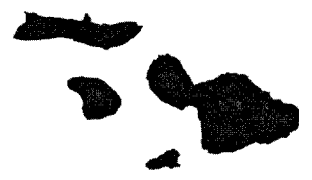
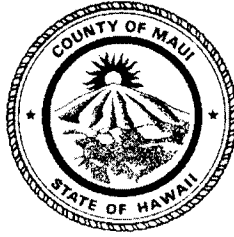


MICHAEL P. VICTORINO  
Mayor

MOANA M. LUTEY  
Corporation Counsel

EDWARD S. KUSHI, JR.  
First Deputy

LYDIA A. TODA  
Risk Management Officer



DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET, 3<sup>RD</sup> FLOOR  
WAILUKU, MAUI, HAWAII 96793  
EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
FACSIMILE: (808) 270-7152

---

**MEMORANDUM**

DATE: February 7, 2020

TO: TASHA KAMA, Chair  
Affordable Housing Committee

FROM: MIMI DESJARDINS *md*  
Deputy Corporation Counsel

SUBJECT: STRATEGIC PLAN FOR HOUSING (AH-17(10))

Pursuant to your letter dated August 20, 2019, inquiring about the legal limits of the use of requirements or preferences regarding affordable housing based on current state, county or district residency; residency for a specified period of time; owner occupancy; a resident's work location; or other criteria designed to give housing priority to County of Maui residents, I provide the following response.

Attached for your review are a number of prior advisory memoranda from the Department of the Corporation Counsel that addressed similar questions relating to the parameters of legally permissible residency restrictions on

eligibility for affordable housing in the County, including use of grant money from programs such as the Affordable Housing Fund and the First-time Homebuyer's Assistance Program.

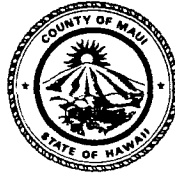
The Department of the Corporation Counsel continues to stand by its positions previously set forth in the attached memoranda. In addition, the Department continues to monitor this area of the law and will advise your committee in the event there is a shift which would favor the use of durational residency requirements.

Please also note that in addition, the definition of "resident" as set forth in 2.96.010, Maui County Code, continues to include the most restrictive residency restrictions allowed under the United States Constitution.

Attachments

LF 2019-0097

ALAN M. ARAKAWA  
Mayor




BRIAN T. MOTO  
Corporation Counsel

**DEPARTMENT OF THE CORPORATION COUNSEL**

COUNTY OF MAUI  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
TELEPHONE: (808) 270-7740  
FAX: (808) 270-7152

August 22, 2005

MEMO TO: Danny A. Mateo, Chair  
Housing and Human Services Committee

F R O M: Edward S. Kushi, Jr., Deputy Corporation Counsel 

SUBJECT: **HRS CHAPTER 201G AFFORDABLE HOUSING PROJECTS (HALE MUA AFFORDABLE HOUSING PROJECT) (HHS-1(2))**

We respond to your request of August 4, 2005 as follows:

1. Is a residency requirement of three-years for the purchase of the market and/or affordable homes within the development legal? Please explain.

SHORT ANSWER: No.

Attached for your review and information is a copy of the December 9, 2003 advisory memorandum from the Department of the Corporation Counsel to Councilmember Joseph Pontanilla, which discussed a "prioritization" marketing plan by the developer of a Hawaii Revised Statutes ("HRS") Chapter 201G affordable housing project (i.e., Pu'unoa), which, in addition to other preferences, proposed to give preference to sales of the affordable units to "long-term West Maui residents". Also attached is a copy of our July 6, 2005 memorandum to you that discussed a proposed three-year residency requirement for applicants applying for benefits/loans from the County's First-Time Home Buyer's Fund. In both memoranda, we opined that the proposed "durational" residency requirements would not withstand judicial scrutiny if challenged on constitutional right to travel, privileges and immunities, due process and/or equal protection grounds.

Although we are not aware of the marketing plans and/or proposals for the subject Hale Mua project, specific to "at the time of purchase" residency requirements, Section 201G-112, HRS, defines the term "qualified resident" as follows:

"Qualified resident" means a person who:

- (1) Is a citizen of the United States or a resident alien;
- (2) Is at least eighteen years of age;
- (3) Is domiciled in the State and shall physically reside in the dwelling unit purchased or rented under this chapter;
- (4) In the case of the purchase of real property in fee simple or leasehold, has a gross income sufficient to qualify for the loan to finance the purchase;

provided that for purchasers of market-priced units in an economically integrated housing project, the term "qualified resident" means a person who is a citizen of the United States or a resident alien; is domiciled in the State and shall physically reside in the dwelling unit purchased; is at least eighteen years of age; and meets other qualifications as determined by the developer." (emphasis added)

We have reviewed Chapter 201G, HRS, as well as Housing and Community Development Corporation of Hawaii ("HCDCH") administrative rules,<sup>1</sup> and cannot find any further definition or clarification of the phrase "other qualifications as determined by the developer". Based on such absence, we are of the position that such "other qualifications", if any, imposed by a developer in any applicable project, must be reviewed and analyzed on a case-by-case basis and, in any event, must conform to established legal guidelines, precedence, and case law.

Accordingly, as in the case of the sale/purchase of affordable units in an HRS Chapter 201G project, we conclude that a condition on the initial sale/purchase of the market-priced units giving preference to three-year residents would also not withstand judicial scrutiny.

2. Do the exemptions listed in Exhibit "1" (attached) of the proposed resolution approving the project allow for the construction of an accessory dwelling on each of the market priced lots? Please explain.

SHORT ANSWER: No, but "farm dwellings" are.

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<sup>1</sup>Hawaii Administrative Rules, Title 15, Subtitle 14, Chapter 174.

The only listed exemption that is relevant to the question of accessory dwellings (i.e., "ohana" units), is exemption F.1<sup>2</sup> which, in pertinent part, states:

1. An exemption from Chapter 19.30A, MCC, Agricultural District, shall be granted to permit the development and use of the parcel for single-family residential purposes, including supporting infrastructure requirements. Further this exemption shall allow the subdivision of the property in the plat configuration shown in the attached Attachment "A". The following zoning standards shall apply to the proposed lots:

Minimum lot size:	5,000 square feet
Height:	No building shall exceed two (2) stories or thirty (30) feet in height

SETBACK:

Front yard	Minimum of 15 feet
Garage	Minimum of 15 feet
Side and rear yard setback:	

Market-priced, one story homes:	Minimum of 6 feet
Market priced, two story homes:	Minimum of 10 feet
Affordable homes:	Zero lot line will be permitted so as to allow two, private, attached carports on abutting lots to adjoin. Other setbacks shall be a minimum of 6 feet. Should any affordable homeowners construct a future second-story addition, the side and rear yard setbacks for the second-story addition shall be 10 feet.

Nowhere under the listing of "zoning standards" is there provision for accessory or ohana units.

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<sup>2</sup>Exhibit "1" attached to resolution "APPROVING THE HALE MUA AFFORDABLE HOUSING SUBDIVISION PURSUANT TO SECTION 201G-118, HAWAII REVISED STATUTES".

Danny A. Mateo, Chair  
Housing and Human Services Committee  
August 22, 2005  
Page 4

Although the Hale Mua project may, through the HRS Chapter 201G process, be permitted to use the parcel for residential uses, the parcel would continue to be in the County's Agricultural zoning district.<sup>3</sup> No "accessory" or ohana dwellings are permitted in the Agricultural district,<sup>4</sup> but two "farm dwellings" per lot, one of which shall not exceed one thousand square feet of developable area, are permitted.<sup>5</sup> Further, upon proof of gross sales of agricultural products, additional "farm labor dwellings" may be permitted.<sup>6</sup>

3. Do the claims questioning the ownership of the subject property made in the attached correspondence from Mahealani Ventura-Oliver impact the Council's ability to approve this project or the developer's ability to complete the project? Please explain.

SHORT ANSWER: A. Council's ability to approve: No.  
B. Developer's ability to complete project: Possibly.

A. From our review of the subject Hale Mua application, all requirements of the Department of Housing and Human Concerns, acting as the "corporation" under section 46-15.1, HRS, and Chapter 201G, HRS, have been met, and the application is properly before the Council for approval or disapproval.

Notwithstanding the assertions of Ms. Ventura-Oliver as to title to the subject real property, to our knowledge and information no claimant(s) have obtained judicial relief (such as an injunction) to stop or prevent the Council's consideration of this resolution.

B. We are informed that the developer has retained legal counsel and has filed a "Complaint to Quiet Title" in the Second Circuit Court, State of Hawaii.<sup>7</sup> The complaint was filed pursuant to Chapter 669, HRS, entitled "Quieting Title", which states: "Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real

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<sup>3</sup>Chapter 19.30A, Maui County Code ("MCC").

<sup>4</sup>Section 19.35.010(C), MCC.

<sup>5</sup>Section 19.30A.050(B)(1), MCC.

<sup>6</sup>Section 19.30A.050(B)(2), MCC.

<sup>7</sup>Civil No. 05-1-0178(3), filed on May 9, 2005.

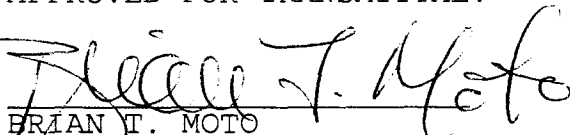
Danny A. Mateo, Chair  
Housing and Human Services Committee  
August 22, 2005  
Page 5

property, for the purpose of determining the adverse claim."<sup>8</sup> As developer's counsel testified in your Committee, this process is a civil litigation matter, and may require a trial before a judge, but in any event may result in a judgment being entered as to legal ownership of the subject property. Such litigation is the appropriate forum for resolution of the claims of Ms. Ventura-Oliver and others.

Before the Director of the Department of Public Works and Environmental Management ("DPWEM") can approve a final subdivision plat, a subdivision applicant must submit "[a] complete title report issued by a licensed title company showing all persons vested with record title in the land subdivided whose consent is required by section 18.12.030.E.13.a of this chapter".<sup>9</sup> Section 18.12.030(E)(13)(a), MCC, requires "[a] certificate signed and acknowledged by all persons vested with record title in the land subdivided consenting to the preparation and recording of the plat...." We have been informed that the developer has not obtained a title report for the subject property. Therefore, until the issue of title is resolved, and proof thereof is submitted, the project, as situated, may not be able to obtain final subdivision approval from DPWEM.

Call if further discussion is needed.

APPROVED FOR TRANSMITTAL:

  
BRIAN T. MOTO  
Corporation Counsel

ESK:ln

S:\ALL\Advisory\ESK\memo to mateo re hale mua.wpd

Attachments

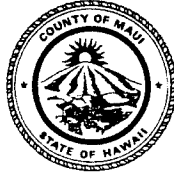
cc: Alice L. Lee, Director, Department of Housing and Human Concerns  
Michael Foley, Director, Department of Planning  
Michael Munekiyo, Munekiyo and Hiraga, Inc.  
Cindy Young, Deputy Corporation Counsel  
James Giroux, Deputy Corporation Counsel

---

<sup>8</sup>Section 669-1(a), HRS.

<sup>9</sup>Section 18.12.040(A), MCC.

ALAN M. ARAKAWA  
Mayor



BRIAN T. MOTO  
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET  
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July 6, 2005

MEMO TO: Danny A. Mateo, Chair  
Housing and Human Services Committee

F R O M: Edward S. Kushi, Jr, Deputy Corporation Counsel

SUBJECT: **First-Time Home Buyer's Fund (HHS-6)**

Responding to your request of June 7, 2005, attached for your review are the following:

1. Copy of proposed bill that was attached to your June 7, 2005 request (the "June 7, 2005 proposed bill");
2. Copy of June 27, 2005 memorandum to you from Councilmember Michael J. Molina, without attachments; and
3. Copy of our December 9, 2003 memorandum to Councilmember Joseph Pontanilla regarding the proposed Pu'unoa housing project.

Specific as to your inquiries of June 7, 2005, we respond below.

A. Explain why the residency requirement of three years should not be an established guideline for this fund.

In pertinent part, Section 3.30.050(A) of the June 7, 2005 proposed bill states:



Danny A. Mateo, Chair  
Housing and Human Services Committee  
July 6, 2005  
Page 2

"3.30.050 Qualifying standards for applicants. An applicant shall meet all of the following standards:

A. A resident of the county for 3 consecutive calendar years from the date the application is submitted; ..."

As we opined in response to the 2003 Pu'unoa Housing Project's 201G-118, HRS, application that proposed a "prioritization" marketing scheme that would have given preference to "long-term West Maui residents", we remain of the opinion that a durational residency requirement for government benefits would not, if challenged, withstand judicial scrutiny. Such a challenge would be based on the constitutional right to travel,<sup>1</sup> which includes the right of the newly-arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state.<sup>2</sup>

The three-year residency requirement as set forth in the June 7, 2005 proposed bill squarely fits into the category of a "durational" residency requirement, as contrasted to a "bona fide" residency requirement. The U.S. District Court for Rhode Island in Fayerweather v. Town of Narragansett Housing Authority, 848 F.Supp 19 (1994), succinctly described the differences in stating:

At the heart of the Fourteenth Amendment protection of the right to interstate travel is the distinction between a durational residency requirement and a bona fide residency requirement. A durational residency requirement is a condition on a public benefit where the availability or level of the benefit is based on the length of time that the individual has lived within the given political entity (e.g., town, county, or state). (citations omitted) On the other hand, a bona fide residency requirement is one that only requires that an individual live within a given political entity without regard to the length of time that the individual has resided there. (citation omitted) When

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<sup>1</sup>Shapiro v. Thompson, 394 U.S. 618 (1969).

<sup>2</sup>Saenz v. Roe, 526 U.S. 489, 502 (1999).

Danny A. Mateo, Chair  
Housing and Human Services Committee  
July 6, 2005  
Page 3

reviewing the constitutionality of a regulation, courts have held that a durational residency requirement affects the fundamental right to travel and, thus, is accorded a strict level of scrutiny. (citations omitted) On the other hand, bona fide residency requirements have been held not to affect any fundamental rights, thus, they need only be rationally related to a legitimate governmental interest, (citations omitted).<sup>3</sup>

Based on the above, we herein reaffirm our position as set forth in our December 9, 2003 memorandum to Councilmember Pontanilla and, accordingly, advise that the proposed three-year residency requirement for applicants desiring to apply for the proposed County benefit would not withstand a challenge on constitutional grounds.

B. Propose alternative language that may establish a residency requirement.

For your review, we offer the following alternative language for Section 3.30.050 of the June 7, 2005 proposed bill:

3.30.050 Qualifying standards for applicants. An applicant shall meet all of the following requirements:

A. Be a resident of the County at the time the application is submitted, and will physically reside in the eligible property to be purchased under this chapter, provided that this requirement may be waived by the County if the applicant is temporarily out of the County to further his/her education or is called to active military duty; an applicant requesting this waiver must provide proof of attending school or military service upon submittal of the application;

B. Be a United States citizen or resident alien;

C. Shall not have owned fifty-one percent or more interest in fee simple or leasehold lands suitable for dwelling purposes for a period of at least three calendar

---

<sup>3</sup>Fayerweather v. Town of Narragansett Housing Authority, 848 F.Supp 19, 21-22 (1994).

Danny A. Mateo, Chair  
Housing and Human Services Committee  
July 6, 2005  
Page 4

years prior to the date the application is submitted, provided that this requirement may be waived by the County if the applicant is the head of the household and is a displaced homemaker, single parent, or is living or has lived in a home not suitable for rehabilitation;

D. Possess household income of no more than one hundred twenty percent of the county median annual income, as reported by the U.S. Census, for the year preceding the year in which the application is being submitted; and

E. Be at least eighteen years of age.

C. Review the draft bill as to form and legality.

Due to the issues discussed above, we have not signed the June 7, 2005 proposed bill. As discussed at your Committee's June 30, 2005 meeting, another draft will be produced for future discussion.

Conclusion:

We understand and appreciate that the initial proposed bill was presented to your Committee to start discussion concerning the First-Time Home Buyer's Fund. We further understand that, as discussed in your Committee meeting of June 30, 2005, more in-depth and detailed discussions will occur before a bill is submitted to the full Council.

We have reviewed Councilmember Molina's June 27, 2005 memorandum. However, our updated research of the federal courts' treatment and analysis of durational residency requirements confirms our prior position, and we therefore advise against the adoption of such durational residency requirements.

Danny A. Mateo, Chair  
Housing and Human Services Committee  
July 6, 2005  
Page 5

Call if further discussion and/or clarification is needed.

APPROVED FOR TRANSMITTAL:

A handwritten signature in black ink, appearing to read "Brian T. Moto", written over a horizontal line.

BRIAN T. MOTO  
Corporation Counsel

cc: Alice L. Lee, Director, Department of Housing and Human Concerns  
S:\ALL\Advisory\ESK\memo to mateo re first-time homebuyer's fund.wpd  
Attachments

ORDINANCE NO. \_\_\_\_\_

BILL NO. \_\_\_\_\_ (2005)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 3.30, MAUI COUNTY CODE,  
RELATING TO THE FIRST-TIME HOME BUYERS FUND

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Section 3.30.010, Maui County Code, is amended by amending to read as follows:

“There is established and created a fund to be known as the first-time home buyers revolving fund”.

SECTION 2. Section 3.30.020, Maui County Code, is amended by amending subsection A (3) to read as follows:

“3. The establishment of the first-time home buyers revolving fund is in the public interest because it will assist in expanding the privilege of home ownership to individuals of low and moderate income levels by providing low interest loans.”

SECTION 3. Chapter 3.30.030, Maui County Code, is amended by adding new subsections and shall read as follows:

“B. The director shall administer the fund and may award a grant for the implementation and administration of the first-time home buyers program.

C. The director and the director of finance may adopt administrative rules necessary to carry out the purpose of this chapter.

D. On or before September 1st of each year, the director shall submit to the council a report on the first-time home buyers fund transactions for the preceding fiscal year. The director shall also furnish to the council such other reports as it may direct.

E. Recaptured loan revenues, accrued interest and equity are deemed appropriated upon receipt and are authorized to be expended for the purposes of the fund.”

SECTION 3. Chapter 3.30, Maui County Code, is amended by adding new sections to be appropriately designed and to read as follows:

“3.3.040 Definitions. For purposes of this chapter, unless the context clearly indicates otherwise, the following words and phrases shall be defined as follows:

"Director" means the director of housing and human concerns of the county or an authorized representative.

"Displaced homemaker" means an adult who has not worked full-time in the labor force for at least one year but has worked during that time primarily to care for the home and family without remuneration, is currently unemployed and experiencing difficulty obtaining employment.

"Household income" means the total adjusted gross income of the applicant(s), as defined by the Internal Revenue Code of 1986, as amended, for the calendar year preceding the year in which an application is submitted pursuant to this chapter.

"Resident of the county" means the person's principal residence and domicile is within the county.

"Single parent" means an unmarried or legally separated adult who is pregnant or has one or more minor (less than 18 years of age) children for whom the adult has custody or joint custody.

3.30.050 Qualifying standards for applicants. An applicant shall meet all of the following standards:

A. A resident of the county for 3 consecutive calendar years from the date the application is submitted; provided that this requirement may be waived by the County if the applicant departed the County to furthering their education or are called to active military duty. These applicants must provide proof of attending school or military service upon submittal of application.

B. Applicant(s) must be a United States citizen or legal resident.

C. Applicant(s) shall not have owned 51 percent or more interest in real property for a period of at least three calendar years prior to the date the application is submitted; provided that this requirement may be waived by the County if the applicant is the head of the household and is a displaced homemaker, single parent, or is living or lived in a home not suitable for rehabilitation.

D. Applicant(s) household income shall be 120 percent or less of the county median annual income, as reported by the U.S. Census, for the year proceeding the year in which the application is being submitted.

E. Eligible properties shall be one of the following:

1. Single family detached dwelling.

2. Condominium or townhouse in a multi-family building.

3. Residential lot with plans to construct a single family detached dwelling.

4. Homestead leasehold property under the jurisdiction of the Department of Hawaiian Home Lands.

F. Applicant(s) shall occupy the property full time as a principal residence.

3.30.060 Terms of Loan. A. The term of the loan shall be fifteen years from the date of purchase of the mortgaged property secured by a second trust deed.

B. The loan shall bear no interest, with no monthly payments and remuneration shall not be required if the applicant utilizes the property as a principal residence for the entire term of the loan.

C. If the property is conveyed, an interest in the property is conveyed, the property is refinanced or the property is no longer utilized as the principal residence, during the term of the loan, the applicant shall repay the full loan amount, including three percent interest per annum in accordance with the terms of the loan agreement."

**3.30.070 Accrued Equity.** A. The County shall receive a share of the accrued equity if any portion of the property is sold or refinanced to receive cash through the transaction during the term of the loan.

B. The County's share of the accrued equity is based on the following recapture table:

1.	First 5 years	50%
2.	Years 6 to 10	25%
3.	Years 11 to 15	10%"

SECTION 2. New material is underscored. In printing this bill, the County Clerk need not include the brackets, bracketed material, or the underscoring.

SECTION 3. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

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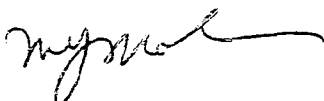
Department of the Corporation Counsel  
County of Maui

CM:MHP:first\_time\_home\_bill3:grs

June 27, 2005

MEMO TO: Danny Mateo, Chair and Members of the  
Housing and Human Services Committee

F R O M: Michael J. Molina  
Council Member



SUBJECT: **FIRST-TIME HOME BUYERS FUND** (HHS-6)

At its meeting of June 2, 2005, the Housing and Human Services Committee reviewed a draft bill entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 3.30, MAUI COUNTY CODE, RELATING TO THE FIRST-TIME HOME BUYERS FUND.

During its discussion the Committee commented on certain provisions of the draft bill, especially as it relates to establishing residency requirements, forgiving of the loan, and establishing an interest rate percentage.

I have conducted research to determine how other jurisdictions have addressed these matters. Below please find a review of the research.

***Residency Requirements:***

There are different variations of how cities within the State of California establish residency requirements. Some cities set a time limit for residing in the community prior to submitting an application for the loan. Other cities establish a priority or preference to individuals living and/or working in the community. Below is a list of communities that utilize the residency requirement:

City	County	Residency Requirement
1. City of Poway	San Diego	Preference to residences, fire fighters, and police
2. Alhambra	Los Angeles	Resident for two years
3. Monterey Park	Los Angeles	Resident for one year
4. Santa Fe Springs	Los Angeles	Resident for 3 years
5. Walnut Creek	Contra Costa	Live or work in city for 90 days prior to application
6. Fremont	Alameda	Priority granted to individuals that live and/or work in community
7. Livermore	Alameda	Priority granted to individuals that live and/or work in community



During the last meeting, the Deputy Corporation Counsel noted concerns about establishing residency requirements. It appears that other communities utilize residency requirements to ensure that the local revenues provided for the program are benefited by the tax payers within the community.

*Forgiving of the loan:*

The draft bill proposes to forgive the loan if the property remains the primary residence for the entire term of the loan. Previously, certain Committee members noted concerns about forgiving the loan. May I note that the County of Maui provides a number of grants and financial assistance to individuals and organizations without financial return to the County. The first-time home buyers program will generate revenue in the following ways:

1. Establishing new homeowners on the property tax roles;
2. Requiring payment of principal and interest if property is sold prior to term of loan; and
3. Requiring accrued equity to be paid if property is sold prior to term.

Below please find a listing of jurisdictions that address the loan payment provision.

City	County	Disposition of loan
1. City of Oxnard	Ventura	Forgiven in 5 or 10 years depending on term.
2. Alhambra	Los Angeles	Forgiven in 20 years
3. Monterey Park	Los Angeles	Forgiven in 30 years
4. Walnut Creek	Contra Costa	Deferred for 45 years
5. Emeryville	Alameda	Forgiven in 30 years
6. Livermore	Alameda	20 year partially deferred loan split into two 10 year notes
7. San Diego	San Diego	Forgiven after 6 years
8. Costa Mesa	Orange	Forgiven in 45 years
9. Fremont	Alameda	25% up to \$10,000, forgiven during the first seven years

*Interest Rate Percentage-*

The draft bill recommends a proposed percentage interest rate of 3 percent, which will be assessed if the property is sold, refinance or is no longer utilized as the primary residences. The Committee discussed adjusting the proposed interest rate. I currently prefer the proposed rate of 3 percent or lower; however below is a listing of various jurisdictions interest rates:

Memo To  
June 27, 2005  
Page 3

City	County	Interest Rate Charged
1. City of Oxnard	Ventura	0% for Seniors, 3%-5% interest depending on credit
2. Alhambra	Los Angeles	No interest first 5 years, 5% interest thereafter
3. Monterey Park	Los Angeles	First 5 years 5% interest, if sold after 5 years interest will be charged from 5th year to date of transfer
4. Santa Fe Springs	Los Angeles	6% interest
5. Walnut Creek	Contra Costa	3% interest
6. Emeryville	Alameda	Low interest or share of equity. Simple interest at 75% of the rate on the first mortgage, not to exceed 5%
7. Los Angeles	Los Angeles	0% interest
8. San Diego	San Diego	0% interest, but level monthly payments start in 6th year
9. Costa Mesa	Orange	Deferred for first 10 years, 5% interest begins in 11th year
10. Glendale	Los Angeles	0% interest

As you can see the interest rate charged for the loan varies. I believe we should make this program as user friendly as possible by utilizing a low interest rate and deferred payment until the property is sold, refinanced or no longer used as the primary residence.

I have attached guidelines from the above-referenced communities relating to issue areas discussed herein. I have also highlighted the applicable sections in the attached documents.

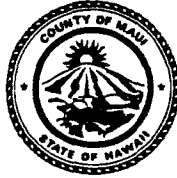
Thank you for your consideration of these items. Should you have any questions please feel free to contact me.

CM:MHP:first\_time\_referral2:grs

Attachment

cc: Alice Lee, Director of Housing and Human Concerns  
Edward Kushi, Jr., Deputy Corporation Counsel  
Jo Ridao, Program Manager, Lokahi Pacific

ALAN M. ARAKAWA  
Mayor



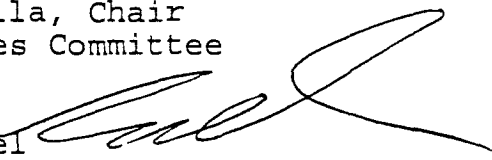
BRIAN T. MOTO  
Corporation Counsel

**DEPARTMENT OF THE CORPORATION COUNSEL**

COUNTY OF MAUI  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
TELEPHONE: (808) 270-7740  
FAX: (808) 270-7152

December 9, 2003

MEMO TO: Honorable Joseph Pontanilla, Chair  
Housing and Human Services Committee

F R O M: Edward S. Kushi, Jr.  
Deputy Corporation Counsel 

SUBJECT: COUNCIL APPROVAL OF AFFORDABLE-HOUSING PROJECTS PROPOSED  
PURSUANT TO CHAPTER 201G, HAWAII REVISED STATUTES (PU'UNOA)  
(HHS-4(1))

Pursuant to your memo of October 29, 2003, inquiring whether there are any constitutional or other legal concerns in the proposed prioritizing of applicants for the affordable housing units in the Pu'unoa project, as presented, we respond in the affirmative.

I) PROPOSED PRIORITIZATION.

As understood and stated in the developer's "Project Marketing" description, preference would be given to applicants in the following order:

- 1) West Maui residents who work in West Maui;
- 2) Maui residents who work in West Maui;
- 3) Long-term West Maui residents;
- 4) Any Maui residents;
- 5) Former Maui residents who wish to return to Maui;
- 6) Hawaii residents who wish to relocate to Maui; then
- 7) Any other interested party.

II) CHAPTER 201G, HAWAII REVISED STATUTES, AND HCDCH'S ADMINISTRATIVE RULES.

In administering Chapter 201G, the corporation (HCDCH or the Counties) shall give preference "to those applicants most in need of assistance in obtaining housing, ...take into consideration the applicant's household income and number of dependents; the age of the applicant; the physical disabilities of the applicant or those living

with the applicant; whether or not the present housing of the applicant is below standard; whether or not the applicant's need for housing has arisen by reason of displacement of the applicant by governmental actions; and other factors as it may deem pertinent."<sup>1</sup>

Chapter 201G requires that the corporation establish a system to determine preferences by lot in the event that it receives more qualified applications than it has units available.<sup>2</sup> Under HCDCH administrative rules, an applicant shall be eligible to purchase a dwelling unit developed under Chapter 201G if the applicant meets certain requirements, including a requirement that the applicant be "a qualified resident who is domiciled in the State and meets other qualifications set forth under section 201G-1, HRS."<sup>3</sup>

In pertinent part, a "qualified resident" means a person who:

- (1) Is a citizen of the United States or a resident alien;
- (2) Is at least eighteen years of age;
- (3) Is domiciled in the State and shall physically reside in the dwelling unit purchased or rented under this chapter;
- (4) In the case of purchase of real property in fee simple or leasehold, has a gross income sufficient to qualify for the loan to finance the purchase; ... (Emphasis added)<sup>4</sup>

"Domicile" is defined as "the state where a person has his or her true, fixed, and permanent home and where the person has the intention of returning whenever the person is absent from it. A person may have several residences, but only one domicile."<sup>5</sup> (Emphasis added.)

As noted, the applicable State statutory sections and administrative rules reference "domicile", while the subject Pu'unoa application references "residency." Therefore, it appears that the developer's prioritization preference plan conflicts with the provisions of Chapter 201G and HCDCH administrative rules which specify that preferences be determined by lot and on the basis of domicile, not residency. Moreover, as discussed further below, the developer's prioritization preference plan is constitutionally impermissible.

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<sup>1</sup> Section 201G-118, HRS.

<sup>2</sup> Section 201G-113(b), HRS.

<sup>3</sup> Section 15-174-73, HCDCH Administrative Rules.

<sup>4</sup> Section 201G-112, HRS.

<sup>5</sup> Section 15-174-2, HCDCH Administrative Rules.

### III) APPLICABLE CASE LAW.

The constitutional right to travel from one State to another occupies a position fundamental to the concept of the Federal Union. It is a right that has been firmly established and repeatedly recognized, although it finds no explicit mention in the Constitution.<sup>6</sup> In striking down a State's one-year residency requirement as a condition for obtaining welfare benefits, the United States Supreme Court labelled the classification suspect because "it touches on the fundamental right of interstate movement."<sup>7</sup> Any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.<sup>8</sup> "The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." (emphasis added)<sup>9</sup> The third component invokes the protection of the privileges and immunities clause of the Fourteenth Amendment of the U.S. Constitution<sup>10</sup>, which, in turn, may invoke due process and equal protection concerns.<sup>11</sup> The privileges and immunities clause should protect the "citizen of State A who ventures into State B" to settle there and establish a home.<sup>12</sup>

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<sup>6</sup> United States v. Guest, 383 U.S. 745 (1966).

<sup>7</sup> Shapiro v. Thompson, 394 U.S. 618 (1969).

<sup>8</sup> Shapiro, 394 U.S. at 634.

<sup>9</sup> Saenz v. Roe, 526 U.S. 489 (1999).

<sup>10</sup> Section 1, 14th Amendment to U.S. Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>11</sup> Saenz, 526 U.S. at 502.

<sup>12</sup> Zobel v. Williams, 457 U.S. 55 (1982).

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Although the seminal case dealt with a one-year waiting period for eligibility for welfare benefits, its reasoning applies to housing benefits, to-wit:

"Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through payment of taxes. ...Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services."<sup>13</sup>

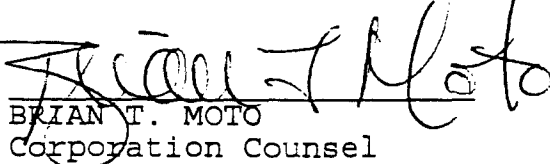
Lastly, "The goal of preventing an influx of outsiders is constitutionally impermissible....Nor do we believe the goal of promoting provincial prejudices toward long-time residents is cognizable under a Constitution which was written partly for the purpose of eradicating such provincialism."<sup>14</sup>

#### IV) CONCLUSION

Applying the relevant judicial declarations of our nation's highest court to the proposed prioritization preference plan for applicants to the Pu'unoa affordable housing project, we opine that said prioritization plan would not withstand judicial challenge or scrutiny, and therefore would be constitutionally impermissible, and invalid.

Call if further discussion is needed.

APPROVED FOR TRANSMITTAL:

  
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<sup>13</sup> Shapiro, 394 U.S. at 632.

<sup>14</sup> Cole v. Housing Authority of City of Newport, 435 F.2d 807,813 (1st Cir. 1970) (holding that two-year residency requirement imposed on applicants for admission to federally-aided public housing project was violative of equal protection clause).