



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

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 2019 AUG 30 PM 4:00  
 OFFICE OF THE MAYOR

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

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August 30, 2019

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

APPROVED FOR TRANSMITTAL

*Michael P. Victorino*  
 Mayor  
 9/2/19  
 Date

For transmittal to:

Honorable Michael J. Molina, Chair  
 and Members of the Governance, Ethics, and Transparency Committee  
 Maui County Council  
 200 South High Street  
 Wailuku, Hawaii 96793

Dear Chair Molina and Committee Members:

**SUBJECT: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI  
 (GET-26)**

Mayor Victorino asked me if there would be any impacts to the Department of Planning (Department) or our permit processes if the County were to withdraw from the above-referenced litigation, which would mean that the Ninth Circuit Court of Appeals' decision would stand. The answer is that it could cause permitting delays.

As you are aware, most of the permits that we process undergo some level of agency review. We transmit dozens of permits each month to various county, state and federal agencies to obtain their input and expertise on the project that is being proposed, and we rely on this expertise to assist us in analyzing the project's potential impacts and, if appropriate, in formulating conditions to mitigate such impacts. The State Department of Health (DOH) is often one of the reviewing agencies.

With certain permits, at some point, the Department has to make a determination or a recommendation to the approving authority (e.g., one of our planning commissions) that any potential detrimental impacts have been sufficiently addressed and that the criteria of the subject permit have been satisfied. If we cannot make this determination or recommendation, then the permit will likely be denied.

From what I understand of the possible withdrawal from the above-referenced litigation, it may be difficult for the Department to make these determinations for certain permits without DOH's approval, whether a large new commercial project or a small, single residential project.

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and Members of the Governance, Ethics and Transparency Committee  
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For example, pursuant to Chapter 205A, Hawaii Revised Statutes, the criteria for a Special Management Area (SMA) use permit include objectives such as *“protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems”* and policies such as *“promote water quantity and quality planning and management practices that reflect the tolerance of fresh water and marine ecosystems and maintain and enhance water quality through the development and implementation of point and nonpoint source water pollution control measures”* (reference sec. 205A-2(b)(4)(A) and (c)(4)(E)).

Furthermore, before a SMA permit can be issued, the Department or planning commission must find *“that the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests. Such adverse effects shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options”* (reference sec. 205A-26(2)(A)).

It is not clear to me at this time that we would be able to make this finding, or recommend that one of our planning commissions make this finding, if drainage systems, septic systems or even stormwater detention basins are considered to be sources of potential pollutants subject to the Ninth Circuit’s test. As such, they could individually or cumulatively have adverse environmental or ecological effects. We would rely on DOH in its permit review to inform us of potential impacts, necessary mitigation, and required permits. If a National Pollutant Discharge Elimination System (NPDES) permit is required for these ongoing activities, then it would be possible that we would not be able to approve or recommend approval of a SMA permit until after DOH issues the NPDES permit. This would be similar to the project reviews conducted by the State Historic Preservation Division (SHPD); we typically do not take action or make a recommendation on a SMA permit until we receive SHPD’s comments or acceptance.

As you know, SHPD can often take months to review a project. If numerous new NPDES permits are required to be reviewed by DOH, it can be assumed that their review times will also be delayed. Therefore, from my admittedly limited understanding of the subject litigation, SMA and other permits could be subject to delays (if not denials) if the County withdraws from the subject litigation leaving in place the Ninth Circuit’s decision, or if the U.S. Supreme Court affirms the Ninth Circuit’s decision.

Thank you for your consideration of this testimony. If you have any questions or need additional information, please feel free to contact me.

Sincerely,



MICHELE MCLEAN, AICP  
Planning Director