

Petition for Waiver and Suspension of §15-217-55(k)(2) of the Mauka Area Rules

Staff Report

July 22, 2015

Background: On May 28, 2015, OliverMcMillan Pacific Rim, LLC (“OMPR”) filed a Petition for waiver and suspension of Hawaii Administrative Rules (“HAR”) §15-217-55(k)(2) (“Glass Rule”) and to amend Development Permit No. KAK 12-075 (“Petition”). In the Petition, OMPR requested the Hawaii Community Development Authority (“HCDA” or the “Authority”) to: (1) waive or permanently suspend the Glass Rule as it applies to the Symphony Honolulu Project (“Project”) associated with Development Permit No. KAK 12-075 (“Development Permit”), that such waiver or permanent suspension be retroactive from April 5, 2015 and (2) suspend the Glass Rule for the Kakaako Community Development District (“KCDD”) in general pending further review, analysis, and research prior to consideration of an appropriate modification and/or amendment to remove the conflict and negative impacts of the current Glass Rule on other Mauka Area Rules.

On June 6, 2012, the Authority approved the Development Permit. The property subject to the Development Permit is located within the Mauka Area of the KCDD. The Development Permit was obtained under HAR Chapter 15-217, Mauka Area Rules of the KCDD (“Mauka Area Rules”). The Glass Rule is a provision under Subchapter 4 (Area-Wide Standards) of the Mauka Area Rules and reads as follows:

“Window glazing shall be transparent with clear or limited UV tint so as to provide views out of and into the building. Visible light transmission level of windows on the ground floor shall be seventy per cent or greater and on all other floors the visible light transmission level shall be fifty per cent or greater;”

Visual light transmittance (“VLT”) was the characteristic intended to be measured in the Glass Rule. The Development Permit was approved with the condition that OMPR would “comply with all applicable requirements of Subchapter 4 (Area-Wide Standards) of the Mauka Area Rules.” Exterior glass for the Project was not specified as a part of the Development Permit submittal. The level of design completeness for the Project at the time of the Development Permit approval was consistent with the typical submittal standards for a development permit submitted in compliance with the Mauka Area Rules. The Authority approved the Development Permit with the condition that OMPR shall comply with the Glass Rule and all applicable Subchapter 4 provisions.

The City and County of Honolulu (“City”) required that the Project obtain a Building Permit. The City requests that the HCDA review and acceptance of the drawings associated with the Building Permit prior to its approval. Although the Building Permit is not a HCDA permit, HCDA staff reviews Building Permit drawings for consistency with the Mauka Area Rules and the HCDA approved the Development Permit. The City provides the option to divide up the Building Permit approval process into several different stages to offer timely approvals and to help avoid project delays. Prior to the final Building Permit, developers can apply for a Foundation Permit and a Superstructure Permit for a development project. The developer applies for these additional permits and can build portion of the Project under those permits at its own risk, since the entire Project is not approved under a Building Permit. OMPR opted to divide up the Project Building Permit and applied for and received both Foundation and Superstructure Permits. OMPR submitted the Project Building Permit drawings for HCDA staff review in January 2015. Specifications for the Project’s exterior glazing was not provided as a part of the Building Permit drawing set. As a part of the Project Building Permit review process, on January 29, 2015 HCDA staff requested via email that OMPR provide the Project glass specifications relevant to the Mauka Area Rules. On February 4, 2015, OMPR responded with an email stating that the Project did not comply with the Glass Rule stating, “Symphony tower glass VRE 1-30 is 28% VLT and does not meet the 50% VLT required in this rule.”

On February 23, 2015, HCDA staff issued a Notice of Violation (“NOV”) to OMPR pursuant to HAR §15-219-99 for violating the Glass Rule. In the NOV, HCDA staff requested that, “any and all non-conforming windows which have been installed be removed by no later than March 25, 2015, and that the developer refrain from any further use of the non-conforming windows.”

On March 3, 2015, OMPR responded acknowledging receipt of the NOV and indicated that (1) OMPR will be seeking “a waiver or suspension of the minimum VLT requirement for windows above ground level in the Project” and (2) “OMPR does not intend to remove any of the so-called ‘non-conforming windows’ pending the final determination on its Petition for waiver or suspension of the administrative rule provisions in §15-217-55(k)(2)”, and (3) OMPR requested confirmation of the “cut-off date for submission of its Petition.” OMPR also notified the HCDA that the NOV is “without prejudice to OMPR’s right under §15-219-99(e) to file an appeal of the NOV letter to the Authority in accordance with §15-219-34 within thirty (30) days of OMPR’s receipt of the NOV letter.” In the letter dated March 3, 2015, OMPR highlights a so-called inconsistency within the Mauka Area Rules. It claims that the “VLT requirement is inconsistent with and conflicts with and/or severely constrains the design alternatives available to meet or achieve other requirements of the Mauka Area Rules, including without limitation, LEED standard energy efficiencies”.

On March 5, 2015, HCDA staff issued a revised Notice of Violation (“Revised NOV”) extending the date to resolve the violation to April 5, 2015. The Revised NOV included

additional language stating, “Pursuant to §15-219-99(e), you may appeal to the Authority within thirty (30) days of your receipt of this notice of violation. An appeal to the Authority shall not stay any notice or any fines imposed thereby.”

On March 9, 2015, HCDA staff responded to OMPR’s letter dated March 3, 2015 acknowledging and responding to the three points in their letter. On March 23, 2015, OMPR’s counsel, McCorriston Miller Mukai MacKinnon LLP (“Petitioner’s Counsel”), requested that the HCDA’s Executive Director, begin the process to waive and/or suspend the Glass Rule.

On March 30, 2015, HCDA staff sent a letter to the Petitioner’s Counsel acknowledging receipt of their March 23, 2015 letter and requesting that OMPR submit a petition. On April 1, 2015, OMPR responded to HCDA staff’s March 5, 2015 Revised NOV stating their intention to file a petition and not to remove the non-conforming windows.

On April 9, 2015, the Petitioner’s Counsel submitted an (1) “Appeal of the Executive Director’s Notice of Violation Letter to Appellant, Dated March 5, 2015 and Received March 10, 2015”, (2) “Motion for Modification of the Compliance Date of Notice of Violation, or in the Alternative to Stay Enforcement, Pending Consideration of any Request by OliverMcMillan Pacific Rim, LLC for Waiver and Suspension of §15-217-55(k)(2) of the Mauka Area Rules”, and (3) a letter request for administrative review and other relief relating to HAR §15-217-55(k)(2) of the Kakaako Mauka Area Rules.

On April 14, 2015, OMPR submitted a “Motion to Stay Appeal Proceedings Pending Consideration of any Request by OliverMcMillan Pacific Rim, LLC for Waiver and Suspension of §15-217-55(k)(2) of the Mauka Area Rules.”

On May 6, 2015, the Authority held a public hearing and approved an order “Granting OliverMcMillan Pacific Rim, LLC’s Motions to Stay Appeal Proceedings Pending Consideration of any Request by OliverMcMillan Pacific Rim, LLC for Waiver and Suspension of §15-217-55(k)(2) of the Mauka Area Rules; and to Stay Enforcement, Pending Consideration of any Request by OliverMcMillan Pacific Rim, LLC for Waiver and Suspension of §15-217-55(k)(2) of the Mauka Area Rules.”

At its May 27, 2014 public meeting, the Authority voted to deny OMPR’s “Request for Administrative Relief for the Symphony Honolulu Project Relating to Hawaii Administrative Rule §15-217-55(k)(2)” since there is no provision in the Rules of Practice and Procedure for the Authority to administratively waive or suspend community development district rules.

On May 28, 2015, OMPR submitted its Petition for waiver and suspension of §15-217-55(k)(2) of the Mauka Area Rules. In a letter dated June 17, 2015, the Petitioner’s Counsel clarified that it is requesting two separate action in its Petition that separate

procedural process would be applicable to each of the two requested actions under the Petition.

On June 20, 2015, a Notice of Public Hearing for considering the Petition was published in the Honolulu Star-Advertiser.

The President of the Senate and Speaker of the House of Representatives were notified upon the posting of the hearing notice. Associations of apartment owners of residential buildings in the KCDD adjacent to the Project, surrounding landowners and businesses, the Ala Moana/Kakaako Neighborhood Board, and the Kakaako Improvement Association were notified of the public hearings. Various elected officials and State and County agencies were also notified of the public hearings. Hearing notice was also provided to approximately 402 individuals and organizations that have shown interest in development activities in the KCDD.

As set forth in the Notice of Public Hearings, the deadline to intervene was July 10, 2015. No motion for intervention was filed.

On July 15, 2015, a pre-hearing conference was held at HCDA's office at 547 Queen Street, Honolulu, Hawaii 96813, and a Pre-Hearing Order was issued, requiring the submission of witness lists, exhibits lists, and exhibits by no later than July 20, 2015.

Discussion: OMPR has made the claim that the VLT requirement [§15-217-55(k)(2)] and the Leadership in Energy and Environmental Design ("LEED") requirement (§15-217-59) of the Mauka Area Rules cannot be met simultaneously, therefore, there is an inherent conflict in the Mauka Area Rules. To assess the OMPR's claim, staff needed to engage a mechanical engineering consultant to review the Mauka Area Rules as well as other pertinent energy and LEED rules. Following a Hawaii Revised Statutes, Section 104D-304, Professional Services procurement process, staff retained Douglas Engineering Pacific, Inc. ("Consultant") to review all pertinent rules and prepare building energy model simulation to evaluate the alleged conflict in the Mauka Area Rules. The Consultant is an electrical and mechanical consultant with expertise in LEED. The Consultant has reviewed all pertinent rules and prepared several building energy model simulation, including simulation for the Project with the glazing that is used in the Project that does not meet Mauka Area Rules requirements as well as glazing that meets the Mauka Area Rules requirements. The Consultant's report is provided as Exhibit A.

The Consultant's report indicates that there is no conflict between the VLT and LEED requirements of the Mauka Area Rules and any building, including an all glass high-rise tower, could be designed to meet both the VLT and LEED requirements. The report also provides a list of glazing products that can be utilized that meet the VLT and LEED requirements. Since there are several glazing products that can meet the VLT and LEED requirements, the VLT rule is not excessively restrictive either.

However, the Consultant provides some insight into the efficacy of regulating VLT. As provided in §15-217-55(k)(2) of the Mauka Area Rules, the intent of regulating VLT is to provide views out of and into the building. In a residential building, a high VLT glazing may cause privacy issues. A high VLT glazing is inherently less energy efficient, therefore, if sustainability and environmental consideration are a priority, lower energy consumption by a building may be more desirable than its transparency. Another objective of high VLT glazing requirement in the Mauka Area Rules was to minimize external reflectance and heat island effect in the surrounding environment. The Consultant's report indicates that high VLT glazing does not necessarily mean lower external reflectance. Glazing products researched by the Consultant indicate that there are several high VLT glazing that have high external reflectance. Also, there are low VLT glazing that have low external reflectance. For these various reasons, the Consultant recommends considering revising the VLT requirement in the Mauka Area Rules.

Attachment: Exhibit A - Douglas Engineering Pacific, Inc. Report