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May 1, 2008

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Kona Community Development Plan Steering Committee
81-950 Onouli Road
Kealahou, HI 96750

Mr. Jon A. Olson, Chair
Puna Community Development Plan Steering Committee
13-631 Leilani Avenue
Pahoa, HI 96778

Ms. Fern White, Chair
North Kohala Community Development Plan Steering Committee
PO Box 22
Hawi, HI 96719

South Kohala Community Development Plan Steering Committee
c/o County of Hawaii, Planning Department
101 Pauahi Street, Suite 3
Hilo, HI 96720

Dear Messrs. Melrose and Olson, Ms. White, and South Kohala Community
Development Plan Steering Committee:

SUBJECT: COMMUNITY DEVELOPMENT PLAN LEGAL EFFECT

A number of questions have been asked by CDP steering committee members, other citizens, and county staff about the legal effect of the CDP's once they are enacted. So this letter, although addressed to the chairs of the steering committees, is really for the information of the broader community involved in the CDP process, including the county council and planning commission.

Sec. 15.1 of the 2005 General Plan requires that the CDP's be enacted by ordinance. The question is what the actual effects are of enacting a CDP by ordinance.

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The answer is not simple, and it depends upon the specific wording or the provisions of the CDP and upon the type of follow-up action. A plan, like a CDP, is a guide to future actions. A plan exists to create a long-range framework and direction for specific decisions. It is not self-implementing, and it is not the action itself. A CDP, for example, may direct that rezoning in the CDP area follow certain criteria, but it does not in itself rezone land.

The question of the legal effect of the CDP is really part of the broader question of how the CDP's are to be implemented. In thinking about the implementation of a plan, it is very helpful to think about the type of action that would implement it. Chap. 15 of the General Plan has a good description of the types of implementing actions. In particular, there are implementing actions that are regulatory. This is common in the land use area, and includes things like rezoning and subdivision approvals. Or there are implementing actions that require funding, like the construction of a park. To make the point that the CDP's are not "self-implementing" by other examples: none of the provisions in the CDP's directly regulate conduct by the general public like ordinances that set a speed limit in an area, or that prohibits smoking in certain places, or that prohibit construction in setbacks, or that prohibit some kinds of land uses in certain zoning districts. For these types of ordinances, the county government can cite the violator based directly on the ordinance in question. The CDP's and the General Plan are not directly regulatory in this sense: you will not be able to cite a member of the general public for violating some provision of CDP. Their regulatory effect is that they guide, and in some cases mandate, how other regulatory programs are handled.

In this letter, whenever it says that a provision in the CDP is "legally binding", or "mandatory", it means that a court could enforce the CDP to overturn a decision that had been made by the county council, planning commission, or other county decision-making body, based on language in the CDP. Or, that because of language in the CDP, a court could order the county to take certain actions. In practical terms, this is the real meaning of the CDP being legally binding or mandatory. As discussed below, because the CDP is

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enacted as a law of the county, the county council, mayor, and other county officials like the department heads are supposed to implement the CDP in good faith, but in many instances, reasonable people may differ on how to implement the CDP in a particular situation, and a court's role in overturning decisions made by the legislative and executive branches of government, within their spheres of authority, is limited.

It is perhaps easiest to give some examples, mostly in the land use area, of how some CDP provisions would be legally binding, or mandatory, because this is the primary focus of the planning department and because this is where the question is most likely to come up in the future. For those interested in reading how the Hawai'i Supreme Court has handled this question, GATRI v. Blane, 88 Haw. 108 (1998) discusses this issue of when a land use plan is legally binding on a later decision.

To start with an example of a mandatory provision from the County General Plan, which is also enacted by ordinance: the General Plan says, on p. 14-4, that rezoning must be consistent with the General Plan, including the Land Use Pattern Allocation Guide (LUPAG) map. Thus, any rezoning ordinance must be consistent with the General Plan. Suppose a landowner submitted a rezoning application to change an area to a "V" (visitor) zoning that would allow 1500 hotel rooms, in an area that was "extensive agricultural" on the LUPAG map, and not listed as a resort area on Table 14-5 of the General Plan. This rezoning would be what the General Plan calls an "intermediate resort", and it would clearly be inconsistent with the General Plan. It would, therefore, be illegal for the county council to rezone the area as requested, unless it first amended the General Plan. The General Plan will sometimes prohibit certain zoning in an area, but it will rarely if ever mandate it because zoning also depends upon site-specific issues, like flooding, infrastructure, traffic, and historic sites, that are not fully analyzed at the General Plan LUPAG map level, and it is also subject to the timing of development: an area may be designated urban on the General Plan but it may be that it shouldn't be developed until infrastructure has been improved, or other areas are developed first.

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A land use plan like the General Plan or CDP typically functions as a guide to other land use decisions, such as rezoning, although not always with mandatory language. So a CDP can have a policy that is worded in a way that is clearly mandatory and limits the range of decisions that can be made in the future. For example, the North Kohala Public Review Draft, on p. 23, says “private lands currently zoned A-5a and A-20a that are outside of the LUPAG ‘Low Density Urban’ designation shall retain their current zoning. Exceptions can be made for affordable housing, ag cluster subdivisions, and small-scale rezonings that may assist families in allowing their children to obtain individual properties.” This is mandatory wording. Now, there is some leeway because the size of a “small-scale rezoning” is not exactly specified, but, for example, a rezoning of 500 acres from A-20a to A-5a would clearly violate this policy and be illegal without first amending the CDP.

To take other examples, the draft Kona CDP has a number of requirements for “transit oriented development” in certain areas. It is mandatory that development in these areas conform to this model of development. There is considerable leeway in how it is actually done, but the basic model has to be followed. There are also a number of road connection requirements that are mandatory at the subdivision level, such as “new subdivisions shall incorporate and continue all collector streets, and selected local streets to adjoining property.”

In contrast to such policies that are worded in a binding manner, and are relatively specific, the draft CDP’s have a great number of policies and goals that are not legally binding: they do not mandate or prohibit certain decisions. These are what the GATRI court called “hortatory”: they are general statements about goals and policies, but are broad and open to interpretation. For example, the South Kohala draft (4/18/08 version) has a policy that “Malama ‘Aina, ‘care for the land’, shall be an overarching land use policy...” This is fine as a statement of principles, but faced with a controversy over a particular rezoning, pro or con, reasonable people can disagree over whether the decision is consistent with this policy, and a court should not overturn a decision made by the

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council because it feels that the decision is inconsistent with this policy.

Broad policies like the one mentioned above are important. They set out the principles that should underly decisions, so that they are not made on the whim of the moment. But the implementation of these kinds of broad policies in the CDP's depends upon the good faith of future decisionmakers, like the county council, mayor, planning commission, department heads, and others, to follow them. Despite being contained in an ordinance, they are not legally binding in the sense that a court should someday order the government to follow them and overturn decisions it thinks may be contrary to the stated policy.

Very often, policies point in different directions. For example, an affordable housing project, favored by one policy, may conflict with open space, favored by another policy. In such cases, the decisionmaker must decide where the balance lies. The CDP will not mandate the decision one way or the other.

Typically, the planning department will make a recommendation on any zoning or other land use request that goes to the council or planning commission, and try to analyze it against the goals and policies of the General Plan. The planning department should try to do the same using the CDP's once they are enacted.

Another type of policy that is not legally binding is one that calls for further follow-up action. A CDP may call for the planning department and council to revise the subdivision code, for example, with some suggestions about changes, but those changes do not go into effect unless and until the subdivision code is amended by another ordinance.

None of the policies, goals, or courses of action in the CDP's that require future funding can legally mandate that the council appropriate those funds. The CDP's collectively call for actions that would cost much more than the current budget of the county. The county

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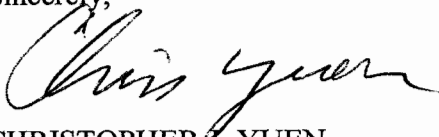
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must have a balanced budget. To do this, the mayor and council have to decide among competing priorities. The CDP's do not make those priority decisions. The CDP's also tend to take the normal operations of the county for granted. They do not, for example, state that the containers at the transfer stations shall be hauled away when full or that grass shall be kept mowed at county parks. They tend to add duties to those that are already being done, but we can't assume that the CDP's mean that these new duties should be given priority over the current ones. There simply isn't enough money to fund all of the proposals. And as one CDP Steering Committee member noted, there is no CDP policy that says "property taxes shall be raised to the level necessary to fund all proposed actions."

The majority of the policies, goals, and various other statements in the CDP's that have been passed by the steering committees so far, or which are in public review form, are not legal mandates under the standards discussed above. Again, that does not mean that they are unimportant. They are extremely important, if future decisionmakers take them seriously as an overall framework and guide to their decisions.

I would be happy to discuss specifics about what provisions in the various draft CDP's are and are not legal mandates at future meetings considering them.

Sincerely,



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Planning Director

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cc: Mayor Harry Kim
County Council
Corporation Counsel
CDP Steering Committee Members
Planning Commission
Mr. Brad Kurokawa
Planning Program Managers
Planners
Ms. Nancy Pisicchio
Mr. John Whalen, Pan Pacific
Mr. Bruce Tsuchida, Townscape
Mr. Roy Takemoto
Wilson Okamoto Corporation
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