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January 27, 2005

MEMO TO: G. Riki Hokama, Council Chair
F R O M: Cindy Y. Young, Deputy Corporation Counsel
SUBJECT: *Cindy Y. Young*
Short-Term Rentals at Puamana Planned Unit Development
(PAF 04-016)

This responds to your memorandum, dated May 4, 2004, requesting an opinion responding to the following questions:

1. Are time share units and transient vacation rentals allowed at Puamana?

2. Does the grandfathering provision provided for in Subsection 19.37.010(B) of the Code allow some units at Puamana to operate as time share units and transient vacation rentals?

3. Subsection 19.37.010(B) of the Code states "...a declaration in a form prescribed by the director of planning shall be deemed exempt from this section so long as the project or apartment unit identified by the declaration continued to operate under a lawful time share plan or registration." What does this provision mean?

4. Does the right to operate as a time share unit or transient vacation rental extinguish immediately if such a use is discontinued? If not, then what period of time must lapse before a unit is no longer eligible under the grandfather provision?

5. Does the transfer of ownership of a unit extinguish any rights related to the operation of a unit as a time share unit or transient vacation rental?

I. Background

The Puamana Planned Unit Development ("Puamana"), located in

Lahaina, was approved as a planned unit development in 1965.¹ Puamana is located within the state urban district and is zoned interim and residential (R-2 and R-3) and designated in the West Maui Community Plan as single family residential. A portion of the property falls within the special management area. We are informed that the Puamana development comprises 59 buildings consisting of 230 units on approximately 30 acres of land.

In 1981, the Intermediate Court of Appeals of Hawai'i ruled against the County of Maui when the County sought to enjoin Puamana Management Corporation from collective and continuous short-term rental of units at Puamana. The circuit court enjoined Puamana Management Corporation from operating a reservation desk and maid or laundry services on the premises, but specifically allowed the operation of a reservation desk, of washer and dryer services, and domestic help services for property owners renting out their units if those operations were based outside of Puamana.²

During the pendency of the lawsuit, the State Legislature enacted Act 186, Session Laws of Hawaii (1980), which authorized the several counties, "by amendment of their zoning ordinances", to "limit the location of time share units, time share plans and other transient vacation rentals, within such areas as are deemed appropriate." The provisions of Act 186 were codified in Hawaii Revised Statutes ("HRS") chapter 514E.

In 1981, the Maui County Council, pursuant to Act 186, passed Ordinance No. 1134 regulating, among other things, "transient vacation rentals". The provisions of Ordinance No. 1134 were codified in Maui County Code ("MCC") chapters 19.04 and 19.37.

In 1991, the Maui County Council passed Ordinance No. 1989 amending MCC section 19.37.010, pertaining to "geographic restrictions" applicable to time share units, time share plans, and transient vacation rentals.

It is our understanding that a number of units in Puamana are currently transient vacation rentals. We have been informed that the complaints received by the Zoning Administration and Enforcement Division ("ZAED"), Department of Planning, regarding Puamana involve only transient vacation rentals. ZAED has not received complaints regarding time share plans or time share units at Puamana. Accordingly, this memorandum is limited to answering

¹Maui County Code chapter 19.32 provides for planned developments.

²County of Maui v. Puamana Management Corp., 2 Haw.App. 352, 354, 631 P.2d 1215, 1217 (1981).

questions posed regarding transient vacation rentals at Puamana and does not address time share units and time share plans.

II. Relevant Statutes and Ordinances

HRS section 514E-1 defines "transient vacation rentals" as "rentals in a multi-unit building to visitors over the course of one or more years, with the duration of occupancy less than thirty days for the transient occupant."

HRS section 514E-5 provides, in relevant part:

Except as provided in this section, time share units, time share plans, and transient vacation rentals are prohibited.

- (1) Existing time share units, time share plans, and transient vacation rentals are not impaired by the provisions of this section.
- (2) Time share units, time share plans, and transient vacation rentals are allowed:
 - (A) In areas designated for hotel use, resort use, or transient vacation rentals, pursuant to county authority under section 46-4, or where the county, by its legislative process, designates hotel, transient vacation rental, or resort use;
 - (B) In a hotel where the county explicitly approves such use, in advance, as a nonconforming use;...

HRS section 514E-4 provides:

The several counties shall, by amendment of their zoning ordinances, limit the location of time share units, time share plans and other transient vacation rentals, within such areas as are deemed appropriate.

MCC section 19.37.010, as originally adopted pursuant to Ordinance No. 1134 (1981), provided, in relevant part:

19.37.010 Geographic restrictions. Except as provided in this section, time share units, time share plans and transient vacation rentals are prohibited.

1. Existing time share units, time share plans and transient vacation rentals operating pursuant to and under law, are not impaired by the provisions of this section.

2. Time share units, time share plans and transient vacation rentals are allowed in hotel and apartment districts, provided such use is explicitly and prominently authorized by the

project instrument....

MCC section 19.37.010, as amended by Ordinance No. 1989 (1991), currently provides:

A. Except as provided in this section, time share units, time share plans and transient vacation rentals are prohibited.

B. Existing time share units, time share plans and transient vacation rentals which were operating pursuant to and under law and which were registered pursuant to chapter 514E of the Hawaii Revised Statutes as of the effective date of the ordinance codified in this section shall not be impaired by the provisions of this section; provided any time share project operating under law that records in the bureau of conveyances within sixty days of the effective date of the ordinance codified in this section, a declaration in a form prescribed by the director of planning shall be deemed exempt from this section so long as the project or apartment unit identified by the declaration continues to operate under a lawful time share plan or registration.

C. Time share units, time share plans and transient vacation rentals are allowed in the hotel district; provided, such use is explicitly and prominently authorized by the project instrument. As used in this section, "project instrument" means one or more documents, including any amendments to the documents, by whatever name denominated, containing restrictions or covenants regulating the use or occupancy of a project. As used in this section, "project" means property that is subject to project instruments, including but not limited to, condominiums and cooperative housing corporations.

D. If the project in which a time share unit, time share plan, or transient vacation rental is to be created is not a hotel and does not contain time share units, time share plans, or transient vacation rentals, then such use may be created only if such use is explicitly and prominently authorized by the project instruments, or the project instruments are amended by unanimous vote of the unit owners to explicitly and prominently authorize time sharing or transient vacation rentals.

MCC section 19.02.030, pertaining to permitted uses in the interim district, provides, in relevant part:

A. No land or building shall be used and no building shall be erected or structurally altered or maintained within the districts of Wailuku, Makawao,

Lahaina, Hana, Lanai and Molokai except for one or more of the following uses:

1. One-family dwellings; provided, that no such dwelling shall be constructed on any lot having an area of less than six thousand square feet and that the minimum frontage for such lots shall be not less than sixty feet; provided further, that this area requirement shall not apply to the building of a single-family dwelling on a lot less than six thousand square feet in area where the boundaries of such lot were established prior to the effective date of the ordinance codified in this article; provided also, that if more than one such dwelling is to be constructed on any lot, there must be at least six thousand square feet for each dwelling and that the minimum frontage for such lots shall be not less than sixty feet. There may be the usual necessary accessory buildings in connection with any such dwelling, including a private garage of such size as may be necessary for the occupants of the dwelling, as well as buildings used for accessory dwellings;

2. One or two-story duplex dwellings; provided, that there is at least twelve thousand square feet of lot area for each such dwelling, and that the minimum frontage for such lots shall be not less than sixty feet; ...

MCC section 19.08.020, pertaining to permitted uses in the residential districts, provides, in relevant part:

Within residential districts, the following uses shall be permitted:

A. Single-family dwellings;

...

I. Subject to the restrictions and standards of chapter 19.64 of this title, Type 1 bed and breakfast homes shall be permitted on any lot; Type 2 bed and breakfast homes shall be permitted on lots of seven thousand five hundred square feet or greater; and Type 3 bed and breakfast homes shall be permitted on lots of ten thousand square feet or greater.

MCC section 19.08.030, pertaining to special uses in the residential districts, provides, in relevant part:

The following are declared special uses, and approval of the appropriate planning commission shall be obtained:

...

I. Residential planned developments only.

MCC section 19.500.110, pertaining to nonconformities, provides, in relevant part:

Nonconforming lots, structures, uses and parking may be continued, subject to the following provisions:

...

C. Nonconforming Uses.

1. A nonconforming use shall not extend to any part of the structure or lot which was not arranged or designed for such use at the time the use became nonconforming;

2. Any nonconforming use that is discontinued for twelve consecutive months shall not be resumed;

3. Work may be done on any structure devoted in whole or in part to any nonconforming use; provided, that work is limited to ordinary repairs, including repair or replacement of walls, fixtures, wiring or plumbing. Further, this work shall not exceed fifty percent of the current replacement cost of the structure within a twelve-month period, and the floor area of the structure, as it existed at the time the nonconforming use was created, shall not be increased; and,

4. No nonconforming use shall be changed to another nonconforming use....

MCC section 19.04.040 defines "nonconforming uses" as "any use of a structure or zoning lot which was previously lawful but which does not conform to the applicable use regulations of the district in which it is located, either on the effective date of the ordinance codified in this article or as a result of any subsequent amendment."

III. Discussion

1. Transient vacation rentals in existence on April 20, 1981, the effective date of Ordinance No. 1134, were allowed to continue pursuant to grandfather provisions in the Ordinance and are a nonconforming use.

Under HRS section 514E-5, "transient vacation rentals" are prohibited, except as provided in HRS section 514E-5. HRS section 514E-5(1) "grandfathered" from this prohibition "existing" transient vacation rentals.

HRS sections 514E-4 and 514E-5(2) authorize counties to adopt

legislation designating areas for transient vacation rentals. Pursuant to HRS sections 514E-4 and 514E-5(2), in 1981 the County Council passed Ordinance No. 1134, which, consistent with HRS Section 514E-5, prohibited transient vacation rentals, except as allowed by the Ordinance.³ Like HRS section 514E-5(1), Ordinance No. 1134 "grandfathered" existing transient vacation rentals.⁴ As amended by Ordinance No. 1989 (discussed above), MCC section 19.37.010(C) permits transient vacation rentals only in the hotel district.⁵

Transient vacation rentals are not a permitted use in areas, such as Puamana, that are in the residential and interim zoning districts.⁶ Act 186 and Ordinance No. 1134 made transient vacation rentals at Puamana illegal in 1981, except for those transient vacation rentals "existing" at the time.

Transient vacation rentals at Puamana existing as of the effective date of Ordinance No. 1134 are "nonconforming uses" in that such uses, although lawful previously,⁷ became nonconforming in the residential and interim districts. In general, nonconforming uses are allowed to continue.⁸ However, the right to

³MCC §19.37.010(A).

⁴MCC §19.37.010(B).

⁵In light of the facts and questions presented in the instant case, this memorandum does not address or analyze the operation of transient vacation rentals pursuant to conditional permits under MCC chapter 19.40 or state special use permits under HRS chapter 205.

⁶See MCC §§19.02.030, 19.08.020, 19.37.010.

⁷As discussed above, the Intermediate Court of Appeals of Hawai'i, in County of Maui v. Puamana Management Corp., 2 Haw.App. 352, 631 P.2d 1215 (1981), held that the Maui County Code, as then constituted, did not prohibit the continuous and collective rental of units for a period of one week or longer with provisions for maid and housekeeping services.

⁸See Waikiki Marketplace Investment Co. v. Chair of Zoning Board of Appeals of the City and County of Honolulu, 86 Hawai'i 343, 353-354, 949 P.2d 183, 193-194 (1997) ("[W]e note that the right of a property owner to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction is grounded in constitutional law.... Therefore, due process principles protect a property owner from having his or her vested property rights interfered with,

continue a nonconforming use is not unlimited, and zoning policy is to minimize nonconforming uses.⁹

Zoning laws often place certain restrictions on nonconforming uses.¹⁰ Accordingly, under MCC section 19.500.110(C)(2), any nonconforming use that is discontinued for twelve consecutive months cannot be resumed. Further, under MCC section 19.500.110(C)(1), a nonconforming use cannot "extend to any part of the structure or lot which was not arranged or designed for such use at the time the use became nonconforming." Under MCC section 19.500.110(C)(3), "[w]ork may be done on any structure devoted in whole or in part to any nonconforming use; provided, that work is limited to ordinary repairs, including repair or replacement of walls, fixtures, wiring or plumbing." Pursuant to MCC section 19.500.110(C)(4), a nonconforming use cannot be changed to another nonconforming use.

In general, the burden of proof in establishing a nonconforming use is on the party asserting it, and requires proof that a lawful use existed before and at the time of the zoning change.¹¹

(citation omitted) and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate."); See also HRS §46-4(a) ("Neither this section nor any ordinance enacted under this section shall prohibit the continuance of the lawful use of any building or premises for any trade, industry, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single family or duplex) or agricultural uses."); MCC §19.500.110.

⁹McQuillin Municipal Corporations §§25.180, 25.183, at 9, 26-32 (3d ed.).

¹⁰McQuillin Municipal Corporations §25.182, at 21-24 (3d ed.).

¹¹McQuillin Municipal Corporations §25.180, at 8 (3d ed.).

2. The transfer of ownership of a unit does not extinguish an allowed nonconforming use.

Generally, an established nonconforming use runs with the land, and, therefore, a change in ownership of a property or unit does not by itself extinguish the right to continue the use.¹² In a memorandum dated July 7, 1997, from John S. Rapacz, Deputy Corporation Counsel, to Alice L. Lee, Council member, on the subject of short-term or transient rental uses in apartment districts, corporation counsel opined, in part:

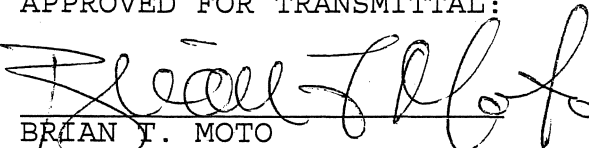
You asked specifically about the effects of changing ownership of lawfully existing short-term or transient uses in the Apartment Districts. The short answer is: If the short-term or transient use is lawfully existing, a change in ownership would have no effect. This would be true whether it was the entire project or a single dwelling unit. (Emphasis in original.)

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Enclosures

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cc: Michael Foley, Planning Director
Wayne Boteilho, Deputy Planning Director
James A. Giroux, Deputy Corporation Counsel
Aaron Shinmoto, Administrator, ZAED

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

¹²McQuillin Municipal Corporations §25.183.50, at 33-34 (3d ed.); See also 83 Am. Jur. 2d *Zoning and Planning* §587 ("The right to maintain a nonconforming use does not depend upon ownership or tenancy of the land on which the use sits. If a particular use of land is permitted, it is beyond the power of a municipality to regulate the manner of ownership of a legal estate. A nonconforming use is not personal to the current owner or tenant, but attaches to the land itself, and is not affected by the user's title, or possessory rights in relation to the owner of the land. Accordingly, a change in the ownership or tenancy of a nonconforming business or structure does not affect the right to continue the nonconforming use. Such right can be exercised equally by the purchaser.")