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August 19, 2004

MEMO TO: Michael J. Molina, Chair  
Public Works and Traffic Committee

F R O M: Cindy Y. Young, Deputy Corporation Counsel

SUBJECT: **Legality of Proposed Monetary Fines for Violations of  
Outdoor Lighting Standards (PWT-18)**

This responds to your memorandum dated April 21, 2004 requesting a legal opinion advising whether the proposed penalty provisions set forth in the draft bill on outdoor lighting are legally appropriate.

**I. Introduction**

The proposed bills entitled, "A Bill for an Ordinance Amending Chapter 2.40 and Repealing Chapter 12.17, Maui County Code, Relating to Street Lighting Committee; and Amending Title 20, Maui County Code, Relating to Outdoor Commercial Lighting Standards", and "A Bill for an Ordinance Amending Chapter 2.40 and Repealing Chapter 12.17, Maui County Code, Relating to Street Lighting Committee; and Amending Title 20, Maui County Code, Relating to Outdoor Residential and Public Lighting Standards", provide standards pertaining to the type and amount of outdoor lighting allowed. The proposed bills provide that violations of the lighting standards shall be subject to the penalty provisions of Maui County Code (MCC") section 19.530.030.

MCC Section 19.530.030 provides that the director of public works and environmental management may impose a civil fine for violations of, among other provisions, Titles 12 and 20, Maui County Code. Such civil fine may include an amount not to exceed \$1,000, an amount not to exceed \$1,000 per day for each day the violation persists, and/or an amount not to exceed one percent of the project cost.

## **II. Relevant Ordinances**

Section 19.530.030, MCC, provides in relevant part:

In lieu of, or in addition to, enforcement by criminal prosecution, if the director of public works determines that any persons are violating any provision of titles 12, 14, 16, 18, 19, and 20 of this code, any rules adopted thereunder, or any permit issued thereto, the director may have the person served, by mail or personal delivery, with a notice of violation and order pursuant to this chapter and such administrative rules as the director may adopt.

A. Contents of the notice of violation. The notice shall include at least the following information:

1. Date of the notice;
2. The name and address of the person noticed;
3. The section number of the provision or rule, or the number of the permit which has been violated;
4. The nature of the violation; and
5. the location and time of the violation.

B. Contents of the order.

1. The order may require the person to do any or all of the following:

- a. Cease and desist from the violation;
- b. Correct the violation at the person's own expense before a date specified in the order,
- c. Pay a civil fine not to exceed \$1,000 in the manner, at the place, and before the date specified in the order,**
- d. Pay a civil fine not to exceed \$1,000 per day for each day in which the violation persists, in the manner and at the time and place specified in the order, and**
- e. Pay a civil fine not to exceed one percent of the project cost as provided in section 20.08.260.E.2 of this code.**

(Emphasis added.)

## **III. Discussion**

A fine may not be unreasonable in relation to the proscribed offense. Whether a monetary penalty is unreasonable or excessive under the circumstances is dependent upon the character of the offense. McQuillin Mun. Corp., § 17:13 (3d ed.) ("What would be a reasonable penalty cannot from the nature of things admit of a general rule applicable to all cases, but must in every case be determined by the nature of the offense intended to be prohibited.").

MCC section 19.530.030 authorizes the director of public works

and environmental management to impose a fine in the maximum amount of \$1,000 per day for each day the violation persists, a fine in the maximum amount of \$1,000 pursuant to the order, and/or a fine not to exceed one percent of the project cost.<sup>1</sup> Pursuant to MCC section 19.530.030, the director has the discretion to impose a lower civil fine amount. Typically, the director of public works and environmental management would not impose the maximum fine unless the violation was particularly egregious. It is also important to note that MCC section 19.530.030 is the penalty provision for violations of MCC chapters 12 (Streets, Sidewalks and Public Buildings), 14 (Public Services), 16 (Buildings and Construction), 19 (Zoning), and 20 (Environmental Protection).

Generally, a civil fine provided by ordinance will be upheld so long as it is not unreasonable in view of the nature of the offense, and courts may determine the reasonableness of a fine. *McQuillin Mun. Corp.*, § 17:13 (3d ed.). Although there are no Hawaii cases directly addressing fines in the context of lighting regulations, based on analogous decisions in other jurisdictions the penalties proposed in the bill do not appear so unreasonable as to be unconstitutionally confiscatory or excessive.<sup>2</sup> Precise legal analysis on this issue depends upon the facts and circumstances of a particular case and the nature and amount of fine imposed. We note that the ordinance does provide the director with some discretion in setting the nature and timing of any penalty and the amount of any fine, which should allow any penalty imposed to reflect the nature and extent of the violation. Further, the proposed ordinance by its own terms identifies the harms sought to be prevented and the public interests sought to be preserved by regulation of outdoor lighting.

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<sup>1</sup>An ordinance may provide for a penalty for each repetition or each day's occurrence of a continuing action, omission, or status constituting a new and distinct offense. *McQuillin Mun. Corp.*, § 17:16 (3d ed.).

<sup>2</sup>See, e.g., *State v. Portney*, 229 N.J. Super. 171, 550 A.2d 1295 (1988) (upholding \$1,000 fine on developer of office building for violating municipal ordinance requiring a permit for the removal of trees); *Sobocinski v. City of Williamsport*, 13 Pa.Cmwlth. 425, 319 A.2d 697 (1974) (fines imposed under city "weed ordinance", which provided for a \$10 to \$100 fine for each violation of ordinance, not unconstitutionally confiscatory and excessive).

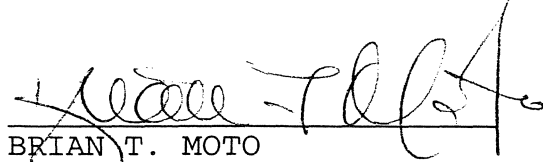
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Should you have any further questions, please do not hesitate to contact this office.

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APPROVED FOR TRANSMITTAL:

A handwritten signature in black ink, appearing to read "Brian T. Moto", is written over a horizontal line. The signature is stylized and cursive.

BRIAN T. MOTO  
Corporation Counsel