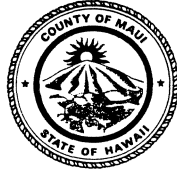


ALAN M. ARAKAWA
Mayor



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 270-7152

May 13, 2004

Craig G. Nakamura, Esq.
Carlsmith Ball LLP
One Main Plaza, Suite 400
2200 Main Street
Wailuku HI 96793

Re: Ke Ali`i Villas Condominium Project (SM1 2002/2003)

Dear Mr. Nakamura:

This is in response to your letter dated April 29, 2004 requesting that our office and/or the Department of Planning reconsider our determination that new published and mailed notice is required for a rescheduled public hearing on the Special Management Area Use Permit application relating to the Ke Ali`i Villas Condominium Project.

Having reviewed the case of Chang v. Planning Commission of County of Maui, 64 Haw. 431, 643 P.2d 55 (1982), pertinent provisions of Chapters 91 and 92, Hawaii Revised Statutes ("HRS"), Section 12-202-13, Special Management Area Rules of the Maui Planning Commission ("SMA Rules"), and Section 12-201-14, Rules of Practice and Procedure for the Maui Planning Commission, and consistent with previous determinations made in similar circumstances, we abide by our determination that new published and mailed notice is required as a consequence of the cancellation of the public hearing originally scheduled for April 27, 2004.

Section 12-202-13(d), SMA Rules, requires that notice of public hearing be mailed not less than thirty days before the hearing date by certified or registered mail to property owners situated within five hundred feet of the subject property. Section 12-202-13(e), SMA Rules, requires that the planning director publish not less than thirty days before the hearing date a notice of public hearing in a newspaper that is printed and issued at least twice weekly.

Section 92-41, HRS, states:

Notwithstanding any law to the contrary, all governmental agencies scheduling a public hearing shall give public notice in the county affected by the proposed action, to inform the public of the time, place, and subject matter of the public hearing. This requirement shall prevail whether or not the governmental agency giving notice of public hearing is specifically required by law, and shall be in addition to other procedures required by law.

The public hearing that was to be held on April 27, 2004 was not convened because the Maui Planning Commission lacked a quorum. It is our understanding that a number of Commission members had unforeseen personal and health matters that made them unable to attend.

Under Section 92-15, HRS, and Section 12-201-15, Rules of Practice and Procedure for the Maui Planning Commission, a quorum is required in order to transact any business. In the absence of a quorum, the Commission is unable to conduct a meeting or convene a public hearing. For these reasons, the Chair adjourned the proceedings of April 27, 2004 when a quorum was not obtained.

The decision in Chang, which you cite, is distinguishable on its facts. In Chang, the Hawaii Supreme Court held that the appellant, intervenor Edward Chang, was not prejudiced when appellee Planning Commission did not provide formal notice of a rescheduled public hearing within time limits prescribed by Planning Commission rules. However, it is noteworthy that the appellant was present at the originally scheduled hearing and received actual notice of the rescheduling. The appellant also received by mail an agenda for the rescheduled meeting. Notice of the rescheduled hearing date was published in the newspaper and the hearing was rescheduled for a date four weeks later. Appellant attended and participated in the rescheduled hearing and did not request a postponement. Further, appellant "neither alleged nor otherwise established ... that his opportunity for full and effective participation was in any way prejudiced by his failure to receive notice of the rescheduling within the ... time limits."¹

In short, the facts in Chang supported the Court's conclusion that the party concerned, appellant Chang, was not prejudiced by the failure to abide by the time limits set forth in Commission rules. However, in the instant situation, it is impossible to know

¹Chang v. Planning Comm'n of County of Maui, 64 Haw. 431, 452, 643 P.2d 55, 61 (1982).

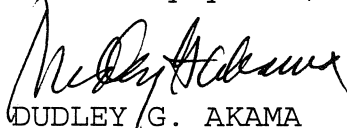
Craig G. Nakamura, Esq.
May 13, 2004
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that this will be the case for the individuals and entities who are entitled, by law, to receive published and mailed notice of the public hearing for the Ke Ali`i Villas project.

It would not be prudent for the Commission or the Department of Planning to simply assume that all people who reside within 500 feet of the proposed Ke Ali`i Villas project site will know of the rescheduled hearing date in the absence of formal notification, nor is it prudent to assume that such persons have no objections to a hearing that does not comply with the notification requirements set forth in Commission rules. We cannot even assume that such persons did not intend to testify before the Commission on April 27, 2004 inasmuch as not all persons are present at the beginning of a Commission meeting when quorum is first established. Unlike Chang, the instant case does not present us with a known and identified party whose rights and position can be determined with a fair degree of confidence.

In circumstances similar to those described herein, the Commission and the Department of Planning have required new published and mailed notices in advance of a rescheduled public hearing. For example, in December, 2003, two public hearings were postponed when a Maui Planning Commission meeting was canceled due to a lack of quorum. In those cases, applicants were required to file new notices, including notices to all property owners situated within 500 feet of the subject properties. To be consistent, the same requirement is being applied to your client's application.

Sincerely yours,

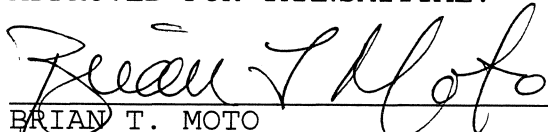


DUDLEY G. AKAMA
Deputy Corporation Counsel

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APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

Craig G. Nakamura, Esq.

May 13, 2004

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cc: Michael W. Foley, Director of Planning
Clayton Yoshida, Administrator, Department of Planning
Isaac D. Hall, Esq.
Cindy Y. Young, Deputy Corporation Counsel
Randy Piltz, Chair, Maui Planning Commission