

The below is a copy of the brief email exchange between myself and Planning which culminates in a set of questions which I would ask of Corporation Counsel regarding Council Bill 181 pertaining to the Draft General Plan process (currently under consideration) and Council Bill 123 which was recently passed pertaining to Accessory Dwelling Units and Transient Accommodations Rentals.

From: tawn@honokaapeople.com <tawn@honokaapeople.com>
Sent: Tuesday, October 8, 2024 11:37 AM
To: Palma, Maryam <Maryam.Palma@hawaiiicounty.gov>; Planning CDP <cdp@hawaiiicounty.gov>
Subject: Request Corp Counsel at tomorrow's Hamakua CDP AC meeting

Hi Maryam,

I have legal questions about both Bill 123 and Bill 181, both of which will be brought up in the context of two of the agenda items for tomorrow's Hamakua AC meeting. Could you ensure that someone from Corporation Counsel will be either at, or zoomed into, the meeting. Thanks, Tawn

-----Original Message-----

From: "Planning CDP" <cdp@hawaiiicounty.gov>
Sent: Tuesday, October 8, 2024 1:57pm
To: "tawn@honokaapeople.com" <tawn@honokaapeople.com>
Cc: "Planning CDP" <cdp@hawaiiicounty.gov>, "Campbell, Jean K" <JeanK.Campbell@hawaiiicounty.gov>
Subject: RE: Request Corp Counsel at tomorrow's Hamakua CDP AC meeting

Aloha Tawn,

We reached out to Corporate Counsel, Jean, and she will not be available for tomorrow's meeting. I've cc'd her on this email, so please feel free to send over any questions you would like answered.

Mahalo,

Community Development Plan (CDP) Team

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Thanks for you reply Maryam. I would like to have legal counsel available at tomorrow's meeting if that would be possible. I wonder if Corp Counsel may have an obligation in that regard. Perhaps you could ask Jean or one of her associates if they can find a replacement for her. My questions would be, so that they can prepare, something along the lines below. Of course, written answers to the questions would also be desirable. But it would be useful to have someone from that office present to discuss the answers.

Regarding Bill 181 and the General Plan status.

Judge Strance in testimony before Council a month or two ago addressed the question of Process of the Draft General Plan through the Planning Commission and then the County Council. The implication was that the Planning Commission may not have authority to offer or enact amendments to the Final Draft General Plan. In fact it sounded as if the Commission may offer comments on the Plan as presented, but the way that I understood her comments was that there would not be opportunity for this Final Draft to be amended by the Planning Department in light of those comments. Rather, The Commission's comments and the current Final Draft would be, after 5 months, forwarded to the County Council for a vote of ratification or denial of ratification without opportunity for substantive amendment. At the most recent Council meeting representative of the Corp Counsel spoke of interim amendment process which I believe was referring to amendment of the ratified General Plan subsequent to its adoption.

Question #1. Is this the correct current interpretation by Corp Counsel of the process which lies ahead for Commission consideration and ratification? Or is there opportunity for the Planning Dept., in conversation with the Commissions to substantially change the current Final Draft before presentation to the Council?

Question #2. If the current General Plan is ratified by Counsel and becomes Ordinance, or whatever status it assumes at that point, does substantial amendment to the Plan at that later point take place by majority vote of the Council or would it require 2/3 of Council votes to amend?

Question #3. If Bill 181 passes Council in its current form, it is my understanding that the Amendment process would not be available to the current Final Draft of General Plan 2045 but that it would be necessary for the Council to deny ratification of the current Final Draft GP and then any General Plan which would subsequently be presented to the Council for ratification would be available to amendment by Council. Is this correct?

Question #4. It is my recollection that April Suprenant said that the Action Committees could present it's recommendations for Amendment of the General Plan at any time to the Planning Commissions and the County Council and did not need to be restrained by the closure of the Public Comment period in that "recommendations for amendment of the General Plan" is among the "Duties and Responsibilities" of the Action Committees. I presume that the Corp Counsel would have no reluctance with our doing so. Would that be correct?

Bill 123 does several things. Among them are:

It changes the name 'Ohana Dwellings' to 'Accessory Dwelling Units'

It allows construction of 3 Accessory Dwelling Units on Building Sites (Properties) in the Residential Single, Residential Double, Family Agricultural, Residential Agricultural and Agricultural County Zoning Districts

It allows that one of the 'up to three' ADUs may be a Transient Accommodation Rental

I specifies that ADUs must comply with County infrastructure, building, sizing, parking, etc. requirements.

Bill 123 was passed by Council on September 17 in a 5-3- one absent vote. It was signed by the Mayor within the past several days in that it was sent to the County Clerk's on Oct. 7 for registration. I had spoken to the Managing Director about it at some length on Oct. 1 and it had not yet been signed.

From 'Big Island Now' September 25, "Hawai'i Supreme Court justices on Tuesday unanimously held in [Rosehill v. State of Hawai'i, Land Use Commission](#) that farm dwellings in an agricultural district cannot be used as short-term vacation rentals."

"Using agricultural lands for genuine agricultural purposes and ensuring that housing is allocated for our residents are two of the most crucial issues facing our state today," said Hawai'i Gov. Josh Green. "I commend the Hawai'i Supreme Court for making the right decision for the people of Hawai'i."

"Hawai'i County has banned short-term vacation rentals in an agricultural district since 2019 after the approval of an amendment to its zoning code."

Question #5: This Supreme Court decision raises questions about the legality of Bill 123's becoming law does it not?

Bill 123 in initial draft form, with a prohibition on Transient Accommodation Rentals among the authorized Accessory Dwelling Units, was presented to the Land Use Commission in February.

The Commission's response from its Executive Officer on Feb. 14 states:

"The Land Use Commission Staff is acceptive of Bill No.123 relating to 'Ohana Dwelling Units' , with the understanding that Section 25-6-38 Prohibited Uses states "Accessory Dwelling Units shall not be for use as transient vacation accommodation rentals." In July, long enough that the Bill's authors may have forgotten the Land Use Commission's above condition, Bill 123 changed 'Prohibited Uses' to 'Permitted Uses' and changed 25-6-38 to read, "No more than one accessory dwelling unit shall be permitted for use as a transient accommodation rental, provided there are no other transient accommodation rentals on the building site."

Inquiry with the Commission determined that there were no subsequent communications from Planning to the Commission subsequent to that February exchange. Thus the LUC was unaware of the change of 'Prohibited' to 'Permitted' Transient Accommodation Rentals among the Accessory Dwelling Units on Agricultural Lands. When I communicated this change of status of Transient Accommodations Rentals on Agricultural zoned lands from "Prohibited" to "Permitted" in bill 123 to an official at the LUC, his prompt response was "That's illegal". When I was able to reach the Executive Officer by phone the day before the Council vote, he stated, "That is not allowed." I had described to him in email format the change of

"Prohibited" to "Permitted" referencing TARs in the agricultural district several days before that and he said that he had spoken to several people about it that morning.

Question: Would it have been required that Planning notify the Land Use Commission of the change of status from Prohibited to Permitted Transient Accommodation Rentals, or is this more of a recommendation?

Question: What is the level of authority of the Land Use Commission to accept or deny usage of lands in the Hawaii County Agricultural District?

Question: Can the County pass a law that states that Transient Accommodations Rentals can be placed on County Zoned Agricultural Land when there is current County Law which states that this is not allowed, and there is State Law that Prohibits Transient Accommodations Rental in the State zoned Agricultural District?

Question: Since the Bill passed by Council had not yet become law by the Mayor's signature until approximately a week after the Supreme Court Decision that stated that "farm dwellings in an agricultural district may not be used as short term vacation rentals." and since this was widely announced in the media, would it not have been wise that Corporation Counsel advise the Mayor to veto the Bill?

Question: If legal action were to proceed against this Bill, can it be directed toward rescinding or nullifying this Bill as a whole (in that it was a single amendment to the current ordinance and changing one part of the Bill might have altered one or more of the Councilmembers to change their vote), or would need be directed only against that element of the Bill, the allowance of Transient Accommodations Rentals in the Agricultural Zone, which is clearly against the Law?

Thank you for responses to the above questions. And again, hopefully someone from Corporation Counsel would be available for discussion of the above.

Respectfully,
Tawn Keeney