

June 8, 1999

OPINION NO. 99-3

James Y. Arakaki, Chairman
Hawaii County Council
25 Aupuni Street
Hilo, Hawaii 96720

Dear Chairman Arakaki:

Re: Bill 64, Draft 3--Limiting Ohana Units on SLU Ag Land

This is in response to questions concerning Bill 64, Draft 3, which the Council raised at its May 25, 1999 meeting. That bill changes the zoning of approximately 5.193 acres of real property in North Kona from Agricultural (A-5a) to Family Agricultural (FA-2a) or Agricultural (A-2a). The land is designated as agricultural by the State Land Use Commission (LUC), and is a 5.193 acre parcel, surrounded on all sides by A.5a zoned parcels. The concern is over the legality of proposed Condition I, which states:

Restrictive covenants in the deeds of all proposed lots within the subject property shall prohibit the construction of a second dwelling unit on each lot. A copy of the proposed covenant(s) to be recorded with the Bureau of Conveyances shall be submitted to the Planning Director for review and approval prior to the issuance of Final Subdivision Approval. A copy of the approved covenant shall be recited in an instrument executed by the applicant and the County and recorded with the Bureau of Conveyances for any portion of the subject property. A copy of the recorded document shall be filed with the Planning Department upon its receipt from the Bureau of Conveyances.

Further, Condition B of the Bill requires that:

The applicant, successors or assigns shall be responsible for complying with all requirements of Chapter 205, Hawaii Revised Statutes, relating to permissible uses within the State Land Use Agricultural District.

The debate over this Bill has raised several interesting legal issues.

I. Possible Conflict with State Land Use Law

Hawaii Revised Statutes, §205-4.5 lists the permitted uses on land which is designated as agricultural by the State Land Use Commission. Subsection (a)(4) includes, as a permitted use:

- (4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;
Farm dwelling as used in this paragraph means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling.

This office has previously rendered the opinion (OP 94-1 of February 9, 1994) that so-called "ohana" units could be permitted on land designated as agricultural by the LUC, so long as all units on the property met the definition of a "farm dwelling." The opinion does not state that there is a right to an unlimited number of farm dwellings on LUC agricultural land, nor does it state that there can be no limitation on the number of farm dwellings on such property.

State law makes it clear, that while such uses as "farm dwellings" shall be permitted on agriculture designated lands, that these cases may be further defined by the counties by ordinance. HRS 205-5(b). Thus, should the Council wish to limit the density of "farm dwellings," through the use of zoning power it would be free to do so. There are difficulties which arise, however, when this power is applied to a single parcel, as opposed to being made part of a generally applicable policy.

II. Spot Zoning

“Spot Zoning” is defined as an arbitrary action by which a small acre within a large area is singled out and specially zoned for a use classification different from and inconsistent with the classification of the surrounding area and which is not in accord with the general plan. *Life of the Land vs. City Council of City and County of Honolulu*, 606 P2d. 866, 61 Haw. 390 (1980). It has also been defined as an amendment which reclassifies a small parcel in a manner inconsistent with existing zoning patterns, for the benefit of the owner and without any substantial public purpose. Anderson, *American Law of Zoning*, §5.12 (4th Ed. 1996). When it occurs, it is an improper exercise of the zoning power, and is void. *Lum Yip Kee, Ltd. vs. City and County of Honolulu*, 767 P2d. 815, 70 Haw. 179 (1989).

At first glance, this proposed action would appear to be an attempt at “spot zoning.” There is no other A-2a property anywhere near the affected parcel, and there is no evidence of any public purpose, other than the benefit of the owner, to be served by this action. Further the size of the parcel falls in between that where Professor Anderson finds nearly all amendments to be disapproved (3 acres), and that where spot zoning challenges are generally rejected (11 acres). *Ibid* at §5.15.

In *Lum Yip Kee*, supra, the Council had downzoned the plaintiff’s parcel from “High Density” to “Low Density” apartment. Noting that the surrounding area contained a mixture of apartment and public facility uses, and noting the presumption in favor of the ordinance validity; the court upheld the action finding it not to be inconsistent with the classification of the surrounding area. Likewise, in *Life of the Land*, supra, the challenged apartment project was consistent with other zoning in the area.

Here, the proposed rezoning involves the change of use, but only of permitted lot size. Thus, while an inconsistency with the surrounding area is created, that inconsistency does not extend to the activities to be permitted on the land. While there may be a suspicion that the real intent of this proposal is to create upscale residential properties, having little or nothing to do with agriculture, that would be prohibited by the State Land Use Law in any event. I do not, therefore believe, that this ordinance, should it become law, would be struck down as having “spot zoning.”

III. Contract Zoning

Where a zoning ordinance authorizes a particular use if the landowner enters into a covenant to restrict the use in certain ways, what is termed “contract zoning” occurs. Such bargaining with the police power is generally found to be unlawful. *Anderson, supra* at §9.21, and any promises made pursuant to such zoning actions unenforceable. *Carlino vs. Whitepain Investors*, 499 Pa. 498, 453 A2d. 1385 (1982).

Thus, in *Zimmer vs. County of Peoria*, 33 Ill. App. 3d 612, 338 NE2d.145 (1975), a landowner seeking rezoning to construct a country and western dance hall, agreed to file a covenant which promised among other things, that the property would not be used for any other permitted business use. Finding that to permit each citizen to be governed by legislation based on the best deal that he can make with the county would not be consistent with the notion that the law should affect alike all who are similarly situated, the Court struck down the ordinance.

The condition which this bill attempts to impose upon future construction of so-called “ohana” housing, imposes a restriction on this property not placed upon similar properties, and does so without any findings as to the necessity to do so. In so doing, this Council would, by use of private restrictive covenants, improperly deprive future councils of the right to exercise their legislative authority to regulate the zoning of this property. *Barton vs. Atkinson*, 228 Ga. 733, 187 SE 2d 825 (1972)

Persuasive arguments have been made that the unrestricted use of the “ohana” process to evade density restriction is a serious problem. The proper approach to that problem is to determine where this situation exists, and to deal with it on the basis of law of general applicability, not by ad hoc agreements with individual property owners.

IV. Conclusion

For the foregoing reasons, it is my opinion that while Condition I of Bill 64, Draft 3, does not controvert state land use law, nor does it conflict with Condition B, which is a somewhat superfluous requirement that the applicant follows the law. Second, while this proposal possesses many of the characteristics of “spot zoning,” because it would not fundamentally change the permitted use of the property it would be defensible. Finally, however, the conditioning of this action on the promise of the property owners,

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and all their successors, to refrain from taking advantage of a benefit to which they would otherwise be entitled, constitutes zoning by contract, and the condition would not be enforceable.

Please contact this office if there are any questions.

Sincerely,

By _____
RICHARD D. WURDEMAN
Corporation Counsel

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