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Kelly King, Chair
CARE Committee
200 South High Street
Wailuku, Hawaii 96793

Memorandum

Re: Outdoor Lighting for Protection of Seabirds (CARE-74)

We are returning the outdoor lighting bill (Bill 21; CARE-74) unsigned for reasons described below. At this early stage, we are unfortunately unable to provide proposed changes to the bill because it is not clear whether conflicts with existing county ordinances are intentional or unintentional and what evidence would be used to support the broad application of lighting restrictions in this ordinance. Once such information is made available, and the issues and questions posed below are resolved, we may be able to suggest a revised ordinance.

In addition to the detailed recommendations below, we suggest that the Committee consider the Kauaʻi Seabird Habitat Conservation Plan, dated March 2020, which provides details on seabird attraction to artificial lights and the approach that Kauaʻi County is using to mitigate those issues. Appendix E of the Conservation Plan provides guidelines for adjusting lighting and citations to scientific support for the guidelines. The Committee may find this Conservation Plan helpful in considering amendments to the existing outdoor lighting ordinance.

We provide some initial thoughts and concerns with the bill, as currently drafted:

1. <u>The draft bill includes vague language that could cause confusion</u>.

The current draft bill includes vague requirements that may be unenforceable. Portions of the draft ordinance are vague and may be found to violate the constitutional right to due process. A civil statute may be unconstitutionally vague if it is "so vague and indefinite as really to be no rule or standard at all." <u>Gardens at W. Maui Vacation Club v. Cty. of Maui</u>, 90 Haw.

334, 343 (1999). For example, using terms such as "unjust," "unreasonable," or "excessive" as applied to prices by a provision in law was found to be unconstitutionally vague because those words "had no commonly recognized or accepted meaning." A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925).

There are several terms that may be impermissibly vague. For instance, the qualifying language such as "wherever possible" has no commonly recognized meaning and it would therefore be unclear to anyone enforcing this ordinance whether a person is in violation of the code. The requirement that lights be "mounted as low as physically possible to limit light trespass" would be difficult to enforce without reference to some objective standard. For example, the provision may be improved by indicating that lights should be as low as possible to comply with an existing lighting or safety standard. Moreover, the specific requirements for "Swimming-pool lighting" is not clear as to whether it applies to lighting outside of pool water, or inside the pool. (Underwater lighting used for illumination of pools, fountains, and spas, are normally exempted from shielding standards.) Even if these vague terms are not unconstitutionally vague, they could lead to confusion for those enforcing or attempting to abide by the code.

2. The "wavelength" requirements should be clarified.

The bill includes a requirement that all outdoor lighting fixtures "be filtered light emitting diode fixtures that limit short wavelength content to <5% wavelengths <550nm." The language of this requirement is unclear and not in any existing statute or model statute that we could locate.

We presume this is intended to mandate that all outdoor light be long wavelength. A simpler approach would be to define "long wavelength" by using a definition such as: "*Long Wavelength: a lamp or light source emitting light wavelengths of 560 nanometers or greater and absent wavelengths below 560 nanometers.*" The bill could then forbid outdoor lights that are not long wavelength, if that is the drafter's intent.

3. The proposed ordinance directly conflicts with MCC 20.35.090.

The proposed ordinance applies to all outdoor lights and therefore directly conflicts with the shielding and usage requirements contained in MCC 20.35.090. That subsection divides outdoor lights into the following usage categories:

- Class I lighting is outdoor lighting use for outdoor sales areas, service stations, outdoor eating areas, outdoor assembly or repair areas, and recreational facilities.

- Class II lighting means all outdoor lighting used for, but not limited to, illumination for equipment yards, parking lots, outdoor security, and other similar application in which general illumination of the ground is the primary concern.

- Class III lighting is any outdoor lighting used for decorative effects, including but not limited to, waterfall and pond lighting, landscaping, and walkways.

- Class IV lighting is all lighting used for the illumination of roadways.

The primary reason for the different classifications relates to safety requirements; lighting in outdoor recreational facilities or parking lots have a specific safety purpose and therefore the lights used tend to be brighter than those used for decoration. The existing ordinance further subdivides these classes into different types of light fixtures because each type of light has a different effect and brightness level and may not require full shielding as long as its usage is limited.

It would be helpful to understand if the drafter would like to have the new lighting standards apply generally, and therefore replace MCC 20.35.090 and delete all references to the different classes, or if these regulations should instead apply to a specific class or classes.

4. <u>The portion of the draft bill relating to wall surfaces needs to be clarified</u>.

The proposed bill requires that where wall-mounted fixtures are used, all "wall surfaces … be non-reflective." It is not clear whether the drafter intended that all outdoor walls which used wall-mounted must be non-reflective. We presume that the drafter intends that certain wall-mounted lights are *directed onto* non-reflective surfaces, not that all wall surfaces using wall-mounted fixtures be non-reflective. Please clarify whether this portion of the draft bill can be clarified to apply to surfaces that may reflect the light.

5. <u>It is not clear why swimming pools are specifically identified in these amendments</u>.

The proposed ordinance provides: "Swimming-pool lighting must be operated by motion detectors to activate when people approach and deactivate five minutes after people depart." Existing code provision MCC 20.35.070 includes the following exemption to the outdoor lighting ordinance: "Outdoor lighting fixtures on a motion sensor timed to turn off within a five-minute time limit."

Please clarify whether the swimming-pool specific portion of the proposed amendment may be deleted or if it is intended to limit the exclusion set forth in 20.35.070.

6. We recommend consideration of ongoing litigation in the *Hawai'i Wildlife Fund and Conservation Council for Hawai'i* case.

A new ordinance with broad application to outdoor lighting may negatively affect negotiations in litigation relating to County-controlled street lights. We recommend that you speak with our litigators involved in that case for guidance outside of a public forum.

These initial thoughts should help guide the next iteration of amendments to existing outdoor lighting regulations. We look forward to continuing to work with you on developing a clear and legally defensible ordinance.

Respectfully,

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County of Maui