

## PSLU Committee

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**From:** Jocelyn Moniz <Jocelyn.Moniz@co.maui.hi.us>  
**Sent:** Tuesday, October 5, 2021 2:24 PM  
**To:** PSLU Committee  
**Cc:** Melody Andrion; Michael Hopper; Moana Lutey; Richelle Kawasaki  
**Subject:** PSLU-24 2021-10-05 Response memo to Chair Paltin re WRA legal Opinion  
**Attachments:** PSLU-24 2021-10-05 Memo to Chair Paltin re WRA legal opinion.pdf

Good afternoon PSLU Committee,

Please see the attached memorandum from Michael Hopper dated today, October 5, 2021 in response to your memo dated 9.28.2021 along with the attachments.

Thank you,  
Joce

*Jocelyn C. Moniz*  
Law Technician II  
Department of the Corporation Counsel  
808-270-1777  
email: [Jocelyn.moniz@co.maui.hi.us](mailto:Jocelyn.moniz@co.maui.hi.us)

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**MICHAEL P. VICTORINO**  
Mayor

**MOANA M. LUTEY**  
Corporation Counsel

**RICHELLE M. THOMSON**  
First Deputy

**LYDIA A. TODA**  
Risk Management Officer



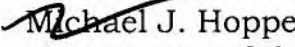
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**MEMORANDUM**

October 5, 2021

MEMO TO: Tamara Paltin, Chair  
Planning and Sustainable Land Use Committee

FROM:  Michael J. Hopper, Deputy Corporation Counsel  
Department of the Corporation Counsel

SUBJECT: **WAILUKU REDEVELOPMENT AREA AND VARIANCES** (PSLU-24)

In response to your September 28, 2021 memorandum, the questions posed relate to the ongoing litigation in Wailuku Good Government Coalition v. Maui Redevelopment Agency et. al., Civil No. 20-0000031. As such, I am unable to provide a public legal opinion on the questions posed. However, by way of background, I am providing previous written opinions from this office on the Maui Redevelopment Agency.

Please contact me if you have any additional questions.

cc: Moana Lutey, Corporation Counsel  
Richelle Kawasaki, Deputy Corporation Counsel

Attachments

LF2021-0016  
PSLU-24 2021-10-05 Response Memo to Chair Paltin

LINDA CROCKETT LINGLE  
Mayor



BRIAN MISKAE  
Planning Director  
GUY A. HAYWOOD  
Deputy Planning Director

RECEIVED  
MAR 25 1 23 PM '91  
COUNTY OF MAUI  
PLANNING DEPARTMENT  
481-251-186753  
250 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793

RECEIVED  
1991 MAR 22 PM 4:30  
OFFICE OF THE MAYOR

March 22, 1991

MEMORANDUM

TO: Cyrus Chan, Acting Corporation Counsel  
Via: Linda Crockett Lingle, Mayor *L.C.L.*  
FROM: Guy Haywood, Deputy Planning Director *G.H.*

At the March 21st Maui Redevelopment Agency (MRA) meeting Deputy Corporation Counsel Howard Fukushima stated that he did not believe that the MRA had the authority to grant parking variances or defer roadway improvements in the Redevelopment Area. The MRA had granted such variances at least within the past two years based on advice from County officials. Having heard these comments while dealing with New Business, Item 2 on the agenda, the MRA members decided to recess the meeting until the Office of the Corporation Counsel had rendered a written opinion as to powers and authority of the MRA. The MRA has scheduled a special meeting for April 4, 1991 at which time they would like to discuss the written opinion from your office.

The primary question is:

What are the legal powers of the MRA?

Do they have the authority to grant parking variances or defer roadway improvements?

We have attached documents concerning the Rules of Practice and Procedure of the MRA for your use. Your prompt attention to this matter is greatly appreciated as our office would like to distribute the written opinion to the MRA members prior to their April 4th meeting. Should you have any questions, please contact Roger Neher of this office.

attachment

CY:sc

cc: MRA Members  
Colleen Suyama  
Ann Cua  
Clayton Yoshida  
Roger Neher

LINDA CROCKETT LINGLE  
Mayor



GUY A. HAYWOOD  
Acting Corporation Counsel

**DEPARTMENT OF THE CORPORATION COUNSEL**

County of Maui  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
TELEPHONE (808) 243-7740

June 19, 1991

Mr. Brian Miskae, Director  
Department of Planning  
250 South High Street  
Wailuku, Hawaii 96793

Dear Mr. Miskae:

SUBJECT: The Scope of Authority of the Maui Redevelopment Agency

This is in response to two requests of this office regarding the scope of authority that may be exercised by the Maui Redevelopment Agency (hereinafter "MRA"). The first request, received by our office on December 3, 1990, asked whether the MRA can promulgate rules to require fees from developers within the MRA's jurisdiction who find it a hardship to provide off-street parking pursuant to the off-street parking requirement in the Comprehensive Zoning Ordinance.<sup>1</sup> The second request dated March 22, 1991, asked that this office clarify what powers the MRA possesses, especially with regard to granting what amounts to variances from the Title 19, Maui County Code, relating to zoning. As the two requests ask for related advice, we attempt to answer them below.

I. What powers has the MRA been granted through State legislation, the Charter, by ordinance, or by rules?

A. Basis for the current regulation.

The initial inquiry focuses upon whether the MRA can exercise, within its jurisdiction, the same powers currently exercised by other County entities or the Board of Variances and Appeals.

The Territorial Legislature empowered the Counties to create, by resolution, local redevelopment agencies. Act 379, Haw. Sess. Laws 1949. Each county redevelopment agency is "a county agency and a public body, corporate and politic . . . ." Haw. Rev. Stat. §53-2 (1985). The Maui County Council established the Maui

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<sup>1</sup>Chapter 19.36, Maui County Code (2/89).

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Redevelopment Agency by ordinance. Ordinance 1859 (1989), codified at Maui County Code §2.40.050.

The intent of the legislation enabling the counties to create redevelopment agencies was to give broad powers to these agencies. Haw. Rev. Stat. §53-5 provides, inter alia:

**§53-5 Powers and duties of agency.** The powers and duties of the redevelopment agency shall be as follows:

- (1) To undertake and carry out urban renewal projects and related activities authorized by this chapter; to make and execute contracts and other instruments necessary or convenient to exercise its powers under this chapter; to sue and be sued; to have a seal; and subject to any limitations in this chapter contained, to exercise all powers necessary, incidental, or convenient to carry out and effectuate the purposes and provisions of this chapter. [Emphasis added.]

The enabling legislation also gave redevelopment agencies the right to exercise powers of eminent domain. Haw. Rev. Stat. §53-8.

Pursuant to the broad grant of authority within chapter 53, the MRA set up what is tantamount to its own zoning and building regulations within the area under its jurisdiction. Through the redevelopment plan it drafted in 1973 (hereinafter "Vineyard Plan"<sup>2</sup>) the MRA incorporated various county code requirements (zoning and building codes) as its own. For example, under "Property Rehabilitation Standards," the Vineyard Plan states:

The Property Rehabilitation Standards consist of a combination of applicable provisions of the Code Standards and Agency requirements to improve properties.

These standards have been established to accomplish certain basic objectives and shall not be construed as

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<sup>2</sup>The enabling statute allows for the redevelopment agency to adopt redevelopment plans, Haw. Rev. Stat. §53-5(4). A redevelopment plan is "a plan, together with any amendments thereto, for the redevelopment of all or any part of a blighted area." Haw. Rev. Stat. §53-1. The procedural requirements for adopting a redevelopment plan are found in Haw. Rev. Stat. §53-6. No amendments have been made to the Vineyard Urban Renewal Plan since its adoption in 1973.

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relieving the property owner or his builder of his responsibility for compliance with local ordinances, codes and regulations including requirements of the Department of Health or other authority having jurisdiction. If a conflict exists between the Code Standards and the Agency requirements, the more restrictive of the requirements will apply.

1. Code Standards

The Code Standards consist of requirements set forth in all applicable laws, rules, regulations, codes and ordinances and as may be amended from time to time. These include:

\* \* \*

c. The permanent Ordinance of the County of Maui, 1971, as amended. The chapters include:

(1) Chapter 8, Zoning.

(2) Chapter 12, Uniform Building Code.

\* \* \*

Vineyard Plan at 14-15 [Emphases added].

The MRA imposes requirements in addition to the building and zoning code in the areas of access, dilapidated portions of structures, painting, yard landscaping, and open space requirements. Also, within County zoning districts, the Vineyard Plan imposes additional conditions, see Vineyard Plan at pp. 19-23.

B. Are the powers granted to redevelopment agencies under chapter 53 superseded by the zoning enabling act?

Whether the MRA can exercise powers that are thought to be zoning powers requires us to look at the legislation enabling the Counties to exercise the zoning power and compare it to the redevelopment agency enabling statute. In 1957, eight years after passing the enabling legislation for redevelopment agencies, the Territorial Legislature delegated the zoning power to the counties. Act 234, Haw. Sess. Laws 1957, codified at Haw. Rev. Stat. §46-4 (1990 Supp.) Section 46-4 provides, inter alia:

Zoning in the count[y] of . . . Maui . . . means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district

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as shall be deemed best suited to carry out the purposes of this section. . . .

The scope of regulation under section 46-4 covers much of the same territory covered by the Vineyard Plan within the redevelopment area.<sup>3</sup> Therefore, in questioning the authority of the MRA to exercise control over development in the redevelopment area, the concern arose as to whether the Legislature, through the zoning enabling act, preempted the MRA's power to control development within its jurisdiction. We believe it does not, and the MRA retains exclusive power to exercise control within the redevelopment area.

Both the redevelopment authority's powers and the zoning powers delegated to the County are part of the police power of the state to regulate land use to further the health, safety, and welfare of its citizens.<sup>4</sup> The redevelopment agency enabling statute was passed before the general zoning enabling act; the latter specifically provides that previous legislation in the same area is not superseded. Section 46-4, Hawaii Revised Statutes, states:

Nothing in this section shall invalidate any zoning ordinances or regulations adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

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<sup>3</sup>Haw. Rev. Stat. §46-4 states that the zoning power may be used by the counties to determine, among other things: areas within which industry, trade, business, and residential uses may be conducted; areas in which particular uses may be subjected to special restrictions; the location of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered; the location, height, bulk, number of stories, and size of buildings and other structures; the location of roads, schools, and recreation areas; building setback lines and future street lines; the percentage of lot which may be occupied, size of yards, courts, and other open spaces; minimum and maximum lot sizes; and "[o]ther such regulations as may be deemed by the boards or city council as necessary and proper to permit and encourage orderly development of land resources within their jurisdictions." These are the kinds of subjects covered in the Vineyard Plan.

<sup>4</sup>As to redevelopment agencies, see McQuillin Municipal Corporations §24.563.15 at 217 (1989) ("Redevelopment of urban areas for recreational, commercial, industrial, or agricultural purposes is within the legitimate scope of the police power.").

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Further, it states that the zoning enabling legislation "shall not be construed to limit or repeal any powers now possessed by any county to achieve the ends through zoning and building regulations. . . ." Even if the zoning enabling act were silent as to whether the redevelopment agency's powers had been superseded by the general grant of the zoning power, the law disfavors implied repeals. 73 Am. Jur. 2d Statutes §396 at 511-12 (1974). Therefore, the MRA can exercise its broad powers to direct and control development over the redevelopment area.

- C. Is the redevelopment plan the proper vehicle to establish legally cognizable standards for development within the redevelopment area?

What legal effect does the Vineyard Plan have upon furthering the powers of the MRA? Although it is labelled a "plan," Haw. Rev. Stat. §53-6 indicates that there is legal significance to the plan's adoption: Upon adoption of the plan, the redevelopment agency may proceed with redevelopment projects contained in the plan, and upon the agency's acquisition of land in a redevelopment project, the lands become automatically rezoned pursuant to its designation in the redevelopment plan.

However, the enabling legislation also provides that the redevelopment agency is empowered to "make, amend, and repeal rules and regulations not inconsistent with this part to carry into effect the powers and purposes thereof, which rules and regulations shall be subject to chapter 91." Haw. Rev. Stat. §53-5(2). Arguably, any rule regarding the zoning, building, and redevelopment of the area could be promulgated through the rulemaking procedures of HAPA.<sup>5</sup> Thus, it is unclear whether the Legislature intended that, in order for development regulations to have any legal force and effect, regulations must be promulgated through rulemaking.

We conclude that either the redevelopment plan or rules promulgated pursuant to HAPA may be used to specify the rules and regulations under which developers within the jurisdiction of the MRA must operate. The procedure for adoption is more elaborate than rulemaking under the Hawaii Administrative Procedures Act (HAPA), Haw. Rev. Stat. chapter 91, because it is reviewed by both

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<sup>5</sup>A "rule" under HAPA means "each 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." Haw. Rev. Stat. §91-1(4). Rules of Practice and Procedure for the Maui Redevelopment Agency were adopted in 1981.



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the planning commission and the county council. The notice requirements for the adoption of the plan are more stringent than those under HAPA. Finally, the adoption of the plan is stayed 30 days to allow for any actions to contest the redevelopment plans. See Haw. Rev. Stat. §53-6. Because of the procedural safeguards built in to the adoption or amendment of the redevelopment plan, we believe that the pronouncements from the redevelopment plan have the force and effect of law, and the rules generated from the redevelopment plan are valid.

II. Can MRA ask for fees in lieu of providing for off-street parking?

One of the objectives of the Vineyard Plan is "to provide adequate offstreet parking facilities convenient to business use areas." Vineyard Plan at 5. The Vineyard Plan also specifies that "[o]ffstreet parking and loading shall comply with the offstreet parking and loading provisions of the Zoning Ordinance (as amended)." Id. at 22. Chapter 19.36, Maui County Code, relating to offstreet parking requirements, currently does not have any provisions for the collection of fees in lieu of providing for offstreet parking within an owner's property. Based upon the advice given above, fees in lieu of parking may be established either by amending the redevelopment plan to allow for the collection of such fees, and the establishment of standards to determine how much of a fee to levy; or by promulgating rules to accomplish the same end.

III. Can the MRA grant variances from the comprehensive zoning ordinance?

A more difficult question to answer is whether the MRA has the power to grant variances from County Code requirements. The County Charter established the Board of Variances and Appeals (hereinafter "BVA"). Section 8-5.4 of the Charter (1989 rev.) states, in pertinent part:

[T]he board of variances and appeals shall: 1. Hear and determine applications for variances from the strict application of any general plan, zoning, subdivision or building ordinances.

Presumably the Charter Commission considers the BVA to be the exclusive authority for the granting of variances. The idea is reinforced by Chapter 19.44, Maui County Code, on variances from the comprehensive zoning ordinance. "Variances from the restrictions imposed by this article may be granted by the board of adjustment and appeals . . . ." MCC §19.44.010.

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The Vineyard Plan also provides for variances from the standards under the Plan, including those County zoning and building code standards incorporated by reference in the Vineyard Plan. The Plan states:

3. Variation to Standards:

A variation to the provisions contained herein may be permitted only when the variation is consistent with the objectives of conservation and when one or more of the following conditions justify the variation:

- a. Topography of the site is such that full compliance is impossible or impracticable.
- b. Long established local practices and customs in the area assure continued market acceptance of the variation.
- c. Design and planning of the specific property offers improved or compensating features providing equivalent desirability and utility.

Vineyard Plan at 16-17. With respect to "Approval of Plans and Specifications," the document states:

The Agency specifically reserves the right to review and approve the redeveloper's plans and specifications with respect to all phases of the renewal. Where unnecessary hardships, practical difficulties, or consequences inconsistent with general purposes of this Plan result from the literal interpretation and enforcement of the restrictions and limitations imposed by this Plan, the Agency, upon receipt of verified application from the redeveloper stating the grounds and facts relied upon, and upon its own investigation may grant adjustments under such conditions and safeguards consistent with the intent of this Plan, provided that in no instance will any modification be granted that will alter the land uses or the basic requirements of the Urban Renewal Plan.

Id. at 25.

We believe the redevelopment agency enabling legislation authorizes redevelopment agencies, exercising the broad powers delegated to them by the Legislature, to grant variances from the

Mr. Brian Miskae  
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standards of redevelopment they have adopted. As the County zoning and building codes have been adopted as part of the standards of the Vineyard Plan, the MRA has the power to grant variances from them.

The instant situation is one in which state enabling legislation appears to conflict with a charter provision. However, the Legislature has the authority to enact general laws allocating and reallocating powers and functions. Article VIII, §2, State Constitution. Further, Article VIII, §6 of the State Constitution, notes that "[t]his article shall not limit the power of the legislature to enact laws of statewide concern."

We conclude that the urban renewal enabling act is a law of statewide concern and superior to the County Charter provisions. Chapter 53 grants broad powers to "exercise all powers necessary, incidental, or convenient" to carry out the purposes of urban renewal. Chapter 53's grant of powers must then include: (1) the power to establish the standards for redevelopment within the MRA's jurisdiction and (2) the power to grant variances from those standards. The Vineyard Plan provides standards for granting variances. Therefore, within the MRA's area of jurisdiction, the power to grant variances from the Vineyard Plan's standards rests with the MRA, not with the Board of Variances and Appeals.

### III. Conclusion

Although we make the above conclusions with respect to the MRA's powers, the public may continue to be confused about the power the MRA wields within the Vineyard Street area. It is

Mr. Brian Miskae  
June 19, 1991  
Page 9

suggested that the County Charter and the County Code acknowledge the power a redevelopment agency has over its area of jurisdiction.

Sincerely,

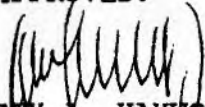
DEPARTMENT OF THE  
CORPORATION COUNSEL



ROBERT K. KEKUNA, JR.  
Deputy Corporation Counsel

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APPROVED:




GUY A. HAYWOOD  
Acting Corporation Counsel

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INTEROFFICE CORRESPONDENCE

November 26, 1996

MEMO TO: David Blane, Director of Planning

F R O M: Howard M. Fukushima, Deputy Corporation Counsel 

SUBJECT: POWERS OF THE MAUI REDEVELOPMENT AGENCY (MRA)

This is in response to your query of October 11, 1996, wherein you requested an opinion regarding the powers of the Maui Redevelopment ("MRA"). We respond as follows:

1. Can the MRA amend the MRA amend the 1973 Urban Renewal Plan from its existing apartment designation to a B-2 or B-MF designation without having to bring the amendment to County Council?

We answer this in the negative.

Section 53-6, Hawaii Revised Statutes, provides for the procedural steps that must be taken to initiate, approve and amend a redevelopment plan.

In short, the MRA is responsible for the formulation of a redevelopment plan. This plan is submitted to the Planning Commission. The Planning Commission may then approve, amend and approve or disapprove the plan.

If the plan is disapproved or amended and approved and the MRA does not accept the same, the MRA's original plan may nevertheless be sent to the Council for its approval or amendment and approval, by resolution, following a public hearing.

If the plan is approved or amended and approved by the Planning Commission, and the MRA accepts the amendments, the plan is sent to the Council for approval, amendment and approval or disapproval following a public hearing. If amended, such amendment must be accepted by the MRA.

David Blane  
November 26, 1996  
Page 2

Upon acceptance by the MRA and final approval by the Council, any action is stayed for 30 days to allow for actions, suits or proceedings contesting the validity of the adoption of the plan.

Upon the expiration of the 30-day period, the MRA may proceed with the redevelopment project(s) covered by the redevelopment plan.

Amendments to the plan that are in the public interest and in furtherance of the purpose of the redevelopment plan are accomplished with the same procedure for the adoption of the original plan.

As a result, the MRA may not unilaterally alter, modify or amend the existing redevelopment plan without Planning Commission and Council approval.

2. If the question to 1. above is yes, could the applicant then request the MRA to grant a variation to the zoning standards to allow the restaurant to expand? Of, does the MRA have the authority to actually rezone the subject parcel to the B-2 zoning classification?

We rephrase the above query to read, "Does the MRA have the authority to grant variances from the code standards adopted by the Redevelopment Plan.

We would refer the Department of Planning ("Department") to the June 19, 1991, opinion by this office relating to Powers of the MRA. Section III concludes by stating:

Therefore, within the MRA's area of jurisdiction, the power to grant variances from the Vineyard Plan's standards rests with the MRA, not with the Board of Variances and Appeals.

Please note that Section C.3. of the Plan sets for the criteria the MRA must apply when considering a request for a variance from the strict application of the Plan's standards. The burden of persuasion and proof lies with the applicant seeking such a variance.

David Blane  
November 26, 1996  
Page 3

With respect to your other queries, we believe the foregoing addresses the primary concern of the Department and accordingly no response to those has been provided.

Should you have any questions or comments, please feel free to contact me.

HMF:pk  
cc: J. P. Schmidt  
c:\wp51\fukushim\memos\blane.opn(pk)

DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI

200 South High Street

Wailuku, Hawaii 96793

INTEROFFICE CORRESPONDENCE

July 23, 1999

**MEMO TO:** John F. Summers, Department of Planning  
**FROM:** Traci Fujita Villarosa, Deputy Corporation Counsel *TFV*  
**SUBJECT:** Maui Redevelopment Agency authority to adopt regulatory standards

You have asked for a legal opinion on whether the Maui Redevelopment Agency ("MRA") has the authority to adopt regulatory standards (ie. zoning, building, public works) through rules. You stated that these standards would implement policies that will be incorporated into the updated Wailuku Redevelopment Area plan.

After reviewing and discussing several previous Office of the Corporation Counsel opinions on MRA authority, our office concludes that the MRA may adopt regulatory standards through rules. In particular, Corporation Counsel opinion 91-4 raised several important factors to consider:

- 1) The legislation enabling the counties to create redevelopment agencies was to give broad powers to these agencies. HRS §53-5.
- 2) The MRA's power to control development within its jurisdiction was not preempted by the legislature through the zoning enabling act. The MRA retains exclusive power to exercise control within the redevelopment area.
- 3) Either the redevelopment plan or rules promulgated pursuant to HRS Chapter 91 may be used to specify the rules and regulations under which developers within the jurisdiction of the MRA must operate.

Therefore, given these factors, it is reasonable to conclude that the MRA may promulgate rules pursuant to HRS Chapter 91 to establish regulatory standards.

However, the rules should specify that such standards shall not be construed to relieve the property owner or the property owner's builder of responsibility for compliance with



John F. Summers  
July 23, 1999  
Page 2

other ordinances, codes and regulations including requirements of the State or other authority having jurisdiction. If a conflict exists between the Maui County Code and the MRA rules, the more restrictive of the requirements shall apply.

If you should have any further questions, please do not hesitate to contact me at extension 7740.

TFV:ko  
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