INTRODUCTION – **(Page 1 - Title)**
Thank you Ms Cochran for your invitation to speak today, as always it's an honor to participate in the democratic process and i'm happy to share the fruits of Maui Causes extensive research for our documentary on the contributing factors of Maui's shoreline degradation. Anyone interested in learning more about that, please see me after.

We're here to day to talk about 3 lot-or-less subdivision infrastructure deferral agreements.

(Page 2 - Maui Time Weekly)
Let me start with a quote from a cover story published by Maui Time Weekly:
"The war in Maui County over deferral agreements is raging again. It flares up now and then through the years, only to dissipate a few weeks later. Silent for the last couple years, the issue began getting discussed a few weeks ago. In fact, county officials are insisting that the problem may even be coming to an actual solution."
Problem is, that written by Anthony Pignataro in Jan of 2013 - just over five years ago.

Let's look at what's happened lately that's caused this issue to flair back up, and how we can solve these problems.

(Page 3 - Cover to Goode's Powerpoint)
On January 8, Public Works proposed the creation of an Improvement District for the substandard roadway Hui Road F in West Maui which, in part, involves collecting on several 3 lot-or-less subdivision infrastructure deferral agreements as a funding source. So collecting on deferral agreements along Hui Rd F is on the front burner. And Public Work's proposal is historic. Not only has the county never once collected on any of the thousands of deferral agreements it has written since 1974, this is the first time Public Works has publically addressed the unpaid agreements since 2014.

(Page 4 - Audit Resolution)
In December the council unanimously approved Mr. Guzman's resolution urging the independent county auditor to audit the Department of Public Works and make specific determinations needed, so the council can move forward with county business. Unfortunately, the Audit won't happen soon enough to address Hui Rd F.

The council stated it needs determinations on; the number of agreements that actually exist, the parcels involved, the CIPs that impact the parcels involved, the different permutations that exist, and their collectability relative to CIPs already completed as well as future CIPs.

The resolution included a partial history relating to the agreements. Briefly:

They were created in 1974.

(Page 5 - goode 2002)

No one knows how many agreements were written between 1974 and 1990.

Prior to 1990 the ordinance was silent as to whether subsequent subdivisions of the resulting lots could also defer their infrastructure improvements.

In 1990 it was made clear they could not: “The land so subdivided shall not thereafter qualify for this exception with respect to any subsequent subdivision of any of the resulting parcels." A one time event, that’s really important. **Remember that please.**

No one knows how many agreements were written between 1990 and 2007 when 3 lot or less deferral agreements were eliminated by the Council.

In 2015 the Upcountry Water Bill fully exempted 2 lot or less subdivisions from having to make any improvements to existing streets, or from contributing a pro rata share to any future County roadway projects. This exemption was added into the upcountry water bill at the last minute.

There’s a few relevant county actions that the recent auditor resolution did not reference:

(Page 6 - Title 18)

In 2010 the council addressed the fact that the county had never actually collected on any these agreements. Essentially, “When and if” was replaced with SHALL. “Notices of Intent to Collect SHALL be sent to property owners bound by the deferral agreements upon commencement of funding and frontage land acquisition.” Responding to the new ordinance Public Works sent out notices of intent to collect to 14 landowners in West Maui with deferral agreements because a CIP, 15 years in the making, was finally scheduled for construction. That project wasn’t Shovel Ready. County records show Public Works spent 1.2 million without first acquiring the necessary land rights.

(Page 7 - PC-17)

Also unreferenced in the recent reso was the extensive 2012 proposed legislation to address these oversights by hiring a professional firm to form assessment districts and collect on developer agreements. The bill also stipulated that all CIPs be Shovel Ready, with all land rights secured before actual construction drawings get authorized.

Council Services approved that proposed legislation as to its form and legality and it was forwarded, not to IEM, but rather to Planning, where it was killed. The Public Works Director told Mauitime weekly simply that Corp Counsel said the bill was not lawful. No further details were given, the differing legal opinions were not reconciled, and it's never been revisited.

(Page 8 - Goode 2012 Letter)
Also in 2012, Council Member Cochran put forth an extensive effort to establish a formula and method of assessment and collection when Phase IV of South Kihei Road was approved for funding. That hit a wall when Public Works wrote Member Cochran that "We are unable to respond at this time as we are researching the applicability of certain agreements on the ability to seek compensation and working out a formula for compensation on certain agreements. Rest assured we are actively working on the issue…" It's now 6 years later. They have still not revealed which agreements they were researching, proposed any formula for collection, or offered any determination as to whether any of the agreements can be collected on.

(Page 9 - Viewpoint)
In 2014 the Director of Public Works wrote in a Maui News Viewpoint "It's unfortunate that anyone would insinuate these agreements are invalid, secret or a big pot of gold that the county is not collecting. They are agreements, plain and simple, and the county is abiding by them." he further wrote: **"The Department of Public Works is currently enforcing the agreements per their express terms."**

In your deliberations over the auditor resolution a few weeks ago member Cochran mentioned that discussions about deferral agreements came to a standstill because of pending litigations. It should be noted that there were no lawsuits involving deferral agreements until 2015, three full years after Public Works stopped responding to your request for determinations. The lawsuits came because Corp Counsel invited them.

The administration has been silent and so today the public and this council are stuck wondering if Hui Rd F or **any** CIP island wide can be legally initiated and performed without first resolving the question as to whether the various forms of these 3 lot or less

deferral agreements can be collected on or not.

The 2015 two lot subdivision exemption, further complicates the collection question. The stated intention of it was to exempt only applicants on the upcountry water meter priority list, but we now know, the exemption is being applied to two lot subdivisions islandwide. For previously deferred subdivisions that actually only contain 2 lots, has their deferral now been replaced with an exemption? Either way, its clear that the citizens will continue to pay for the impacts and the improvements for private subdivisions. As the Hui Road F improvement district contains multiple 2 Lot subdivisions and overlapping deferral agreements, these questions must be addressed.

(Page 10 - proposal)
The county needs to move quickly to avoid uncertainty and public outrage and whatever is done here will set the precedence island-wide. Municipal standards and practices exist to manage this process and the council has already received proposals get it all handled professionally.

(Page 11 - ordinance 1990)
Understanding how all this evolved will help illuminate what systemic changes are needed going forward so that Maui can mature as a modern municipality with healthy transparency and accountability.

As I understand it, the intent of this ordinance was to allow parents to subdivide their properties for their kids and not face the immediate expense of performing infrastructure improvements, like road widening, overhead utility relocation, storm drain structures, curb, gutters, and sidewalks, etc. Instead, families could defer the cost of improving their subdivision frontage until the County performed an overall roadway project along that frontage. The owners simply agreed to pay a prorated share at some future date.

The whole thing made a lot of sense. For years the County didn't have overall roadway plans, so putting in costly improvements along relatively short frontages of a County road which will, in all likelihood, not match what the County did, whenever they did it, would only end up getting ripped out and replaced. A lose / lose end result and complete waste of millions of dollars of both public and private resources.

By County ordinance, subdivisions of 4 lots or more specifically require developers to install all conditioned roadway improvements to all or most of the frontage of their subdivisions. While not the stated intent, the 3-lot-or-less deferral alternative surely provided incentive to keep housing density low.

Should I do 4 lots or more and pay a fortune in infrastructure now or do I accept a one time only 3-lot-or-less limit, defer the costs now and maybe even pass them along to future owners? You bet!

It was a prudent and logical idea but the original ordinance was not well fleshed out and subsequent revisions, though well intended, have only made matters worse.

The troublesome unintended consequences, and why I think we are here today, have come from what the ordinance didn't do. What's missing from the ordinance has spawned systemic loopholes that have been the key to the exploitation of Maui's taxpayers and our environment, for decades. Here's what seems to have happened:

(Page 12 - Milton Arakawa qoute)
The ordinance didn't provide for any guidance or oversight of how to execute the agreements or manage them over time. For decades Corp Counsel wrote thousands of these agreements, recorded them with the Bureau of Conveyance, and then stored them in boxes and never referenced them again. Corp Counsel, Public Works & the Dept of finance have never successfully coordinated on cataloging them or collecting on them.

(Page 13 - Hui F Power Point Parcels)
Remember how these subdivision deferrals were supposed to be a one-time event? That's just the deferral part. If the lots were big enough, additional subdivisions **could** be added, but the ordinance restricted the new subdivisions from deferring, once again, the infrastructure improvements on the original subdivision's entire roadway frontage.

If additional lots were carved-out and added, beyond 3, that would logically trigger the 4-lot-or-more subdivision requirement and all improvements across the entire parent parcel must now be performed. It's a fair trade financially: Since the original owner's value gets decreased by the increased neighboring density and the new developers benefit financially by being able to build, the cost of all the improvements on the entire parent parcel, that were previously deferred, but now must be performed, are assumed by the incoming developers.

The intent of the original ordinance has clearly been obscured by the fact because the agreements were not cataloged and tracked, rather than adhere to the one-time-only limit, Corp Counsel continued to write deferral agreements for subsequent subdivisions. Developers, who knew how the system was flawed, applied for and got sequential,

overlapping 3 lots or less deferrals that allowed them to subvert the 4 lots or more requirements.

This map is from the Hui Road F PowerPoint presentation given by Public Works. You can see here that there are multiple numbers on certain parcels. Those are overlapping one-time deferrals on the same parent parcels. That's a problem when it comes time to collect.

But that's not the only problem.

The ordinance did not put any limitations on the size and acreage of the 3 Lots or Less subdivisions. It didn't put any limitations on what type of developments could take place on the resulting 3 Lots. As you'll soon see, over the years these agreements have been applied to commercial and massive residential and condominium developments, providing financial benefits to big developers far beyond the relief that was intended for local families. Is the new 2 lot or less exemption now being abused the same way?

The ordinance also didn't go into specific dollar amounts and provided no formula to calculate the future costs. It also didn't create any method of collection to complete the back end of the agreements.

The agreements Corp Counsel wrote did get recorded and attached to the land's deed, so they would travel over time with the parcel, not the original developer or land divider. But with no value, formula or payoff mechanism established on the agreements, they are open ended and there is no way for a property owner to satisfy and remove them from their title.

On titles the agreements show up in Schedule B as a nonspecific cloud and encumbrance. They only become an actual lien if and when the County sends a notice of its intent to collect. Remember that too because its important and we'll come back to it, Notice of intent to collect.

(Page 14 - Tom Welch qoute)

For decades prospective buyers and mortgage companies have been told by attorneys, real estate brokers and title companies not to worry about these agreements, simply, truthfully, because the County has never, ever, yet collected on any of them and that its questionable that they ever will.

(Page 15 - Auditors letter)

When Capital Improvement projects that should have triggered collection did occur, and CIP's did occur many times, the County has never collected from the landowners their fair share. One of the legal questions that Corp Council has not addressed, and maybe the auditor will, is whether since the County did not pull the trigger at the time the roadway projected was completed, can they go backwards now to try to collect?

(Page 16 - Director Goode's Figures)

How much money are we talking about? Let's apply the suggested assessment figures that Director Goode sent to Council Member Cochran on April 16, 2012 to a typical 3 Lot Subdivision. We know they come in much larger shapes and sizes, but let's establish a minimum foundation of the magnitude of what's uncollected.

Minimally lets say a lot has 100 linear feet of roadway frontage, that's the width of this room.

100 feet at a cost $250 per lineal foot which the Director of Public Works applied to development along South Kihei Road = $25,000.00 per lot. Who wouldn't cough up $25,000 to obtain an extra buildable lot on Maui? That's a gift.

3 lots would equal $75,000. Think you could improve 300 feet of road widening, drainage, utility relocations, curb, gutter and sidewalk for just $75,000? Again it's a gift, way low by real world cost estimates, but let's use it as our base.
If there were just 1000 of these agreements that's 75 million dollars.

(Page 17 - sullivan qoute)

Our research shows the director's $250 per linear foot is way low. We've got actual bids from actual engineering firms on actual County roadway projects which show the number may be more than 3 times the director's estimate. If we find this to be case islandwide, the number mushrooms to over 200 million dollars.

Keep in mind, this is a 100 lineal foot per parcel estimate. I know of a development upcountry that is 65 acres. That could be a ¼ mile of uncollected deferred improvements that get absorbed by Maui taxpayers. The public has, and will continue to foot the bill for the private developers obligations.

These 3 Lots or Less subdivisions are also completely exempt from having to pay Park Assessment Fees, regardless of size or assessed value of the resulting parcels.

Multimillion dollar ocean front homes, no park fees paid, ever. Another huge giveaway of what would otherwise be the public's assets.

The money owed from these agreements are revenues to offset the expenditures of public funds for projects approved during annual budget hearings. Our Charter requires the Administration to establish and track a 5 year projection of anticipated revenues for future projects. But because the administration has not cataloged the agreements, even if we went with The Director's $250 per linear foot, no one knows how many roadway feet are involved. The County really has no idea how much money is missing every year from the annual budget which the Council is asked to approve. That the owed amounts are not included as a line item in the annual budget appears to be a repeating violation of the County Charter.

(Page 18 - south kihei areal 4 phases)

And so the simple questions are: how many subdivision deferral agreements are there? This view shows just a small section of S kihei rd. Each circle is a deferred subdivision. Some of the sites are huge. Can these be collected on? What would be a real world formula to use to collect on them?

Those are basically the questions that the council just voted 9 to 0 to ask the independent county auditor to answer because no one else has.

(Page 19 - W&K beach homesteads)

Let's look at what took place on just one oceanfront development along South Kihei road:

(Page 20 - chart part 1)

1) In 1984, the underlying oceanfront parent parcel was subdivided into 2 lots and Corp Counsel executed and recorded a "3 Lots or Less" roadway improvement deferral agreement on the resulting parcels.

(Page 21 - chart part 2)

2) In 2002, one of those lots was further divided with another 3 lot subdivision, making a total of 4 lots. It's not that the subdivision itself was a problem, rather the problem came when Corp Counsel executed and recorded another "one time", "3 Lots or Less" deferral agreement of the second subdivision parcels.

Not only did the overlapping subdivision NOT qualify for the deferrals, the overlapping subdivision triggered the 4-lot or more requirement and roadway improvements should have been made right then to the frontage along the entire parent parcel.

(Page 22 - chart part 3)

3) In 2005, a Public Works Deputy Director signed off on yet another 3 lot subdivision, making it 6 multi million dollar, oceanfront parcels. Both these overlapping, one-time deferrals were outside the Director's authority and represent a complete disregard for County ordinance.

In 2001, Council Member JoAnne Johnson Winer had already informed the Director and the Mayor that 4 lot or more requirements were being subverted using 3 Lots or Less deferral agreements and the citizens were incurring the costs.

Finally in 2007 Johnson Winer forced an end to the 3 lot or less deferral program. I'd like to note that at that time 26 parcels were grandfathered in and though they have not yet been developed they still carry the entitlement to do so and can still defer their infrastructure costs.

(Page 23 - Kihei Aerial Map 1)

This is also kihei. Letter k is a massive development with enormous collective frontage, involving acres and acres of homes that were all carved out from the same original 3 Lots or Less subdivision. Each and every home has a "3 Lots or Less" deferral agreement recorded on it's title.

(Page 24 - Kihei Aerial Map 2)

Here letters x y & Z shows a commercial development along Lipoa with a mini storage and office buildings that was allowed to use a "3 Lots or Less" deferral agreement. And notice how many parcels have circle over circles which represent multiple overlapping deferral agreements.

(Page 25 - goode quote 1)

All of these questionable applications in just one area of Maui grew out of the "3 Lots or Less" deferral ordinance, shifting tens of millions of dollars of the both commercial and residential developer's financial obligations to us, the taxpayers. Phase 1, 2 and 3 of s kihei rd have been completed, Phase 4 has been funded, and none of that has triggered the collection required by the ordinance.

How many different variations of deferral agreements has Corp Counsel written?

1. 3 Lots or Less prior to 1990 amendment.
2. 3 Lots or Less after 1990 amendment.
3. 3 Lots or Less with multiple overlapping applications of additional 3 Lots or Less.

4. 3 Lots or Less with countless condominiums on one of the resulting parcels.
5. 3 Lots or Less with Multi Single Family Homes in a Planned Development on one of the resulting parcels.
6. 3 Lots or Less in Commercial / Industrial zones.
7. 3 Lots or Less on “Crazy” overlapping subdivisions that the director of Public works has referenced, without disclosing where they occured.
8. And finally, there’s one application that we know of, and may be more, where a private attorney actually altered the 3 Lots or Less County agreement by writing private warranty deeds to add parcels beyond the 4 lot threshold, with no notices to or approvals from the county or the other subdivision participants.

So what happens if the County tries to start collecting on one or more of these many different types of agreements as they are proposing on Hui Road F? This is where It gets thorny.

Who do they collect from?
Wouldn’t the owners of the first layer of deferrals claim that the subsequent deferrals which agreed to pay the future amounts, absolves them of the financial burden established in the original agreement? Wouldn’t the second say that of the third?
Or would the second and the third realize that in issuing their agreements the County made a faulty decision that violated the one time only stipulation of the county’s own ordinance, making their agreement unenforceable?

That’s reminiscent of Montana Beach where the county vigorously defended a Director’s faulty decision, and ultimately lost, and Maui Taxpayers ended up having to make the developer whole. How many Montana Beaches are out there? How many overlapping multiple applications of one time only deferral agreements are out there?

(Page 26 - goode quote 2)
In his viewpoint the Director of Public Works wrote, this is not a “countywide conspiracy, it actually boils down to a conflict between neighbors that has been ongoing for years.”

The fireworks have NOT begun yet. Just wait until the county moves to collect countywide, which they actually tried to do along one CIP in 2010, with disastrous results that are still working their way through the courts today.

As the Director asked recently: If one of the lots is oceanfront with just a narrow driveway that fronts along a major roadway, while the other two lots front the County

roadway completely, do they split the bill in thirds or does the oceanfront owner, with a property of obvious greater value, just pay for the linear footage of his narrow driveway?

Are neighbors to “haggle” over how to determine pro-rata shares amongst themselves, as one Director put it in public hearings? Where in the ordinance is that dispute driven language?

(Page 27 - goode quote 3)
In his 2014 Maui News Viewpoint the Public Works Director wrote ”the agreements state that if and when the County of Maui does a capital improvement project along a roadway fronting a property that has one of these agreements recorded against it property, the county **may** recover the costs of doing those improvements that were specifically deferred. That may have been true before 2010, but not after. In 2010 the council mandated that all CIP’s must trigger notices of intent to collect, which triggers the whole encumbrance transition to lien debacle.

(Page 28 - sma permit record)
Public records reveal that the impacts of how deferral agreements are managed goes beyond financial, to include the degradation of our shorelines. Installing roadway and drainage improvements, storm drains, curb inlets, retention basins, that are assessed as environmental protections under SMA Minor permits often get lumped into the work that gets deferred under a 3 lot or less subdivision deferral agreement, and the environmental protections never get installed.

We believe this is actually a violation of the Federal Shoreline Management Act which ironically, the County of Maui is paid by the State of Hawaii to administer and uphold.

(Page 29 - johnson)
In 2015 former County Council Member Joanne Johnson wrote: “As I have learned during the final years of my tenure as a Council Member, the Planning Department was not tracking SMA requirements that would insure compliance of developers in completing their SMA Permit roadway and drainage mitigations. They appear to rely solely on the integrity of developers and complaints from citizens to administer developer compliance.
I am deeply concerned that the SMA permitting process has become a means for private developers to skirt their infrastructure and environmental mitigation responsibilities, since enforcement may be absent or selective.”

(Page 30 - brown water)
We all see the impacts as we sit in traffic along the shoreline roadways. Is this an unethical manipulation of county ordinances that violates federal law and contributes directly to the degradation of our precious shoreline?

(Page 31 - petition)
Because we've seen no movement from the county to close these loopholes that are impacting the public and our environment Maui Causes recently initiated a public petition that also calls on the county's independent auditor to assess the loses to the public from both deferral agreements AND SMA Permit application fraud. We've got 1757 signature represented right here. At the council's request we'd be happy to make a seperate presentation on how that SMA permit fraud works.

(Page 32 - end Title)
Looking forward, there are some silver linings manifested from this all of this research once we tackle the hard realities of this sobering history. So let's look at how to put an end to the mess, admit our oversights, and repair the injuries we've all suffered;

First, the Council and the public needs a sample of each of the different forms and applications of deferral agreements that Corporation Counsel has executed so the entire playing field can be evaluated as a whole.

Second, Each individual form of agreement needs a legal determination as to its enforceability and collectability.

Third, we need a legal opinion as to whether collecting on one form of agreement and not another constitutes selective enforcement, which could force the forgiveness of them all.

Fourth, we need a determination as to whether an agreement can be collected on if it relates to a CIP that has already been completed, or, if the County failed to collect on prior phase of a roadway, can they collect on future phases.

Fifth, if the agreements are deemed collectable, we need to establish a database, boundary map, a formula of assessment for each type of deferral agreement, a process for proper noticing and collection, and the removal of the encumbrance on the affected parcels.

Sixth**,** if the Council determines the collection and assessment process will lead to overwhelming disputes between property owners and repeating legal challenges, we need to swallow our pride and expunge them and all look to apply the lessons learned going forward.

Seventh, as a Council, while the immediate legal review is taking place, we can make sure we don't repeat these errors by adopting legislation to insure every future development pays their fair share their roadway infrastructure.

We should look back at the legislation that was shelved at the direction of Corporation Council in 2012 which provided concise solutions to accomplish these goals. For example;

- If the frontage lies along a roadway without an adopted plan, we can collect a fee in lieu with district specific accounts like park fees.
- We can avoid the legal challenges that could stall all new roadway projects by replacing the questionable islandwide upcountry water bill 2 lot exemption with an appropriately determined Fee in Lieu.
- We can avoid millions of dollars of waste by insuring CIP's are shovel ready before approving funding. What this means is the overall plan has been presented to the public and adopted by the Council and the land rights along the roadway frontages have been negotiated and secured.
- We can amend the County code to ensure all developments including condominization and re-subdivision and consolidation of Agricultural subdivisions are treated the same. For example, the overlapping splitting of land ownership through condominiumization of Ag lots should be treated the same as other land subdivisions.
- We can eliminate the ongoing Park fee exemption for 3 Lots or Less and only provide relief for subdivisions processed under the family subdivision ordinances. For example, oceanfront subdivisions and resulting multi million dollar residences should not receive ongoing exemptions from paying their share of park fees.
- We can amend Title 18 of the Maui County Code to ensure that SMA Permit environmental mitigations are implemented into the roadway engineering plans and completed as assessed and not deceptively discarded, deferred, or exempted.
- We can amend Title 18 of the Maui County Code to ensure, as most municipalities do, that all order of magnitude estimates created by development consultants for the issuance of SMA Permits are signed off by engineers in

Public Works for their accuracy to insure they have not been purposely underestimated to avoid public review and environmental assessments.

Maui Causes seeks positive and urgent change and we hope this presentation aids in this purpose on the issues presented today.

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