

## IT Committee

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**From:** Melody Andrion <Melody.Andrion@co.maui.hi.us>  
**Sent:** Friday, October 29, 2021 11:53 AM  
**To:** IT Committee  
**Cc:** Jennifer Oana; Laksmi M. Abraham  
**Subject:** IT-38 Community Facilities Districts with Memo  
**Attachments:** IT-38 2021-10-29 RFLS Closing Community Facilities District.pdf

See attached closing of RFLS received on 08/31/2021 regarding the subject matter. Thanks!

**NOTICE:** The information in this transmittal (including attachments, if any) is privileged and confidential and is intended only for the recipient(s) listed above. Any review, use, disclosure, distribution or copying of this transmittal is prohibited except by or on behalf of, the intended recipient. If you have received this transmittal in error, please notify me immediately by reply email and destroy all copies of the transmittal. Thank you.

# REQUEST FOR LEGAL SERVICES

**RECEIVED**

By Dept. of the Corporation Counsel at 4:07 pm, Aug 31, 2021

**Date:** August 31, 2021  
**From:** Yuki Lei K. Sugimura, Chair  
Infrastructure and Transportation Committee

TRANSMITTAL  
**Memo to:**

**DEPARTMENT OF THE CORPORATION COUNSEL**  
**Attention: Jennifer Oana, Esq.**

**Subject: COMMUNITY FACILITIES DISTRICTS (IT-38)**

**Background Data:** Please review and provide comments on the attached draft Community Facilities District Procedural Guidelines. Please email response to [it.committee@mauicounty.us](mailto:it.committee@mauicounty.us).

**Work Requested:**  FOR APPROVAL AS TO FORM AND LEGALITY  
 OTHER: Legal comments on draft procedural guidelines.

Requestor's signature  Yuki Lei K. Sugimura	Contact Person <u>Laksmi Abraham</u> (Telephone Extension: 7659)
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ROUTINE (WITHIN 15 WORKING DAYS)  RUSH (WITHIN 5 WORKING DAYS)  
 PRIORITY (WITHIN 10 WORKING DAYS)  URGENT (WITHIN 3 WORKING DAYS)

SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): \_\_\_\_\_  
REASON: \_\_\_\_\_

## FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: JMO	ASSIGNMENT NO. 2021-0015	BY: maa
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TO REQUESTOR:  APPROVED  DISAPPROVED  OTHER (SEE COMMENTS BELOW)  
 RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE):  
Please see attached memo dated 10/29/2021.  
\_\_\_\_\_  
\_\_\_\_\_

DEPARTMENT OF THE CORPORATION COUNSEL

Date 10/29/2021

By /s/ J.O.

(Rev. 7/03)

it:ltr:038acc01:lma

Attachment

**County of Maui**  
**Community Facilities District (“CFD”)**  
**PROCEDURAL GUIDELINES**

**I. INTRODUCTION**

Section 46-80-1 of the Hawaii Revised Statutes (HRS) provides that a county may initiate proceedings to establish a community facilities district (“CFD”). On December 24, 2018, Ordinance 4947 (the “Ordinance”) took effect, amending Title 3 of the Maui County Code (“MCC”) authorizing the formation of CFDs for certain types of special improvements identified under MCC Section 3.75.050.

In furthering the goal of utilizing CFDs to benefit the County, property owners who may become subject to CFD special taxes and benefit from CFD improvements, and the general public who may benefit from CFD improvements, the County Council wishes to adopt administrative policies and procedures (the “Guidelines”) to guide it in considering whether and how to approve CFD formation.

These Guidelines are subject to amendment by the County Council at any time. The Mayor will be provided an opportunity to provide comments and recommendations on any proposed amendment before adoption by the County Council. In each circumstance, the decision as to whether the County will establish a CFD will be made solely by the County Council with approval by the Mayor. Nothing contained herein shall be construed as obligating the County to establish a CFD in any circumstance or as granting to any person any right to have the County establish a CFD in any circumstance.

In each circumstance, the decision as to whether the County will establish a CFD under Chapter 3.75 will be made solely by the County. Nothing contained herein shall be construed as obligating the County to establish a CFD in any circumstance or as granting to any person any right to have the County establish a CFD in any circumstance.

**II. POLICIES AND PROCEDURES GENERALLY**

The County is committed to promoting the health and welfare of its residents, responsible economic development including the promotion or retention of employment, resource and environmental preservation, development of public infrastructure, and the stabilization or increase of the tax base. Therefore, it is the prerogative of the County to use CFDs to finance public infrastructure and public facilities (“Public Infrastructure”) that will help facilitate the above objectives.

Generally, the County will require that Public Infrastructure financing through a CFD provide a general public benefit, that a source to fund maintenance costs is identifiable and affordable, and that, absent findings of special circumstances, the essential Public Infrastructure does not increase the County’s public liability risks beyond levels normally acceptable for public improvements.

The procedures and standards set forth herein will apply generally to CFDs proposed by the County and those proposed by private property owners. However, the application process will differ for CFDs proposed by private property owners (as discussed herein).

The County may also form a CFD on its own initiative for Public Infrastructure benefiting certain property owners or communities. In the case of CFDs proposed by the County, the development and construction of the infrastructure financed by the CFD will be managed in the same manner to the same standards as all other County or State public infrastructure projects. The County may also consider the availability of County general funds to offset costs.

### **III. APPLICATIONS; CONDITIONS; DEPOSITS**

No application, conditions or deposits will be required for County initiated CFDs. For CFDs proposed by developers or otherwise by groups of individual property owners, one or more of the owners of the property that directly benefits from the Public Infrastructure to be financed by the CFD will be required to complete an application in such form as the County may prescribe. Information provided in the application will be considered public information other than confidential financial disclosures.

The application should indicate if the issuance of CFD bonds is proposed or if the CFD is being proposed to fund Public Infrastructure costs on a "pay as you go" basis.

All County, legal and consultant costs incurred in the evaluation of any CFD application, or in the formation of a CFD or the issuance of CFD bonds, will, at the County's option, be paid by the property owners (the "Applicant"), which payment will be secured by an advance deposit with the County as provided for in MCC Chapter 3.75 that authorizes the creation of the CFD. The County will not be expected to incur any expenses for processing a CFD, and expenses not chargeable to the CFD will be borne by the Applicant. In general, due to the complexity and specialized professional and legal experience required to form a CFD, the deposit will not be less than \$75,000, as required by the County. The deposit may be increased upon demand of the County if at any time the County determines that the remaining amount is not sufficient to cover anticipated remaining expenses and costs. If the additional amount is not paid within ten business days of the written demand by the County to the Applicant, the County will cease all activities with respect to the CFD financing until the additional amount is paid. The initial deposit and any additional amounts will be held by the County and used only for the expenses and costs incurred in connection with the CFD proceedings. Any balance of such deposit remaining upon completion of the CFD proceedings, or the abandonment thereof, and not needed to pay expenses and costs relating thereto, will be returned to the Applicant. If CFD bonds are issued the Applicant may be entitled to reimbursement of deposits from the proceeds of the bonds or special taxes. The use of the deposit shall in no way be construed as requiring the County to issue CFD bonds or to provide reimbursement from the proceeds thereof for portions of the deposit that are expended.

The Applicant will also be required to prepare and submit a plan for the Public Infrastructure financed by the CFD to address administrative, operational and maintenance expenses not funded by the proposed CFD special taxes, unless otherwise agreed, including the source of funds or deposits proposed to fund administrative, operational and maintenance costs. The Applicant shall also prepare a statement of public benefit which shall identify the public benefit of each improvement proposed to be financed by the CFD.

In connection with each CFD proposal, a public benefit requirement must be met by the Applicant to the satisfaction of the County. This public benefit requirement will be evaluated in terms of the benefits to the public that will be provided by the Public Infrastructure to be funded through the formation of the

CFD and issuance of CFD bonds, if applicable. In view of the financial benefits to be realized by developers and owners of properties within the boundaries of the CFD, the County will require demonstration of meaningful types and levels of public benefits prior to the County taking action to proceed with CFD formation. Examples of public benefits include:

A. Regional Benefits.

Public Infrastructure that provides regional benefits include those which serve and provide benefits to communities beyond the boundaries of the CFD, including but not limited to: the construction or improvement of regional roadways and transportation systems; shoreline improvements; flood control; the expansion or improvement of water and sewer facilities; and the construction or improvement of other public facilities (such as police stations, fire stations, and public parks and recreational facilities) .

B. County Initiatives.

The Public Infrastructure may provide public benefits by supporting identified County initiatives, such as facilities necessary for the development of affordable housing projects (including projects to provide senior housing, low-to-moderate income housing or workforce housing) or for community revitalization.

C. Environmental Benefits.

The Public Infrastructure may also be considered as providing public benefits to the extent the CFD addresses environmental concerns. Examples include acquisition and preservation of wetlands (or other significant ecological habitats) and open space; provision of public access to coastal areas and recreational trails; shoreline restoration and construction of storm water facilities.

D. Timing of Improvements.

CFD funding for Public Infrastructure may have the effect of accelerating the completion of Public Infrastructure in comparison to other funding sources by making them available to the public sooner.

E. Other Public Benefits.

The foregoing is not intended as an exhaustive listing of factors to be considered in determining whether Public Infrastructure funded by a proposed CFD will provide meaningful benefits to the public.

#### **IV. COUNTY STAFF REVIEW**

County Administration staff, overseen by the Managing Director and including other key County executives from finance, public works, planning and the Mayor's office, as applicable, will review each CFD application prior to any action taken by the County Council. CFD applications may also be reviewed by the County's outside legal and financial advisors. County staff shall produce a recommendation based

on reasonable assumptions and upon representation of the property owners. The recommendation shall contain the following:

- A. Confirmation that the information provided in the CFD application is sufficiently complete and that the County has no reason to believe that the Applicant and the underlying development project is financially unsound, whether or under what conditions the County or State is willing to accept the Public Infrastructure improvements into its system, that the County or State has funds or a plan to maintain the Public Infrastructure, and that the CFD special taxes and bonding would not be detrimental to property owners, the general public or the County.
- B. Identification and evaluation of the public benefits included in the proposed CFD.
- C. A review of relevant components of the proposed CFD formation as contained in HRS 46-80-1 and MCC Chapter 3.75 C.

## **V. PERFORMANCE OF WORK**

For CFDs proposed by Developer Applicants. A Developer Applicant may be required, pursuant to a funding and acquisition agreement (which details the terms and conditions of the County's or State's acquisition and acceptance of the Public Infrastructure) to finance and construct the Public Infrastructure with funds other than the proceeds of CFD bonds. Pursuant to the funding and acquisition agreement, CFD bonds will be sold and proceeds will be used to acquire the Public Infrastructure upon completion and approval by the County or State for acceptance into the County or State system. The developer applicant and the County and/or State, if applicable, will enter into an agreement at the time of CFD formation. The developer Applicant will need to manage the Public Infrastructure construction to County or State standards. The requirement that the Applicant manage and fund the Public Infrastructure construction may be waived at the sole discretion of the County or State should non-Developer Applicants, such as individual property owners, are determined to not have the ability to manage or finance the construction of the CFD Public Infrastructure. In circumstances where the Applicant is a non-Developer Applicant and is unable to manage the construction of the capital improvements or is deemed, at the sole discretion of the County or State if applicable, to be unable to manage the construction, the County or State may consider third party agreements or partnerships to manage and complete the Public Infrastructure improvement work.

Public Infrastructure and/or fees to be financed will be dedicated and owned by the County or State, or be subject to an intergovernmental agreement with the State. Unless otherwise agreed, the County or State shall not be responsible for oversight, review, or other work with respect to improvements to be financed until such a time as the improvements are fully completed, reviewed and approved, and accepted into the County or State system as County or State property at the sole discretion of the County or State, whether a CFD has been formed or not, and whether bonds have been issued or not.

Each Applicant will be required to provide an indemnity to the County or State, if applicable, its members, officers, agents and employees for all costs, expenses and attorney fees, as well as any judgment or settlement costs arising out of the CFD formation, or in any of the documentation related thereto, as a result of the actions or information reasonably relied upon by the County or State provided by the Applicant.

The provision of this section will not apply to County initiated CFDs. The County has full discretion to issue CFD bonds, use CFD bond proceeds to fund Infrastructure construction, and take any other action allowed under CFD law and Chapter 3.75 of the Maui County Code.

## **VI. PRIORITIES FOR FINANCING**

The County will prioritize CFD-financed Public Infrastructure and facilities as follows:

- A. Facilities and Public Infrastructure needed to serve approved development which is deficient in Public Infrastructure needed to accommodate the development or rehabilitation of the area as planned.
- B. Other facilities and Public Infrastructure for which there is a clearly demonstrated public benefit.
- C. Other facilities and Public Infrastructure to be owned and operated by the County or the State; and
- D. Other facilities and Public Infrastructure that are permitted by the Ordinance.

The above listed priorities are not in order of preference and are instead a representative list of prioritized public facilities. The County may consider financing any other improvement authorized to be financed pursuant to the Ordinance if the County determines it will serve the public interest to do so. The specific list of financeable improvements, with a useful life of five years or longer, as outlined in MCC Section 3.75.050 includes:

- 1. Streets, roads, highways, bikeways, pedestrian malls, sidewalks, or alleyways, including grading, paving, or otherwise improving the foregoing.
- 2. Public parking facilities.
- 3. Lighting systems, including traffic signals, for any public right-of-way.
- 4. Local park, recreation, child care, parkway, and open-space facilities.
- 5. Libraries, museums, and other cultural facilities.
- 6. The undergrounding of natural gas pipeline facilities, telephone lines, facilities for the transmission or distribution of electrical energy, cable television lines, and other utility facilities. The county may enter into an agreement with a public utility to utilize those facilities to provide a service and for the conveyance of those facilities to the public utility. If the facilities are conveyed to the public utility, the agreement may provide for a refund by the public utility to the district or improvement area thereof for the cost of the facilities. Any reimbursement made to the district shall be utilized to reduce the special tax levied within the district or improvement area or construct or acquire additional special improvements within the district or improvement area, as specified in the ordinance of formation. For the purposes of this subdivision only, a cable television company shall be deemed a "public utility."

7. Water systems.
8. Police, criminal justice (including jails), fire suppression (including fire stations), and paramedic facilities.
9. Wastewater, storm drainage, sewage removal or treatment, solid waste disposal, and recycling or resource recovery systems or facilities.
10. Transit or transportation systems.
11. Telecommunications systems.
12. Shoreline restoration and beach nourishment projects.
13. Any other facilities which the county is authorized by law to contribute revenue to or construct, own, maintain, or operate.

The debt of a CFD may not have any material direct or indirect negative impacts on the debt financing capabilities or bond ratings of the County as reasonably determined by the County. In addition, the debt of a CFD may not impose an unreasonably high financial burden on future CFD residents. The County may consider debt burdens, and corresponding tax rates and levies, in its decision on whether to approve the formation of a CFD.

#### **VII. DEDICATION OF REAL PROPERTY**

Unless otherwise provided to the County or State pursuant to other requirements, prior to CFD financing and acquisition by the County or State of completed facilities, the County or State may require an independent environmental report or assessment of any real property which is proposed to be dedicated to or otherwise owned, leased or operated by the County or State. Additionally, the County or State may require an indemnity agreement with respect to all environmental law liability.

#### **VIII. CREDIT QUALITY REQUIREMENTS FOR CFD BOND ISSUES**

The County will work with its advisors, consultants and underwriters to review each proposed project for financing through the County's use of the CFD ordinance to determine its credit quality and economic viability. The County will require that the credit quality of any CFD bond issue be such that the requirements of MCC Section 3.75.670 will, at a minimum, be met; provided, however, that the County will require that the appraised value of the real property, assuming the CFD financed Public Infrastructure is completed, that would be subject to the special tax to pay debt service on the bonds be at least three times the principal amount of the bonds to be sold or five times the principal amount of bonds based on the most recent County assessed valuation if an appraisal is not practical given the number of property owners or number of parcels contained in the CFD.

##### **A. Entitlement and Development Status.**

The County will require that a Developer Applicant must obtain all environmental approvals, land use planning approvals, special permits (e.g., permits required by the Army Corps of Engineers,



the State, other agencies), and approval by the County prior to the issuance of any CFD bonds. The Developer Applicant will be required to provide the County with information regarding all discretionary approvals that remain necessary for development of the Developer Applicant's project to proceed to the Applicant's planned development stage.

B. Reserve Fund.

In order to enhance the credit quality of bond issues, the County may require that each bond issue be secured by a reserve fund funded in an amount no less than the least of (a) 10% of the original proceeds of the bond issue, (b) maximum annual debt service on the bonds of issue, and (c) 125% of the average annual debt service on the bonds of such issue, unless such lower amounts shall be required to maintain the tax exemption on the bonds. If the properties subject to the CFD special taxes are developed and there are multiple land owners, a bond reserve fund based on a multiple of historical delinquency rates may be considered subject to review by County bond counsel and municipal advisor. If the bonds are not tax exempt a larger bond funded reserve fund may be contemplated.

C. Credit Enhancement.

If an Applicant fails to meet the credit criteria otherwise specified herein, the County may require credit enhancement to increase the credit quality of a CFD bond issue, particularly where the value-to-lien ratio of a significant portion of the property in such CFD is less than three-to-one. Such credit enhancement will usually be in the form of an irrevocable bank letter of credit, will be required to be in an amount not less than two times the amount of annual special taxes levied on such undeveloped property and will be required to remain in effect or be renewed until such property is developed or the value thereof has otherwise be increased to be greater than three-to-one or as otherwise required. Such letter of credit will generally be required to be issued or guaranteed by an entity, the long-term unsecured obligations of which are rated not less than "A" by Moody's Investors Service, Fitch or Standard & Poor's ratings service.

D. Capitalized Interest.

The amount of capitalized interest funded for an issue of CFD bonds may not exceed two years or as otherwise required by federal tax law.

E. Additional Measures.

The County may require additional measures to increase the credit quality of any bonds issued.

F. Investor Suitability.

Based upon the credit characteristic of the CFD Bonds, the County, in consultation with the County's municipal advisor, bond underwriter and legal counsel, shall determine if investment in the CFD Bonds should be restricted to qualified institutional buyers and accredited investors and/or sold in bond denominations greater than \$5000.

## **IX. PROPERTY APPRAISALS**

When the CFD is established as discussed herein, an appraisal will also be required in connection with the offering of CFD bonds unless otherwise waived at the sole discretion of the County based on the number of parcels or property owners involved. The appraisals will be performed by the independent appraiser retained by the County and funded by the property owners from the deposit agreement. Each appraisal will be prepared in compliance with applicable standards under the Uniform Standards of Professional Appraisal Practice developed by the Appraisal Foundation, and the Code of Professional Ethics and Standards of Professional Appraisal Practice developed by the Appraisal Institute.

If an appraiser has been retained by a construction lender for the proposed Public Infrastructure improvements, the County may, but shall not be required to, accept that appraiser's report for purposes of the appraisal requirement. The definitions, standards and assumptions to be used in appraisals required in connection with the County's use of the Ordinance are as set forth:

- A. An independent review appraiser and/or independent property absorption study may be required.
- B. The income discounted cash flow method is preferred but comparable sales method may be used whenever there is sufficient data available.
- C. The appraiser should assume the presence of the Public Infrastructure to be financed with the bonds.
- D. The special tax lien need not be computed as the present value of the future tax payments if there is a pre-payment mechanism or other more appropriate measure, except where necessary to make a meaningful comparable sale comparison; and
- E. The date of the value estimate must be clearly identified in the appraisal report. The period between the date of value contained in the appraisal (or, if applicable, the date of value contained in any update to such appraisal) and the date of the issuance of CFD bonds shall be no greater than three months.

## **X. DISCLOSURE TO PROSPECTIVE PROPERTY PURCHASERS**

In order to ensure that prospective property purchasers who may purchase or lease property (pursuant to HRFS 46-80-1 and MCC 3.75.670) subject to a special tax lien are fully informed about their taxpaying obligations imposed under the CFD, the County will require disclosure to prospective property purchasers as contained in the Ordinance. The County reserves the right to require additional disclosure procedures in any particular case.

In order to ensure that such prospective property purchasers are fully informed about their special tax obligations, the County will require that proper disclosure statements regarding such special tax obligations be made to prospective property purchasers. Such disclosure statements will be subject to approval by the County Managing Director or their designee and will include the following information:

- a statement that the property being purchased is subject to a special CFD tax which is in addition to regular County property taxes.

- the maximum annual amount of the special tax, the number of years over which it will be levied and the permitted amount of annual increases.
- the prepayment provisions for the special tax.
- if the property owner fails to pay the special tax, the County may foreclose on the property to collect the delinquent special tax; and
- such other information regarding the CFD and special tax as may be required by the County.

## XI. EQUITY OF SPECIAL TAX FORMULAS AND MAXIMUM SPECIAL TAXES

The County's criteria for evaluating the equity of tax allocation formulas, and the desirable and maximum amounts of special taxes to be levied against any parcel pursuant to the Ordinance, are set forth in this section.

### A. Reasonable Basis of Apportionment.

Special taxes must be allocated and apportioned on a reasonable basis to all categories and classes of property (other than exempt property) within the CFD that receive general or special benefit from the Public Infrastructure financed through the CFD. Exemptions from the special tax may be given to parcels which are publicly owned unless such property is granted a leasehold or possessory interest to a non-governmental owner.

### B. Total Tax Burden.

The total tax burden (that is, the maximum annual CFD special tax, together with ad valorem property taxes, special assessments, and any other taxes, fees and charges payable from and secured by the property) on any residential owner-occupied parcel in a CFD shall not exceed 2% of the expected assessed value of such parcel upon completion of the public and private improvements relating thereto unless otherwise approved by the County.

### C. Rate and Method of Apportionment.

The rate and method of apportionment for CFD special taxes must be structured so as to annually produce special tax revenues sufficient to pay (1) annual debt service on all authorized series of CFD bonds, (2) fund capital projects for "pay as you go" projects and (3) reasonable and necessary annual administrative expenses of the CFD. Additionally, the rate and method of apportionment may be structured so as to produce amounts sufficient to fund (1) any amounts required to establish or replenish any reserve fund established for a CFD bond issue, (2) the accumulation of funds reasonably required for future debt service on a CFD bond issue, (3) amounts equal to projected delinquencies in special tax payments, (4) remarketing, credit enhancement or liquidity fees, and (5) any other costs or payments permitted by law.

The rate and method of apportionment must be structured such that the projected maximum special tax that could be levied in any year would produce special tax revenues at least equal to (1) 110% of projected annual debt service on all CFD bonds for such year, plus (2) projected reasonable and necessary administrative expenses of the CFD for such year. Generally, the rate and method of apportionment for CFD special taxes will be required to include a back-up tax so

that changes in development within the CFD would not result in the inability to levy special taxes that would produce special tax revenues in such amounts.

D. Increases in Special Tax.

The annual increase, if any, in the maximum special tax for any residential parcel may not exceed 2%. The increase in the special tax levied on any parcel as a consequence of delinquency or default by the owner on any other parcel may not exceed any maximum specified in the ordinance creating a CFD.

E. Prepayment of Special Tax.

Generally, the special tax rate and method of apportionment for a CFD will be structured to allow the prepayment of special taxes by property owners.

F. Foreclosure Covenants.

CFD bonds shall provide for the judicial foreclosure of delinquent payments of special taxes. The ability to commence foreclosure shall be subsequent to notification to the property owner of a delinquency in a form prescribed by law. Any costs advanced by the County to collect special taxes, including any actions taken related to foreclosure, shall be reimbursed by the proceeds of the foreclosure sale or other legally available funds from the CFD. The timing of foreclosure action will be determined prior to the issuance of CFD bonds as the sole discretion of the County and as otherwise required to sell the CFD Bonds.

## XII. DISCLOSURE TO BONDHOLDERS

A. Initial Disclosure.

Each owner of property within a CFD whose special tax payments will support for more than 10% of the annual debt service on an issue of CFD bonds will be required to provide for inclusion in the official statement, or other offering materials distributed in connection with the offering and sale of such bonds, such information as may be required for the County to comply with, satisfy any requirements of, or avoid any liability under, any applicable federal or state securities laws.

B. Continuing Disclosure.

Each owner of property within a CFD, and each subsequent owner of property therein, that is an "obligated person" for purposes of SEC Rule 15c2-12 will be required to provide such information, on an ongoing basis, as may be required by the underwriter of such bonds to satisfy the requirements imposed on the underwriter pursuant to Rule 15c2-12 promulgated under the Securities Exchange Act of 1934.

### **XIII. CONSULTANTS**

The selection of all consultants necessary for the formation of a CFD and the issuance of bonds, including the appraiser, market absorption study analyst, special tax consultant, municipal advisor, bond counsel and underwriter, will be subject to final approval by the County.

### **XV. MINIMUM STANDARDS; WAIVERS AND AMENDMENT**

The Guidelines set forth herein reflect the minimum standards under which the County or State will assist in the development of property through the use of the Ordinance. The County or State may, in its discretion, require additional measures and procedures, enhanced security and higher standards in particular cases. The County may, in limited and exceptional circumstances and to the extent permitted by law, in its discretion, waive any of the Guidelines set forth herein.

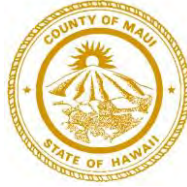
The goals and Guidelines set forth herein may be amended at any time and from time to time by the County Council after receiving the Mayor's comments and recommendations on such amendment.

**MICHAEL P. VICTORINO**  
Mayor

**MOANA M. LUTEY**  
Corporation Counsel

**RICHELLE M. THOMSON**  
First Deputy

**LYDIA A. TODA**  
Risk Management Officer



DEPARTMENT OF THE CORPORATION COUNSEL  
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October 29, 2021

To: Councilmember Yuki Lei Sugimura

SUBJECT: Draft Community Facilities District Procedural Guidelines

Dear Councilmember Sugimura,

In response to your request for comments regarding the draft Community Facilities District Procedural Guidelines (“CFD Procedural Guidelines”), our office offers the following remarks. Thank you for the opportunity to work on this.

Chapter 46-80.1, Hawaii Revised Statutes (“HRS”), enables the County of Maui to create a CFD by ordinance. Chapter 3.75, Maui County Code (“CFD Ordinance”), describes the process by which a CFD may be created and administered. As a preliminary note, adoption of procedural guidelines is not required by State or County law.

Pursuant to Section 4-1 of the Maui County Charter, every legislative act of the Council shall be by ordinance or resolution. The Council may consider adopting the proposed CFD Procedural Guidelines by resolution and using it as a guidance document. However, the proposed CFD Procedural Guidelines contain language that differs from the CFD Ordinance. Conflicting provisions could result in uneven or inconsistent application of the CFD ordinance. Amending the CFD Ordinance is advised if the Council would like to change its requirements.

On a project-specific basis, the proposed CFD Procedural Guidelines could serve as a guidance document that could be helpful in analyzing and implementing the CFD Ordinance. The language contained in the draft CFD Procedural Guidelines appears to be tailored to the Kahana Bay CFD, and the

Council could use the document in its consideration of the project. Permanent changes should be adopted by ordinance.

**Section I. Introduction.** “Guidelines” is misspelled in the second paragraph.

**Section III. Applications; Conditions; Deposits.** The first paragraph contemplates that no conditions or deposits shall be required for County-initiated CFDs. This statement should be vetted by the Council, as there have been other types of situations (i.e., community plan amendments) that are initiated by individual councilmembers at the request of private developers. The proposed sentence may absolve such a private developer from having to deposit fees for consultants that would otherwise be required of a private developer not having the assistance of a councilmember.

The third paragraph requires a deposit of not less than \$75,000, as required by the County. It also states the deposit may be increased upon demand of the County and must be paid within ten business days of such written demand. Section 3.75.100, Maui County Code (“MCC”), does not include these specifications. It may be more appropriate to adopt such specifications by ordinance.

The fourth paragraph requires an Applicant to prepare and submit a plan to address administrative, operational, and maintenance-related expenses for the CFD project. This plan should be reviewed and approved by the Director of the Department of Finance and the department head of the County department that will have the administrative, operational, and maintenance-related jurisdiction over the CFD project upon dedication to the County. The Council should consider amending Chapter 3.75, MCC, to add a new provision to address these matters in the Code. Also in the fourth paragraph, “addresses” should be changed to “address”.

**Section VI. County Staff Review.** Subsection C references Chapter 3.75.C, MCC. I believe the correct reference is simply Chapter 3.75, MCC.

**Section V. Performance of Work.** Our office advises seeking confirmation from Katten, bond counsel for the County, that the draft CFD Procedural Guidelines adequately address concerns raised in the memorandum from Katten to the Department of Finance dated May 28, 2021 (“May 28, 2021 Katten memorandum”).

Pursuant to this section, the County or State may consider third-party agreements or partnerships to manage and complete the public infrastructure

improvement work. It is unclear what authority the County has to include the State in this provision. Further, the Council should consider the implications of entering into a third-party agreement or partnership whereby the County or State takes ownership over a project that was overseen, reviewed, and otherwise managed by a third-party. Any such costs of the third-party consultant should be considered additional “costs of the special improvement” to be paid through the special tax.

**Section VI. Priorities for Financing.** Section 3.75.050, MCC, already details the types of special improvements that may be financed by a CFD.

**Section VII. Dedication of Real Property.** This section should more clearly state that the Applicant must comply with all environmental requirements, including but not limited to the requirements of Chapter 343, HRS, if applicable. Further, that if for any reason the Environmental Assessment or Environmental Impact Statement is challenged, the Applicant shall be solely responsible for all costs involved in defending the EA or EIS, including any legal fees and costs. Until the challenge is resolved, the County would not be obligated to accept the CFD project.

**Section VIII. Credit Quality Requirements for CFD Bond Issues.** Please verify with Katten that concerns raised in the May 28, 2021 memorandum have been addressed.

**Section IX. Property Appraisals.** Again, please confirm with Katten that the draft CFD Procedural Guidelines address the concerns outlined in the May 28, 2021 memorandum. Subsection IX.B may conflict with Real Property Assessment Division appraisal methods. Accordingly, the Council should consider the implications, if any, of requiring an appraisal by income discounted cash flow method.

Subsections IX.D and IX.E add a significant amount of detail not otherwise included in the MCC. Adopting such language by ordinance may be more appropriate.

**Section X. Disclosure to Prospective Property Purchasers.** There appear to be typographical errors in the first sentence. The correct references are to “HRS” and MCC 3.75.350. Further, the Ordinance of Formation and the Special Tax Lien, at least, should be recorded in the Bureau of Conveyances or the Land Court of the State of Hawaii, as applicable, against the subject parcel.

**Section XI. Equity of Special Tax Formulas and Maximum Special Taxes.** Subsection XI.A appears to require special taxes to be allocated and



apportioned on a reasonable basis to all categories and classes of property (other than exempt property) within the CFD that receive general or special benefit from the Public Infrastructure financed through the CFD. This language differs significantly from that of Section 3.75.260, MCC, which allows the Council greater discretion in levying and apportioning special taxes within the CFD.

Subsection XI.B includes a total tax burden limit of 2% of the expected assessed value of such parcel upon completion of the improvements. This limit is not included in Chapter 3.75, MCC, and it is unclear why it is included in the draft CFD Procedural Guidelines.

Subsection XI.C contains factors the Council may consider in its analysis of a CFD proposal and special tax apportionment. However, Chapter 3.75, MCC, is much broader and allows the Council greater discretion to apportion special taxes on a project-by-project basis.

Subsection XI.D contains a 2% cap on the annual increase in the maximum special tax for any residential parcel. This appears to be more restrictive than set out in Section 3.75.260, MCC.

Regarding Subsection XI.E, pursuant to Section 3.75.290, MCC, the Council may allow or prohibit the prepayment of special taxes or specify conditions under which special taxes may be prepaid and permanently satisfied. The draft CFD Procedural Guidelines conflict with the corresponding provisions in the MCC.

Subsection XI.F discusses foreclosure covenants. Section 3.75.330, MCC, discusses foreclosure in the event of delinquency in payment special taxes. It is unclear why additional language is needed in the draft CFD Procedural Guidelines and/or whether such language should be adopted by ordinance.

**Section XII. Disclosure to Bondholders.** Please consult with Katten to ensure the concerns raised in the May 28, 2021 memorandum have been addressed in this section.

**General Comments.** The purpose of the draft CFD Procedural Guidelines is unclear. Adoption of Procedural Guidelines is not required by State or County law. In addition, much of the language overlaps with the provisions contained in Chapter 3.75, MCC, and some of the remaining language appears to be more restrictive than what is required by the MCC.

Section 46-80.1, HRS, and Chapter 3.75, MCC, give broad discretion to the Council to create CFDs on a project-by-project basis. Recognizing the many

types of allowable improvements detailed in Section 3.75.050, MCC, it seems broader Council discretion would be advantageous so that Council can examine each proposal on its merits and tailor the CFD specifications accordingly.

Our office defers to bond counsel regarding any bond-specific provisions.

Sincerely,  
/s/ Stephanie M. Chen  
/s/ Jennifer M.P.E. Oana

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JENNIFER M.P.E. OANA  
Deputies Corporation Counsel