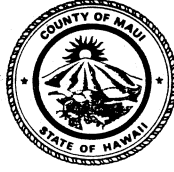


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November 3, 2004

MEMO TO: Lori Sablas, Chairperson  
Cultural Resources Commission  
County of Maui

F R O M: *JG* James A. Giroux, Deputy Corporation Counsel

SUBJECT: **BANYAN TREE PARK ARTS FAIR DECISION AND ORDER BY CULTURAL RESOURCES COMMISSION**

Introduction and background.

This is in response to Dawn Duensing's request of October 5, 2004, to review and comment on a draft Findings of Fact, Conclusions of Law, Decision and Order of the Maui County Cultural Resources Commission regarding The Matter of the Proposed Revisions for the Use of Banyan Tree Park in Lahaina Historic District No. 1 in Lahaina, Maui, Hawaii, Tax Map Key 4-6-001:009.

The Cultural Resources Commission conducted three meetings where public testimony was taken regarding various aspects of the use of the Banyan Tree Park. These meetings were on March 4, 2004, August 5, 2004, and September 2, 2004. The Commission voted to adopt various conditions to be imposed on all permits for commercial activities in the Banyan Tree Park. These votes took place on August 5, 2004 and September 2, 2004.

Issue presented.

Are the actions of the Commission "rule making" under the Hawaii Administrative Procedures Act (HAPA), Chapter 91, Hawaii Revised Statutes ("HRS")?

Applicable law.

Section 91-3, HRS, states, in part:

(a) Except as provided in subsection (f), prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

(1) Give at least thirty days' notice for a public hearing. The notice shall include:

- (A) A statement of the topic of the proposed rule adoption, amendment, or repeal or a general description of the subjects involved; and
- (B) A statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed will be mailed to any interested person who requests a copy, pays the required fees for the copy and the postage, if any, together with a description of where and how the request may be made;
- (C) A statement of when, where and during what times the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed may be reviewed in person; and
- (D) The date, time, and place where the public hearing will be held and where interested persons may be heard on the proposed rule adoption, amendment, or repeal.

The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its rulemaking proceedings, given at least once statewide for state agencies and in the county for county agencies....

(2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency, if requested to do so by an interested person, shall issue a concise statement of the principal reasons for and against its determination.

Section 12-530-61, Rules of Practice and Procedure For the Maui County Cultural Resources Commission, states:

All rules and regulations of the commission shall be adopted by the commission and approved by the mayor in accordance with Hawaii Revised Statutes; provided, however, that such procedure shall not be applicable to regulations concerning only the internal management of the department or the commission not affecting the private rights of or procedures available to the public, to declaratory rulings, or to intra-agency memoranda.

Section 91-1(4), HRS, defines "rule" as:

[E]ach agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

### Analysis.

The Hawaii Intermediate Court of Appeals addressed the issue of rule making by an agency in Foster Village Community Association v. Hess, 4 Haw. App. 463, 667 P.2d 850 (1983). In Foster Village, the Court reviewed whether the action of an agency, the Honolulu Zoning Board of Appeals, was rule making or adjudicatory in nature. The Court defined "rule making" as "agency action governing the future conduct either of groups of persons or of a single individual; it is essentially legislative in nature, not only because it operates in the future, but also because it is concerned largely with considerations of policy." The Court also defined rule making as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations."

It appears that the Commission through its actions wishes to govern the future conduct of users of the Banyan Tree Park through the adoption of certain "conditions". As proposed, these conditions are intended to operate prospectively to unnamed and unspecified persons or situations, and are concerned largely with considerations of policy. These policies would affect the rights of persons who in future may want to use Banyan Tree Park and would prescribe procedures for such uses. These policies would not be "mere internal regulations" nor do they involve or constitute "adjudication".<sup>1</sup> Therefore, these policies are more likely "rules" and the rule making procedures of Chapter 91, HRS, and the Rules of Practice and Procedure for the Maui County Cultural Resources Commission should be followed to adopt these rules.

### Proposed course of action.

Based on this analysis I will draft administrative rules based on the findings of the Commission. When the draft rules are completed the rules will be presented to the Commission for comment

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<sup>1</sup>In Foster Village, the Court characterized "adjudication" as "concerned with the determination of past and present rights and liabilities." Foster Village, 4 Haw. App. at 476.

Cultural Resources Commission

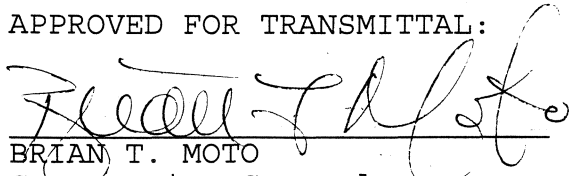
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and, if acceptable to the Commission, the procedures for adoption of the rules pursuant to Chapter 91, HRS, and the Rules of Practice and Procedure for the Maui County Cultural Resources Commission will be followed.

cc: Michael Foley, Planning Director  
Wayne Boteilho, Deputy Planning Director  
Dawn Duensing, Cultural Resource Specialist

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO  
Corporation Counsel

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