OHANA ZONING:
A FIVE-YEAR REVIEW

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FOREWORD

Senate Concurrent Resolution No. 88, adopted by the Fourteenth State Legislature, requested the Legislative Reference Bureau to undertake an evaluation of the "ohana zoning law," section 46-4(c), Hawaii Revised Statutes. Specifically, the Bureau was asked to determine whether the purpose of the law was being met in each county and whether any changes should be made to further effectuate the purpose of the law, to review the specific problems of each county in implementing the law, and to review the law to determine if the counties should be granted more flexibility.

This report responds to the resolution.

The Legislative Reference Bureau thanks the many individuals who participated in the study and the accompanying survey. The various county officials who were contacted were most gracious in taking the time to answer questions. Special mahalo goes to Ms. Carol Whitesell of the Department of Land Utilization of the City and County of Honolulu and Councilmember Velma M. Santos of the Maui County Council for their help, and Representative Mitsuo "Mits" Shito, Chair of the Housing and Community Development Committee of the House of Representatives, who held public hearings and invited Bureau attendance in all four counties on this topic.

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INTRODUCTION

Objective of the Study

Senate Concurrent Resolution No. 88 (see Appendix A), adopted during the 1987 Regular Session, requested the Legislative Reference Bureau to review section 46-4(c), Hawaii Revised Statutes, popularly called the "ohana zoning" law. The statute, enacted in 1981, provided that counties could not prohibit the construction of a second single-family dwelling on a lot, as long as certain requirements were met. The declared purpose of the law was to "assist families to purchase affordable individual living quarters and, at the same time, to encourage the preservation of the extended family."[1]

The counties enacted their ohana zoning ordinances in 1982. Since that time, the counties and individual legislators have expressed concerns about the law, especially as it affected the counties' ability to do long-range land use planning.[2]

Nature and Scope of the Study

The legislature had four specific requests with respect to this study:

(1) A review of the ohana zoning law to determine if its purpose and intent have been met in each county;

(2) A determination whether any changes should be made to the law to better effectuate the purpose and intent;

(3) A review of the specific problems each county has with the law; and

(4) A review of the ohana and other related laws to determine if counties should be given more flexibility to deal with each county's individual problems with the ohana zoning law.

The legislature specifically forbade the Bureau from considering a repeal of the ohana zoning law, or of making the law discretionary with the counties.

The report is organized into seven chapters. The second chapter explains what the ohana zoning law is, discusses the legislative intent behind the ohana zoning law, notes the possible conflicts in the stated intent, and touches on the problems caused by limited resources. It also addresses the impact of restrictive covenants on the applicability of ohana zoning.

The operation of the ohana zoning concept as applied to the four counties are discussed in the third, fourth, fifth, and sixth chapters. The seventh chapter evaluates the law as a whole and discusses possible changes to the state statute.

Chapter 2

WHAT IS OHANA ZONING?

The "ohana zoning" law is the popular name for section 46-4(c), Hawaii Revised Statutes, which permits homeowners who meet certain conditions to build a second dwelling on their property. The term "ohana zoning" is actually a misnomer, as the law involves neither ohana nor zoning. Ohana is the Hawaiian word for family[1] but under this statute, the occupancy of the second dwelling is not limited to family members. Zoning refers to the "division of a city by legislative regulation into districts and ... regulations prescribing use to which buildings within designated districts may be put."[2] As will be shown in more detail below, the dependence of ohana zoning on the sufficiency of the infrastructure leads to elastic district lines and awarding of permits on a case-by-case basis, which is the antithesis of true zoning.

Other states that permit this type of second dwelling call them accessory apartments, second residential units, or cottage units, which would be a more accurate description.[3] However, since the Hawaii law is commonly referred to as the ohana zoning law, that term will be used in this report.

The concept of ohana zoning in Hawaii was popularized in 1980 by Eileen Anderson during her first mayoral campaign.[4] In her original concept, ohana zoning would allow families to build a second dwelling on a residential lot to accommodate extended family members.

Senate Bill No. 55 (enacted as Act 229, Session Laws of Hawaii, 1981), which created the ohana zoning law, was introduced in the Regular Session of 1981 (see Appendix B). It provided that no state or county law or regulation could prohibit the construction of 2 single-family dwellings on any lot where one residential dwelling unit was permitted, provided that the second unit met all applicable county building requirements, and that the county determined that the public facilities were adequate to service the second unit. Certain

types of developments were excluded as they already had a higher than normal density.

Section 1 of the Act, describing the purpose of the Act,[5] indicates two primary goals: to assist families to purchase housing, and to encourage the preservation of the extended family:

> The legislature recognizes that the spiraling costs of housing, the limited availability of land for housing, and the failure of wages to keep pace with inflation, contribute to the inability of many families to purchase their own homes.
>
> The legislature also recognizes the resulting trend of children living in their parents' homes even after reaching adulthood and after marriage. This trend has positive and negative aspects. The situation is negative when it is forced upon persons because there is a scarcity of affordable homes. The trend can be positive, however, because it helps preserve the unity of the extended family.
>
> The purpose of this Act is to assist families to purchase affordable individual living quarters and, at the same time, to encourage the preservation of the extended family.

The inquiry into the legislature's intent begins with this language. The second stated intent, to encourage extended family living situations, is plain. Allowing family members to live in close proximity would tend to encourage a closer relationship. But the first stated goal invites further investigation. How does allowing ohana zoning assist families to purchase affordable housing?

The legislature might have intended that the ohana units be sold, not just rented, to family members. Units could be sold only if they were either subdivided under county law, or converted into condominiums under the Horizontal Property Regime law, Chapter 514A, Hawaii Revised Statutes. Because the units would be on smaller lots, theoretically the prices should be lower than those for regularly-sized lots, making them more affordable.

The language could also be read as the legislature's belief that ohana zoning would assist in the purchase of housing by permitting family members to live in ohana units, either free or at a lower than market cost, to allow them to save their earnings for a down payment on a home of their own. Under this construction, the ohana unit would not be sold at all, but would serve as temporary housing for the family members. This rental use of the ohana unit interpretation of the legislative intent is very different from the purchase of the unit interpretation. The problem becomes more complicated as no mention is made in the act or the legislative history of rental housing at all. However, as reflected in the survey reported in Appendix E, the vast majority of ohana units are rented, and have not been sold.

The difference between these two interpretations of legislative intent is marked. Under one, success is indicated by sale of the units, and under the other, by rental. However, as both interpretations can help the extended family, this report will not seek to distinguish further between the uses and will examine both in gauging the effectiveness of ohana zoning.

One more preliminary area that should be mentioned is one that came up frequently during interviews and meetings conducted in the preparation of this study. This is the persistent notion of many people that ohana zoning is primarily for the benefit of extended families, and that ohana units must be occupied by family members only. While this is one way to look at the purpose language of the statute, another position is that the legislature created the statute primarily to increase the housing supply, with only an incidental benefit to extended families. The legislative history does not supply an easy evaluation of these opposing positions.

A review of the committee reports seems to indicate that the legislature sought primarily to create more housing, and found the extended family benefit a fringe benefit. House Standing Committee Report No. 929[6] states the purpose of the bill is "to allow construction of two-family dwelling units or two separate units for single-family residential use on lots zoned for residential use." In discussing the impact of the bill, the report read: "Your Committee finds that an immediate, and far less costly, increase in the

supply of housing can be achieved by allowing construction of multiple dwellings. An additional benefit that will be realized by passage of this measure is that several generations of a family will be allowed to live together on one lot."[7] (Emphasis added.)

The Senate Standing Committee Report lists the same purpose, and indicates:

> The zoning created by the bill ("ohana" zoning) would allow more residents to live in lower-density residential areas. Construction of additional units, through expansion of existing units, would be less costly than building new structures, since land and infrastructure are amortized; and ohana zoning would allow several generations to live together and share with one another. Senior citizens would particularly benefit, allowing them to occupy separate units on a single family lot.[8]

Finally, the House and Senate Conference Committee Reports list three objectives of the act:

(1) Allowing optimal utilization of scarce land;

(2) Providing an immediate and relatively inexpensive means of increasing the supply of affordable housing, and

(3) Encouraging the maintenance of the extended family lifestyle valued in Hawaii.[9]

These goals are phrased in the conjunctive, so there is still some question as to whether the legislature wanted all these results to take place within a family-oriented situation, or whether the primary goal was just to increase housing. But given the fact that the text of the law itself does not restrict application to or even refer to families, it would appear that the primary legislative intent was to increase the housing supply, with an

incidental benefit for extended families. This report will evaluate the effectiveness of the ohana zoning law in this light.

Rental of Ohana Units

Neither the legislative history nor the Act itself mention an intent to provide additional rental housing. While ohana units used for extended family might be used at no cost,[10] or rented at a minimal cost, no controls exist to moderate the rental cost for units rented to non-relatives. Rental of units to non-relatives is perhaps inevitable, since the law does not forbid it, but it actually works at cross-purposes to the legislative intent if the rental cost is excessive.

A reasonable rental encourages the creation of ohana units, as it can help cover the cost of constructing the units. Several responses to the ohana survey[11] showed this direct connection, indicating that the "rental" cost was the mortgage on the ohana unit. An excessive rental, however, while it may also be an incentive to the construction of ohana units, acts as a windfall to the landlord, and hinders the tenant from accumulating a down payment for a home of the tenant's own.

Additionally, the rentals can be further abused through people who buy property, put an ohana unit on it, and then rent out both units. This subverts the intent of the legislature that housing be affordable, as this "middleman" adds to the cost of the rental in order to make a profit. It is also pernicious in some counties, most notably Honolulu, where resources are scarce and ohana zoning limited. This double rental use helps to exhaust resources in an area, which then cannot support additional ohana zoning for others. (As will be discussed in more detail in Chapter 7, one way to curb this particular kind of speculative use is to require that either the ohana unit or the main unit be owner-occupied.)

Rentals do serve a useful purpose. Even if the unit originally is built for a family member, the situation may change due to increased family size,

higher income, or death of an elderly relative, leaving the ohana unit vacant. When the family members leave the ohana unit, the owner should be permitted to rent the unit out. Given a housing shortage throughout the State,[12] it would not further the public interest to require the unit to remain vacant if another family member is unable to move in. Further, the owner may need the continued rent payments in order to pay the mortgage on the unit. Without the ability to rent the unit to non-relatives, the owner might be discouraged from building the unit at all.

The ohana unit may also be constructed now with an eye toward family use in the future. A number of responses to the ohana survey indicated that the unit was to be used for elderly parents when they began to need family care. Until that time, the units were rented out to non-relatives.

Although perceived speculative abuses may need to be curbed, some leeway should be retained for the owners to rent out the units.

Resources Necessary for Ohana Zoning

Ohana zoning is a sensitive issue because it involves one of Hawaii's most scarce and important resources: residential land.[13] People who want ohana zoning may feel that they are entitled to it: after all, "it's their land," and they feel that should be able to do what they want with it.

Neighbors, on the other hand, can feel very hostile to ohana zoning. For most people, their home and the land on which it is located is the most valuable asset they will ever own. Ohana zoning, which increases the density in a neighborhood, decreases the amount of open space, and can lead to parking problems, can be very threatening to the neighbors' sense of security.

Both law-abiding ohana owners and their neighbors, in turn, feel the injustice caused by "unfair" ohana owners who violate either the established county regulations or the neighborhood perception of what is right. This

"unfair" behavior ranges from not supplying enough parking spaces for the actual number of cars used by the ohana unit, which causes congestion on the streets, to building units that clash with the character of the neighborhood, to using the units for speculative, primarily profit-making purposes.[14] These "unfair" uses, although technically within the law at this time, create "bad press" about ohana zoning, at least at a grass-roots level. Neighbors who will tolerate density and resource problems when family use is involved can feel imposed upon when the ohana unit is rented to a non-relative and is perceived as being a profit-making enterprise.

Infrastructure Requirements

Another source of tension is that, in some counties, the infrastructure needed for ohana zoning is limited. The state ohana zoning statute does not set forth infrastructure requirements for ohana zoning. The statute merely requires the counties to "determine that public facilities are adequate to service the additional dwelling units permitted by this subsection." The House Standing Committee Report goes into a little more detail: "The counties are allowed to condition the applicability of "ohana zoning" to specific residential areas upon satisfaciton (sic) of plan review and reasonable health, safety and welfare requirements. Thus, ohana zoning would not be allowed in a particular neighborhood if the existing infrastructure of streets and sewer and water systems cannot support the increased density."[15]

Although this language does not limit the public facilities to be considered to streets, sewer, and water systems, the four counties chose to restrict infrastructure requirements to these three elements alone. A more thorough discussion of each county regulations will follow in subsequent chapters, but first, each of these three areas will be reviewed briefly.

Water

Water is one of Hawaii's most precious resources. All four counties have agricultural land uses, most notably sugar cane and pineapple, leading to some measure of competition for developed water sources.[16] Lack of sufficient water has led to denial of ohana zoning on Oahu and Kauai. Only Hawaii County will permit ohana zoning where water is supplied through a catchment, rather than from a pumped water system.

Sewers

The adequacy of a sewage system is another stumbling block to ohana zoning. Honolulu is the only county that requires ohana units to be on a sewer system. In fact, historically, the most frequent reason ohana permits are denied in Honolulu is due to inadequate sewers.[17] Kauai, Maui, and Hawaii counties permit ohana units to use cesspools if the lot size meets certain minimum requirements set by the State.

Streets

All four counties have adopted a minimum sixteen-foot width for roadways that serve ohana units. The roadways themselves have caused few problems; rather, the closely related issue of adequate off-street parking has.[18]

Each county requires the ohana unit to have a certain minimum number of appurtenant parking stalls. Specifically, Maui requires one, while the other counties require two. But the specified number of stalls may easily become inadequate, especially for the larger ohana units. A married couple with one teenage child can readily exceed the two parking spaces allotted. Indeed, except for Maui County, where size of the ohana unit is limited by lot size, the ohana unit can be any size consistent with the counties' general setback and zoning requirements. Where the number of cars exceed parking

spaces, the residents will park their cars on the street. It is at that point that the sixteen-foot width becomes critical. The sixteen-foot width was selected on the theory that the ohana unit parking would be adequate and that no on-street parking would exist, sixteen feet being the minimum width necessary for two lanes of traffic. When on-street parking becomes rampant, the streets become too clogged for normal traffic.

Planning

The main problem with ohana zoning, from the perspective of those who are supposed to make it work, is that it is inimical to long-range planning. Ohana units are developed at the decision of the homeowner. County planners are unable to predict who will choose to put in an ohana unit. Consequently, especially in Honolulu, where the infrastructure is often old and already being used at capacity, gauging future use in upgrading the infrastructure is difficult.

The solution is not just to oversize the infrastructure. First, such expansion is very costly. If ohana users had to shoulder the whole cost, it is highly unlikely that anyone could afford the permit. Second, some of the infrastructure, notably sewage systems, work best only when at or near capacity.[19] Oversizing them will diminish their effectiveness.

However, without additional accommodations to meet the desire of homeowners for ohana zoning, two negative results occur. First, those who truly need ohana zoning and who fall into the categories sought to be benefitted by the legislature will not be able to obtain the necessary permits.

Second, certain unscrupulous persons who really want an ohana-type unit will install illegal units anyway. Since these "bootleg" units do not go through the usual system of check that legal units do, they may lack the required parking spaces, accentuating an existing on-street parking problem, and their owners will not pay the water facilities charge, which helps to subsidize the upkeep and refurbishment of the water system.[20]

The counties then are faced with a problem: how to provide for an unknown quantity of ohana units. The problem is exacerbated by the fact that not all those who want ohana units can get them. The specific categories of use that the legislature finds particularly worthy of encouragement -- extended families, or families who wish to buy affordable housing -- may not necessarily be the ones to obtain ohana zoning as ohana permits are issued on a first-come, first-served basis. Those who request a permit in order to build ohana units strictly for the rental income may apply first and exhaust the available infrastructure resources, before the more appropriate category of homeowner does so. This will then deprive those for whom the law was enacted of the benefits of ohana zoning.

Restriction to Families

Many people who were interviewed or who completed a survey in the preparation of this report indicated that they felt that the ohana zoning law either was limited, or should be limited, to extended family only. The popular name, "ohana zoning," apparently misled them, as the ohana zoning statute makes no such restriction.

Limiting use to family members at first sounds appealing. Hawaii has a long tradition of respect for the elderly and for extended families, and this restriction would benefit both. It would also curb speculation, and, as there would be fewer units, it would result in a smaller impact on any given neighborhood.

But four problems exist with this idea. The first is a question of constitutional law: could a state legally restrict use of ohana units to family members only? A detailed analysis of this issue is outside the scope of this report, but it would certainly need to be thoroughly investigated from a legal aspect before any restriction could be considered.[21]

The second drawback in restricting ohana zoning to families is that ohana zoning, even when used for non-family members, helps to alleviate the

housing shortages experienced by all four counties. Third, the family restriction works as long as there are family members who are available to occupy the ohana unit. But young couples may eventually move to their own home, and elderly relatives will eventually pass on. If the unit must remain vacant because no family member is available to live there, not only is a valuable resource wasted, but the family may be caught in a financial bind if it is unable to realize any income at all from the unit to offset the payments on the debt incurred to build the unit. In a worst-case situation, this restriction could devastate the family if the loss of income from the unit that must remain vacant leads to foreclosure on the entire lot.[22]

Finally, enforcement of a family restriction would be difficult. One county has already indicated that it would not approve a family limitation as it would be too hard to enforce.[23]

While limiting ohana zoning to extended family members is initially an appealing idea, as it would appear to promote a concept near and dear to many in the State as well as seeming to act as a curb on improper usage, such a restriction has definite drawbacks that might result in thwarting the statute entirely.

Bars to Ohana Zoning: Restrictive Covenants

The issue of putting more than one house on a lot predates the ohana zoning issue.[24] To forestall this possibility, some developers put restrictive covenants in the deeds to the lots. These restrictive covenants, among other things, can restrain the building of more than one home on a lot. The issue raised by these covenant is whether they are superseded by the ohana zoning law, or whether the ohana statute overrides the covenant.

Although a full legal analysis of this issue is outside the scope of this report, a well-reasoned law review article on this topic exists which sheds light on the answer.[25] The article notes that "when a conflict arises between a zoning ordinance and a private covenant, the most restrictive lawful

provision will be enforced." (Footnote omitted)[26] In the ohana situation, the most restrictive provision would be the covenant forbidding a second home.

The article does bring up several situations in which a more restrictive private covenant would not be enforced. For instance, if the covenant infringed on a fundamental right or is contrary to public policy, its enforcement can be prohibited under the Fourteenth Amendment to the United States Constitution by the courts.[27] An example of this would be a covenant to sell property only to members of the Caucasian race.[28] At this point, however, neither the federal nor the Hawaii courts recognize the right to housing as a fundamental right. Also, public policy in this State does not appear to have evolved to the point where it would invalidate a restrictive covenant.[29] Merely amending the statute, then, would probably not override these covenants unless the amendment was accompanied by a distinct, stated policy change that private covenants are to be subordinated to the legislature's attempts to increase the housing supply.

Strict application of zoning principles might also be a means to invalidate the covenants: the Hawaii courts could, as a few other states have, require private landowners to consider the health, safety, and welfare of the public in promulgating their covenants. Since these covenants would need to meet the zoning standards, they would be invalid if their provisions contravened the existing ohana zoning regulations.[30]

The court might possibly invalidate covenants if the court feels that they impose on family relationships, which in certain circumstances are fundamentally protected rights.[31] However, as neither the statute nor the counties' ordinances require occupancy by family members, at least at this time that argument lacks merit.[32]

Although private covenants, under the present state of the law, appear to be valid, they are not effective until they are enforced. The responsibility for enforcing them does not lie with the government,[33] it lies with the other private individuals involved with the covenant, as the covenant is intended for their benefit.[34] However, to be effective, homeowner enforcement must

be prompt and consistent. If a homeowner or community association chooses not to object to the first violation of the private covenant, they may be deemed to have waived their right to object to subsequent violations.[35]

As of 1984, approximately 9,000 lots in Honolulu alone were affected by this type of restrictive covenant.[36] The legislature would have to take the bold step of either finding housing to be some type of protected right, or apply zoning principles generally and the ohana zoning law specifically to restrictive covenants, in order to abolish the covenants. Either of these steps would be innovative. If the legislature chooses not to take these steps, the restrictive covenants still may fail if they are not enforced. Before the legislature makes a decision on this matter, a determination should be made as to where these restricted lots are, especially in Honolulu, for ohana zoning is so limited in Honolulu that lots subject to the covenants may be in areas which are not otherwise eligible for ohana zoning, thus negating or limiting the effects of any legislative action.

Ohana is Not the Ultimate Solution

When reviewing this report, it must be kept in mind that ohana zoning was recognized from its inception as only a partial solution for Hawaii's housing problems.[37] Ohana zoning is fulfilling its role as a source of additional housing. Its problems -- lack of availability and high cost -- are similar to Hawaii's general housing problems, and should not be considered serious enough to warrant termination of the program.[38]

Chapter 3

OHANA ZONING IN HONOLULU

The City and County of Honolulu has experienced the highest number of requests for ohana zoning. As many ohana-eligible areas are among the older neighborhoods, infrastructure problems are considerable. While Honolulu may have the most problems with ohana zoning, its problems are not dissimilar from those of its sister counties.

The Ordinance

Honolulu's ohana zoning ordinance[1] states:

> Two dwelling units (either separate or in a single structure) may be located on a residentially zoned lot, with the following limitations:
>
> A. All provisions of the zoning district shall apply except the provisions on the number of dwelling units permitted on a zoning lot.
>
> B. These Ohana Dwelling provisions shall not apply to lots within a Zero Lot Line project, Cluster Housing Project, Planned Development-Housing or duplex unit lots.
>
> C. The following public facilities are required to service the lot:
>
> (1) The sewer capacity shall be approved in writing by the Department of Public Works.

(2) The availability of water shall be confirmed in writing by the Board of Water Supply.

(3) Approval in writing from the Honolulu Fire Department is required for all parcels served by private streets.

(4) The lot must have direct access to a street which has a minimum paved roadway width of 16 feet.

D. Public facilities clearance may be obtained prior to application for a building permit. Forms for public facilities clearance will be available at the Building Department and Department of Land Utilization. The form, approved by all agencies, shall be submitted with the building permit application. Where complete plans and specifications are submitted for building permit application processing, the submission of the public facilities clearance form will be attached with the building permit and processed concurrently.

E. Neither the Director nor the Zoning Board of Appeals shall have the authority to modify Subsection C., above. (Italics omitted.)

The most noteworthy part of the ordinance is the relative lack of restriction. Only three elements of the infrastructure are to be examined: sewer, water, and roads. The ohana zoning statute does not limit county restriction to these areas: in fact, the legislative history of the statute indicates that ohana zoning is permitted on lots "which can reasonably accommodate such increased density," and that in addition to the usual zoning requirements, the statute "also enables counties to establish additional requirements." (Emphasis added.)[2] Honolulu, as is true of the other counties, has much more leeway to control ohana zoning than it is actually using.

The ohana zoning permit process is straightforward. A copy of the permit is attached as Appendix D. The applicant takes the permit to the four departments: the Building Department, to determine whether the parcel is zoned residential and is in an area generally identified as ohana eligible; the department of public works, to determine sewer adequacy; the fire department, to determine road access; and the board of water supply. There is a separate, stamped box for the department of transportation services to indicate whether the parcel meets the minimum roadway requirements. All the requirements must be met, and no variances can be obtained for non-conforming parcels. The form also asks the applicant to indicate whether there is sufficient room for two additional parking stalls.

The Building Department receives the completed permit. Obtaining the signatures takes about two days.

The problems with ohana zoning in Honolulu lie not with the process but with the inadequacy of the infrastructure. When the ohana zoning ordinance was first enacted, the county originally had anticipated that much of the older urban area would be eligible: one publication indicated eligibility for Hawaii Kai, Kailua, Wahiawa, and all of the central urban core, from Salt Lake to Waialae Nui.[3] However, problems with sewers and water were discovered, and the eligible areas shrank. At present, small areas of eligibility are scattered throughout the county (see Appendix F).

Sewer

Honolulu's most severe infrastructure shortage has occurred in the area of adequate sewerage systems. Most of the county is on an island-wide sewer system, composed of eleven waste-water treatment plants. Each plant is broken down into interceptor sewers, which are in turn broken down into trunks, which are broken down into mains. Each main services about 4,000 people, living in about 1,000 homes.[4] These projects were designed to handle the actual projected flow for each area. An excess capacity was not built

into the system, as the treatment plants work best when at or near full capacity.[5]

Ohana units, not being factored into the planning stages of the sewage system, can overload the sewers. In its early days, when large portions of the county were nominally eligible for ohana zoning, up to 40% of the applications were rejected because of inadequate sewers[6] The cost of sewer improvements that would increase sewage capacity would be substantial,[7] and may be too speculative to justify the expense, given the fact that future ohana development, because it is done by the individual, is unpredictable.

The problem is compounded by the fact that at this point, unlike the situation with the water infrastructure, people who add ohana units are not required to pay a fee to obtain the sewer hook-up. At the time of this report, the City Council was considering a proposal to impose a sewer fee, called a "wastewater system facility charge," for projects, developments, and ohana units which would be used to improve the sewer system.[8] The fee would help pay for expansions to the system and additions to handle increased usage. If this bill passes, it would also help "repay" the moneys already expended by the county for the sewer system, which benefits both ohana unit owners and the general public.

Proliferation of ohana units, when combined with the shortfalls of the sewer system, may thwart the plans of developers. According to the Department of Public Works, the department does not impose sewer requirements on new subdivisions; rather, the developer tells the department how many units it intends to build, and the department will respond with the statistics on the number and types of lines to put in. If the developer does not take possible ohana usage into consideration, adequate reserve sewer capacity may not exist. If the developer is building a series of phases, it is possible that ohana units on the earlier phases may preempt enough sewage capacity so that development of later phases is precluded.

There is one possible solution to the limited sewer capacity: cesspools.[9] At present, one cesspool is permitted on each 5,000 square foot lot,[10] so a

lot must be at least 10,000 square feet to support 2 cesspools, one for the main and one for the ohana unit. However, although the wording of the ohana statute does not prohibit use of cesspools in determining the adequacy of the infrastructure, the Honolulu ordinance specifically calls for a determination of the adequacy of the sewer system, which has been interpreted so far by the county as excluding cesspools.[11]

Thus, at this time, cesspools cannot be used to alleviate problems of sewage capacity. Any change which would allow them to be used for ohana zoning, as they presently are in the other counties, could come directly through county modification of its own ordinance, without the need for state mandate.

If the county were to choose to use cesspools, a new set of problems would arise. The first is jurisdiction. Until 1984, cesspools came under the sole jurisdiction of the Department of Health.[12] The county had no control over cesspool requirements, which may have been one of the reasons cesspools were not accepted: that would have put them into the anomolous situation of having the State partially regulate the county ohana zoning process. In 1984, jurisdiction over the cesspools was transferred to the counties,[13] although the transfer does not formally take effect until the State releases start-up funds, which has not yet been done. However, no funding to monitor the cesspools has yet been implemented, so the counties have not yet taken over control of this area.

Even when the counties do take control over cesspools, other considerations may preclude their use in ohana zoning. At present, the Department of Health requires a certain minimum lot size before it will allow a cesspool. This size is 5,000 square feet, or 10,000 if both the house and ohana unit are on cesspools. When the counties take over, apparently they will keep the same minimum requirements.[14] This size factor, and various siting factors, could preclude the use of cesspools on individual lots.

In summation, the status of the sewer system in the City and County of Honolulu is the major factor in preventing a more widespread use of ohana

zoning. Unfortunately, the cost of expanding the sewer system capacity is quite high. Use of cesspools could partially help alleviate this problem. This would also help bring ohana to the more rural sections of the island, where cesspools are more prevalent, and could also be a mechanism to enable the county to implement ohana zoning on agricultural land, as is presently allowed in the Hawaii county.[15] This change can be implemented by the county alone, without any changes in the state law.

Water

While water is by no means over-abundant in the City and County of Honolulu, ohana problems with water are less troublesome than those with sewers. Once an area has been approved for ohana, the water supply, for both household use and fire control, has been adequate for the area and no shortages have been experienced.[16]

The board of water supply has noted two problems related to ohana. The first is the general public confusion at the apparent randomness of the availability of ohana zoning. Under the new, more conservative eligibility areas, houses literally on the same block can differ as to their eligibility. This perception of ohana zoning as being whimsically allowed is not one that can be cured by legislative or county action, although it should not be ignored: as stated above, a home is the most valuable tangible asset that the average person owns. Ohana zoning infringes on that asset by creating a more crowded neighborhood. Conversations with members of the public and the neighborhood boards indicate that people are more willing to accept the impact of ohana zoning if they feel it is being used for family needs, and not for profit. Similarly, ohana zoning will be tolerated more readily if its limitations and availability are clearly explained to the public.

The second problem also arises in the sewer situation, and stems from the inability to predict or plan for development of ohana units. A developer of a project is responsible for developing the water supply to the area. After the water system is completed, it is turned over to the board of water

supply. If the project encompasses several phases, it is possible that ohana units built on the initial phases can use up the excess water capacity, leaving the later phases with insufficient water. The board of water supply is currently trying to give developers a commitment for additional facility usage to avoid this problem.

Streets

Determining the availability of a street of the proper width is the province of 2 departments: the Department of Transportation Services and the Fire Department. The Fire Department apparently uses a map that indicates whether the street appurtenant to the lot meets the sixteen-foot road requirement. The Fire Department characterizes its participation in the ohana process as "minute."[17] The department has never rejected an application for road width which is inadequate under the fire code, although the department would prefer to increase the width to the standard twenty feet.[18]

The fire department becomes more involved with the process when the proposed ohana unit will be 150 feet or more away from the road. The department will then require construction of a twenty-foot road to the unit, which is the minimum width required under the fire code. The Department of Transportation Services (DTS) enters into the picture if there is some question as to the width of the roadway. The DTS will go out to the site and measure the width. The DTS, like the fire department, is not happy with the sixteen-foot minimum, and would like to see the width be increased to eighteen feet for dead-end roads, and twenty feet for all other roads.[19]

Parking

The sixteen-foot road width is the minimum width for a two-lane roadway when used for traffic circulation only, and not for parking. A twenty-foot roadway is the minimum width necessary for a two-lane roadway with

on-the-street parking. Although the parking requirement of two stalls for each ohana unit is supposed to ensure adequate off-street parking, in reality, on-the-street parking seems to have increased, both from visitors to the units and because the occupants of many ohana units have more than two cars. Since ohana unit size is not regulated other than having to meet the normal zoning setback requirements, large multi-bedroom units can be constructed, and if occupied by families with teenaged children, three or more cars may easily be owned by the family.

Both problems with roadways -- street width and parking-- arise from standards set by the county ordinance, not State law. If adjustments need to be made in this area, the county can do so by amending its own ordinance.[20]

Social Impact

The social impact of ohana zoning cannot be ignored. A significant number of families have benefitted from ohana zoning, both in ways intended and unintended by the legislature.

First, a great number of families are using ohana zoning to aid their extended families. The county sent out a survey in July of 1984, one of the purposes of which was to determine if family members were using the ohana unit.[21] Sixty-seven percent, or two-thirds, of the respondents indicated that family members were living in the ohana units.

In the preparation of this report, the Legislative Reference Bureau sent out a survey to determine whether family members were currently using the ohana units. The survey was sent to all Oahu homes which had applied for ohana units and for which the DLU records indicated that an ohana unit had been completed.[22] The survey showed that 68% of the original occupants of the ohana units were family members, and that currently, 58% of the occupants are. Some of the comments by the participants in the Legislative Reference Bureau survey indicated that family members were living together so that family members could care for each other, and others indicated that

family members were renting the ohana unit -- or using it without cost -- out of economic necessity. These types of usage meet the legislative goal of encouraging the extended family, and the not specifically mentioned but also laudable goal of providing affordable housing -- although not the specific legislative goal of providing for the purchase of affordable housing. However, it should be noted that, to some extent, those two goals create different statistics. Unless the ohana unit is sold under the Horizontal Property Regime (condominium law), which presently is done in only 5.3% of the cases,[23] the family will have to move out of the ohana unit to be able to finally purchase their own home. Moving away to purchase a home undercuts the goal of preserving the extended family, and opens up the ohana unit for use by others -- either relatives or strangers.

Thus, one way to interpret the data would be to note that a decrease in the numbers of related families occupying the ohana units could be occurring because those families have succeeded in buying their own homes. In fact, the recent Legislative Reference Bureau study does show a distinct decline in family usage, as demonstrated in the following table:

Originally intended for use by relatives:	Originally intended for use by non-relatives:
207	55
First use by relatives:	First use by non-relatives:
206	46
Present use by relatives:	Present use by non-relatives:
174	77

This table shows that usage by relatives declined by 10%, to 58% from 68%, while usage of ohana units by non-relatives increased by the same amount, to 25% from 15%.[24]

A number of reasons exist, besides family care, for families to continue living in ohana units even if they are financially able to afford homes of their own. Some of those reasons are: availability of relatives for childcare; waiting for outside conditions (e.g., mortgages rates) to become more

favorable; representation of relatives that if they remain, they will be deeded or willed the property; attachment to the neighborhood; attachment to the school system; and desire to save money for other goals (such as education).

Unfortunately, social problems have also arisen concerning ohana zoning. One of the foremost is the inability of the county to plan its developments, as the county cannot predict who will apply for and construct an ohana unit.[25] In a worst-case scenario, where a whole neighborhood constructs ohana units, the entire tract simply becomes doubly dense. However, the real "worst case" for ohana zoning, from a societal and not a planning point of view, is not where the whole neighborhood goes ohana, but when only a portion does, and has a significant impact on the quality of life on their non-ohana neighbors, which is perceived as detrimental.

Increased density leads to an increasingly crowded neighborhood: there is less green open space, more cars parked on the streets, more people, and more noise. While some neighborhoods have adjusted to this added impact, others, particularly in Kaimuki, Kailua, and Manoa, are frustrated by what they perceive as a decrease in the quality of life in the area.[26] A particularly ironic result is the potential impact on real property taxes, which are based on the value of the property. Land with an ohana unit built on it has greater value, and is taxed at a higher rate. Should land that has ohana capability be taxed at a higher rate, even if that capability is presently not being exercised? Should land in a neighborhood, even though itself not eligible for ohana zoning, have greater value and be taxed at a higher rate because it is surrounded by higher-value ohana-built property? These are legitimate, worrisome questions for a homeowner, whose tax assessment could be increased even though the homeowner feels that the quality of the neighborhood has decreased.[27] An increased assessment from ohana zoning may be more threatening to the homeowner than a similar assessment increase caused by a density increase from other types of re-zoning, because ohana zoning can appear without prior notice or hearing.

At the moment, these remain theoretical questions, because the county department of finance is only revising property taxes for units that actually

do have the ohana units.[28] The department of finance has indicated that it will adjust the real property assessment based on sales for non-ohana units in a crowded, doubly-dense ohana area.[29] The department retains the ability to increase the value of ohana-eligible units, and any such change in policy is purely a matter of county rather than state law, since real property taxes are the province of the counties and not the State.

The last societal problem is the unavailability of ohana zoning for those who want it. Honolulu, like the other counties, is in the midst of a shortage of affordable housing, both for sale and for rent.[30] The rental market, in particular, has been described as "very tight."[31] Ohana zoning is a partial answer to this problem, but only limited areas of Honolulu are eligible for ohana zoning. Law-abiding citizens who live in other areas are frustrated and do not always appear to understand the reason for the denial of their application. "Bootleg" ohana units installed by lawbreakers can have a serious impact on the infrastructure resources as, unlike applicants who go through the process, bootleg owners do not pay the water systems fee that helps improve the system, and may not construct the unit up to code standards, thereby endangering those who live there. Bootleg units leech off the system and overcrowd already taxed resources. To the extent, however, that these problems stem from the inability or unwillingness of any county to educate its citizens about, or enforce, its own zoning ordinances, they will not be ameliorated by amendments to the state ohana zoning statute.

Variances

A variance is a waiver of zoning standards which effectively legalizes an otherwise non-conforming building or structure. Requests for variances are reviewed by the Director of Land Utilization.[32] Zoning standards, according to the City and County Charter[33] concern location, height, bulk, and size of buildings and other structure, area of yards, courts, off-street parking, open spaces, density of population, and use of the buildings. These types of variances are permitted for ohana units.[34]

But ohana zoning infrastructural standards, in contrast, are concerned with approval by other county departments. The heads of the various departments are trained professionals in their areas.[35] Those departments operate under regulations that are not contained in the Land Use Ordinance.[36] Although the ohana zoning ordinance itself is found in the Land Use Ordinance, the Honolulu Corporation Counsel has issued an opinion that the Zoning Board of Appeals (which previously reviewed variances) does not have jurisdiction to vary infrastructure requirements for ohana zoning because the board simply does not have jurisdiction over issues which relate to health, life, and safety standards established by other agencies.[37] The decision of the various agencies on the availability of infrastructure resources is outside the jurisdiction of the Director of Land Utilization and may not be varied.

Although these intrastructure requirements cannot be varied, one bright spot for those not currently eligible is the fact that the ohana eligible areas are not static: as resources in various areas become available, areas are opened up for ohana zoning. For example, in June of 1987, Niu, Aina Haina, and parts of Kahala and Kaimuki/Waialae became eligible for ohana zoning.[38] Conversely, when infrastructure resources are at maximum capacity, those areas are removed from ohana zoning eligibility. While, due to the cost of increasing the capacity of the infrastructure,[39] ohana eligibility will probably not occur county-wide in the near future, further expansion of eligibility is possible.

Selling Ohana Units Under the Horizontal Property Regime

An ohana permit merely gives a homeowner the right to construct a second unit on the homeowner's property. It does not give that second unit an interest in the property. In fact, financial institutions generally treat the ohana unit as an extension of the main dwelling, and use as security both homes and the underlying real property.[40]

If a homeowner wants to sell the unit and part of the lot, to create a second, legally separate property, the homeowner can use one of two routes. One route is subdivision under chapter 22, of the Revised Ordinances of Honolulu, 1983. This process so far does not appear to have been used in Hawaii to sell ohana units. The second way to separate the property so the ohana unit can be sold separately is to make the ohana unit a condominium under the Horizontal Property Regime (HPR) law.[41] To date, the HPR method has been used infrequently, if at all, in the other counties.

There are two advantages to selling ohana units under the HPR. First, the sale of the units comports with the second specified legislative goal of providing for the purchase of affordable housing. Second, the sale of the unit creates independent legal and financial liability for the unit. The importance of this option arises where, for example, parents build an ohana unit for one of their children, on the representation of the child that he or she will pay the mortgage for the ohana unit. If the child should fail or be unable to pay on the mortgage, and the parents owning the main unit are either unaware of the default in payment or are unable to pay themselves, the whole property, including the main dwelling, could be foreclosed upon.

But if the ohana unit is sold under the HPR, and the mortgage loan is refinanced so that all financial responsibility for the ohana unit is placed on that unit and its property, and not on the main dwelling, the owners of the main dwelling would no longer be responsible for any failure of the ohana unit owner to pay the mortgage. This system is a valuable tool to protect family assets.

The negative impact of applying the HPR to ohana units occurs when the ohana unit is used for speculation. In some neighborhoods, notably Manoa, units have been offered and sold to non-relatives for over $250,000. Now that portions of Kahala have been opened up for ohana zoning, the same type of expensive, upscale ohana unit housing can probably be expected.

The problem with speculative sales of this type is that the market they target is the market of people who already can afford housing. Whether it is

in Manoa, Kahala, Waialae-Iki, Tantalus, or Nuuanu, people who can afford $300,000 homes will be able to buy them. But by the legislature's statement that ohana zoning was meant to provide affordable housing, the Legislature implicitly recognized the need for lower and moderate income housing. As mentioned above, ohana resources are limited, and should probably be reserved for the more needy cases, which would be for family members and for affordable low-income housing.

A second, perhaps more pernicious type of speculation occurs when both units are sold for use as rental housing. Under this scenario, even the argument sometimes used that the ohana unit is needed to help finance the owner's own home is completely lacking. The detrimental aspect of this use, of course, is that property used solely for rental purposes tends not to be the most affordable.

Yet limiting application of the HPR to curb speculation contains its own problems. The legislature has specifically stated that one purpose of the ohana statute is to provide for the purchase of housing. That intent would need to be reevaluated before the application of the HPR to ohana units could be constrained. Second, one use of the HPR is beneficial to families, that of separating the financial interests in the property, and the utility of that safeguard must be weighed against the apparent abuses.

The counties could not perform these changes on their own: since the HPR is a state statute, the legislature would have to revise the law. If the State wanted to cut back on speculative use of ohana units, the State could forbid the application of the HPR to ohana units unless the purchaser was a family member of the applicant.[42] Yet that would not be a total solution, for the family member who makes the initial purchase could then turn around and sell the unit to a non-relative. Requiring relatives who purchase the unit to live in it for a certain minimum period before it could be rented or sold might be effective in curbing speculative sales due to the delay.

Another type of abuse is sale of an ohana unit which is then used by its new owner as a rental unit. Some respondents to the survey indicated that

they needed the rental income from the ohana unit is order to afford the mortgage on the main home. That is perhaps questionable usage of an ohana unit, given the stated legislative intent. When an ohana unit is sold strictly as an investment device, the use is even less connected to the legislative purpose as the owner lacks even the rationale that the ohana unit enables him or her to afford a home to begin with. The use is strictly speculative.

One way to prohibit this particular type of speculative use is to require that all ohana units sold under the HPR to be owner-occupied, either permanently or for a minimum number of years. This would forestall the obvious speculative use by the ohana owner, although, of course, it would still not prevent speculative gain to the original owner who sells the ohana unit.

The statistics show that at this point, only 5.3% of the ohana units are being sold under the HPR.[43] So at the present the need for controls, if the legislature finds them necessary, is not particularly pressing.

Evaluation

The ohana zoning program in Honolulu has benefitted approximately 800 applicants during the past five years.[44] Statistics show that approximately 58% of the units are occupied by family members, which accords with the legislative goal of preserving extended family living situations. The remaining rental units serve a legitimate, although not specifically enumerated, purpose of providing housing. Some of the few units that have been sold may comply with the goal of providing for the purchase of affordable housing, but in some cases sale of units have been used for speculation, which appears to be contrary to the legislative intent. However, steps to control speculation are not easy to implement in a constitutional and equitable manner and at best will probably mitigate, rather than eliminate, the problem.

The demand for ohana zoning outstrips the ability of the county infrastructure to supply it. As water, sewers, and roads improve, more areas are being added to the ohana eligible areas, but since these improvements are to the overall system and are not generally designed to support ohana units, areas are opening up only sporadically. While some areas are opening up, others are closing down because their capacity has been met. The State could attempt to mandate infrastructure improvements, but without a substantial outlay of state funds, such a mandate would be useless.

The City and County of Honolulu supported a review of the ohana zoning law because it wanted more discretion in implementation.[45] Yet for the most part, the ohana zoning statute is broad and flexible enough for the counties to make major modifications. Since the statute and legislative history give the counties the ability to make "other requirements" to ensure that the "public facilities" are adequate to service the ohana units, the county could presumably look at other facilities, such as availability of schools, parks and other green areas, or uncrowded roadways, to determine availability. This would make the permit process more complicated, but could fine-tune ohana zoning in neighborhoods that are already densely populated.

The Legislative Reference Bureau asked the counties to submit suggested changes to the state statute. The suggestion from Honolulu was that a version of House Bill No. 244, 1987 Regular Session, be enacted. That bill provides that each county adopt reasonable standards that allow accessory dwelling units in accordance with zoning ordinances and rules, and general plan and development plan policies. No specific changes were given, and thus this report cannot comment on what, if anything, Honolulu would do to implement or restrict ohana zoning.

Ohana zoning is working in Honolulu. It is not offered as widely as it is wanted, and the selling of ohana units under the Horizontal Property Regime may need to be re-evaluated. However, it has provided affordable housing and permitted many families to stay close together. Those results should not be overlooked merely because the system is not ideal.

Chapter 4

OHANA ZONING IN MAUI COUNTY

Maui[1] has the most regulated ohana zoning scheme, including several innovative provisions which the other counties might want to consider. As such, it also shows elements of the flexibility which is inherent in the ohana zoning law. As in the case of Honolulu, Maui has a housing shortage, so ohana zoning, whether or not it fulfills the specified legislative intent, benefits the people of the county by providing needed housing.

The Ordinance

The Maui ohana ordinance[2] contains a purpose section which parallels that of the state statute, finding a need to secure additional housing and preserve the extended family. The section continues:

> The Council is at the same time mindful of the need to secure the quality of life in such residential areas by ensuring that infrastructural facilities are adequate to support the higher densities and by maintaining a vigorous effort to preserve open space and air and light to the extent possible. Accordingly, the Council finds that lots containing an area of less than 7,500 square feet are not large enough to accommodate more than one dwelling unit.

Thus, Maui's ordinance differs from Honolulu's in that it establishes a minimum lot size for ohana zoning. This limitation is a proper exercise of the power delegated to the counties, for, as indicated in the legislative history, the counties were instructed to apply ohana zoning to areas which can "reasonably accommodate" the increased density. Requiring a minimum lot size for ohana zoning appears to be rationally related to ensuring that a lot

can accommodate the extra unit and therefore would be within the scope of that parameter.

The Maui ordinance makes all other zoning requirements applicable. The full text of the Maui ordinance is set forth in Appendix C. It limits application of ohana zoning to five types of districts: residential, apartment, hotel, interim zoning, and state land use rural districts. It also restricts ohana zoning from applying to duplex and planned development lots.[3]

Most innovatively, the Maui ordinance prescribes a maximum ohana unit size. This maximum is pegged to the square footage of the lot, as described in the table below.[4]

Lot Area	Maximum Gross Covered Floor Area
7,500 to 9,999	500 square feet
10,000 to 21,779	600 square feet
21,780 to 43,559	700 square feet
43,560 to 87,119	800 square feet
87,120 or greater	1,000 square feet

There is a separate set of maximum dimensions for cumulative floor area of uncovered walkways and lanais.[5]

The ordinance requires only one parking stall, in contrast to the other counties, which require two.[6]

Maui also has infrastructure requirements, the pertinent provisions of which are printed below:

Public facilities required. The following public facilities are required to service the lot:

A. Adequacy of sewage disposal system. This shall be secured in writing from the department of public works for public sewage systems and the state (sic) of Hawaii Department of Health for cesspools, septic tanks and private sewage systems;

B. Adequacy of water supply. This shall be secured in writing from the department of water supply;

C. Adequacy of fire protection from all lots served by private streets. This shall be secured in writing from the department of fire control;

D. Adequacy of street. The lot must have direct access to a street which has a minimum paved roadway width of sixteen feet and which the director of public works determines to be adequate for the proposed construction.[7]

The major difference in infrastructure requirements, as compared to Honolulu, is that the Maui ordinance permits the use of cesspools and other types of private sewers.

The Application Process

The procedure for obtaining an ohana zoning permit is very similar to that found in Honolulu. The applicant is given a public facilities clearance form to take to the various agencies that monitor sewer, water, and streets, for their review. Once all signatures are obtained, the applicant returns the form to the Department of Public Works. A copy of the permit can be found in Appendix D.

Unfortunately, Maui lacks statistics on how many applications have been accepted or rejected. However, as the Department of Water Supply states that it has never rejected a permit application, and the use of cesspools is an

option for many applicants, the rejection rate could reasonably be expected to be on the low side.

One difference from Honolulu in actual implementation is that Maui does not have a comprehensive infrastructure overview as Honolulu does.[8] Thus, there is no map, as there is in Honolulu, which outlines areas generally eligible for ohana zoning: each petition is evaluated on a case-by-case basis by each department.

The Housing Shortage

Maui's overall format seems well designed to control at least one of the problems that plagues ohana zoning: the drain on resources. Because the unit size is limited, less water and sewer usage can be expected. However, that same format has a concomitant drawback: it makes the units less useful, as they house fewer people.

Maui, like Honolulu, is in the grip of a serious housing shortage.[9] Increasing reports have been made of families living in vans or in tents in sugarcane fields.[10] Ohana zoning might serve as a partial solution to this problem, but the lack of statistics make it impossible to calculate the effect of ohana zoning on the shortage. At this point, Maui does not have statistics on the number of ohana units and number of people they house, much less the ability to determine how many units are utilized by extended families as compared to non-relatives. A synopsis of Maui's particular problems follows.

Zoning Requirements

Maui's ordinance weighs maximum utility of the unit against concern for the living environment, and decides in favor of the latter. The minimum lot size, the maximum unit size, and the maximum covered area limitation restrict the impact of the unit on the area. However, the limit on the unit size undeniably decreases their utility.

The Maui Board of Variances and Appeals formerly received numerous petitions for variances to increase the size of the unit, which were routinely granted. But last year the Board received a resolution from the Maui County Council asking them not to thwart the intent of the ordinance.[11] Since that time, no variances have been granted. However, at least one proposal has been introduced to increase the size maximums an extra 250 square feet each.[12]

Sewage

Maui does permit ohana units to use a cesspool rather than requiring them to be on the sewer system. The Department of Health regulations require a 10,000 square foot lot requirement[13] for ohana units on cesspool -- 5,000 minimum per dwelling. This means that units with a square footage of 7,500 to 9,999 square feet, although technically eligible for ohana, will fail to meet the ohana requirements if the lot is not on the sewer system.

Water

Maui estimates that an ohana unit, because of its size restriction, uses only 35 - 40% of the water that the main unit does.[14] The county thus tries to recognize this lesser usage and support ohana zoning by charging half of the current rate for its meter hook-up.[15]

Maui, like the other islands, has its wet and dry areas. The Water Department has never rejected an ohana permit due to a shortage of water, but in the "up-country" areas, the department will grant permission only on the condition that it will not install another pipe. This means that the original pipe that services the main house will have to service the ohana unit as well, which can result in decreased water pressure for both units.

Streets

Another conflict arises with the parking space requirement. Maui stands alone among the counties in requiring only one additional stall per unit. County officials note that this, in general, is too small: the severe on-street parking problem in more populous areas shuts some streets down to one useable lane. This is a problem which can be solved by the county itself, by requiring more off-street parking stalls.

Enforcement

According to county officials, abuse of the ohana zoning concept exists and the number of enforcement personnel is insufficient to correct these abuses. One type of abuse is a true ohana zoning abuse and results from the size restrictions: after constructing an attached ohana unit and going through the inspection process, the owner simply knocks down the interior wall separating the two units and expands the ohana unit. A second type of abuse is not an ohana zoning abuse per se, but it contributes to giving ohana zoning a bad name. Some owners construct a unit ostensibly as an outbuilding. After inspection, the owner illegally installs kitchen facilities, making the unit a separate dwelling unit. This contributes to the over-crowding a neighborhood experiences and can be a source of tension between neighbors.

The county has insufficent resources to adequately police ohana abuses. The zoning enforcement division of the Department of Public Works has had a personnel shortage and has been unable to crack down on offenders.[16] Part of the problem also lies in a legal inability to obtain a search warrant without certain minimum knowledge requirements.[17] At least one county official has indicated a belief that ohana zoning is a state mandate and that consequently the state should contribute funds to enforce the law.

Restrictive Covenants

Maui County, like the City and County of Honolulu, does not want to become involved in the enforcement of private covenants that might prohibit ohana zoning. The county's position is that enforcement should be left up to the relevant homeowners' association.[18] Maui did become involved with covenant enforcement in the Lahaina area in a buy-back program along with the Hawaii Housing Authority, but has no plans to become involved on a regular basis.[19]

Property Taxes

The Real Property Tax Division of the Maui Department of Finance looks at two factors when it assesses real property. One is the value of the land itself, and the other is the value of the improvements on the land. In the case of ohana zoning, the improvement in the form of the ohana unit will not be assessed until it is built. The mere fact that a homeowner has a permit will not cause that part of the assessment to rise.

But the valuation of the land itself may be affected merely because it is in an ohana-zoned area, whether or not the particular property has a permit or is even eligible for a permit. The land value is based on market sales in the area. If ohana-eligible or ohana-zoned homes in the area command a higher price in the market, those prices may be used as comparables which would increase the assessment for neighboring parcels.[20]

Limitation to Family Members

At the time Maui enacted its ordinance, Maui could have effectively limited ohana zoning to family members only, according to Councilmember Velma M. Santos. When the ohana statute was enacted, Maui already had a guest cottage ordinance that provided for construction of accessory units that could not be rented. If Maui had modified that ordinance, keeping the no-

rent provision, probably the only persons who would construct and use the units would be members of an extended family. However, according to Santos, some of the guest cottages were already being rented illegally. At least under the ohana system, buildings are constructed to code standards and pay fees that aid in upkeep of the infrastructure. Legalizing the units puts them under these controls, which benefit the community as a whole. At any rate, the ohana units, whether rented to family members or not, serve the valuable purpose of providing badly needed housing.

Evaluation

It is difficult to determine the results of ohana zoning on Maui, given the lack of statistics. The number of extended families using ohana zoning cannot be determined. Also, according to county officials, it appears that no units have been sold, either under the HPR law or by subdivision. Therefore, a strict comparison of Maui's results with the stated goals of the ohana zoning statute, which are to assist in the purchase of homes and to preserve the extended family, might lead to the conclusion that ohana zoning is not "working" in Maui. However, that would be too hasty an assumption.

As discussed above, the goal of providing affordable rental housing, while not a specific legislative goal, is a worthy one that is needed throughout the State. The housing crunch on Maui is not going to go away. New hotels and projects are under construction,[21] requiring more and more workers. As the unemployment rate is a low 5%,[22] this need for employees creates a vacuum that could lure more workers to Maui. These people will need housing.

Ohana zoning, while blamed for some infrastructure problems, is one useful safety valve that takes care of some housing needs. The blame associated with ohana, such as increased on-street traffic and consequent decreased road capacity, is merely a symptom of the general overcrowding. If affordable, legal housing is not available, people will create and live in illegal units. Legalizing ohana zoning at least allows some element of

governmental control over building standards and infrastructure requirements, and brings a small amount of revenue back into the system for water improvements.

One of the counties' criticisms that led to this study was the perception that the counties had *little or no control over ohana zoning and that more* discretion was needed.[23] Yet Maui has imposed significant controls on density, by limiting minimum size of lot, and preserved more of its green areas, by *limiting maximum size* of ohana unit. Maui has also chosen to permit cesspools, which increase the number of lots available. Maui now asks for more autonomy in planning, through greater flexibility in implementation.

One wonders what form that flexibility might take. If Maui seeks to absolutely block certain parts of the county from eligibility for ohana zoning, the possible results would be an increase in those places in illegal housing and a decrease in percentage of individuals housed where the need is greatest -- where the county is most dense. On the other hand, if Maui seeks to review ohana on a case-by-case basis as part of its planning policy, the administrative burden seems immense, although the State should not patronize the county by taking that option away from it. Although the Legislative Reference Bureau asked for specific suggestions from the county on how to amend the statute to give the county the *flexibility* it is requesting, no suggestions were forthcoming. This report therefore cannot comment on any specific changes and their impact on the county and the ohana zoning concept.

Maui's thoughtful handling of the ohana situation to date indicates that the state ohana zoning law is more flexible than some county officials believe. Taking the county's housing crisis into consideration, Maui's desire for more "flexibility" in implementation is probably not just a code word for elimination of ohana zoning. What form that flexibility might take, however, is unknown, because county officials have not indicated what sort of leeway they need or even want. As suggested in Chapter 7, a specifically enumerated list of additional factors the county could consider might give the county the

flexibility it is asking for while assuring that ohana zoning remains as a viable means of increasing the supply of housing.

Chapter 5

OHANA ZONING ON KAUAI

Kauai has had its own unique experiences with ohana zoning. Perhaps the least urbanized of the major islands, its infrastructural problems are different from the more populous islands. The limited number of ohana units on Kauai to date gives Kauai County more time to adjust its ordinances to meet its needs.

The Ordinance

The Kauai ohana zoning ordinance[1] provides for ohana zoning under the following restrictions:

> Ohana Dwelling Unit. Notwithstanding other provisions to the contrary, for any residentially zoned lot where only one single-family residential dwelling is permitted, one additional single-family residential unit (attached or detached) may be developed, provided;
>
> (1) All applicable county requirements, not inconsistent with Section 46-4(c), Hawaii Revised Statutes and the county's zoning provisions applicable to residential use are met, including but not limited to, building height, setback, maximum lot coverage, parking, and floor area requirements.
>
> * * *
>
> (4) The following public facilities are found adequate to service the additional dwelling unit:

A. Public sanitary sewers, an individual wastewater system (or cesspool), or a private sanitary sewer system built to County standards and approved by the Department of Health.

B. For sewered areas, the availability of a public sewer system shall be confirmed in writing by the Department of Public Works. The availability of a private sewer system shall be confirmed by the Department of Health.

C. The availability of water shall be confirmed in writing by the Department of Water.

D. Approval in writing from the Kauai Fire Department is required for all parcels.

E. The lot must have direct access to a street which has a minimum paved roadway width of sixteen (16) feet continuous to the main thoroughfare.

* * *

(6) Nothing contained in this section shall affect private covenants or deed restrictions that prohibit the constriction of a second dwelling unit on any residential lot.

Kauai's ordinance scheme is similar to the others' in that the normal zoning requirements apply to ohana units, and special infrastructural approval is required for water, sewers, and streets.

The Application Process

The process of obtaining the ohana zoning permit is the same as in the other counties: the applicant receives a form which is taken to the pertinent county authorities to receive infrastructure approval. The form is returned

to the Department of Planning along with an application for a building permit. A copy of the permit is contained in Appendix D.

The problems arise from infrastructure limitations. But given Kauai's shortage of affordable housing, any additions to the housing supply are helpful.

Sewage

Kauai has made some transition from use of cesspools to a modern sewer system. Sewers are presently being used in portions of Hanamaulu, Waimea, Eleele, Lihue, Hanapepe, and the hotel area of Wailua.[2]

Kauai is the recipient of a federal Environmental Protection Agency (EPA) grant, which requires that the county move to 100% hookup in the sewered areas.[3] No permits in areas accessible to the sewage system have been denied for lack of sewer capacity:[4] only about 50% of the present capacity of the wastewater system is being used.[5]

The State Department of Health currently monitors the cesspool requirements, which require a minimum lot size of 10,000 square feet.[6] According to Councilmember James Tehada, however, lots of this size are a rarity, as the lot sizes have generally decreased in order to make housing more affordable.[7] Ohana zoning may have to wait in these areas until a sewer system is available.

To date, lack of access to sewers and cesspools appears to be a minor problem.

Water

Although Kauai is acknowledged as containing the rainiest spot in the world,[8] potable water is not available everywhere on the island. Kauai has

two types of water systems: public and private. A homeowner under either type of system may be eligible for ohana zoning.

Public Water Systems

While Kauai has enough water for primary use for all areas of the island, the county requires the development of an additional source for back-up use, in the event the primary system becomes unavailable.[9] In some areas, this secondary source is not developed, leading to a moratorium on construction. Currently, there is such a moratorium in the Kalaheo area because it does not have this back-up.[10] A secondary system is expected to be available by the end of 1987.[11] Two other areas, Anahola and Haena, also lack this back-up capacity. Earlier this year, Kilauea experienced this type of moratorium, which has since been lifted. According to the water department, the current moratorium would not prohibit ohana units, although some may have been denied during the Kilauea moratorium.[12]

Private Water Systems

Private water systems are of two types: a complete system, privately owned by a company, such as those on agricultural land, and those where no potable water is available and where private wells must be drilled. To date, the Department of Health is not aware of any ohana zoning applications made for property on private water systems.[13]

Streets

Kauai, like the other counties, requires a minimum 16 foot road width to qaulify for ohana zoning. The more rural areas have a substandard road width, and thus do not qualify for ohana. Generally, only the newer subdivisions have roads of the requisite width.[14]

Social Impact

As of August 1987, only 114 ohana zoning permits had been approved on Kauai, and of those, well over half (73) were concentrated in the south (Koloa-Poipu-Kalaheo) and east (Wailua-Kapaa-Anahola) areas. One estimate is that a majority, if not all of, the units applied for have been built.[15] Yet for such a small number of units, ohana zoning has caused a great deal of controversy on Kauai.

The county has the same complaints as the other counties do with the double density caused by ohana zoning, and lack of ability to plan. Although the county has no statistics on family usage of ohana units, according to one county planner, the use of ohana units by extended families is minimal.[16] Ohana is used as an "advertising gimmick" by realtors to increase the value of property.[17] To date, county officials are unaware of any ohana lots being sold under the Horizontal Property Regime law.

Restrictive Covenants

One of the most heated issues is the applicability of restrictive covenants. As discussed above, restrictive covenants are agreements put into deeds which bind subsequent owners. Since deeds are usually recorded, this information is part of the public record. The type of restrictive covenant that affects ohana zoning is the type that forbids construction of more than one house on a lot. Kauai, like all counties other than Hawaii County, takes the position that enforcement of restrictive covenants is up to the homeowners association and neighbors of the person breaching the covenant.[18] The county will not intervene in these private disputes involving the interpretation of covenants, unless the breach of the covenant also violates county zoning requirements.[19]

However, the issue of whether the county should take positive steps to enforce restrictive covenants by either initiating a law suit against people who violate the covenant, or by refusing to issue an ohana zoning permit when

the deed contains a restrictive covenant limiting the number of houses, has been raised. At present, the latter position is being discussed in the community.[20] An ordinance was proposed that would have required notice to be given to a neighborhood that an ohana zoning permit was being sought, but the ordinance did not pass.[21]

Types of Use

It seems from the limited information available that most ohana units are being used as rentals to non-relatives.[22] County officials were unable to determine how many, if any, of the ohana units were rented to Kauai residents, and how many might be being used as vacation rentals to tourists.

It is difficult to evaluate whether ohana zoning on Kauai comports with the intent of the legislature in enacting the ohana zoning statute. If the units are providing the community with rental housing, then, as discussed above, even though the legislature did not specifically intend to increase the supply of rental housing to non-relatives, the result is one that increases the housing supply. To the extent that ohana units are used as vacation rentals, this would constitute a type of use not contemplated or intended when the law was enacted. While vacation rentals do benefit the owner of the unit by providing income, and may be, as is the case in Honolulu, necessary to the owner's ability to afford the main unit, given the housing shortage on Kauai, the best interest of the community would be much better served by ensuring that the ohana units increase the housing supply for residents.[23]

Property Taxes

Ohana zoning may have some impact on real property taxes for neighboring lots. According to the Real Estate Tax Division of the Kauai Department of Finance, land values on Kauai are based on the sales of vacant land in the area. If the market responds to ohana-zoned property as being more valuable, then the assessment of land in the area rises.[24]

Areas Eligible for Ohana

Ohana zoning on Kauai is limited to residential districts only, despite the fact that the statute states that ohana zoning is permitted on "any lot where a residential dwelling unit is permitted." The legislative history of the statute specifically indicates that this language was used to increase the scope of ohana zoning to include "areas ... not specifically zoned for residential use (for example, apartment, hotel, etc.)"[25]

However, Kauai focused not on that part of the legislative history, but on the later portion which permits the counties to "establish additional requirements" to ohana zoning,[26] along with the general statement in section 46-4(a), Hawaii Revised Statutes, that the counties are to allow and encourage the most beneficial use of the land. Kauai has taken the position that ohana zoning in the other five districts (resort, commercial, industrial, agricultural, and open) will impermissibly conflict with the basic and reasonable zoning and general plan considerations of the county.[27] Thus the county, which was one of those that requested that the law be amended to make the application of ohana zoning discretionary and not mandatory,[28] has already exercised some discretion in limiting the areas to which ohana zoning applies.

Evaluation

Lack of water and adequate roads prevents some homeowners on Kauai from obtaining ohana zoning permits. Of the homeowners who do receive the permits, the impression of one county official is that most units are used for rentals to non-family members.[29] The number of units that may be rented to tourists is unknown.

By these limited data, it appears that Kauai is facing problems in implementing its ohana zoning program, and has a way to go to achieve the specified legislative goals. However, as long as the units are providing

housing for Kauai residents either directly or indirectly, the program is serving a useful function.[30]

The State could try to mandate use by family members only, as discussed in Chapters 2 and 7, but if a critical housing need is being met on Kauai, the legislature might not want to tamper with a working, although partial, solution.

The most evident public concern on Kauai about ohana zoning relates to the county's decision not to aid in the enforcement of restrictive covenants. The State could mandate that the counties give public notice to the neighborhoods that an ohana zoning permit has been applied for, but if the county feels this lack of notice is a problem, the county could solve this problem as it has the power to require notice. In fact, most of the "problems" on Kauai could be solved by county action and need not be addressed by amendments to the state law.

The State could give Kauai County more autonomy, but, in light of the response of some of the county officials was that the majority of people feel that ohana zoning is not necessary, and that it would be better to have none at all, more leeway might result in a severely restricted application of ohana zoning, or, if it is made discretionary, perhaps no ohana zoning at all.

Chapter 6

OHANA ZONING IN HAWAII COUNTY

Ohana zoning seems to work the best in Hawaii County, as county officials make additional efforts to work around infrastructural problems. County officials do recognize the shortcomings of ohana zoning, as it does adversely affect their ability to plan community devlopment. But to date, the degree of crowding and citizen complaint has not reached the levels of the other islands.

The Ordinance

The Hawaii County ordinance[1] is printed in full in Appendix C. The more pertinent provisions are:

> Section 25-271. General provisions. Notwithstanding any law, ordinance, or rule to the contrary, two dwelling units may be constructed on any lot within all state land use urban, agricultural, rural and conservation districts provided that:
>
> (1) Applicable County requirements, not inconsistent with the intent of this section and the zoning provisions applicable to residential use are met, including use, building height setback, and off street parking;
>
> (2) The County determines that public facilities as specified in 25-272 ... are adequate to serve the ohana dwelling unit;
>
> (3) That at the time of the application for a county building permit for a second dwelling unit, the subject lot or land parcel is not restricted by a recorded covenant or a

recorded lease provision (in a lease having a term of not less than fifteen years) which prohibits a second dwelling unit; and

(4) Appropriate state approval has been received if the lot is situated within the State Land Use Conservation district.

Section 25-272. Requirements. (a) An ohana dwelling shall comply with all other requirements of this article and of the County Code, except with regard to density. On any lot where a dwelling unit is permitted, an ohana dwelling may be constructed, provided that:

(1) The access to a public or private street shall meet with the approval of the chief engineer;

(2) It meets with State department of health wastewater treatment and disposal system requirements. Additional standards will not be imposed by the County; and

(3) It has an area for two off-street parking stalls on the lot.

The ordinance also specifically provides that it is not intended to supersede private restrictive covenants.[2]

The Application Process

Hawaii County's permit process differs markedly from those of the other counties. Instead of receiving a form to take to the various departments for their approval, the Hawaii County form merely asks the owner information about the lot size and zoning district, asks if there is a restrictive covenant prohibiting an additional dwelling, and requires submission of a site plan, drawn to scale, showing, among other things, the cesspool location, two

parking spaces, and the proposed location of the ohana unit. A copy of the form is attached as part of Appendix D.

The application is reviewed by the Planning Department, along with the Department of Public Works and the state Department of Health.[3] Action is taken on the permit within 60 days. If the application is denied, the applicant may appeal to the Board of Appeals within 30 days.

Of course, as with the other counties, obtaining an ohana permit merely entitles a homeowner to put a second unit on the property: it is not a substitute for a building permit, which must be obtained separately and must meet the usual requirements. A building permit must be secured within two years after the date the ohana permit application is approved.

Hawaii County's tolerance of ohana zoning extends to agricultural land. Hawaii County is the only county to allow ohana zoning outside of residential districts.

Hawaii County's process is also notable for its inquiry into the existence of restrictive covenants. As stated above,[4] Honolulu, Maui, and Kauai, take the position that since these covenants are made between private parties, the county should not become involved with them. While Hawaii County does not take the most active step possible to enforce these covenants, i.e., taking the parties to court to enforce them, Hawaii County will not issue a permit if the deed, a copy of which must be attached to the permit application, contains a covenant restricting the construction of an additional unit. The Planning Department will review the covenant to check whether it does restrict construction of an ohana unit. If the covenant is ambiguous, the planning department will turn the matter over to the corporation counsel, who will make the determination.[5]

Hawaii County's position is in sharp contrast to that of Kauai. At least one homeowner on Kauai has requested that the county give the neighboring public notice of the application for an ohana permit, so that the neighbors can take timely legal action before the unit is actually built. Kauai takes the

position that it will not give public notice of application, much less review the deed to check for any restrictive covenants.

From 1982, the year the ohana zoning ordinance was enacted, through 1986, thirty-three applications have been rejected in Hawaii County because the deeds to the lots contained restrictive covenants.[6] Although not consonant with the position of the other counties, Hawaii County's practice of reviewing the deed for covenants has proved beneficial to the general public.

The Infrastructure

The island of Hawaii is the least densely populated of the four main islands[7] Perhaps due to that reason, infrastructure problems have been worked around and ohana zoning is widely available.

Sewage

Most of Hawaii County is not on a sewer system. Except for the urban areas of Hilo and Kailua-Kona and the communities of Papaikou and Pepeekeo, the island is on a system of individual cesspools.[8] In those areas where the sewer system is available, there is sufficient capacity to support ohana units, as most of the existing wastewater treatment plants are not operating at capacity.

Hawaii County, as the other counties do, follows the state Department of Health's 10,000 square foot minimum lot size requirement for two homes on cesspools (5,000 square feet each). The vast majority of residential lots on Hawaii County are zoned for 10,000 square feet or greater,[9] so they would be automatically eligible for ohana zoning, at least as far as the sewer requirement is concerned. The Department of Public Works has been informed that the state Department of Health is considering amending their requirements to lower the cesspool minimum size standards to allow two cesspools on a 7,500 square foot lot,[10] which would make nearly all of Hawaii

County eligible as far as this infrastructural requirement, as the current minimum residential lot size on Hawaii County is 7,500 square feet.[11]

Water

Hawaii County contains areas of marked water shortages. In some areas, the availability is critical and additional service, including that to ohana units, will be denied.[12] In areas where water is sufficient, the county recognizes the benefit of ohana units by charging them less for the installation cost then they would normally be charged.[13]

Homeowners in areas of critical water shortage may still be able to obtain an ohana permit if they are on a catchment system, one where rainwater is collected and stored. However, catchment systems run the chance of drought and inadequate fire protection, and the risk of using them is up to the individual homeowner.

Streets

The Department of Public Works monitors road access to units. Hawaii County, like the others, requires a minimum 16 foot roadway to the lots. No particular problems with this requirement, or the requirement of two additional parking stalls, were noted.

The Social Impact

County officials have not received many objections or much praise for the ohana zoning system. It appears to be accepted by the neighborhoods. However, in the opinion of at least some county officials, ohana zoning has a pernicious impact by driving up the price of land. Some realtors have been applying for, and obtaining, an ohana zoning permit for a property. They then ask for a higher price for the lot, based on the enhanced value they

have created.[14] The objection to this tactic is that it thwarts the objective of affordable housing by increasing the price of the main unit, which is then passed on to the renter or purchaser of the ohana unit.

County officials also object to ohana as it interferes with their ability to devise a master zoning plan for the county. Since ohana units are constructed at the individual choice of the homeowner, the county is unable to predict who will apply for a permit, and in what neighborhood. The factor most affected by this inability to plan ahead is the water supply. While the wastewater systems are only at half capacity, and can handle additional demand, in some areas of the island, water is in critical shortage. Decisions to improve the water pumping system are based on assumptions of the number of future users, which in the case of ohana zoning cannot be predicted.

Compared to the other counties, however, Hawaii County's infrastructure can handle the additional ohana units, and a high percentage of applications have been granted.

			Denied:		
Year	Applications	Approved	covenants	other	% Approved
1982	45	37	6	2	82.2%
1983	92	81	2	9	86.9%
1984	131	115	10	6	87.7%
1985	152	135	12	5	88.8%
1986	137	124	3	10	90.5%
Total	557	492	33	32	88.3% (average)

Source: Hawaii County Planning Department

The 1987 figures were not complete at the time this report was prepared, but as of July 1987, 138 applications had been processed by the Department of Planning, more than the total number received the previous year.

Property Taxes

Hawaii County does adjust its property tax assessments to reflect a higher value for lots on which ohana units have been constructed. However, the assessments have not been increased for land that is merely eligible for ohana zoning, but on which a unit has not yet been constructed. There have not been enough sales of ohana-built lots for the Department of Finance to gather sufficient data concerning the impact of ohana on general land prices. Consequently, the real property assessments have been revised for those lots that actually have the units, but not for units that merely have the permit, or those that are in areas generally recognized to be eligible for ohana zoning.[15]

Variances

No variances from the zoning code are permitted for an ohana unit. This contrasts with Honolulu's policy, which will not grant a variance for infrastructural requirements but which is open to zoning variances requests for ohana units.[16]

Selling of Ohana Units

As discussed in chapter 2, ohana units may be sold individually, separate from the main units, under one of two methods: either by subdivision, or by making the unit a condominium under the horizontal property regime. Subdivision is allowed only if each of the resultant lots meet the minimum size requirements for that residential zone.

The use of the HPR to convert ohana units into condominiums has occurred infrequently, if at all, in Hawaii County. At this time, there are no restrictions on lot size for this procedure.

Evaluation

Ohana zoning has not caused much controversy in Hawaii County. County officials, while recognizing that ohana zoning causes problems in planning, have tried to accommodate ohana zoning by requiring that applicants meet only two of the three infrastructure requirements. A lot in Hawaii County has a better chance of qualifying for ohana zoning than its counterpart in the other counties because of the alternatives available -- cesspools, catchment -- to the standard requirements of sewer and water facilities.

Additionally, ohana zoning is more generously applied in Hawaii County than in the other counties. While the other three restrict ohana zoning to residentially-zoned lots only, Hawaii County will allow ohana zoning in agricultural areas and even in conservation zones if the Department of Land and Natural Resources will approve it.[17] Perhaps because of its large average lot size, the County Council has received no complaints from neighbors concerning density problems from ohana zoning,[18] although Hawaii County has perhaps the single highest concentration of ohana units in the counties -- a 21-lot development in Waimea that was ohana-developed right from the start, creating 42 units.[19]

When asked if they would like more flexibility in applying ohana zoning in terms of being allowed to consider more factors -- open areas, adequate school systems --in making a decision on ohana zoning permits, officials at the Department of Planning indicated that they liked the "cut and dried" system they are presently using, and that they felt that it worked well.[20] They felt that ohana was designed to be useful, and should be judged by those criteria, not those of aesthetic judgment.

One area in which governmental intervention may be useful is that of preventing realtors from obtaining an ohana zoning permit as an extra selling point for the home. This causes an increase in the price of the home, which certainly fails to meet the legislature's goal of providing for the purchase of affordable housing. Since such a high percentage of applications are

granted, this seems like less of a precaution to ensure that ohana zoning will be available and more of a mark-up on the value of the home.

Prevention could be done in a number of ways. The county could adjust its property tax methodology to increase the assessment for homes that have the permit, even before a unit is built, or require that the person who applied for the permit live in one of the units after completion, or simply *require that the permit lapse upon transfer if the ohana unit is not yet* completed. The State could impose a windfall tax on the excessive profits on the sale of the home due to the ohana zoning value increase. These methods would decrease the number of ohana permits requested merely to increase the value of a home on the market, by imposing financial disincentives.

Are the legislative goals being met in Hawaii County? Statistics were not available to determine the percentage of ohana units occupied by family members, as compared to strangers. Statistics were likewise unavailable for the number of units sold under the Horizontal Property Regime, although county officials felt that it was an extremely small number. However, as stated above, the inability of this report to determine whether the legislative intent of increasing the ability of families to purchase affordable housing and to preserve the extended family does not mean that the actual goals accomplished by ohana zoning on Hawaii County should be discredited. Hawaii County, like the others, is experiencing a housing shortage in some areas.[21] Ohana zoning serves the socially useful goal of providing needed housing to residents.

Chapter 7

EVALUATION OF OHANA ZONING

The ohana zoning statute and enabling ordinances have been in existence for over five years. The impact of the statute should be evaluated in context. One goal of the ohana zoning statute was to counter an increasing shortage of housing, and to that extent, the statute has succeeded, although some limitations on speculative sales may be desired. As to whether the goal of assisting extended families has been met, that depends on what the purpose is. As discussed in chapter 1, the original intent of the statute may be read narrowly -- primarily to benefit families -- or broadly -- to increase the supply of housing in general, which would have the incidental effect of helping family members. The latter goal is being met, while the former is not.

While problems with ohana zoning do exist, it should be kept in mind that some of them are inherent in any attempt to increase the housing supply in an urban center, whether by subdivision, construction of multi-family dwellings, rezoning, or allowance of variances.

Have the Purpose and Intent of Ohana Zoning Been Met in Each County?

The answer to this question is difficult to determine due to lack of information. The purpose of the ohana law was two-fold: to enable families to purchase affordable housing, and to aid in the preservation of the extended family. The most recent survey performed in Honolulu indicates that, among the 38% of the persons who responded, 58% of the ohana units are rented to relatives. This statistic should not necessarily be considered representative of the whole, however: a number of respondents indicated their belief that ohana zoning is limited to family members only, and some expressed feelings of guilt that their ohana unit was not being used by a family member (see Appendix E). Indeed, throughout the research for this

report, the writer noted a high percentage of residents who stated their belief that ohana zoning was limited to family members. The writer suspects that one reason for the lack of higher response rate to the survey was that the non-respondents are more likely to be renting or have sold their ohana units to non-relatives, and did not want to reveal those facts because of their erroneous belief that they had done something illegal.

The answer to the question of whether the intent has been met is even less discernible for the counties of Maui, Kauai, and Hawaii, as no statistics relating to family usage have been collected.

The question of whether the goal of aiding families to purchase affordable housing has been met is also difficult to determine. If the question is to be given the most basic interpretation -- what percentage of ohana units have been sold, the answer is that the goal has not been met. Only thirty-seven ohana units -- 5.3% -- have been sold in Honolulu, and, although statistics are not available for the neighbor islands, officials there do not think that more than a couple of units have been sold.

If the question is the more subtle one of whether ohana zoning has enabled young families, by living with relatives, to save sufficient funds to buy housing of their own, no definitive answer can be gleaned. The survey, which was designed to be short and simple to facilitate responses, indicated that while 68% of the ohana units were originally occupied by family members, currently only 58% are so occupied. This may indicate that young families are taking advantage of ohana zoning, becoming financially secure, and moving out to buy their own homes. But this presumption must be tempered by the realization that other, equally possible reasons exist for the change in this statistic. For example, some units may have been previously occupied by elderly relatives who have passed away, or by relatives who relocated to the mainland or because of military transfer.

Instead of focusing on the two goals previously indicated to the exclusion of all else, since it is not possible to pinpoint the extent to which the legislature's stated goals have been complied with, it may be helpful to

see what positive results ohana zoning has produced. Additional, needed housing has been created. All four counties have experienced and are experiencing some degree of shortage of affordable housing, and ohana zoning has helped to alleviate this situation. The value of providing more housing in general was implicitly acknowledged in the committee reports on Act 229.[1]

Regardless of whether the legislature might want to change some aspects of the law, or the counties some aspects of their ordinances, ohana zoning should not be deemed a failure because its exact effect cannot be calculated with precision. Ohana zoning has made a positive contribution to the State by providing more housing.

Should Changes Be Made to Effectuate the Purpose?

As discussed in the following section, the counties have a considerable amount of flexibility in the statute already. However, the State may choose to make some of the following changes if the Legislature wants to tailor the law to fit the more restrictive view of ohana zoning more closely, and to respond to complaints and concerns raised by members of affected communities:

(1) Restrict ohana zoning to family members.

If the legislature concludes that its intent was, or is now, solely to benefit the extended family, the Legislature could impose such a restriction.

(2) Restrict speculative sales of ohana units.

Since one of the purposes of the statute is to assist families to buy affordable housing, the Legislature may want to curb, not all sales of ohana units, but sales of the units by speculators which drive up the price of housing.

(3) Require counties to help with restrictive covenants.

While this would not specifically aid the enumerated legislative goals, it would help the ohana zoning process by preventing abuses and unnecessary expenses.

In the alternative, rather than the State imposing these requirements on the counties, the State could delegate to the counties the power to impose them as the counties find necessary, thereby giving the counties an additional measure of the flexibility that they have requested.

Limitation to Families

If the legislature takes a narrow view of the extended family purpose, the legislature may seek to restrict (or allow the counties to restrict) ohana zoning to extended family members only. Limitation of ohana zoning to extended families would be emotionally satisfying for many residents. The concept of the ohana is a well-recognized and important component of life in Hawaii. People interviewed in connection with this study were, or felt that they would be, more tolerant of the hardships ohana zoning can impose on a community when the use was for extended family members.

Restriction to families could be done in a number of ways. However, before those are discussed, the fundamental question of constitutionality must be touched upon. Preliminary and partial research suggests that a family restriction may be constitutional as a legitimate device to protect the family relationship.[2]

One way to avoid this constitutional question but still effectively restrict ohana zoning to families is to require that no rent be charged for use of the units.[3] This would probably result in units being occupied by family members or very close friends. But this approach is not recommended. First, such a requirement would be very difficult to enforce. Second, this approach would limit ohana zoning to families who could afford to build a

rent-free ohana unit. Although provision of rental housing is not specifically stated in the legislative history, rental housing does serve three family-related purposes. First, when the ohana unit is occupied by a relative, the owner of the main unit should be able to decide whether to charge rent or not. In some cases, the unit will be rent-free. In other situations, however, some rent will have to be charged to cover the expenses of the ohana unit, such as the mortgage and the increased property tax. Families in the latter situations will be precluded from using ohana zoning if a strict no-rent requirement is imposed.

Second, when family members move out of the ohana units due to increase in family size, increased income, or death, the family may need continued rent from the unit. The inability of the owners of the main unit to derive some income from the ohana unit to pay for the cost of constructing the unit may discourage owners from building them. Lack of income from the unit could also result in an inability to meet the mortgage payments on the property. Also, leaving the unit vacant if no other family member is available to live there is a waste of a valuable resource.

Third, the unit may be constructed in the present to be used in the future by family members, such as elderly parents. Renting the unit to non-relatives now allows constructive use of the unit until it is needed by family members. Accordingly, the effect of prohibiting rental charges as a means of ensuring that only relatives live in the unit may preclude some families from obtaining an ohana unit at all.

Another problem with limiting ohana zoning to family members is that banks may be reluctant to lend mortgage funds on property with that kind of restriction. If the bank forecloses on the property, the potential buyers of the property are basically limited to those extended families who want to occupy both units. This limited market may make mortgage money less available to the applicant, unless the legislature also releases the family restriction upon foreclosure of the ohana unit.[4]

This result would be particularly ironic in that the primary losers would be the family members, the intended beneficiaries of the statute, who will have lost their homes, while the ultimate beneficiaries would be the subsequent buyers, who would have no restrictions on whom they could rent the ohana units to or what rent they could charge.

One way to handle an extended family requirement could be to require a family member to reside in the unit for a fixed number of years, and then permit occupancy by anyone. This could be monitored by requiring all owners of ohana units to apply for a permit for the unit, renewable annually, in which the owner must state the identity of those living in the ohana unit and their relationship to the owner. The report should be made under oath, and the applicant fined substantially for false reporting, which could be done by forfeiture of a bond. This type of requirement would help to ensure that ohana units are constructed initially for an approved purpose, yet would not be so restrictive as to discourage families and financial institutions from expending the moneys to build the units.

The legislature might face some opposition from the counties on a proposal to limit ohana zoning to family members as this would impose another difficult regulatory requirement. One county official has already asked that restriction to families not apply, as it would be too hard to enforce[5] and another has indicated that enforcement personnel are already under-staffed.[6] The difficulties of enforcement are definitely elements to be considered before deciding the issue.

One method of alleviating additional county involvement with ohana zoning is to permit enforcement by citizens acting as private attorneys general. Citizens could be given the right, by statute, to bring civil actions to enjoin activities that conflict with the ohana restrictions. This right would most probably be exercised by neighbors who are affected by the challenged behavior, and could be encouraged by allowing them to receive reasonable attorney fees and costs if they prevail.[7]

Finally, as stated above, the legislature could amend the statute to allow, but not require, the counties to implement some type of family restriction if they desire to do so. This would give each county some flexibility to balance the needs of its people against the problems perceived by the ohana zoning requirement.

Restriction on Speculative Sales

The legislature might also want to consider imposing a restriction on some types of sale of ohana units under the Horizontal Property Regime (condominium law), or through subdivision. While purchase of ohana units may be a legislative goal, it is only truly fulfilled if the price of the ohana unit is affordable. However, some owners construct expensive units selling for over $200,000. Sale of ohana units in desirable areas for high prices is inconsistent with the stated goal of providing affordable housing.

One way to stop this type of speculative sale is to restrict the size of the unit, as Maui already does. A smaller unit (the minimum size on Maui is 500 square feet, which is a typical one-bedroom, one bath size, and the maximum is 900 square feet, which is a typical size for a two-bedroom unit) would sell for a lower price and be less desirable due to the space limitation. Size could either be limited to a set square footage or by percentage of the lot size. It should be noted that such a size limitation would penalize all persons using the unit, including those using them for extended family, due to the restricted area. If the counties desire to make this type of change anyway, they can do so without further state legislation, as the actions of Maui county demonstrate.

Speculative sales of units could also be curbed if a maximum cost on the value of materials were set for ohana units. A modest maximum would ensure that smaller, less expensive units were built, which would be less attractive to the investor. Even if an investor did purchase the unit, it would not command as high a rental as a more luxurious unit would, which would tend to keep the housing more affordable.[8] This could be difficult to enforce,

however, and, to the extent it was enforced, would put county building officials in the unusual position of insisting that builders use cheaper, inferior materials and not substitute more expensive ones.

Another way to stop one particular type of speculation is to require that, after sale, the ohana unit be owner-occupied. Reports have been made that ohana units are being sold to investors and then rented out as a source of income for their new owners, or that both the main and ohana units are sold to an investor who then rents both out. The objection to this practice is that using the units as rentals injects a "middleman" into the housing system, which increases the cost of housing to the ultimate occupant. Requiring owner-occupancy will help ensure that the housing remains affordable.

A final alternative would be to impose a windfall profits tax on the sale of the ohana unit, which would tax 95% of any profit made from the sale or transfer of an interest in the ohana unit. This would certainly discourage speculators. A curb of this type would have to be imposed by the State, unless the counties are given specific taxing authority.

This alternative would be difficult to apply and enforce at the state level under the income tax law, because:

(1) Barring an extensive exchange of information between county agencies and the Department of Taxation, it will be impossible to distinguish between the sale of ohana units and other real property on a tax return; and

(2) It may be difficult to apportion the valuation between the main dwelling and the ohana unit for purposes of determining the "profit" on the ohana unit--especially if both units are sold at the same time.

On the other hand, giving the counties the authority to impose such a tax would give the counties the option of balancing the revenue raising

aspects against the goal of controlling speculative sales. This approach would also eliminate the need for the extensive sharing of information between the State and the counties because the counties already have complete control over real property taxes, and thus the records of assessments which may be of importance in determining valuation.

While all sales of ohana units should not be prohibited, a halt on speculative sales of expensive units at a large profit would be in keeping with the goal of providing affordable housing.

Restrictive Covenants

The legislature might want to consider revising the law to require the counties to take a more active role in the enforcement of restrictive covenants that limit the number of homes on a lot to one. These covenants effectively prohibit ohana zoning. As these covenants are agreements between private parties, the county is not involved in creating them and and need not be involved in enforcing them. Requiring county involvement in restrictive covenants would probably be a controversial decision strongly opposed by the counties of Honolulu, Maui, and Kauai, which presently do not involve themselves in this area. Reasons to have the county involved in enforcing the covenants revolve around the benefit to the public of knowing, in advance, that someone under the covenant plans to violate it, so that appropriate action may be taken in a timely manner. Reasons against it include the extra work and extra responsibility for the county, which can conceivably become subject to legal action for failure to assess the wording of the covenant correctly, or for giving inadequate notice.

If county involvement is desired, this could be implemented in one of two ways. The counties could give notice to the public of the location of parcels for whom an ohana zoning permit has been applied, so that interested neighbors and community organizations could go to court to enforce the covenant before the applicant has expended money to plan and build the unit. This idea has been proposed on Kauai, but was rejected by the county

council. In the alternative, county officials could review the deed and deny the permit if a restrictive covenant is applicable, as the Hawaii County does.

An inherent unfairness exists in requiring the county to referee an agreement between private parties and risk becoming liable in that role. If the legislature requires the counties to become actively involved in enforcing the restrictive covenants, such a requirement might be considered to be a state mandate for which the State would be obligated to share in the cost of enforcement under Article VIII, section 5, of the State Constitution.

The legislature does not need to amend the statute to permit the counties to become involved voluntarily with restrictive covenants, as they are free to do so now if they wish, as is demonstrated by Hawaii County's position.

Should More Flexibility Be Granted to the Counties?

As discussed in the chapters on the individual counties, the statute contains a considerable amount of flexibility which is not being used. The counties have the power now, for example, to require an adequate amount of parking, limit the size of the ohana unit, require a minimum lot size, increase the road width requirement, take into consideration steepness and abrupt turns in considering the adequacy of the roads, provide some kind of help with restrictive covenants, require a sewer development fee to help improve and expand the sewage system, allow cesspools to be used for ohana dwellings, restrict vacation rental use, and apply or restrict zoning variances. The counties can choose to make these changes -- or not -- as their needs require.

The counties do not appear to be taking advantage of the flexibility that they have now.[9] For example, if Honolulu wants to open up more areas for ohana zoning, it could authorize the use of cesspools (to the extent allowed by the State Department of Health) in addition to sewers, as the other counties do. Sewer capacity could be improved by imposing a sewer installation fee similar to the water systems fee. Where parking is a

problem, the counties, particularly Maui, which only requires one off-street parking stall, could require that more off-street parking be provided, either by specific number of spaces or by requiring that all cars, however many, be provided with off-street parking spaces. The counties could also help to alleviate the parking problem by allowing ohana zoning only on streets that were at least twenty feet wide. Overcrowding could be decreased by limiting the size of the unit or the number of people living there, or by allowing ohana units to be built only on lots of a certain minimum size.

In preparation for this report, the Bureau asked representatives from each county to submit proposed legislation designed to cure the problems they perceived with ohana zoning. Honolulu was the only county to respond, and its model legislation consisted of a variant of the changes proposed by House Bill No. 244, Regular Session of 1987, which passed in the House and is currently in committee in the Senate. This variation would amend section 46-4(c), Hawaii Revised Statutes, by requiring each county to adopt reasonable standards for accessory dwelling units in accordance with zoning ordinances and rules, and general plan and development plan policies.[10]

What would these proposed changes do that the present statute does not? They would permit county planners to evaluate a wider range of considerations in determining whether to allow an ohana dwelling.[11] The bill would allow consideration of factors beyond the infrastructure, which is what most of the counties limit themselves to evaluating, and would embrace the issue of density and the number of existing ohana units in the neighborhood.[12] To some extent, this limitation is self-imposed: the statute itself only requires that the counties to determine whether the public facilities are adequate to service the lot, without enumerating what those facilities are, and the legislative history indicates that the counties are free to impose "additional requirements."[13] However, even giving those factors full credence, the statute is still not as broad as the proposed changes would be. The term "public facilities" does not approach the scope of the master development plan suggested by the City and County of Honolulu, in which the entire community is designed, not just by certain physical requirements, but by a range of considerations, including population and transportation

projections, historical and cultural preservation, and public health and safety. The adoption of the proposed changes would give the counties more flexibility than they presently enjoy -- or use.

While the obvious difference between the statute and these proposed changes is the increased scope of restrictions, the more subtle difference between the two is their approach to ohana zoning. The statute requires the counties to permit ohana zoning unless a consideration intervenes: it applies to all residential lots unless an exception is made. The proposed changes, on the other hand, provides that the county adopt "reasonable standards" for ohana zoning, which means ohana zoning is excluded unless specifically included by the county. This is no mere semantic change: it signals a difference in approach by limiting the treatment of ohana zoning from something approaching a right, to a privilege.

If the counties were given the free rein suggested in the pending bill, what would become of ohana zoning? Some county officials have indicated that they are not in favor of ohana zoning. Would the counties use this freedom to cut ohana eligibility to the bone? Even if they would not intentionally do so, the effect of imposing master plan restrictions could ipso facto lead to a severe cutback on ohana zoning. This potential result alone might give the legislature pause in its decision on any changes to the current statute.

The legislature might want to proceed more cautiously on this issue by granting the counties more flexibility in the elements they can consider in processing the ohana zoning applications, while still retaining the mandatory nature of the ohana zoning statute. Specifically, the legislature may amend the statute to include a specified list of items that the counties may consider in deciding whether to permit ohana zoning, including the ability to limit it if the area reaches a certain density. This enumerated list would give those counties that wanted it more control over implementing ohana, while ensuring that it remained available.[14] In the alternative, unless the legislature takes the position that these changes should not be made, the legislature could give the counties greater flexibility than they now have by allowing them the

option of imposing the restrictions outlined above -- limitations to families and restriction on sale of units.

FOOTNOTES

Chapter 1

1. 1981 Haw Sess. Laws, Act 229, section 1.

2. See, e.g., "Lawmakers refuse to revoke statewide ohana zoning law," The Honolulu Advertiser, April 22, 1982 at A-12 (Kauai officials suggest that ohana zoning be required only in Honolulu, and optional for the other counties); Maui County Council Resolution 86-83, November 7, 1986 (requesting a review of ohana zoning and consider allowing counties discretion to implement ohana zoning), Kauai County Council Resolution 73, August 5, 1986; testimony submitted by John Whalen, Director of the Department of Land Utilization on S.C.R. 88, Regular Session of 1987; introduction of H.B. 2062-84, which would have repealed ohana zoning; and introduction of S.B. 2392-86 and H.B. No. 2530-86, which would allow individual voter precincts to approve ohana zoning in their precinct.)

Chapter 2

1. M. Pukui & S. Elbert, Hawaiian Dictionary (Univ. of Hawaii Press 1984), p. 276.

2. Black's Law Dictionary, 5th ed. 1979 at 1450.

3. See, e.g., Cal. Gov't Code section 65852.2 (Deering 1987) (second residential units, second units); M. Dyett, "Cottage Units and Second Units" (prepared for the American Planning Association's Second Annual Zoning Institute, October 1982), p. 1.

4. "Fasi Scores 'Big Lie' Tactic," Honolulu Star-Bulletin, September 12, 1988, p. A-1, "Mayoral race in a macadamia shell," The Honolulu Advertiser, September 19, 1980, p. A-12, "Ohana zoning extended to 2,400 more homes," The Honolulu Advertiser, September 8, 1984, p. A-2.

5. The purpose section, not being part of the statute proper, appears in the Session Laws but is not codified as part of the Hawaii Revised Statutes.

6. Hawaii, Journal of the House of Representatives of the Eleventh Legislature, Regular Session of 1981, p. 1329.

7. Ibid.

8. Senate Standing Committee Report No. 577, on Senate Bill No. 55, Eleventh Legislature, 1981.

9. House Conference Committee Report No. 41, 1981 House Journal, p. 923; Senate Conference Committee Report No. 42, 1981 Senate Journal, p. 916.

10. The ohana survey sent out to Oahu residents contained four options for intended use: sale or rental to relatives, and sale or rental to non-relatives. A number of people took the time to write in, sometimes indignantly, that their relatives were using the unit at no charge.

11. See Appendix E.

12. As of July 1, 1985, the Census Bureau found Hawaii's gross vacancy rate to be an "exceptionally low" 3.7%. Claire Marumoto, The Residential Landlord-Tenant Code, Legislative Reference Bureau Report No. 1 (Honolulu: 1986), p. 42.

13. Just under 4% of all land in Hawaii is designated as residential land. The rest is in agricultural, conservation, and rural districts. Hawaii, Department of Planning and Economic Development, The State of Hawaii Data Book 1986 (Honolulu: 1986), p. 194.

14. Perceptions of unfairness are also caused by owners who built illegal units before the statute came into effect, and then legalized the existing second dwelling. In fact, statistics from the City and County of Honolulu indicate that a large percentage of ohana units are existing units, not newly-created units. The category of existing units covers both illegal units as well as those units which can be converted to ohana living by adding facilities without adding floorspace. As of July 17, 1987, 1395 ohana zoning permits had been issued. Of that number, 818 had been issued for new construction, and 577 had been issued for existing units. Not every permit leads to an actual unit. As of the end of June 1987, the Department of Land Utilization records show that only 798 of the properties for which ohana permits had been issued had completed ohana units on them. Since the existing units were already built, it seems logical to assume that more of them would fall into the completed category. The discrepancy in the numbers is thus attributable to permits issued that have since lapsed or are currently under construction. Many of the permits are one to three years old, giving rise to the suspicion that many may have been abandoned.

15. House Standing Committee Report No. 929, 1981 House Journal, p. 1329.

16. "Statewide water code plan comes under fire," The Honolulu Advertiser, January 26, 1986, p. A-3; 1987 Haw. Sess. Laws, Act 45, section 1.

17. "Sewer problems closing areas once eligible for ohana zoning," The Honolulu Advertiser, May 1, 1985, p. A-5.

18. Some complaints have been received that the county does not consider the steepness and curvature of the roads in assessing suitability for ohana zoning. Since roads are a public facility it would be within the authority delegated to the counties to consider those factors.

19. H. Eng, "Ohana: Observations, Problems, Forum, December 4, 1985" (Honolulu, Office of Council Services, January 1986), p. 3.

20. Specifically, the moneys go into three areas: source, transmission, and improving the reservoir capacity. Conversation with Ken Sprague, Board of Water Supply, City and County of Honolulu, October 22, 1987. At the time of this report, Honolulu was considering a similar type of fee for sewer facilities. See "New building sewer fee asked," The Honolulu Advertiser, October 16, 1987, p. A-11.

21. See discussion in chapter seven, infra.

22. See discussion in the HPR section of chapter three, supra, which indicates that banks financing ohana units will take a mortgage on the entire property.

23. Interview with Albert Lono Lyman, Hawaii County Department of Planning, August 27, 1987.

24. For instance, density of a lot could be increased through subdivision under section 22-3.1 - 22-3.12, Revised Ordinances of Honolulu (1985 ed.)

25. Comment, "Resolving a Conflict -- Ohana Zoning & Private Covenants," 6 U.H. Law Rev. 177 (1984) (hereinafter "Resolving a Conflict").

26. Ibid. at 193.

27. Ibid. at 193-94.

28. Ibid.

29. See discussion ibid.

30. Ibid. at 217-18.

31. Ibid. at 220.

32. Ibid. at 222.

33. Although the government may voluntarily inject itself into the matter: see discussion of Hawaii County policy in chapter six, infra.

34. See 20 Am.Jur.2d Covenants, Conditions, and Restrictions, sec. 21 (1965) (covenant running with the land is enforceable only by the grantee in possession or the grantee's assignee).

35. See, e.g., 28 Am.Jur.2d Estoppel and Waiver, secs. 53, 57 (1966) (silence may be acquiescence in another's conduct so as to preclude a subsequent lawsuit against such conduct).

36. "Resolving a Conflict" at 188.

37. House Standing Committee Report No. 929, 1981 House Journal p. 1329 ("ohana zoning an acceptable and practical partial solution to Hawaii's housing problems") (emphasis added).

38. The researcher notes that the Resolution authorizing this study does not permit this report to consider abolishing ohana zoning or making it discretionary with the counties.

Chapter 3

1. Originally enacted in 1982, currently codified as section 6.20 of the Land Use Ordinance, Ordinance No. 86-96, effective October 22, 1986.

2. Senate Conference Committee Report No. 41, 1981 Senate Journal, p. 923.

3. Source: "Ohana Housing: a guide to adding a second unit on your lot," published by the City & County Honolulu. A reproduction of the eligibility map is included as Appendix F.

4. Interview with Dennis Nishimura, Department of Public Works, July 21, 1987.

5. Ibid.

6. "Sewer problems closing areas once eligible for ohana zoning," The Honolulu Advertiser, May 1, 1985, p. A-5. The department of public works indicated that, historically, it had received approximately 3900 ohana applications, and had rejected approximately 1000 of them for various reasons. Conversation with Dennis Nishimura, supra fn. 4.

7. According to a September 17, 1985 report from the Department of Public Works, it would cost $28.9 million to improve the known inadequate sewer lines. The report cautions that other inadequacies probably exist but have not yet been documented. Report, Department of Public Works, attached to letter dated September 17, 1985, from John Whalen, Director of Land Utilization, to the Honorable Rudy Pacarro, Chair of the Land Use Controls Committee, Honolulu City Council.

8. "New building sewer fee asked," The Honolulu Advertiser, October 16, 1987, p. A-11.

9. A cesspool is an underground wastewater leaching system used on individual lots.

10. Hawaii Rev. Stat., sec. 342-31.

11. But see memorandum from Gary M. Slovin, Corporation Counsel, to Michael J. Chun, Director and Chief Engineer, Department of Public Works, dated December 26, 1984, in which Mr. Slovin concludes, "Ultimately, it is for the Department to decide this issue but, again, I believe that the present ordinance does not prohibit the use of cesspools."

12. Hawaii Rev. Stat., sec. 321-11(4).

13. 1985 Haw. Sess. Laws, Act 282, partially codified in Hawaii Rev. Stat., sec. 27.21.6(5).

14. Ibid., Hawaii Rev. Stat., sec. 342-31.

15. See further discussion of ohana zoning on agricultural land under Hawaii county.

16. Telephone interview with Ken Sprague, Deputy Manager and Chief Engineer, Board of Water Supply.

17. Telephone interview with Captain Paul Perry, Fire Department, July 21, 1987.

18. Ibid.

19. Telephone interview with Mel Hirayama, Department of Transportation Services, July 21, 1987.

20. In fact, the Department of Land Utilization has recommended to the Honolulu City Council that the ordinance be amended to limit the floor area of ohana units to 900 square feet, which might have alleviated the problem by decreasing family size and the concomitant number of cars but a bill to make that change expired on July 3, 1987 without approval. Bill No. 105, draft 3.

21. Three hundred and fifty-three questionnaires were sent out, and one hundred sixty-six were returned, for a response rate of 47%.

22. The total number of approved ohana applications in Honolulu, as of July 1987, was 1396. Of this number, 798 of the homeowners had completed construction of ohana units. Surveys were sent out to all 798 homes. A copy of the survey is attached as Appendix E, and the tabulated results are indicated. Three hundred and five surveys were returned, for a response rate of 38%.

23. The LRB study indicated a slightly lower figure for use by relatives, 4%, but the Real Property Tax division indicated that 37 lots with ohana zoning had been turned into condominiums under the Horizontal Property Regime, which is about 5.3%.

24. Of course, these figures are just for respondents to the survey. The county's 1984 survey had a 47% response rate, while the LRB survey had a 38% response rate. The LRB figure also does not include the 7% of the respondents who stated that they themselves were living in the ohana unit.

25. The department of general planning has no active role in the implementation of ohana zoning. However, according to Donald Clegg, Chief Planning Officer for the City & County of Honolulu, ohana zoning is not a good idea because of the double density problem. Ohana zoning also frustrates neighbors who buy into an area believing that it has a certain kind of density, and who then have that expectation shattered when ohana units enter the picture. Clegg added, however, that because the total number of ohana units is comparatively small, that it is more of a nuisance than a real problem, and its impact is negligible so far. Telephone interview with Donald Clegg, July 22, 1987.

26. Other areas indicating a dislike of ohana zoning include Pacific Heights and Waialae-Kahala.

27. Memorandum from Peter D. Leong, Director of Finance, to Michael M. McElroy, Director of the Department of Land Utilization and Joseph Conant, Director of the Department of Housing and Community Development, November 5, 1981, stated that the finance department believed that ohana-eligible lots would be considered more valuable and thus be assessed at a higher rate, and that lots adjoining those on which ohana units have been built also would receive a higher assessment if classification is for two or more residential lots.

28. Interview with Ed Ferreira, Administrator, Department of Finance, August 5, 1987.

29. Ibid.

30. "Housing revolt ahead? The Honolulu Advertiser, Thursday, September 24, 1987 at A-10.

31. Ibid.

32. See Mayor's Directive 87-1, effective August 12, 1987, transferring this power from the Zoning Board of Appeals to the Director of Land Utilization.

33. Revised Charter of the City & County of Honolulu, 1983, section 6-906.

34. Telephone interview with Art Hatton, Branch Chief, Zoning Adjustments Branch, Department of Land Utilization, on November 9, 1987.

35. The head of the Department of Public Works must be an engineer with at least five years' experience, the head of the Board of Water Supply the same, and the Fire Chief must be an experienced fire fighter. Revised Charter, 1983, sections 6-402, 6-502, and 7-105(a).

36. See, e.g., Revised Ordinances of Honolulu, 1978, 1983 edition, chapters 11 and 19A.

37. Memorandum from Jane Howell, Deputy Corporation Counsel to Michael McElroy, Director of the Department of Land Utilization, dated June 20, 1983, entitled, "Zoning Board of Appeals Jurisdiction in Ohana Zoning Cases."

38. "City expands ohana zoning to new areas," The Honolulu Advertiser, June 26, 1987, p. A-7.

39. See n. 7 supra.

40. Telephone interview on September 18, 1987, with Linda Ilae, Loan Officer, American Savings Bank (security is entire lot and both homes); Martha Eggerking, Assistant Cashier and Residential Loan Officer, Bank of Hawaii (refinances total mortgage package, giving cash-out for ohana unit); Alvin Ige, Mortgage Loan Officer, Finance Factors, Ltd. (second mortgage on property); Wes Young, Assistant Vice-President, First Hawaiian Creditcorp (property taken as security); and

Greg Terry, Vice-President/Loan Officer, Territorial Savings and Loan Association (the whole property used as security).

41. Hawaii Rev. Stat., ch. 514A.

42. See further discussion in Chapter 7.

43. See n. 23, supra.

44. As of June 30, 1987, only 798 ohana units were listed by the department of land utilization as completed.

45. See testimony submitted by John Whalen, director of the Department of Land Utilization, on April 16, 1987, in support of Senate Concurrent Resolution No. 88.

Chapter 4

1. Throughout this report, Maui refers to Maui county, which includes the islands of Maui, Molokai, and Lanai. However, ohana zoning does not appear to have been applied on Molokai and Lanai.

2. Ordinance 1269, effective October 19, 1982.

3. Code of the County of Maui, section 19.35.010, 1980, as supplemented (Code).

4. Ibid. at 19.35.020.

5. Ibid. at 19.35.060.

6. This number is probably insufficient, at least for the larger units. Honolulu's Department of Land Utilization performed a 1984 study in Honolulu that indicated that 40% of all units had one car, while 48% had two or more. (Pamphlet) Ohana Housing: A Program Evaluation, Office of Information and Complaint, September, 1984.

7. Code, section 19.35.090.

8. Maui's Comprehensive Zoning Provisions is being revised. The county will be divided into community development plans, but the system is not yet in place. Interview with Councilmember Velma M. Santos, August 13, 1987.

9. Research Division, First Hawaiian Bank, "Maui County in 1987," Economic Indicators, Neighbor Island Profiles, July/August 1987, pp. 1, 5. According to the Department of Public Works, there are theoretically enough rental units extant to house the population. However, in the multi-family districts, especially Lahaina and Kihei, many of these units are being used for timesharing for tourists. Interview with Clyde Murashige, Department of Planning, August 13, 1987.

10. "Maui County in 1987" p. 5.

11. Santos interview.

12. Ibid.

13. See sewer section in chapter 2.

14. Interview with Vince Bagoyo, Director, Department of Water Supply, August 13, 1987.

15. Seven hundred dollars rather than $1400, according to Vince Bagoyo, ibid.

16. Santos interview.

17. Interview with Aaron Shinmoto, Department of Public Works, August 13, 1987.

18. Santos interview.

19. Ibid.

20. Interview with Dennis Ichikawa, Assessor, Department of Finance, November 4, 1987.

21. "Maui County in 1987," p. 5.

22. Ibid.

23. See, e.g., Testimony by Council Vice-Chairman Goro Hokama on H.B. 244, February 13, 1987; Letter from Mayor Hannibal Tavares to Representative Mitsuo Shito, dated March 3, 1987, on H.B. 244.

Chapter 5

1. Ordinance 430, enacted August 17, 1982, codified in the Revised Code of Ordinance of the County of Kauai, 1976, as amended, as section 8-3.3(d) of the Comprehensive Zoning Ordinance.

2. Telephone interview with Russell Sugano, Deputy County Engineer, Department of Public Works, November 5, 1987.

3. Ibid.

4. Telephone interview with George Yamamoto, Building Superintendent, Department of Public Works, November 5, 1987.

5. Telephone interview with Raymond Sato, Manager and Chief Engineer, Department of Water, November 5, 1987.

6. Hawaii Rev. Stat., sec. 342-31.

7. Letter from James Tehada to the Honorable Mitsuo Shito and the Committee on Housing and Community Development, dated October 23, 1987, submitted at the Committee's October 26, 1987 hearing in Lihue, Kauai.

8. Mount Waialeale, according to The World Almanac and Book of Facts, Mark S. Hoffman (ed.), (New York: Pharos Books, 1987), p. 750.

9. Sato interview.

10. Ibid.

11. Ibid., According to Sato, the water is available, but the source needs to be developed.

12. Ibid.

13. Telephone interviews with Gerald Takamura, Supervising Sanitarian, Department of Health, November 6 and 20, 1987. He attributes this to the fact that subdivisions with a private water system generally have restrictive covenants that otherwise prohibit ohana zoning, and that agricultural workers living on the plantation do not own the land and have no right to build on it.

14. Interview with Mike Laureta, Department of Planning, August 18, 1987.

15. Interview with Michael J. Belles, County Attorney, August 18, 1987. and telephone conversation, December 18, 1987.

16. Laureta interview.

17. The June 1987 edition of the Kauai Business & Real Estate Magazine contained four real estate advertisements mentioning that the property in question was ohana-zoned.

18. Belles interview.

19. "Restrictive Covenants," Tom Shigemoto, Deputy Planning Director, County of Kauai, Kauai Business & Real Estate Magazine, June 1987, p. 5.

20. "Restrictive Covenants ... or are they?" editorial by Gary Hooser in Kauai Business & Real Estate Magazine, June 1987, p.2, "Restrictive Covenants ... a pertinent fact," ibid. p. 7.

21. Testimony of Councilmember Joanne Yukimura, submitted at the October 26, 1987 hearing of the House Committee of Housing and Community Development held in Lihue, Kauai, p. 2.

22. Kauai County Council Resolution No. 73, adopted August 5, 1987, states that "approximately 60 Ohana dwelling permits [have been] issued as of July 1986, and virtually all are intended to be used as rentals to non-family members," and Laureta interview.

23. See, e.g., "Waiting for the Westin," by Tom Yoneyama in Hawaii Business, July 1987 at 33, indicating a lack of rental units on Kauai, "Shortage of housing predicted for Kauai," Honolulu Star-Bulletin, October 28, 1987, p. A-18. To the extent, however, that ohana units are in fact used as vacation rentals, this would provide an indirect benefit to the community by reducing the number of the existing housing units which might otherwise have been converted to vacation rentals.

24. Telephone interviews with Roy Fujioka and Dotty Bekeart, Department of Finance, September 24, 1987.

25. Senate Conference Committee Report No. 41, 1981 Senate Journal, p. 923.

26. Ibid., at 924.

27. Letter of Max W. J. Graham, Jr., Deputy County Attorney, to Gillman T. M. Chu, Associate Analyst, Office of the Ombudsman, dated May 11, 1984.

28. See, e.g., Kauai County Council Resolution No. 73, adopted August 5, 1987, requesting the state legislature to review the ohana zoning law and consider whether it would be appropriate to make application of ohana zoning discretionary.

29. See note 22 supra, and Belles interview.

30. Councilmember James Tehada, in written testimony to the Committee on Housing and Community Development, see n. 27 supra, stated that "I contend that regardless of being an Ohana or rental unit [to non-relatives], any addition to our housing inventory does relieve our present housing shortage." The letter points out that many young couples could not take advantage of ohana zoning if it were limited to family members because their parents do not own property and cannot provide them with a unit. Also, if a family has more than one young married child, only one could use the unit, forcing the others to seek rental housing elsewhere. Tehada states that "more than 50% of our residents are renters and this percentage is steadily increasing."

Chapter 6

1. The Hawaii County Code, sections 25-270 - 25-277, 1983, as amended.

2. Ibid., 25-270.

3. Although the three infrastructure requirements are stated in the ordinance, county officials stated in interviews that an ohana zoning permit will issue if only two out of the three requirements are there. Interviews with Gary Kawasaka, Department of Water Supply; Masa Onuma, Department of Planning, August 27, 1987.

4. See "Bars to ohana zoning: restrictive covenants" in chapter two.

5. Onuma interview.

6. Letter from Mayor Dante K. Carpenter to Councilmember Bill Kaipo Asing, April 8, 1987.

7. Department of Planning and Economic Development, The State of Hawaii Data Book 1986 (Honolulu: 1986), p. 16, indicates that as of 1985, Hawaii County was the least densely populated island at 28.7 people per square mile. Kauai was next, with 89.8.

8. Interview with Stanley Takemura, Department of Public Works, August 27, 1987.

9. Interview with Ted Nagasako, Legislative Aide to Councilmember Takashi Domingo, August 27, 1987.

10. Interview with Stanley Takemura, telephone interview with Harold Matsuura, Chief Sanitarian, Hawaii District, State Department of Health.

11. Takemura interview.

12. Kawasaka interview. See also Research Division, First Hawaiian Bank, "Hawaii County in 1987," Economic Indicators, Neighbor Island Profiles, September/October 1987, p. 3.

13. Kawasaka interview.

14. Onuma interview.

15. Telephone interview with Glen Kiyota, Administrator of the Real Property Tax Division, Hawaii County Department of Finance, on October 2, 1987.

16. Interview with Art Harton, Branch Chief, Zoning Adjustments Branch, Department of Land Utilization, November 9, 1987.

17. Onuma interview.

18. Interview with Councilmember Takashi Domingo, August 28, 1987.

19. Onuma interview.

20. Interview with William Yamanoha, Department of Planning, August 27, 1987.

21. Ibid.

Chapter 7

1. Senate Conference Commitee Report No. 41 on S.B. No. 55, Eleventh Legislature, 1981, State of Hawaii (bill "would allow optimal utilization of scarce land [and] provide an immediate and relatively inexpensive means of increasing the supply of affordable housing.")

2. Preliminary and partial research indicates that a family restriction may be permissible. The Supreme Court, in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), upheld an ordinance limiting occupancy of single family dwellings to family members. The Court found this restriction rationally related to a permissible state objective and thus constitutional. An additional problem with restricting ohana zoning to family members only might be the restriction on the subsequent sale of the land. However, the Supreme Court has also come out strongly in favor of the extended family in zoning situations. See Moore v. City of Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), where the Supreme Court struck down an ordinance which limited occupancy of a dwelling to a narrowly-described definition of family members. In its ruling, the Court spoke strongly in favor of extended families and basically indicated that it struck down the ordinance only because the definition of family was too limited.

   If the legislature wants to pursue this type of limitation, it should draft a statute with purpose clauses similarly constructed to those in Chapter 516, Hawaii Revised Statutes, popularly known as the Land Reform Act. This Act enabled the government to condemn the fee interest in leasehold lands. The Act was held constitutional by the United States Supreme Court in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) because the Court found that the legislature's stated goals were rationally related to a legitimate state purpose. Although the aims of a family restriction are not similar in kind to that of the Land Reform Act, a similar mechanism might be employed to demonstrate a legitimate relationship to an important state goal, that of helping the extended family.

3. This could probably only be applied prospectively.

4. As is done, for example, upon foreclosures on property restricted by the Hawaii Housing Authority. Cf. section 201E-221, Hawaii Revised Statutes.

5. Interview with Albert Lono Lyman, Director, Hawaii County Department of Planning, August 27, 1987.

6. Interview with Aaron Shinmoto, Maui County Department of Public Works, August 13, 1987.

7. This type of "private attorney general" provision is already in use in some situations. Hawaii Revised Statutes, sec. 603-23.5 allows any person, as well as government attorneys, to maintain an action to enjoin violations of section 708-871, Hawaii Revised Statutes, which prohibits false advertising, and to recover damages if injured. Section 481-27, Hawaii Revised Statutes, permits the attorney general or a private person to enjoin anyone participating in unfair trade practices relating to the sale of United States surplus goods.

8. This could be enforced at the building permit approval level, and again at final inspection.

9. At an ohana zoning hearing held on Kauai by the Housing and Community Development Committee of the House of Representatives on October 26, 1987, the Acting Director of Planning was asked whether the county was taking the position that it cannot consider any other factors other than streets, water, and sewers in reviewing the ohana zoning permits. The response was that the county was trying not to impose more strict conditions on ohana zoning. At the companion hearing on Maui on November 16, 1987, a representative from the Office of the Mayor complained that the number of vehicles was not controlled. However, the counties have the power to impose off-street parking requirements, and in fact, they all have imposed such requirements.

10. A copy of the City & County's proposed bill is included in Appendix G, and is followed by a copy of House Bill No. 244 as it presently reads.

    House Bill No. 244, Regular Session of 1987, provides that counties may allow ohana units in accordance with zoning ordinances and rules.

11. Another type of change that has been brought up is to allow ohana zoning in a district only if

the residents of the district vote to allow it. This approach is not recommended because: (1) while residents may be the best source of information on neighborhood character, they are not generally knowledgeable about the planning and infrastructure requirements that should be considered, and (2) this may lead to a drastic decrease in the availability of ohana zoning under the "not in my backyard" syndrome.

12. Increased density in a formerly single-family residential area is one of the primary concerns for the Neighborhood Boards that oppose ohana zoning.

13. See discussion in chapter 3, supra, "the Ordinance."

14. Of course, with these greater controls, ohana zoning would be more limited, as more factors exist to justify curtailing it. However, ohana zoning without additional environmental controls could lead to social problems due to overcrowding that are worse than the condition sought to be alleviated.

THE SENATE
FOURTEENTH LEGISLATURE, 1987
STATE OF HAWAII

APR 0 9 1987

S.C.R. NO. 88

SENATE CONCURRENT RESOLUTION

REQUESTING A REVIEW OF THE "OHANA ZONING" LAW.

WHEREAS, in 1981, the State Legislature through Act 229 enacted section 46-4(c), Hawaii Revised Statutes, which is popularly known as the "Ohana Zoning" law; and

WHEREAS, the "Ohana Zoning" law specified that, effective January 1, 1982, a county could not prohibit the construction of two single-family dwellings on any lot where a residential dwelling is permitted if certain requirements are met; and

WHEREAS, the declared purpose of the "Ohana Zoning" law is "...to assist families to purchase affordable individual living quarters and, at the same time, to encourage the preservation of the extended family..."; and

WHEREAS, during the time the "Ohana Zoning" bill was discussed, several counties raised concerns such as whether the statute would usurp the counties long-term land use plans, whether the individual counties should be given more discretion because of their differing housing needs, and whether the counties could impose reasonable regulations such as those relating to size and location; and

WHEREAS, since adoption of the "Ohana Zoning" law, each of the counties has adopted a different type of implementing ordinance which allows for different types of Ohana dwellings and locations for Ohana dwellings; and

WHEREAS, approximately five years have passed since adoption of the "Ohana Zoning" law, and it appears timely for a comprehensive review to see if the purpose and intent of the law have been met in each of the counties; and

WHEREAS, the call for the review, however, should not be construed as legislative disfavor of "Ohana Zoning", but as an exercise of legislative oversight intended to improve implementation of the law; and

WHEREAS, in this respect, the Legislature reiterates its support for the purpose of the "Ohana Zoning" law, as specified in Act 229, Session Laws of Hawaii 1981; now, therefore,

S.C.R. NO. 88

BE IT RESOLVED by the Senate of the Fourteenth Legislature of the State of Hawaii, Regular Session of 1987, the House of Representatives concurring, that the Legislative Reference Bureau is requested to review the "Ohana Zoning" law to determine if its purpose and intent have been met in each county and to determine whether any changes should be made to the law to better effectuate the purpose and intent; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau also review the specific problems encountered by each county within the past five years in implementing the law; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau also review the "Ohana Zoning" law and other pertinent state laws to determine if the counties should be given more flexibility to deal with individual problems encountered with "Ohana Zoning", but the Bureau shall not consider repeal of the law or making "Ohana Zoning" discretionary for the counties; and

BE IT FURTHER RESOLVED that the findings and recommendations of the Legislative Reference Bureau be submitted to the Legislature prior to the convening of the Regular Session of 1988; and

BE IT FURTHER RESOLVED that a certified copy of this Concurrent Resolution be transmitted to the Director of the Legislative Reference Bureau.

OFFERED BY:

ACT 229 S.B. NO. 55

A Bill for an Act Relating to Housing.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature recognizes that the spiraling costs of housing, the limited availability of land for housing, and the failure of wages to keep pace with inflation, contribute to the inability of many families to purchase their own homes.

The legislature also recognizes the resulting trend of children living in their parents' homes even after reaching adulthood and after marriage. This trend has positive and negative aspects. The situation is negative when it is forced upon persons because there is a scarcity of affordable homes. The trend can be positive, however, because it helps preserve the unity of the extended family.

The purpose of this Act is to assist families to purchase affordable individual living quarters and, at the same time, to encourage the preservation of the extended family.

SECTION 2. Section 46-4, Hawaii Revised Statutes, is amended to read as follows:

"**§46-4 County zoning.** (a) This section and any ordinances or rules and regulations adopted in accordance with it, shall apply only to those lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended.

Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner. Zoning in the counties of Hawaii, Maui, and Kauai means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district as shall be deemed best suited to carry out the purposes of this section. In establishing or regulating the districts, full consideration shall be given to all available data as to soil classification and physical use capabilities of the land so as to allow and encourage the most beneficial use of the land consonant with good zoning practices. The zoning power granted herein shall be exercised by ordinance which may relate to:

(1) The areas within which agriculture, forestry, industry, trade, and business may be conducted.
(2) The areas in which residential uses may be regulated or prohibited.
(3) The areas bordering natural watercourses, channels, and streams, in which trades or industries, filling or dumping, erection of structures, and the location of buildings may be prohibited or restricted.
(4) The areas in which particular uses may be subjected to special restrictions.
(5) The location of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered.
(6) The location, height, bulk, number of stories, and size of buildings and other structures.

(7) The location of roads, schools, and recreation areas.
(8) Building setback lines and future street lines.
(9) The density and distribution of population.
(10) The percentage of lot which may be occupied, size of yards, courts, and other open spaces.
(11) Minimum and maximum lot sizes.
(12) Other such regulations as may be deemed by the boards or city council as necessary and proper to permit and encourage orderly development of land resources within their jurisdictions.

The council of any county shall prescribe such rules and regulations and administrative procedures and provide such personnel as it may deem necessary for the enforcement of this section and any ordinance enacted in accordance therewith. The ordinances may be enforced by appropriate fines and penalties, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

Nothing in this section shall invalidate any zoning ordinances or regulation adopted by any county or other agency of government pursuant to the statutes in effect prior to July 1, 1957.

The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accord with a long range, comprehensive, general plan, and to insure the greatest benefit for the State as a whole. This section shall not be construed to limit or repeal any powers now possessed by any county to achieve the ends through zoning and building regulations, except insofar as forest and water reserve zones are concerned and as provided in subsection (c).

Neither this section nor any ordinance enacted under this section shall prohibit the continuance of the lawful use of any building or premises for any trade, industry, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect, provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single family or duplex) or agricultural uses. Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262.

(b) Any final order of a zoning agency established under this section may be appealed to the circuit court of the circuit in which the land in question is found. The appeal shall be in accord with the Hawaii rules of civil procedure.

(c) Neither this section nor any other law, county ordinance, or rule shall prohibit the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted; provided:

(1) All applicable county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback, maximum lot coverage, parking, and floor area requirements; and
(2) The county determines that public facilities are adequate to service the additional dwelling units permitted by this subsection.

This subsection shall not apply to lots developed under planned unit development, cluster development, or similar provisions which allow the aggregate number of dwelling units for the development to exceed the density otherwise allowed in the zoning district.

Each county shall establish a review and permit procedure necessary for the purposes of this subsection."

SECTION 3. Statutory material to be repealed is bracketed. New material is underscored.*

SECTION 4. This Act shall take effect on January 1, 1982.

(Approved June 22, 1981.)

6.20 Housing: Ohana Dwellings.

Two *dwelling units* (either separate or in a single *structure*) may be located on a residentially zoned lot, with the following limitations:

A. All provisions of the zoning district shall apply except the provisions on the number of dwelling units permitted on a *zoning lot*.

B. These Ohana Dwelling provisions shall not apply to lots within a Zero Lot Line project, Cluster Housing project, Planned Development-Housing or *duplex unit* lots.

C. The following public facilities are required to service the lot:

1. The sewer capacity shall be approved in writing by the Department of Public Works.
2. The availability of water shall be confirmed in writing by the Board of Water Supply.
3. Approval in writing from the Honolulu Fire Department is required for all parcels served by private *streets*.
4. The lot must have direct access to a street which has a minimum paved roadway width of 16 feet.

D. Public facilities clearance may be obtained prior to application for a building permit. Forms for public facilities clearance will be available at the Building Department and Department of Land Utilization. The form, approved by all agencies, shall be submitted with the building permit application. Where complete plans and specifications are submitted for building permit application processing, the submission of the public facilities clearance form will be attached with the building permit and processed concurrently

E. Neither the *Director* nor the Zoning Board of Appeals shall have authority to modify Subsection C., above.

6.30 Housing: Site Development Plan.

Three (3) to 6 dwelling units may be placed on a single zoning lot, provided a site development plan for the lot is approved by the Director.

A. Any zoning lot which has at least twice the required minimum lot size for the underlying residential district may have two *detached*

(Maui)

Chapter 19.35

ACCESSORY DWELLINGS

Sections:

19.35.010 Generally. The limitations and requirements of this chapter shall apply to any accessory dwelling.

A. Any person who wishes to construct, or in any manner otherwise establish, an accessory dwelling shall apply for a building permit therefor in accordance with this chapter.

B. All provisions of the county zoning district, or state land use district as the case may be, in which the accessory dwelling is proposed to be constructed shall apply, except the provisions on the number of dwelling units permitted on a lot and except as the provisions of such district may be inconsistent with the provisions applicable to accessory dwellings. To the extent of such inconsistency, if any, the accessory dwelling provisions shall prevail.

C. The provisions of this chapter shall apply to any lots in the following county zoning and state land use districts:

1. Residential district;
2. Apartment district;
3. Hotel district;
4. Interim zoning district;
5. State land use rural district.

No accessory dwelling shall be placed or constructed on any lot located in any district other than the districts specified in this subsection.

D. Notwithstanding the provisions of subsection C of this section, the provisions of this chapter shall not apply to any lot within a duplex zone or a planned development in any district. No accessory dwelling shall be placed or constructed on any such lot. (Ord. 1269 §7(part), 1982).

19.35.020 Maximum gross floor area. The maximum gross floor area of an accessory dwelling shall be determined as follows:

Lot Area (in square feet)	Maximum Gross Covered Floor Area (including any storage covered decks, walkways, patios, lanais and similar structures, but excluding an attached carport or parking space)
7,500 to 9,999	500 square feet
10,000 to 21,779	600 square feet
21,780 to 43,559	700 square feet
43,560 to 87,119	800 square feet
87,120 or more	1000 square feet

(Ord. 1269 §7(part), 1982).

19.35.030 Separate entrance. An accessory dwelling shall have at least one separate entrance. (Ord. 1269 §7(part), 1982).

19.35.040 No interior connection. An accessory dwelling shall not have an interior connection to the main dwelling. (Ord. 1269 §7(part), 1982).

19.35.050 One accessory dwelling per lot. No more than one accessory dwelling shall be permitted on a single lot regardless of the size of the lot. (Ord. 1269 §7(part), 1982).

19.35.060 Maximum cumulative area of open decks, etc. An accessory dwelling may have uncovered open decks, walkways, patios, lanais or similar structures, subject to the following:

A. The uncovered open decks, walkways, patios, lanais or similar structures shall not exceed the following respective cumulative total areas:

Lot Area (in square feet)	Maximum Cumulative Floor Area of uncovered open decks, walkways, patios, lanais or similar structures (in square feet)
7,500 to 9,999	200
10,000 to 21,779	240
21,780 to 43,559	280
43,560 to 87,119	320
87,120 or more	400

(Ord. 1269 §7(part), 1982).

19.35.070 Off-street parking required. An accessory dwelling shall have a carport or other off-street parking space. The carport shall be a single-car carport not exceeding a total floor area of two hundred forty square feet. Where the first dwelling unit on any lot complies with all provisions

applicable to accessory dwellings, only one carport or off-street parking space shall be required; provided, that if a main dwelling unit is constructed, such main dwelling unit shall have at least two parking spaces or a carport for two cars in addition to the parking for the accessory dwelling. (Ord. 1269 §7(part), 1982).

19.35.080 Driveway. An accessory dwelling may have a separate driveway from that of the main dwelling, provided that all driveway requirements are met. In addition to any other requirements, a minimum of ten feet between the lot boundary and any building on the property shall be required for such separate driveway. (Ord. 1269 §7(part), 1982).

19.35.090 Public facilities required. The following public facilities are required to service the lot:

A. Adequacy of sewage disposal system. This shall be secured in writing from the department of public works for public sewage systems and the state of Hawaii Department of Health for cesspools, septic tanks and private sewage systems;

B. Adequacy of water supply. This shall be secured in writing from the department of water supply;

C. Adequacy of fire protection for all lots served by private streets. This shall be secured in writing from the department of fire control;

D. Adequacy of street. The lot must have direct access to a street which has a minimum paved roadway width of sixteen feet and which the director of public works determines to be adequate for the proposed construction. (Ord. 1269 §7(part), 1982).

19.35.100 Public facilities clearance. Public facilities clearance may be obtained prior to application for building permit. Forms for public facilities clearance will be available at the land use and codes administration, department of public works. The forms shall be submitted with and attached to the building permit application. Where complete plans and specifications are submitted for building permit application processing, the public facilities clearance form and the building permit will be processed concurrently. In all other cases, the forms shall be processed prior to submitting the building permit application. (Ord. 1269 §7(part), 1982).

AN ORDINANCE AMENDING THE COMPREHENSIVE ZONING ORDINANCE, CHAPTER 8 OF THE REVISED CODE OF ORDINANCE, 1976, AS AMENDED, PROVIDING FOR OHANA DWELLING UNITS

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUAI, STATE OF HAWAII:

SECTION 1. That Section 8-3.3 of the Revised Code of Ordinances, 1976, as amended, is hereby amended by adding Subsection (d) to read as follows:

"(d) Ohana Dwelling Unit. Notwithstanding other provisions to the contrary, for any residentially zoned lot where only one single-family residential dwelling is permitted, one additional single-family residential dwelling unit (attached or detached) may be developed, provided;

(1) All applicable county requirements, not inconsistent with Section 46-4(c), Hawaii Revised Statutes and the county's zoning provisions applicable to residential use are met, including but not limited to, building height, setback, maximum lot coverage, parking, and floor area requirements.

(2) The provisions of this subsection shall not apply to lots developed under a project development, or other multi-family development, or similar provisions where the aggregate number of dwelling units for such development exceeds the density otherwise allowed in the zoning district.

(3) For residentially zoned lots on which an Ohana dwelling unit is developed, no guest house under Sec. 8-3.3(a) (3) shall be allowed in addition.

(4) The following public facilities are found adequate to service the additional dwelling unit:

A. Public sanitary sewers, an individual wastewater system (or cesspool), or a private sanitary sewer system built to County standards and approved by the Department of Health.

B. For sewered areas, the availability of a public sewer system shall be confirmed in writing by the Department of Public Works. The availability of a private sewer system shall be confirmed in writing by the Department of Health.

C. The availability of water shall be confirmed in writing by the Department of Water.

D. Approval in writing from the Kauai Fire Department is required for all parcels.

E. The lot must have direct access to a street which has a minimum paved roadway width of sixteen (16) feet continuous to the major thoroughfare.

(5) Facilities clearance may be obtained prior to application for building permit. Forms for facilities clearance will be available from the Building Division, Department of Public Works. The form, approved by all agencies, shall be submitted with the building permit application. Where complete plans and specifications are submitted for building permit application processing, the submission of the facilities clearance form will be attached with the building permit and processed concurrently.

(6) Nothing contained in this section shall affect private covenants or deed restrictions that prohibit the construction of a second dwelling unit on any residential lot.

SECTION 2. This ordinance shall take effect upon its approval.

CERTIFICATE OF THE COUNTY CLERK

I hereby certify that hereto attached is a true and correct copy of Bill No. 815 (Draft 2), As Amended, which was adopted on second and final reading by the Council of the County of Kauai at its meeting held on August 3, 1982, by the following vote:

FOR ADOPTION: Asing, Fukushima, Yadao, Yotsuda, Harris — TOTAL - 5
AGAINST ADOPTION: None — TOTAL - 0
ABSENT/EXCUSED & NOT VOTING: Sarita — TOTAL - 1

Dated at Lihue, Kauai, Hawaii, this 4th day of August, A. D. 1982

Tatsuo Kato
County Clerk
County of Kauai

Date of transmittal to the Mayor:

August 4, 1982

Approved this 17th day of August, A. D. 1982

Eduardo E. Malapit
Mayor
County of Kauai

Article 25. Regulations for Ohana Dwelling.

Section 25-270. Purpose and applicability. The purpose of this article is to describe the conditions under which an "ohana dwelling," as *defined in section 25-4 of this chapter, shall be permitted in furtherance* of the legislative intent of Act 229, Session Laws of Hawaii 1981, which is to assist families to purchase *affordable individual living quarters and*, at the same time, to encourage the preservation of the extended family. It is not the intent of this article to supersede private deed restrictions or agreements which may prohibit the construction of an additional dwelling on the lot.

Section 25-271. General provisions. Notwithstanding any law, *ordinance, or rule* to the contrary, two dwelling units may be constructed on any lot within all state land use urban, agricultural, rural and conservation districts provided that:

(1) Applicable County requirements, not inconsistent with the intent of this section and the zoning provisions applicable to residential use are met, including use, building height setback, and off street parking;

(2) The County determines that public facilities as specified in section 25-272 of this article are adequate to serve the ohana dwelling unit;

(3) That at the time of application for a county building permit for a second dwelling unit, the subject lot or land parcel is not restricted by a recorded covenant or a recorded lease provision (in a lease having a term of not less than fifteen years) which prohibits a second dwelling unit; and

(4) Appropriate state approval has been received if the lot is situated within the State Land Use Conservation district.

Section 25-272. Requirements.

(a) An ohana dwelling shall comply with all other requirements of this article and of the County Code, except with regard to density. On any lot where a dwelling unit is permitted, an ohana dwelling may be constructed, provided that:

(1) The access to a public or private street shall meet with the approval of the chief engineer;

(2) It meets with State department of health wastewater treatment and disposal system requirements. Additional standards will not be imposed by the County; and

(3) It has an area for two off-street parking stalls on the lot.

Section 25-273. No variances granted. No variance from applicable requirements of this chapter, including yard setbacks, shall be granted to permit the construction of an ohana dwelling.

Section 25-274. Subdividing prohibited. There shall be no subdivision of a lot upon which an ohana dwelling is situated unless each proposed lot can meet the minimum building site requirement of the zoning district in which it is located.

Section 25-275. Facilities approval form. An ohana dwelling facilities form, as prepared by the planning department, shall be filed with and approved by that department as a prerequisite to the issuance of a building permit to a property owner for an ohana dwelling. The form shall be approved by the planning director only upon:

(1) The certification by the department of public works and the State department of health as to the adequacy of the respective facilities; and

(2) The verification of the planning director that the existing zoning for the property allows the ohana dwelling, and that the building site is adequate to support the additional dwelling.

Section 25-276. Time limitation. Upon acceptance of a properly filed application, the planning director shall render a decision within sixty calendar days.

Section 25-277. Appeals. The disapproval of the ohana dwelling facilities form by the planning director may be appealed to the board of appeals in accordance with its rules.

Appendix D

(Honolulu)

MAY 30, 1985
1308E

SECOND ACCESSORY DWELLING
Public Facilities Pre-Check

THIS FORM IS NOT PERMISSION TO BUILD AND ALL OTHER REQUIREMENTS OF LAW MUST BE MET

TAX MAP KEY
Zone Sec. Plat Par. Lot No.

OWNER'S NAME (Please Print/Type) _____

Owner's Phone Number _____

CONSTRUCTION SITE ADDRESS _____

Applicant's Phone Number _____

APPLICANT'S NAME _____

Application Date _____

ADDRESS _____

* * * * * * * * * * * * * INSTRUCTIONS FOR COMPLETING FORM * * * * * * * * * * * * * * * * * * *

1. Applicant must provide all information in Section I.
2. Applicant must acquire approvals and signatures from all four agencies as listed in Section II. If any one agency does not approve, a Building Permit cannot be granted.
3. Submit approved form along with Building Permit application and required drawings to the Building Department, 1st Floor, Municipal Bldg., Permit Section, 650 South King St.

* * * * * * * * * * * * * * * * * * ADDITIONAL INFORMATION * * * * * * * * * * * * * * * * * *

1. The pre-check form is NULL and VOID 120 days after the first date of approval by an agency, except if a one-time 90-day extension is granted by the Board of Water Supply.
2. There will be a water development charge assessed by the Board of Water Supply. If separate meter is installed there will also be an installation charge.
3. There will be a monthly sewer service charge on the second unit.
4. Compliance with private covenants or lease restrictions prohibiting two dwelling units on a lot is applicant's responsibility.

* * * * * * * * * * * * * * SECTION I. (TO BE FILLED IN BY APPLICANT) * * * * * * * * * * * * *

1. PROPOSAL FOR: (check one which apply to you)
   ___One separate new unit ___Use of existing second unit which is separate
   ___Two new units on a vacant lot ___Use of existing second unit which is attached to house
   ___Interior work only (converting garage, guest quarters, bedroom, etc.)
2. NUMBER OF NEW/ADDED BEDROOMS IN THE SECOND UNIT IS _____ Bedrooms.
3. PARCEL NOW SERVED BY OR HAS: (check Yes or No)
   a. Municipal sewers ___Yes ___No
   b. No cesspool or septic tank. ___Yes ___No
   c. Direct access to a street with minimum paved roadway width of 16 feet. ___Yes ___No
   d. Has sufficient area for 2 parking spaces for the second unit. ___Yes ___No

PROCEED TO SECTION II ONLY IF THE ABOVE SECTION I ITEMS ARE CHECKED YES.

* * * * * * * * * * SECTION II. (TO BE COMPLETED BY GOVERNMENT AGENCIES) * * * * * * * * * *

STEP

1 BUILDING DEPT., 1st Floor, Municipal Building, 650 South King St., Permit Section 523-4505.
Parcel is zoned residential and is in an area generally identified as eligible for a second unit.

___YES
___NO Checked by: _____ _____
Signature Date

2 DEPT. OF PUBLIC WORKS, Div. of Wastewater Management, Public Service Section, 650 South King St., 523-4429
Meets Wastewater Management requirements.

___YES
___NO Checked by: _____ _____
Signature Date

3 FIRE DEPT., 1st Floor, Municipal Bldg., 650 South King St., 523-4186
Meets access and fire safety requirements, except for BWS fire protection standards.

___YES
___NO Checked by: _____ _____
Signature Date

4 BOARD OF WATER SUPPLY (across street from Municipal Bldg., parking garage)
Service Engineering Section, Ground Floor, 630 South Beretania St., 527-6189 or 527-6190

Water is available.

___YES
___NO Checked by: _____ _____
Signature Date

BWS ONLY: Approval for one-time 90-day extension (affix seal of approval, date and brief explanation for extension). Attach verification letter.

ADDITIONAL COMMENTS

# # # # #

ACCESSORY DWELLING (OHANA ZONING) FACT SHEET

1. This ordinance is for the accessory dwelling on the lot. Only one is permitted per lot.

2. Accessory dwelling means living quarters attached or detached to a main dwelling or within an accessory building located on the same lot as the main dwelling for use as a separate dwelling.

3. The lot must be in the following County zoning and State land use districts:

   a. Residential District
   b. Apartment District
   c. Hotel District
   d. Interim Zoning District
   e. State Land Use Rural District

4. The ordinance is not applicable within a duplex zone, planned development, or State land use agricultural district.

5. For areas without a sewer system, the lot must have at least 10,000 square feet of land area in order to have an accessory dwelling (State Department of Health Rules and Regulations).

6. Maximum area of accessory dwelling permitted:

Lot Area (sq. ft.)	Gross Covered Floor Area (sq. ft.) (Including storage, covered decks, walkways, patios, lanais, etc., but excluding attached carport.)	Floor Area or uncovered decks, walkways, patios, lanais, etc. (sq. ft.)
7,500 to 9,999	500	200
10,000 to 21,779	600	240
21,780 to 43,559	700	280
43,560 to 87,119	800	320
87,120 or more	1,000	400

7. Must comply with all other requirements of the Comprehensive Zoning Ordinance such as:

   a. One additional parking space must be provided.
   b. Setback requirements.

8. Adequate public facilities must be available. The owner must verify that adequate facilities are available with documentation provided by submitting a completed Public Facilities Clearance Form (copy attached).

9. Lot must have access to a 16 feet minimum paved roadway.

10. The dwelling may contain installed equipment for only one kitchen.

11. Permits must be obtained for construction of the accessory dwelling.

LUCA
4/83

COUNTY OF MAUI
Department of Public Works
Land Use and Codes Administration
200 South High Street
Wailuku, Maui, Hawaii 96793

ORDINANCE 1269
PUBLIC FACILITIES CLEARANCE FORM

Owner:_____
Applicant (if other than owner)_____
Description of Project:_____
_____
Address:_____
Tax Map Key:_____

COUNTY SEWERAGE SYSTEM
The existing sewerage system is adequate to allow the proposed accessory dwelling.

_____YES _____NO
Comments:_____
_____
_____

_____
Waste Management Division Date
Department of Public Works

CESSPOOL, SEPTIC TANKS, PRIVATE SEWERAGE SYSTEMS
The existing/new cesspool, septic tank, or private sewerage system is adequate to allow connection to the proposed accessory dwelling.

_____YES _____NO
Comments:_____
_____
_____

_____
Department of Health, State of Hawaii Date

NOTE TO APPLICANT: The existing system must be inspected by the Department of Health and conform to the Public Health Regulations Chapter 38, Section 3.4A and 7.1(b). Call 244-4255 for any information.

POTABLE WATER SOURCES
The existing water system is adequate to allow the proposed accessory dwelling.
_____YES _____NO
Comments:_____
_____
_____

_____
Department of Water Supply Date

FIRE PROTECTION FOR PROPERTY SERVED BY PRIVATE STREETS
Fire protection is adequate for the proposed accessory dwelling.

_____YES _____NO
Comments:_____
_____
_____

_____
Department of Fire Control Date

STREET
The lot has direct access to a street with a minimum paved roadway width of 16 feet and said street is adequate for the proposed accessory dwelling.
_____YES _____NO
Comments:_____
_____
_____

_____ _____
Department of Public Work Date

County of Kauai
OHANA DWELLING
Public Facilities Clearance

TAX MAP KEY: _____ OWNER: _____ DATE: _____

LOT SIZE: _____ STREET NAME: _____

PROPOSAL FOR:		No. of Bedrooms
One additional Dwelling Unit	_____	_____
Two New Dwelling Units	_____	_____
Converting 1-family dwelling unit to a 2-family dwelling unit	_____	_____
Approval of existing 2-dwelling units	_____	_____

A. ZONING — REMARKS

Lot: ☐ Qualifies, provided the attached zoning requirements are met.

Lot: ☐ Does not qualify.

_____ _____
Planning Department Date

	Adequate	Inadequate	
B. SANITARY SEWER SYSTEM			
1. Private Sewer System	☐	☐	
2. Cesspool	☐	☐	

_____ _____
Department of Health Date

3. Public Sewer System	☐	☐	

_____ _____
Public Works Department Date

C. ROADWAY			
1. Paved Road (16 ft. min.)	☐	☐	

_____ _____
Public Works Department Date

D. WATER SYSTEM			
1. Private Water System	☐	☐	

_____ _____
Health Department Date

2. Public Water System	☐	☐	

_____ _____
Water Department Date

E. FIRE PROTECTION	☐	☐	

_____ _____
Fire Department Date

NOTE: 1. Checking for private covenants or deed restrictions prohibiting two dwelling units on a lot is the applicant's responsibility.
2. All agencies above must indicate "Adequate" to qualify for an Ohana dwelling.
3. Building permit must still be obtained before constructing the Ohana dwelling unit.

_____ _____ _____ _____
Signature of Applicant Date Mailing Address Phone Number

OHANA DWELLING PROCEDURES

County of Hawaii
Planning Department

In processing your ohana dwelling application, there are certain things that you should be aware of. These are:

1. Zoning: An Ohana Dwelling is allowed in all zones except industrial and open.

2. Covenants: An ohana dwelling is not allowed if the property has a covenant which prohibits the construction of a second dwelling.

3. Variance: No variance from the zoning code (such as setback, height, etc.) can be issued for an ohana dwelling.

4. Subdivision: No subdivision would be allowed of an ohana dwelling lot, unless all resultant lots meet the minimum lot size requirement of that zone.

5. Access: Access to the ohana dwelling unit must meet with the approval of the Chief Engineer, Department of Public Works.

6. Sewage System: The sewage system must meet with the approval of the State Department of Health.

7. Processing: Upon receipt of a properly filed application, the Planning Department will review the request together with the Departments of Public Works and Health. The Department will take action within sixty (60) calendar days of receipt of the application.

8. Building Permit: A building permit application for the ohana dwelling will be accepted and processed only upon approval of the Ohana Dwelling by the Planning Director. A copy of said approval must accompany the Building Permit application.

9. Time Limit: Once an ohana dwelling application has been approved by the Planning Director, a building permit must be secured within two (2) years from that date.

10. Appeal: Should an application be denied, the person has a right to appeal the decision to the Board of Appeals within 30 days of the official denial date.

PD 7/82
PD 5/84
4557A/17A (#3)

OHANA DWELLING - PUBLIC FACILITIES FORM
COUNTY OF HAWAII
PLANNING DEPARTMENT

APPLICANT: _____

ADDRESS: _____

_____

PHONE (BUS.) _____ (HOME) _____

APPLICANT'S INTEREST, if not owner: _____

_____

I certify that the information provided herein is accurate and truthful to the best of my ability.

APPLICANT'S SIGNATURE

RECORDED OWNER(S): _____

OWNER(S) SIGNATURE: _____

ADDRESS: _____

PHONE: (BUS.) _____ (HOME) _____

This application must be accompanied by one (1) original and two (2) copies of the Ohana Dwelling - Public Facilities Form and three (3) site plans drawn to scale showing:

* Property boundaries
* Cesspool location(s)
* All existing structures and driveways
* Two (2) parking spaces
* Proposed ohana dwelling location, including setback(s) from property lines

Additionally, one (1) copy of the recorded deed including its restrictions and/or covenants must be submitted with this application.

TAX MAP KEY NUMBER: _____

LAND AREA: _____ Sq. Ft. ZONING: _____

STATE LAND USE: _____

OHANA DWELLING TYPE (check one):

___ Add'l Single Family Dwelling
___ 2 New Single Family Dwellings
___ Duplex Conversion
___ New Duplex

Restrictive covenants prohibiting additional dwelling on lot

(check one): _____YES _____NO

REMARKS: _____

_____

_____

_____

_____

TAX MAP KEY

Z S PL PAR LOT	Ohana Dwg Permit No.	Building Permit No.

(OFFICE USE ONLY)

P.D. - Sept. 1982 (Rev.)
P.D. - 7/85 (7483A/9A)

Appendix E

LRB SURVEY

The LRB sent out a questionnaire to 798 residences on Oahu that were identified by the Department of Land Utilization as having constructed ohana units (this number is almost half of the number of permits that have been issued). The purpose of the survey was two-fold: to determine how many of the units were occupied by extended family members, and to determine whether the units were being rented (or used free of charge) or whether they had been sold.

Three hundred and five surveys were returned, for a response rate of 38%. Of those, only 302 had usable responses, so the percentage rates are calculated against 302, not 305. The answers, which are tabulated below, do not add up to 302 as some respondents left certain categories blank. As we received a significant number of write-in responses for the categories of "free use by relatives" and "use by self," those categories have been broken out especially for this evaluation.

The survey had two parts, one designed for those who had applied for the ohana zoning permit themselves (to ascertain their original intent), and one for those who had bought property with an existing ohana unit. The responses in the latter category were very sparse.

For those who originally requested the ohana zoning permit:

1. Why did you want an ohana unit?

    a. For rental to a relative: 119 (39%)

    b. For free use by a relative: 68 (22%)

    c. For rental to a non-relative: 53 (18%)

    d. For sale to a relative: 20 (7%)

    e. For own use: 11 (4%)

    f. For sale to a non-relative: 2 (less than 1%)

Note: Total who indicated some type of use by relative is 68%.

2. Who first occupied the ohana unit?

    a. A relative: 174 (68%)

    b. A non-relative: 46 (15%)

    c. Self: 16 (5%)

3. At that time, the unit was:

a. Rented: 124 (41%)

b. Sold: 10 (3%)

4. Who currently occupies the ohana unit?

a. Relatives: 174 (58%)

b. Non-relatives: 77 (25%)

c. Self: 19 (7%)

d. It is vacant: 18 (6%)

5. At this time, the ohana unit is:

a. Rented: 124 (41%)

b. Sold: 11 (4%)

For those of you who purchased your property with an ohana unit already in place:

1. If you own both the main home and the ohana unit, who lives in the ohana unit?

a. Non-relatives: 3

b. Relatives: 1

c. It is vacant: 1

2. If you own the main unit but not the ohana unit, who lives in the ohana unit?

a. Non-relatives who live there: 1

b. All other categories: 0

3. If you are renting the main unit:

a. Are you related to anyone in the ohana unit?

No: 2 Yes: 1

b. Does a person in the ohana unit own your home?

Yes: 2 No: 1

These figures lead to interesting conclusions. While initially 68% of the ohana units were occupied by relatives, currently only 58% are, a drop of 10%, which is reflected in the rise of initial occupancy by non-relatives, 15%,

to 25%. (Those who listed relatives cited parents, children, grandchildren, in-laws, in-laws' relatives, siblings, cousins, uncles, and nephews.) These figures demonstrate part of the problem in attempting to limit ohana zoning to family members only: at some point, for some reason, family use was ended. Because there is no family restriction, the property is still serving a useful function by housing non-relatives. Granted, 10% is only about 30 households, but that still indicates that 60 to 120 people are being housed in a tight housing market.

The number of homes actually sold came out to an astonishingly low 11, or under 4% of the respondents. The Department of Land Utilization supplemented this questionnaire with data obtained from the Real Property Tax Division, which shows that 37 properties with ohana units have been made into condominiums under the Horizontal Property Regime. This figure is 5.3% of the total number of completed ohana units as of June 30, 1987.

The human element is often missing in a dry recital of statistics. Below, some of the more thoughtful comments received in the survey are listed.

> "It's a godsend to have this type of zoning for the convenience of having the entire family living together which allows both families to have privacy and of course, most importantly, helping the younger generation get started in life. Nowadays an average income earner cannot afford to buy a home."
>
> "There are several ohana units in our neighborhood and the biggest objection from non-ohana owners seems to be the proliferation of on-street parking and the pressures from too many people on too little land, i.e., they spill over onto the street. This neighborhood has definitely been degraded by the ohana law. One lot which was previously a single family home with four bedrooms was granted a permit for two two-story additions with a new total of 12 bedrooms. Our street is sometimes difficult to negotiate because of trucks parked on both sides, children and pets in the street and a seeming disregard for the rights of others."
>
> "Should be confined to properties large enough to accommodate another unit, maintained properly, of quality construction, and in line with community requirements."
>
> "Excellent opportunity for small income property owners to supply needed housing and afford us the opportunity to obtain more favorable tax incentives for providing rentals. Would prefer the ohana zoning qualifications to remain the same."
>
> "I am relieved to know that when my parents are no longer able to live on their own, I have a home next to mine where they can live yet I can monitor and take care of them."
>
> "Retirees can convert their home equity into an income source and still remain on the property."

"It is my considered opinion that ohana zoning is positive because it helps the housing market and also helps seniors to continue to live in familiar surroundings, utilizes what otherwise might become wasted space, provides some income to help pay real property taxes, and most important, provides funds to maintain the [main house.] *** I do not feel taxpayers should shoulder the burden of street parking nor do I feel that residents in a neighborhood should be inconvenienced by illegally parked cars on sidewalks or permanent parking on streets ... It's not so important to control the number of unrelated versus unlimited related people living in a household, which is difficult to administer, as it is controlling the lack of parking ...."

"I'm very disenchanted with (ohana zoning). Mainly because we are not enforcing our zoning laws -- now we have ohana units in addition to all the illegal units."

"The ohana zoning permits affordable housing and if designed correctly actually improves the neighborhood. Although our original intent was to sell the unit on the open market, the price was such a good deal that my mother-in-law bought it."

"Love it! We helped our children through this. They were able to save money and went out to buy their own home."

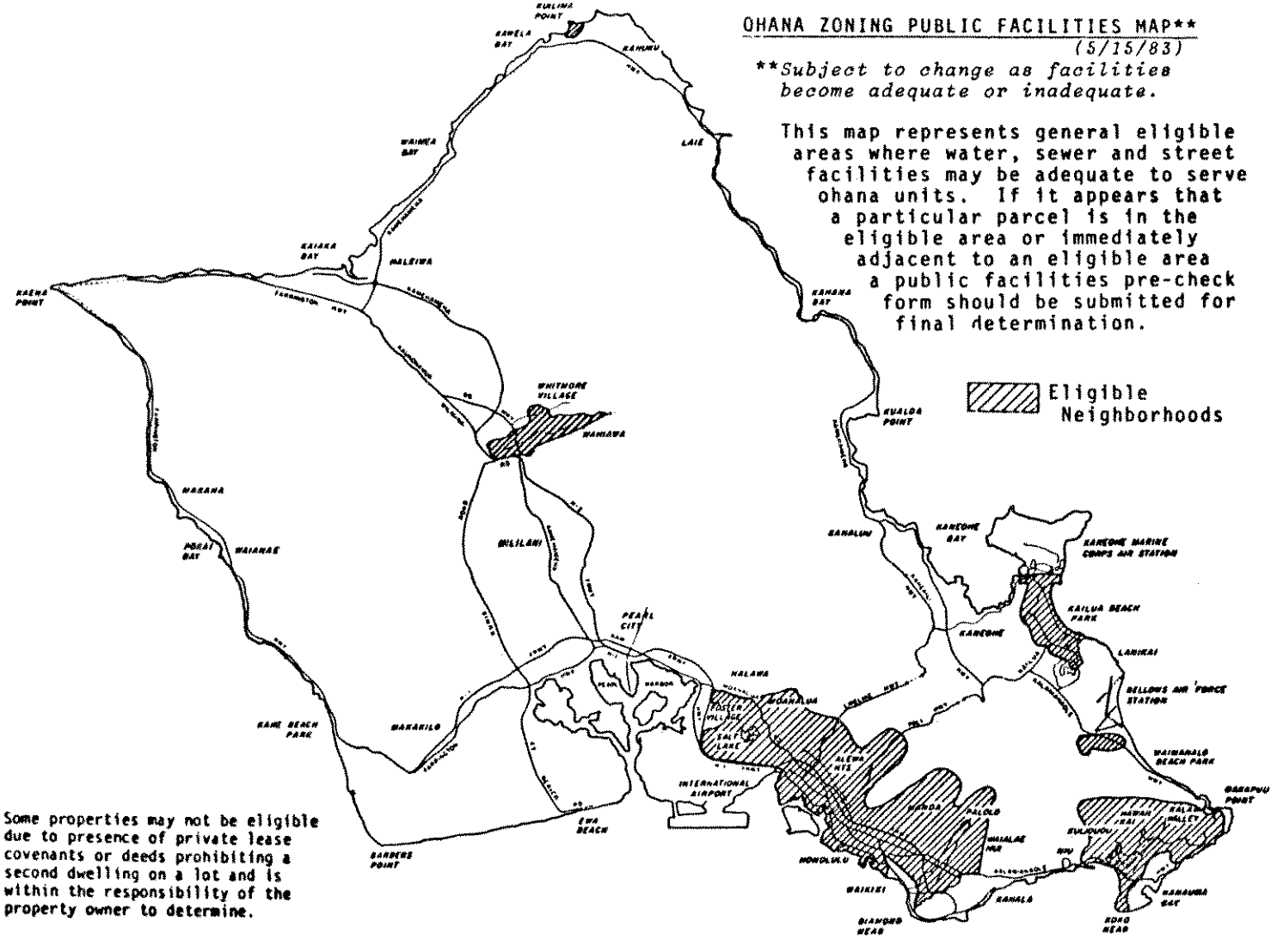
"It legalized a pre-existing condition for tens of thousands of people."

"I ... had no intention whatsoever in requesting for ohana zoning permit to build a unit for money-making purposes.... [My sister and I] are getting on in years and togetherness, we figured, would help and comfort us in many ways. I swear there's no intent on my part to cheat the government."

"Ohana home is for my children or relative to live and enjoy because children and grandchildren can't afford to buy property."

"I think it's gone beyond its original purpose where now people are building units for rental/sale to non-relatives."

"The unit is not rented or sold to my mother. She's living in it because she's family!"



Note: Some properties may not be eligible due to presence of private lease covenants or deeds prohibiting a second dwelling on a lot and is within the responsibility of the property owner to determine.

Kapahulu urban renewal area ineligible.

(To be made one and ten copies) (City and County Version) H.B. NO. 244

HOUSE OF REPRESENTATIVES
FOURTEENTH LEGISLATURE, 1987
STATE OF HAWAII

A BILL FOR AN ACT

RELATING TO COUNTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 46-4, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) [Neither this section nor any other law,] Each county [ordinance, or rule] shall [prohibit] adopt reasonable standards to allow the construction of [two single-family] accessory dwelling units on any lot where a residential dwelling unit is permitted[; provided:

(1) All], in accordance with applicable [county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback, maximum lot coverage, parking, and floor area requirements; and

(2) The county determines that public facilities are adequate to service the additional dwelling units permitted by this subsection.

This subsection shall not apply to lots developed under planned unit development, cluster development, or similar

provisions which allow the aggregate number of dwelling units for the development to exceed the density otherwise allowed in the zoning district.

Each county shall establish a review and permit procedure necessary for the purposes of this subsection.] zoning ordinances and rules, and general plan and development plan policies.

SECTION 2. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

INTRODUCED BY: _____

(As Introduced)

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FOURTEENTH LEGISLATURE, 1987
STATE OF HAWAII

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H.B. NO. 244

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INTRODUCED BY: Herbert J. Lamb
By Request

E7528
LRB/e6142