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March 14, 2006

The Honorable Romy M. Cachola
Councilmember
City Council
Honolulu Hale
Honolulu, Hawaii 96813

Dear Councilmember Cachola:

Re: Waimea Valley Acquisition Funds

We are responding to your Memorandum dated February 17, 2006, requesting a legal opinion as to whether the General Obligation bond funds of $5.1 million appropriated in Ordinance 01-03 to "acquire privately owned nature park, " Project No. 01905, Waimea Valley Park, may be legally used to acquire only a perpetual conservation and public access easement pursuant to proposed Resolution 06-017, FD1.

Under the Court-mediated settlement in City and County of Honolulu v. Attractions Hawaii, et al., Civil No. 01-1-3622-12, and Resolutions No. 01-151 and No. 02-161, the City and County of Honolulu ("City") would acquire, through condemnation, the fee-simple title to the Waimea Valley Park property for the sole purpose of ultimately acquiring a conservation easement and a public access easement over and across the property in perpetuity. Under the contemplated procedure, the Court will issue an order of condemnation of fee simple title to the property in favor of the City. The City shall thereafter convey the property by Deed to the Office of Hawaiian Affairs ("OHA"), who in turn shall execute and deliver a Deed of Conservation Easement and a Right of Entry and Grant of Public Access Easement in favor of the City.

On December 24, 2001, the City, in accordance with the Court rules, deposited into the First Circuit Court, the sum of $5.1 million in conjunction with the condemnation lawsuit, as just compensation for the property. Under the contemplated Court procedures whereby the City will acquire fee simple title to the property prior to conveyance by Deed by the City to OHA, the requirement of the budget appropriation that the bond funds be used to "[a]cquire privately owned nature park" is satisfied. We

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do not believe that the subsequent transfer of the property to OHA in exchange for a conservation easement and public access easement invalidates the legality of the expenditure as appropriated.

Further, it is our opinion that the use of General Obligation bond funds to ultimately acquire the conservation and public access easements satisfies the legal requirement that the City obtain a sufficient property interest for its $5.1 million expenditure. Previously, our office has opined that General Obligation bond funds can be used only for public improvements and for a "public purpose."[1] Article VII, Section 4, of the Constitution of the State of Hawaii, provides in part, "[n]o tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose." Section 47-2, Hawaii Revised Statutes ("HRS"), is the general law which authorizes counties, including the City, to issue general obligation bonds, within limitations, for the purposes, upon the terms and conditions, provided in Chapter 47, HRS. Under Section 47-3, HRS, general obligation bonds shall be issued "for public improvements of the county and such other purposes as may from time to time be authorized by other provisions of general law . . ., including special improvements the cost of which is assessed or assessable . . . against properties benefitted or improved by such improvements; . . . ." Except for the law relating to special assessment improvement bonds, there is no statutory provision in Hawaii which would permit the issuance of general obligation bonds for any purpose other than "public improvements." The concept of what constitutes "public purpose" is incapable of precise definition and is a concept that changes as conditions create changing public needs. Darmond v. Alaska State Development Corp. 376 P.2d 7171 (1962). Determining what constitutes a public purpose is generally a question for the legislature to decide. State ex rel. Amemiya v. Anderson, 56 Haw. 566 (1976).[2] (Acquisition of land through condemnation to maintain flood plain and preserve water storage capability of land, funded by general obligation bonds, was reasonable and necessary public purpose. ACCO Unlimited Corp. v. City of Johnston, 611 N.W.2d 506 (2000).

We have conferred with the City's bond counsel as to the adequacy of the proposed conservation easement and public access easement for the use of General Obligation bond funds for the Waimea Valley Park property. Bond counsel has confirmed that the conservation and public access easements are sufficient property interests within the meaning of "public improvements" for a public purpose, provided

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[1] Memorandum Opinion 00-1, dated February 18, 2000, by Deputy Corporation Counsel Cynthia Nojima.

[2] This is consistent with the Memorandum from the City's bond counsel, Elaine Bayus, of Orrick, Herrington & Sutcliffe, LLP, dated June 10, 2005, regarding the "Use of City and County G.O. Bond Proceeds for Waianae YMCA Project."

that there is a reasonable basis to determine that the easements are valued at least at $5.1 million. Further, an appraisal by a City appraiser is deemed acceptable.

We received the Restricted Use Appraisal Report of Robert J. Vernon, the City's real property valuation consultant, dated March 15, 2006. Mr. Vernon's appraisal report has established the fair market value of the perpetual conservation easement and public access easement over and across the Waimea Valley Park property to be $5.4 million. As such, there is a reasonable basis to support the expenditure of the bond funds in the amount of $5.1 million to acquire the proposed easements.

In summary, it is our opinion that the $5.1 million appropriation in Ordinance 01-03 to "[a]cquire privately owned nature park" funded by General Obligation bond monies may be legally expended by the City to obtain the fee-simple title to the Waimea Valley Park property for the sole purpose of ultimately acquiring a conservation easement and a public access easement over and across the property in perpetuity, based upon the valuation of the easements at $5.4 million. Should you have any questions, please contact the undersigned at extension 5688.

Very truly yours,

Amy R. Kondo

AMY R. KONDO
Deputy Corporation Counsel

APPROVED:

for CARRIE K. S. OKINAGA
Corporation Counsel

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