

January 4, 2023

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Re: Draft South Maui Community Plan (“Draft SMCP”) Provisions Related to Shoreline Development and the Special Management Area

Dear Chair Weltman and Committee Members:

Thank you for the opportunity to comment on the Draft SMCP. I write to raise the concerns regarding provisions in the Draft SMCP that you will consider today.¹

The SMCP incorporates the Sea Level Rise Exposure Area (“SLR-XA”) and its modeling for coastal erosion at 3.2 feet of sea level rise (“EHL”). Policy 2.3.1 adopts the SLR-XA coastal erosion modeling and provides policies as follows:

To minimize impacts from future coastal erosion to development, new permanent structures must be located landward of the State-recognized sea level rise exposure area (SLR-XA) with coastal erosion, except a minimum buildable area must be provided. This restriction does not apply to structures needed as part of an approved beach restoration project or cultural project such as loko i‘a, and which must be evaluated on a case-by-case basis.

Draft SMCP at 41 (emphasis added). The Draft SMCP also includes Policy 2.3.2 with subsections c and d, which together provide as follows:

¹ Policy 2.3.1 of the Draft SMCP adopts policy 2.1.2 of the Maui Community Plan (“WMCP”) verbatim. Policy 2.3.2 of the Draft SMCP adopts subparts a and b of policy 2.1.3 of the WMPC verbatim and amends subsections c and d without resolving the significant legal issues with the policy.

For redevelopment and new developments within the SLR-XA, developers must proactively:

...

c. Not hold the County of Maui and State of Hawai'i liable for any and all future costs associated with maintaining or protecting the property developed within the SLR-XA, including costs associated with retreat, hazard mitigation, and cleanup costs to maintain the health of the nearshore marine environment from material debris originating from the ocean or from the structures' own deterioration or failure; and

d. Recognize that permit approvals from the County of Maui will be conditioned to prohibit future shoreline hardening for their property or project.

Id. at 42 (emphases added). Policy 2.3.5 of the Draft SMCP provides, "Support coastal retreat of South Maui structures currently located in the shoreline setback area and the SLR-XA." *Id.*

Illegal Incorporation of the SLR-XA

The principal legal failings with the SMCP's incorporation of the SLR-XA are summarized below.

The strategy of managed retreat is incomplete and premature. First, the Draft SMCP's undefined strategy of "managed retreat" from the shoreline fails to incorporate the primary two methods of adaptation (protection and accommodation) preferred by State guidance and fails to incorporate the education and necessary community buy-in before implementing managed retreat. Specifically, State guidance explains there are three main adaptation strategies to address sea level rise: accommodation, protection and retreat.² *See* State of Hawai'i, Office of Planning, *Assessing the Feasibility and Implications of Managed Retreat Strategies for Vulnerable Coastal Areas in Hawai'i Final Report* (2019). Accommodation and protection strategies must be examined and considered for the particular area before turning to retreat because retreat is not feasible in all areas, is expensive and will have far-reaching impacts on public interests like the tax base, County revenue and insurance. *Id.* at 20. Thus, planning process should incorporate the preferred methods

² Protection measures may be both hard (seawalls or revetments) and soft (beach renourishment) and are utilized to "protect" structures or other resources from the impacts of sea level rise. Accommodation seeks to address impacts of sea level rise by altering the structures that may be impacted, such as elevating a house on a pile foundation.

of addressing sea level rise and should include studies regarding the potential impacts and costs associated with retreat prior to implementing managed retreat policies.

Policy 2.3.1 establishes the EHL as the *de facto* shoreline in violation of State law. County laws may not conflict with State law, be inconsistent with State law or tend to defeat the intent of any State statute. HRS §§ 46-1.5(13), 50-15. Where a County law conflicts with or is inconsistent with State law, the County law is preempted. *See Atay v. Cnty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016); *Richardson v. City and Cnty. of Honolulu*, 76 Hawai'i 46, 62, 868 P.2d 1193, 1209 (1994). The State Coastal Zone Management Act establishes a minimum distance from the certified shoreline as the shoreline setback. *See* HRS § 205A-43(a). While the County may establish a greater shoreline setback than the minimum provided for by State law, *see* HRS § 205A-45(a), it may not alter the location of the “shoreline” or provide that the setback may be measured from a point other than the “shoreline” as defined by State law. *See* HRS § 205A-41. Policy 2.3.1 provides that no new permanent structures may be located makai of the EHL, which effectively establishes the EHL as the point from which setbacks for new development must be measured. The EHL not the shoreline. The effect of this policy is to impermissibly use the EHL in lieu of the certified shoreline established under State law.

Policy 2.3.2 illegally requires developers to waive the ability to seek shoreline hardening or compensation. Under the current version of the Shoreline Rules, a property owner is only required to record a unilateral agreement not to seek shoreline hardening for a new structure within the shoreline area. Requiring such an agreement for structures within a lot’s minimum buildable depth, repairs, new structures and variances illegally imposes a waiver in return for the exercise of present rights. Requiring an owner to surrender a constitutional right in order to receive a land use approval violates the unconstitutional conditions doctrine. *See e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Nakamoto v. Fasi*, 64 Haw. 17, 22, 635 P.2d 946, 951–52 (1981).

Policy 2.3.1 illegally takes property without compensation. The State and Federal Constitutions provide that private property shall not “be taken for public use, without just compensation.” *Lingle*, 544 U.S. at 536 (internal quotations omitted); Haw. Const. art. 1, §20. Reducing or eliminating the opportunity to make productive use of land effects a taking of property “when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). The policy will take property in three ways: (1) a total taking of affected parcels that cannot be put to economically viable use under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); a partial taking for affected parcels where some economically viable use remains but Policy 2.3.1 interferes with distinct, investment-backed expectations under *Penn Central*, 438

U.S. at 108; and (3) a taking of property where the SMCP prohibits owners from protecting their property against coastal hazards and from repairing and maintaining lawfully existing structures.

Areas for Revision

Given the legal issues discussed above, I recommend the Committee revise the Draft SMPC as follows:

- **Remove Policy 2.3.1 requiring new development to be landward of the SLR-XA for coastal erosion.** The Planning Department is currently working on Shoreline Rules for consideration by the Commission. If adopted, those rules will implement a significantly greater shoreline setback for the entire island that will take sea level rise and coastal erosion into account. Allowing the Commission to carry out its duties unimpeded by conflicting provisions in the SMCP will ensure that there is a clear and equitable shoreline policy for South Maui and the rest of Maui.
- **Remove Policy 2.3.5 supporting coastal retreat for structures currently located in the shoreline setback area and the SLR-XA.** Managed retreat has not been studied and lacks the requisite community buy-in from those who will be impacted. Moreover, structures within the shoreline setback are governed by the Shoreline and Special Management Area Rules. Conflicting provisions will inject confusion regarding which rules and policies control and will likely lead to litigation.
- **Replace Policy 2.3.1 with a policy that incorporates the State's recommendations and guidance.** Rather than impose retreat strategies, the SMCP should call for funding to study the economic, social, tax and legal impacts of managed retreat on the County and develop informed criteria to determine when retreat may be necessary.
- **Revise Policy 2.3.2 to remove subsections (c) and (d).** Like Policies 2.3.1 and 2.3.5, subsections (c) and (d) interfere with the responsibilities of the Commission and Planning Department to develop and enforce a uniform shoreline management policy for Maui. Policies encouraging landowners to cede the ability to seek shoreline hardening or statements purporting to limit liability of governmental agencies do not belong in a community plan or anywhere else.

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I thank each member of the Committee for the opportunity to provide written testimony on the Draft SMCP and for your consideration of the same.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Calvert G. Chipchase".

Calvert G. Chipchase