

MICHAEL P. VICTORINO
Mayor
MICHELE CHOUTEAU MCLEAN, AICP
Director
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Deputy Director



DEPARTMENT OF PLANNING
COUNTY OF MAUI
ONE MAIN PLAZA
2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793

December 13, 2021

Honorable Michael Victorino
Mayor, County of Maui
200 South High Street
Wailuku, Hawaii 96793

APPROVED FOR TRANSMITTAL

Michael P. Victorino 12/14/21
Mayor Date

For Transmittal to:

Honorable Michael J. Molina, Chair
Government Relations, Ethics and Transparency Committee
Maui County Council
200 South High Street
Wailuku, Hawaii 96793

Dear Chair Molina,

**SUBJECT: CONSTRUCTION ON LOWER HONOAPIILANI ROAD
(NAPILI) (GREAT-36)**

As a follow-up to the Department of Planning's December 8, 2021 letter to you that transmitted a December 2, 2021 letter to the property owner at 5385 Lower Honoapiilani Road (TMK 4-3-002: 057), enclosed please find the owner's December 7, 2021 response.

If you have any questions or require additional information, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michele McLean".

MICHELE MCLEAN, AICP
Planning Director

Attachment
xc: Moana Lutey, Corporation Counsel
MCM:atw
S:\ALL\Michele\Council\Molina GREAT 36 status 2.docx

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December 7, 2021

Via e-mail to michele.mclean@co.maui.hi.us

Michele Chouteau McLean, AICP
Planning Director
County of Maui
One Main Plaza
2200 Main Street, Suite 315
Wailuku, Hawaii 96793

Re: 5385 Lower Honoapiilani Road
TMK No. (2) 4-3-002:057

Dear Director McLean,

In response to your December 2, 2021 letter we do not agree with the Planning Department's analysis however we are encouraged that the Department now appears receptive to resolving matters. Mr. Brown has made numerous attempts to reach an understanding with the Department since being made aware of its concerns in March of 2020, however the Department was not receptive to any of his proposals. The Department's review of this project has been extremely in-depth and of such a technical nature that it is well above and beyond its typical review. The Planning Department's position regarding transient vacation rental uses on the property also is suspect as it is inconsistent with prior approvals and authorizations issued by the Department. These actions are indicative of selective enforcement motivated by a political agenda, rather than performing the job for which the Department is tasked.

Transient vacation rental uses are permitted on the Property as 1) Mr. Brown in response to a request from the Planning Department for clarification regarding the use of the property during the SMA Assessment process, stated via e-mail that his intention was to use the property as a vacation rental when not being used by his family; and 2) Mr. Brown received his last discretionary permit before the enactment of Ordinance 5233 (2021) and made substantial expenditures in

reliance on assurances by officials, *Kauai County v. Pacific Standard Life Insurance Company*, 65 Haw. 318, 653 P.2d 766 (1982). Before taking action against Mr. Brown on his use it would be wise for the Planning Department to review this issue with its legal counsel.

We are very surprised that the County has taken the position that it can rescind approvals after substantial work has been completed in accordance with the approvals. While the Planning Department's position is that, "the plans did not state nor clearly show," and, "the plans were not clear enough," these same plans were clear and detailed enough for the home to be built and County building inspectors have conducted inspections on the property and confirmed that the home is being built in accordance with the approved plans.

If it is the Planning Department's position that a "mistake" was made in the review of the plans, the Hawaii Supreme Court in *Waianae Model Neighborhood Association, Inc., v. City and County of Honolulu*, 55 Haw. 40, 514 P.2s 861, 1973, agreed with the proposition discussed in *Schultz v. Wilson*, 54 N.J. Super. 309, 140 A.2d 852 (1959), that, "an act of an administrative official which is without any semblance of compliance with or authorization in an ordinance, is beyond his competence and is utterly void; but an act of such official, done in good faith and within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance, is no more than an irregularity, and the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith." (emphasis added)

The Planning Department employees who reviewed these plans are more than competent and their actions certainly were not "without any semblance of compliance," therefore their actions may not be questioned at this late stage of construction. The permitting process took over two (2) years for this home, and multiple revisions were made to the plans at the request of the Planning Department and that if there were any "unclear" items on the plans, clarification should have been requested during plan reviews, not after approvals have been granted. It is extremely poor policy for the Planning Department to threaten to rescind approvals for the lack of clarity on plans when it approved said "unclear" plans and it had ample opportunity to request clarification. The purported issues are mere technicalities and the construction is so far along that corrections

requiring significant revisions will be very costly, it would be in the best interests of my client and the County for the Planning Department to accept Mr. Brown's proposal.

While this entire ordeal has been exhausting and costly for Mr. Brown he is willing to work with the County on resolving the perceived issues. Mr. Brown proposes the following:

1. Elevator Machine Room

- a. The elevator equipment that was to be placed in the Elevator Machine Room on the roof will be relocated to another portion of the house.
- b. The walls of the machine room will be lowered and will not reach the roof of the elevator shaft.
- c. The walled areas will fall under the overhang of the elevator shaft roof and not have a ceiling or roof and therefore not fall within the definition of a "story" per Section 19.04.040, Maui County Code ("MCC").
- d. The definition of gross floor area for determining possible SMA exemptions under Section 205A-22, Hawaii Revised Statutes, as established in the Planning Department's October 24, 2012 memo to Munekiyo and Hiraga, would not include this area as it is not within the exterior perimeter of the exterior walls of the building. The definition of "Floor area" in Section 19.04.040, MCC, excludes "[a]reas covered by roofing treatment to screen rooftop machinery only[,]" and "[e]xterior machinery and equipment enclosures such as for laundry, water heaters, air conditioning, and trash receptacles." Under both interpretations of "floor area" we believe this area would not count towards the gross floor area.

2. Area between the First and Second Floor

- a. Plywood sheathing on the top of the first floor joists will be removed, with the exception of the area where the air conditioning equipment will be located. The height regulations in the Residential District per Section 19.08.050, Maui County Code ("MCC") state that, "[n]o building shall exceed two stories nor thirty feet in height." Many two-story homes in the Residential District have plywood sheathing on the joists in the attic area for the placement of air conditioning air handlers, Mr. Brown's home should be treated similarly and this area should not be counted as a "floor" and therefore adding an additional "story" to the home.
- b. By removing the plywood sheathing, the area between the first and second floor will not have a "floor" and therefore will not fall within the definition of a story per Section 19.04.040, Maui County Code ("MCC").
- c. Since there will be no "floor" in the area between the first and second floor and the height is below 7' throughout, much lower in certain areas, this unfinished,

uninhabitable area would not count as “floor area” for the purposes of calculation of square footage for SMA Exemption purposes.

These reasonable modifications address the Department’s concerns and therefore should be acceptable. The roof will be “dried in” in the near future and any structural modifications to the roof after it is “dried in” will be more costly, complex and will risk water damage to the interior of the home. We need an official response from the Department in regards to the Elevator Machine Room modifications within three (3) days of the date of this letter, if we do not hear back from the Department by the close of business of the third day, we will move forward with the Elevator Machine Room modifications and the drying in of the roof, relying on the lack of response as the Department’s acquiescence that the modifications effectively satisfy the Department’s concerns.

The cost and expense of the modifications to correct the Planning Department’s concerns should be borne by the County of Maui, however due to the time constraints imposed by the Planning Department’s threats and the construction schedule for the home, the priority is reaching an understanding with the Department, and the issue of costs will be revisited at a later time. If this proposal, or any portion thereof, is not acceptable to the Planning Department, we continue to be open to reasonable, appropriate recommendations from the Department.

We look forward to your timely, reasonable response to this proposal. As always please feel free to contact me with any questions or concerns.

Sincerely,



Jeffrey Ueoka

cc: The Honorable Michael P. Victorino, *via e-mail to michael.victorino@co.maui.hi.us*
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