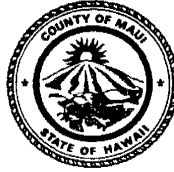


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December 9, 2003

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

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

A handwritten signature in black ink, appearing to read "E. Kushi", is written over the name "Edward S. Kushi, Jr." in the "FROM" field.

SUBJECT: **COUNCIL APPROVAL OF AFFORDABLE-HOUSING PROJECTS PROPOSED
PURSUANT TO CHAPTER 201G, HAWAII REVISED STATUTES (PU'UNOA)
(HHS-4(1))**

Pursuant to your memo of October 29, 2003, inquiring whether there are any constitutional or other legal concerns in the proposed prioritizing of applicants for the affordable housing units in the Pu'unoa project, as presented, we respond in the affirmative.

I) PROPOSED PRIORITIZATION.

As understood and stated in the developer's "Project Marketing" description, preference would be given to applicants in the following order:

- 1) West Maui residents who work in West Maui;
- 2) Maui residents who work in West Maui;
- 3) Long-term West Maui residents;
- 4) Any Maui residents;
- 5) Former Maui residents who wish to return to Maui;
- 6) Hawaii residents who wish to relocate to Maui; then
- 7) Any other interested party.

II) CHAPTER 201G, HAWAII REVISED STATUTES, AND HCDCH'S ADMINISTRATIVE RULES.

In administering Chapter 201G, the corporation (HCDCH or the Counties) shall give preference "to those applicants most in need of assistance in obtaining housing, ...take into consideration the applicant's household income and number of dependents; the age of the applicant; the physical disabilities of the applicant or those living

with the applicant; whether or not the present housing of the applicant is below standard; whether or not the applicant's need for housing has arisen by reason of displacement of the applicant by governmental actions; and other factors as it may deem pertinent."¹

Chapter 201G requires that the corporation establish a system to determine preferences by lot in the event that it receives more qualified applications than it has units available.² Under HCDCH administrative rules, an applicant shall be eligible to purchase a dwelling unit developed under Chapter 201G if the applicant meets certain requirements, including a requirement that the applicant be "a qualified resident who is domiciled in the State and meets other qualifications set forth under section 201G-1, HRS."³

In pertinent part, a "qualified resident" means a person who:

- (1) Is a citizen of the United States or a resident alien;
- (2) Is at least eighteen years of age;
- (3) Is domiciled in the State and shall physically reside in the dwelling unit purchased or rented under this chapter;
- (4) In the case of purchase of real property in fee simple or leasehold, has a gross income sufficient to qualify for the loan to finance the purchase; ... (Emphasis added)⁴

"Domicile" is defined as "the state where a person has his or her true, fixed, and permanent home and where the person has the intention of returning whenever the person is absent from it. A person may have several residences, but only one domicile."⁵ (Emphasis added.)

As noted, the applicable State statutory sections and administrative rules reference "domicile", while the subject Pu'unoa application references "residency." Therefore, it appears that the developer's prioritization preference plan conflicts with the provisions of Chapter 201G and HCDCH administrative rules which specify that preferences be determined by lot and on the basis of domicile, not residency. Moreover, as discussed further below, the developer's prioritization preference plan is constitutionally impermissible.

¹ Section 201G-118, HRS.

² Section 201G-113(b), HRS.

³ Section 15-174-73, HCDCH Administrative Rules.

⁴ Section 201G-112, HRS.

⁵ Section 15-174-2, HCDCH Administrative Rules.

III) APPLICABLE CASE LAW.

The constitutional right to travel from one State to another occupies a position fundamental to the concept of the Federal Union. It is a right that has been firmly established and repeatedly recognized, although it finds no explicit mention in the Constitution.⁶ In striking down a State's one-year residency requirement as a condition for obtaining welfare benefits, the United States Supreme Court labelled the classification suspect because "it touches on the fundamental right of interstate movement."⁷ Any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.⁸ "The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." (emphasis added)⁹ The third component invokes the protection of the privileges and immunities clause of the Fourteenth Amendment of the U.S. Constitution¹⁰, which, in turn, may invoke due process and equal protection concerns.¹¹ The privileges and immunities clause should protect the "citizen of State A who ventures into State B" to settle there and establish a home.¹²

⁶ United States v. Guest, 383 U.S. 745 (1966).

⁷ Shapiro v. Thompson, 394 U.S. 618 (1969).

⁸ Shapiro, 394 U.S. at 634.

⁹ Saenz v. Roe, 526 U.S. 489 (1999).

¹⁰ Section 1, 14th Amendment to U.S. Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

¹¹ Saenz, 526 U.S. at 502.

¹² Zobel v. Williams, 457 U.S. 55 (1982).

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Although the seminal case dealt with a one-year waiting period for eligibility for welfare benefits, its reasoning applies to housing benefits, to-wit:

"Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through payment of taxes. ...Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services."¹³

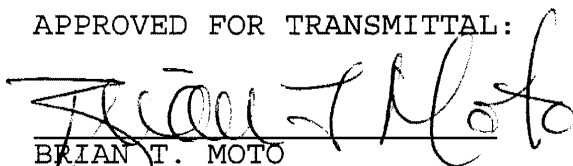
Lastly, "The goal of preventing an influx of outsiders is constitutionally impermissible....Nor do we believe the goal of promoting provincial prejudices toward long-time residents is cognizable under a Constitution which was written partly for the purpose of eradicating such provincialism."¹⁴

IV) CONCLUSION

Applying the relevant judicial declarations of our nation's highest court to the proposed prioritization preference plan for applicants to the Pu'unoa affordable housing project, we opine that said prioritization plan would not withstand judicial challenge or scrutiny, and therefore would be constitutionally impermissible, and invalid.

Call if further discussion is needed.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

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¹³ Shapiro, 394 U.S. at 632.

¹⁴ Cole v. Housing Authority of City of Newport, 435 F.2d 807, 813 (1st Cir. 1970) (holding that two-year residency requirement imposed on applicants for admission to federally-aided public housing project was violative of equal protection clause).