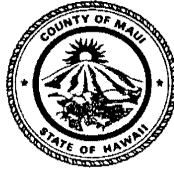


ALAN M. ARAKAWA
Mayor



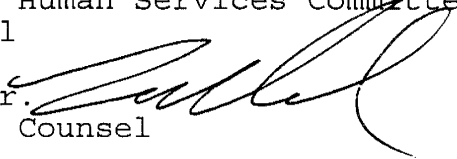
BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

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

October 30, 2003

MEMO TO: Honorable Joseph Pontanilla
Chair, Housing and Human Services Committee
Maui County Council

F R O M: Edward S. Kushi, Jr. 
Deputy Corporation Counsel

SUBJECT: COUNCIL APPROVAL OF AFFORDABLE-HOUSING PROJECTS PROPOSED
PURSUANT TO CHAPTER 201G, HAWAII REVISED STATUTES (HHS-4)

This responds to your memo of October 21, 2003 concerning the above matter, specifically with respect to the proposed 254-unit Pu'unoa Development by Kent Smith Development.

1. What, if any, impacts are there on processing the application if the "corporation" under the HRS 201G scheme is the HCDCH rather than the County Administration?

None. A review of Section 201G-118(a)(3), Hawaii Revised Statutes ("HRS"), reveals no distinction as to whether the proposed resolution for Council consideration is submitted by HCDCH or the County administration as the "corporation."

2. It appears that the applicant will contend that no environmental assessment is necessary. If the State exempts the developer from compliance with the general and community plans, does it follow that no environmental assessment or environmental impact statement is required?

Pursuant to Section 343-5, HRS, one of the "triggers" which would require, at a minimum, an environmental assessment is a development that:

"(6) Propose any amendments to existing county general plans where such amendment would result in designations other than agriculture, conservation, or preservation, except actions proposing any new county general plan or

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amendments to any existing county general plan initiated by a county."¹

In Maui County, the community plans are part of the general plan.²

The subject project is located in Lahaina, and is, therefore, subject to the West Maui Community Plan, which plan designates the subject property as agriculture. Said community plan, as adopted by the Council in 1996, is a planning ordinance.

Projects/developments approved pursuant to Chapter 201G, HRS, may be exempt "from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of units thereon". (Emphasis added.)³ The applicant is requesting specific exemptions from the provisions of the West Maui Community Plan.⁴

In summary, were it not for Chapter 201G, HRS, and the authority it vests in the Council to exempt a project from existing, applicable planning ordinances, the subject project⁵ would be required to process a community plan amendment to the West Maui Community Plan in accordance with Section 2.80A.060, Maui County Code, which would then trigger the requirement of an environmental assessment. Although a project approved under Chapter 201G, HRS, is not specifically listed as an exempt action under Chapter 343, HRS, in the absence of any use

¹Section 343-5(a)(6), HRS.

²Section 2.80A.010(B), Maui County Code.

³Section 201G-118(a), HRS.

⁴See page 11, "Project Overview".

⁵It is our understanding that the proposed Pu'unoa Development meets the definition of an "assisted project" as set forth in §15-174-2, Hawaii Administrative Rules. An "assisted project" is defined as: ... a project which is initiated and developed by an entity other than the corporation, and which is being provided state assistance to lower sales prices or rental rates. Such assistance may include, but is not necessarily limited to, interim and permanent financing, expedited processing of projects, seed money loans or grants, tax credits, general excise tax exemptions, and rental assistance. (Emphasis added.)

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of state or county funds or state or county lands, there would be no "trigger" requiring compliance with Chapter 343, HRS, if the Council exempts the subject project from the provisions of the existing West Maui Community Plan.

The Department of the Attorney General, by letter dated September 22, 2003, has opined that, for reasons discussed in the letter, "an EA or EIS would not be legally required if the proposed project does not involve the use of any state or county funds and does not require a county general plan amendment."⁶ A copy of this letter is attached hereto.

3. If a 201G project is disapproved, can the developer resubmit the proposal at a later date?

Yes. We find no statutory provision prohibiting a resubmittal.

4. If the Council, developer, and HCDCH agree, can exemptions and/or conditions for approval be changed? Would a change to the conditions be substantial, requiring that the item be posted again on the Council or Council committee agenda?

This office has consistently taken the position that once the "preliminary plans and specifications for the project"⁷ have been

⁶However, we note that, pursuant to §§201G-118(a)(4) and 205-4, HRS, the Pu'unoa Development will require a state land use district boundary amendment. Pursuant to §15-15-50, Hawaii Administrative Rules, the petitioner for such a district boundary amendment will be required to provide information similar in scope and content to an environmental assessment. For example, the petitioner will be required to provide information such as:

- (10) An assessment of the impacts of the proposed use or development upon the environment, agriculture, recreational, cultural, historic, scenic, flora and fauna, groundwater, or other resources of the area;
 - (11) Availability or adequacy of public services and facilities such as schools, parks, wastewater systems, solid waste disposal, drainage, water, transportation systems, public utilities, and police and fire protection, and to what extent any public agency would be impacted by the proposed development or reclassification;
 - ...
 - (13) Economic impacts of the proposed reclassification, use, or development...
 - (15) An assessment of need for the reclassification...
- §15-15-50, HAR.

⁷Section 201G-118(a)(3)(A), HRS.

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received by the Council, said plans and specifications cannot be revised and/or amended and, therefore, the Council must approve or disapprove the project as submitted.

5. If the developer is proposing a multi-unit project, with a portion of the units affordable and the remainder at market-rate, does the Council approve the entire project under the expedited timeframe, or only the affordable units?

The entire project as described in the preliminary plans and specifications submitted must be approved or disapproved. It was the "corporation's" (in this instance, HCDCH's) decision to present the project, as a whole, to the Council for its consideration. Pursuant to HCDCH's rules (Section 15-174-26, Hawaii Administrative Rules) and Section 201G-118(a)(1), HRS, HCDCH must have found that the subject project "is consistent with the purpose and intent of this chapter, and meets minimum requirements of health and safety".⁸

Call if further discussion/clarification is needed.

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

S:\ALL\ESK\Advisory\memo to pontanilla re HCDCH 201G project.wpd

Attachment

cc: Alice Lee, Director, Department of Housing and Human Concerns

⁸§201G-118(a)(1), HRS.

LINDA LINGLE
GOVERNOR



MARK J. BENNETT
ATTORNEY GENERAL

RICHARD T. BISSEN, JR.
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
485 SOUTH KING STREET
HONOLULU, HAWAII 96813
(808) 587-3080

September 22, 2003

Mr. Robert J. Hall
Acting Executive Director
HCDCH
677 Queen Street, Suite 300
Honolulu, Hawaii 96813

2003 SEP 22 PM 2:33

HCDCH
CONFIDENTIAL

RE: Whether the Proposed Puu Noa Housing Development Requires an EIS Pursuant to Chapter 343, Haw. Rev. Stat

Dear Mr. Hall:

You requested a written opinion on whether the proposed Puu Noa ("Puu Noa") housing development would require an environmental assessment (EA) or an environmental impact statement (EIS) pursuant to chapter 343, Haw. Rev. Stat., if it is developed with HCDCH under section 201G-118, Haw. Rev. Stat.

I. SHORT ANSWER

For the reasons discussed below, the short answer is that an EA or an EIS would not be legally required if the proposed project does not involve the use of any State or county funds and does not require a county general plan amendment.

II. FACTS

Smith Development Company, Inc. ("Smith") proposes to build 254 single family residential units on 60 acres of privately owned land at its proposed "Puu Noa" housing development located in Lahaina, Maui. At the HCDCH board meeting on July 17, 2003, Smith submitted an application which proposes to develop Puu Noa with HCDCH pursuant to section 201G-118, Haw. Rev. Stat. In pre-submission discussions with HCDCH, Smith has asserted that if Puu Noa is developed with HCDCH under section 201G-118, Haw. Rev. Stat., it is exempt from the requirements established in

chapter 343, Haw. Rev. Stat., relating to the filing of an EA or an EIS for the project. Smith has also requested exemptions from other Maui county zoning and building code requirements in its application.

HCDCH staff will review the application. They may ask for additional information and may suggest changes to the application if necessary to further the needs of affordable housing residents. If the application is approved, HCDCH staff will participate with Smith in seeking the various other State and county approvals.

Puu Noa is to be built on approximately 60 acres of privately owned land. The subject property is situated in the State Agricultural District, is designated Agriculture by the West Maui Community Plan, and is presently zoned Agriculture by the Land Use Commission. The Puu Noa application requests no use of State or county funds.

III. DISCUSSION

The requirements as to when an environmental assessment ("EA") or an environmental impact statement ("EIS") needs to be filed are governed by chapter 343, Haw. Rev. Stat. Under section 343-5(a), Haw. Rev. Stat., there are eight actions that require the preparation and filing of an EA. An "action" is defined as "any program or project to be initiated by any agency or applicant." Section 343-2, Haw. Rev. Stat. The only two actions which could be applicable to the Puu Noa application are section 343-5(a)(1) which requires an EA if there is a "proposed use of state or county funds" or section 343-5(a)(6) which requires an EA if the action requires an amendment to the county general plan. The application states that the financing for the project will come completely from private sources and therefore Smith is not requesting the use of any HCDCH, State, or county funds at this time.

HCDCH staff time will be used in the proposed development of Puu Noa. Section 11-200-8 of the environmental administrative rules, however, specifically exempts certain classes of actions from filing an EA because they will "probably have minimal or no significant effect on the environment." Section 11-200-8(a) (10), H.A.R. exempts "continuing administrative activities including, but not limited to, purchase of supplies and personnel-related actions." The Office of Environmental Quality Control (OEQC) has opined that the facilitation in obtaining other State or county approvals and the review and processing of the Puu Noa application by HCDCH staff will not trigger Chapter 343 because such activities are "administrative activities" within the meaning of section 11-200-8(a) (10), H.A.R. (See Attachment 1). An agency's interpretation of its own rule is accorded some deference by the courts. Sam Teague, Ltd. v. Hawaii Civil Rights Comm'n, 89 Hawaii 269, 276 n.2 (Haw. 1999) ("we give persuasive weight in this instance, to the administrative rules that further the purpose of H.R.S. § 386-11"); Aio v. Hamada, 66 Haw. 401, 410 (1983) ("we customarily accord persuasive weight to the construction given words of broad and indefinite meaning by the agency charged with the

responsibility of carrying out the mandate of the statute in question, unless the construction is palpably erroneous"). We do not believe that OEQC's interpretation of its statutes or rules is palpably erroneous. Accordingly, based upon the particular facts and circumstances of this case, we conclude that HCDCH's processing of the Puu Noa application will not trigger the EA/EIS requirements based upon the expenditure of state monies.

We have not, however, found any case law for the proposition. We also note that if HCDCH exercises significantly greater involvement than merely reviewing and approving the application or facilitating approval of other State or county approvals, this conclusion could change.

Further, section 343-5(a)(6), Haw. Rev. Stat., would trigger the need for an EA if the Puu Noa project proposed any amendment to the existing county general plan. However, section 201G-118, Haw. Rev. Stat., exempts the project from any governmental requirements "relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of units thereon." Accordingly, Smith's application to develop Puu Noa with HCDCH would not require an amendment to the county general plan because its 201G application actually seeks an exemption from the requirements of the general plan. An exemption from the county general plan under section 201G-118 would obviate the need to amend the general plan. Therefore, we conclude that an exemption from the county general plan would not trigger the need for an EA under section 343-5(a)(6). For similar reasons, county zoning changes would also be unnecessary if an exemption under chapter 201G is granted.

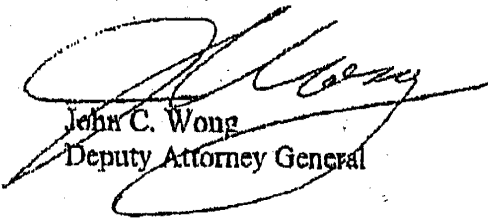
Norwithstanding this conclusion, we note that section 201G-118 requires the concurrence of Maui county in the approval process. If Maui county rejects the 201G-118 exemption, Smith would need to obtain a general plan amendment that would then trigger the EA/EIS requirement.

Finally, HCDCH is still required under section 201G-118(a)(1) to find that the project is "consistent with the purposes of this chapter" and that it meets "minimum requirements of health and safety." In its review of the application, HCDCH could request that Smith address and resolve the types of issues and concerns that would normally be addressed in an EA or an EIS. This opinion does not address the policy issue as to whether HCDCH should participate in a housing development without an EA or EIS. OEQC has argued that an EA or EIS should be required as a matter of policy. See Attachment 2.

IV. CONCLUSION


It is our opinion that the proposed Puu Noa housing project does not require the filing of an EA or an EIS under chapter 343, Haw. Rev. Stat. The proposed project does not require the use of any State or county funds or any amendment to the county general plan if an exemption is provided under section 201G-118, Haw. Rev. Stat., and therefore does not trigger the requirements of an EA or EIS under section 343-5(a), Haw. Rev. Stat.

Respectfully submitted,



John C. Wong
Deputy Attorney General

APPROVED:



Mark J. Bennett
Attorney General