisa

Vice-Chair
Robert Carroll

Presiding Officer Pro Tempore
Michael P. Victorino

Council Members
Elle Cochran
Donald G. Couch, Jr.
Stacy Crivello
Don S. Guzman
G. Riki Hokama
Mike White



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October 22, 2014

Director of Council Services
David M. Raatz, Jr., Esq.
RECEIVED
CORPORATION COUNSEL

2014 OCT 23 AM 11: 02

MEMO TO: Patrick K. Wong
Corporation Counsel

F R O M: Donald G. Couch, Jr., Chair
Planning Committee

A handwritten signature in black ink, appearing to read "DGC", written over the name "Donald G. Couch, Jr." in the "FROM" field.

SUBJECT: **AMENDING CHAPTER 2.80B, MAUI COUNTY CODE, RELATING TO
GENERAL AND COMMUNITY PLANS (PC-56)**

May I please request that you review and transmit a version of the attached proposed bill entitled "A BILL FOR AN ORDINANCE TO AMEND CHAPTER 2.80B OF THE MAUI COUNTY CODE, PERTAINING TO GENERAL AND COMMUNITY PLANS", approved as to form and legality.

May I also request the proposed bill's title be revised to indicate it relates to ministerial permits, to differentiate it from other proposed bills amending Chapter 2.80B, Maui County Code.

I would appreciate receiving a response by **October 31, 2014**. To ensure efficient processing, please include the relevant Committee item number in the subject line of your response.

Should you have any questions, please contact me or the Committee staff (Chancy Hopper at ext. 7886, Kimberley Willenbrink at ext. 7761, or Pauline Martins at ext. 8039).

pc:ltr:056acc01:csh

Enclosure

cc: William Spence, Planning Director
Michael Hopper, Deputy Corporation Counsel