

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

July 18, 2003

MEMO TO: Mayor Alan M. Arakawa
FROM: Traci Fujita Villarosa, Deputy Corporation Counsel
SUBJECT: Commercial Charter Boats at Hulopoe Beach Park, Lanai

On July 7, 2003 I was asked to attend a meeting in your office with Jack Kulp, representatives from Trilogy Excursions, representatives from Lanai Company, Inc. ("Lanai Company") (via telephone conference), and yourself. The purpose of the meeting was to discuss the un-permitted commercial use of Hulopoe Beach Park by two charter boat companies, Paragon Sailing Charters Maui and SeaView Adventures Cruises.

Hulopoe Beach Park is owned by Lanai Company but has been dedicated for park use for public purposes. Article IV of the Park Area Rules and Regulations for Hulopoe Beach Park ("Park Rules") states that commercial activity on the park is prohibited unless authorized by issuance of a Type IV permit by Lanai Company.¹ The Park Rules define "commercial activity" as "any act whereby a person receives any benefit or promise to receive a benefit by providing goods or services to another person ... whether or not there is consideration exchanged on Park property or elsewhere."

The Park Rules were established to ensure that Hulopoe Beach Park would be used for public purposes in perpetuity. The Park Rules were attached as an exhibit to the Unilateral Agreement and Declaration for Development and Coordination of a Park Access and Maintenance Program, dated April 23, 1987, which was executed by Lanai Company pursuant to Section 19.70.110(A), Maui County Code, "Lanai Project District I (Manele)."

Trilogy Excursions currently holds a permit issued by Lanai Company pursuant to the Park Rules to engage in commercial activity at Hulopoe Beach Park. The two charter boat companies at issue do not have permits. Trilogy Excursions and Lanai Company both stated during the meeting that they have made attempts to stop the two un-permitted charter boat companies from

¹As discussed further in this memorandum, the "Park Rules" are not rules of a county agency, nor were they adopted in accordance with the statutory procedures (Chapter 91, Hawaii Revised Statutes) applicable to governmental administrative rules.

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utilizing Hulopoe Beach Park for commercial activity but have been unsuccessful. Lanai Company requested the County's cooperation to stop these two charter boat companies from using Hulopoe Beach Park for commercial activity.

In response to the request, I advised that it is Lanai Company, and not the County, that has the responsibility to enforce the Park Rules. The Unilateral Agreement executed by Lanai Company states that Lanai Company voluntarily agreed to "[m]ake infrastructural (sic) improvements, perform proper maintenance and **assume all responsibility of administering public use**" at Hulopoe Beach Park. The Unilateral Agreement goes on to state that "**[s]aid rules and regulations shall be administered and amended by Declarant [Lanai Company]** in a reasonable, nondiscriminatory and nonarbitrary manner." Thus, if the County were to take any enforcement action under the Unilateral Agreement, it would be against Lanai Company for failing to comply with the terms of the Unilateral Agreement. It remains the responsibility of Lanai Company, as the owner of Hulopoe Beach Park, to halt, by lawsuit if necessary, activities that are not permitted at Hulopoe Beach Park.

When the issue of possible assistance by the Maui Police Department was raised during the meeting, I reminded everyone that the Department of the Corporation Counsel had advised in a prior enforcement matter involving Hulopoe Beach Park that police assistance would be provided to Lanai Company in the same manner as it is provided to any other private property owner. I reiterated that Lanai Company has the primary duty to enforce the Park Rules, including those rules regulating for profit activities.

For example, if Lanai Company asks someone to leave Hulopoe Beach Park because the person violated the Park Rules and that person refuses to leave, Lanai Company, like any other property owner, may call the police for assistance in escorting that person off Lanai Company property. However, Lanai Company should first exhaust its own security and enforcement resources before calling the police. The police should not become the primary enforcement at Hulopoe Beach Park. It is our understanding that the Police Department has expressed this position on a number of occasions.

Pursuant to your request I drafted letters to both Paragon Sailing Charters Maui and Sea View Adventures Cruises for your signature. Please keep in mind, however, that this office has concerns with the letters requested and the nature of your involvement. Not only is enforcement of the Park Rules Lanai Company's responsibility, but by involving yourself in this matter you could potentially be called as a witness in any legal action arising from this matter. In the event that you nevertheless decide to issue letters of the type contemplated, you may want to consider having the Director of Parks and Recreation sign the letters inasmuch as Hulopoe Beach Park was dedicated for park and recreational purposes.

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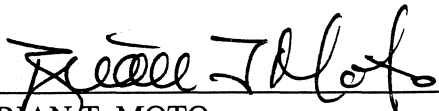
Please advise on the course of action you wish to take at this time.

TFV:ko

cc: Glenn Correa, Director of Parks and Recreation
Jack Kulp, Managing Director
Edward S. Kushi, Jr., Deputy Corporation Counsel

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APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel