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November 18, 2024

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OFFICE OF THE
COUNTY COUNCIL

MEMO TO: Nohelani U'u-Hodgins, Chair
Government Relations, Ethics, and Transparency Committee

F R O M: David Raatz, Director of Council Services *DMR*
Megan Moniz, Legislative Attorney *MM*

SUBJECT: **INDEPENDENT NOMINATION BOARD** (GREAT-5(7))

Introduction

Through the Charter Commission's apparent inadvertence, the 2022 Charter amendment on the Independent Nomination Board failed to provide a mechanism to fill board and commission vacancies under certain circumstances.

You have asked us whether an ordinance to provide a mechanism to fill board and commission vacancies in those circumstances would be allowed under the Revised Charter of the County of Maui (1983), as amended.

As explained below, we think the answer is probably yes, the Council could enact a valid ordinance for such a purpose under the Charter.

2022 Charter Amendment on Boards and Commissions

Charter Section 13-2, "Boards and Commissions; Nomination of Certain Officers," was revised by the electorate's approval of Charter Commission Proposal Ten at the 2022 General Election, effective July 1, 2023.

The Charter amendment created the Independent Nomination Board to "recruit, evaluate, and nominate individuals to serve on boards and commissions established by this charter and by ordinance, and such other offices as shall be specified in this charter." The Charter amendment also established new procedures for boards and commissions, with the INB, the Mayor, and the Council facing various deadlines.

Permanent Board and Commission Vacancies

For most boards and commissions, the Mayor makes nominations for the Council's approval or disapproval. Under the prior version of Section 13-2, when

the Mayor missed a deadline to make a nomination, the Council was given unilateral authority to fill the seat. Additionally, when the Council missed a deadline to approve or disapprove a nomination, the Mayor's appointment would be approved.

Under the new version of Section 13-2, the Charter does not provide a mechanism to fill seats when the INB, Mayor, and Council all miss their deadlines. As a result, several current seats are set to remain unfilled until their terms expire. For some seats, the terms expire on March 31, 2025, and the vacancies can be filled through next year's mass-nomination process. For other seats, though, the seats are set to remain vacant through March 31, 2026; March 31, 2027; March 31, 2028; and March 31, 2029.

Issue Raised by the 2022 Charter Amendment

We have considered this legal issue: Does Section 13-2's silence prevent the Council from establishing by ordinance a mechanism to fill these open seats?

Interpretation of Charter Provisions

Charter Section 12-1(1) says the Charter Commission's intent is the "foremost" guiding principle when interpreting a Charter amendment. Intent is found by examining the Charter amendment's language and, if needed, the following:

- "extrinsic aids," such as a Charter Commission report;
- the Charter amendment's "spirit and purpose," and
- "the cause that induced" the Charter amendment.

Council's Ability to Enact an Ordinance to Fill Board and Commission Vacancies

We have reviewed the 2021-22 Charter Commission's meeting minutes and found no direct expression of intent on the question of whether the Council could enact an ordinance on filling board and commission vacancies. The

Charter Commission received testimony from Ipo Mossman, a former Executive Assistant in the Office of the Mayor, on the County's difficulty in filling board and commission seats. The Charter amendment charged the INB with recruiting applicants for board and commission vacancies. In this context, a reasonable inference is that the Charter Commission's intent and the Charter amendment's "spirit and purpose" were for the County to improve its effectiveness in filling board and commission vacancies.

In Hawai'i, ordinances are presumed valid. *Lum Yip Kee, Ltd. v. City & County of Honolulu*, 70 Haw. 179, 189-90, 767 P.2d 815, 822 (1989). That presumption will be overcome when an ordinance conflicts with the Charter's express terms, object, or purpose. *Harris v. DeSoto*, 80 Haw. 425, 431, 911 P.2d 60, 66 (1996).

Here, the Charter's terms do not prohibit the Council from enacting an ordinance on boards and commissions. Indeed, Charter Section 13-2 on boards and commissions refers to, and by implication authorizes, ordinances on boards and commissions. So, the Charter's structure shows that the Charter is not intended to be the sole source of policy on boards and commissions. An ordinance that allows for the filling of board and commission vacancies, without contradicting any Charter text, would probably be valid.

This conclusion is bolstered by two additional principles.

First, Charter provisions must be construed to avoid "absurdities." § 9:23, "Construction of charter," 2A *McQuillin Mun. Corp.* § 9:23 (3d ed.). Construing a Charter provision or other law in a way that defies the drafters' intent leads to "absurd results." *Amantiad v. Odum*, 90 Haw. 152, 165, 977 P.2d 160, 173 (1999) (construing a statute to require Director of Labor's approval of settlements, despite the absence of express language, to avoid absurd results); *Lawhead v. United Air Lines*, 59 Haw. 551, 557, 584 P.2d 119, 124 (1978) (authorizing workers' compensation benefits for an employee who spent much of her time out of state, even though the law limited coverage to employees "hired in the state"). A literal construction of a law is absurd if it creates "illogicality." *Keliipuleole v. Wilson*, 85 Haw. 217, 222, 941 P.2d 300, 305 (1997).

In this matter, construing the Charter as allowing an ordinance to create a mechanism to fill board and commission vacancies would avoid the "illogicality" of permanent vacancies.

Second, courts in other jurisdictions have noted the long-held principle that “general law can be used to fill in gaps in what a charter doesn't expressly provide for.” *People ex rel. Kerr v. County of Orange*, 106 Cal. App. 4th 914, 926, 131 Cal. Rptr. 2d 274 (2003).

Examples of gaps in charters that have been filled by general law include:

- “charter forgot to provide for retirement for probation officers”;
- “charter omitted mechanism for filing claims”;
- “charter omitted salary for assistant district attorney”; and
- “charter made no provision for a deputy county clerk to be paid.”

Id.

One example of the Council enacting an ordinance to fill a gap in the Charter is found in Section 2.01.020, Maui County Code, which states: “The office of the mayor must provide necessary staffing to assist the independent nomination board in the exercise of its authority.” The Charter makes no provision for the INB’s staffing. The staffing ordinance enacted by the Council has not been considered to be in conflict with the Charter.

The Department of the Corporation Counsel has endorsed the concept of gap-filling ordinances. After a 2002 Charter amendment restructured the Department of Water Supply, the Council noticed gaps in the new version of the Charter and sought the Department of the Corporation Counsel’s guidance. In the attached opinion dated December 4, 2022, the Department provided the following advice:

[Under] Charter Section 2-2, the Council may, by ordinance, implement Charter amendments and define necessary terms and establish procedures. Any implementing ordinances should conform to, not conflict with, and not exceed the confines of the Charter, as amended.

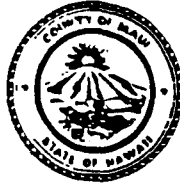
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Conclusion

We would be pleased to draft a bill for an ordinance, under your direction and in consultation with the Department of the Corporation Counsel, to create a mechanism to fill board and commission seats that would otherwise have permanent vacancies. We believe such an ordinance could be drafted to avoid conflicting with Charter Section 13-2. Please let us know if you would like us to do so or if you have any questions.

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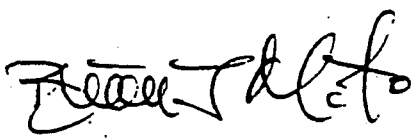
Attachment



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December 4, 2002

TO: Dain P. Kane
Acting Council Chair

FROM: Brian T. Moto
First Deputy Corporation Counsel 

SUBJECT: COMPLYING WITH AND IMPLEMENTING NEW CHARTER AMENDMENTS
(PAF 02-259)

The purpose of this memorandum is to respond to your memorandum, dated November 8, 2002, requesting legal advice regarding amendments to the Revised Charter of the County of Maui (1983). These amendments were adopted by the voters of the County at the general election of November 5, 2002.

We respond to the questions posed in the order in which they were presented.

1. Pursuant to Charter Section 14-2(3), will the approved Charter amendments become effective on December 5, 2002 (30 days after they were approved at the general election)? Is the 30-day period triggered by the election date or the date upon which the election results are certified?

At the general election of November 5, 2002, the voters (or electors, as they are referred to in Chapter 50, Hawaii Revised Statutes ("HRS")) voted upon nineteen¹ individual Charter amendment proposals, of which two (proposals 7A and 9A) were alternative proposals. Of the nineteen Charter amendments proposals, three

¹The proposals were numbered 1, 2, 3, 4, 5, 6, 7, 7A, 8, 9, 9A, 10, 11, 12, 13, 14, 15, 16, and 17.

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proposals² were proposed by the Council through resolutions³ adopted pursuant to Charter Section 14-1(1).⁴ The remaining Charter amendment proposals were proposed pursuant to the deliberations of the 2001-2002 Charter Commission and the procedures prescribed by HRS Chapter 50 and were set forth in the Charter Commission's Revised Final Report.

Based upon the votes cast at the general election, sixteen of the Charter amendment proposals were adopted.⁵

Charter Section 14-2(3) states, in pertinent part, as follows:

3. Should the majority of the voters thereon approve the proposed amendments to this charter, the amendments shall become effective at the time fixed in the amendment, or if no time is fixed therein, thirty (30) days after its adoption by the voters of the county.

Council Resolution Nos. 02-99, 02-100, and 02-101, pertaining to Charter amendment proposals 15, 16, and 17, respectively, included identical effective date provisions. In particular, each of the Resolutions included a provision that stated as follows:

That, upon approval by the majority of the voters in favor of amending the Revised Charter of the County of Maui (1983), as amended, as indicated by the number of votes cast and upon official certification of such result, the amendments proposed herein shall take effect.

Therefore, pursuant to Charter Section 14-2(3) and Resolution Nos. 02-99, 02-100, and 02-101, Charter amendments 15, 16, and 17

²Charter amendment proposals 15, 16, and 17.

³Resolution No. 02-99 (Charter amendment relating to nomination and confirmation of individuals appointed to fill vacancies on boards and commissions); Resolution No. 02-100 (Charter amendment relating to restrictions on Council and Council members); Resolution No. 02-101 (Charter amendment relating to initiative).

⁴Section 14-1 states, in pertinent part: "Amendments to this charter may be initiated only in the following manner: 1. By resolution of the council adopted after two readings on separate days and passed by a vote of six or more members of the council."

⁵Charter amendment proposals 1, 3, 4, 5, 6, 7, 8, 9A, 10, 11, 12, 13, 14, 15, 16, and 17.

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will take effect upon certification of the results of the general election. Pursuant to HRS Section 11-155, the county clerk is required to compile and certify election results after the expiration of the time for bringing an election contest. Under HRS Section 11-174.5, a complaint contesting the results of a general election must be filed no later than 4:30 p.m. on the twentieth day following the general election. Roy Hiraga, County Clerk, has informed us that no complaints were filed by the filing deadline, and all race results have been certified by the State Office of Elections. He has further informed us that he will be certifying the Charter amendments shortly, as soon as he is able to publish the certification in *The Maui News*.

The Revised Final Report of the Charter Commission set forth no effective date provisions regarding Charter amendment proposals 1, 3, 4, 5, 6, 7, 8, 9A, 10, 11, 12, 13, and 14. Therefore, in the absence of any specified effective date, and pursuant to Charter Section 14-2(3), Charter amendments 1, 3, 4, 5, 6, 7, 8, 9A, 10, 11, 12, 13, and 14 become effective "thirty (30) days after ... [their] adoption by the voters of the county." Further, because Charter Section 14-2(3) refers to the date of "adoption by the voters", which is that date on which the voters cast ballots, the effective date should be determined by reference to the number of days elapsing from the day of the general election, not the day of certification of election results.

Accordingly, we are of the opinion that Charter amendments 1, 3, 4, 5, 6, 7, 8, 9A, 10, 11, 12, 13, and 14 will become effective on December 5, 2002, which is that date that is thirty days after the general election.

2. Revised Chapter 11 (of Article 8) states that the Director of Water Supply shall be appointed or removed by the Mayor with the Council's approval. What is the legal status of the existing Director's position? Does the position become automatically vacated upon the effective date of the subject Charter amendment or may the Director continue to hold the position until removed by the Mayor with the Council's approval?

Pursuant to Charter amendment 9A, the Department of Water Supply will, upon the effective date of the Charter amendment (see foregoing discussion regarding December 5, 2002 effective date), become a County agency subject to the Mayor's executive management and the Council's legislative oversight.⁶ In summary, amendment 9A

⁶2001-2002 Maui County Charter Commission Revised Final Report 27-28.

recasts the Board of Water Supply as an advisory body, repeals those portions of the Charter that authorize the Board of Water Supply to appoint, evaluate, and remove the director of the Department of Water Supply, and confers upon the Mayor the power to appoint the Director of the Department of Water Supply, with the approval of the Council.⁷

⁷Among other changes, amendment 9A amends Charter sections 8-11.3 and 8-11.4 as follows:

Section 8-11.3 Board of Water Supply. The board of water supply shall consist of nine members who shall be appointed by the mayor with the approval of the council. The [planning] director of the department of planning and the director of the department of public works and waste management shall be non-voting ex-officio members of the board of water supply. The board of water supply shall act as advisor to the director of the department of water supply, the mayor and the council in all matters concerning the county's water system.

Section 8-11.4 Powers, Duties and Functions. The board of water supply shall:

1. [Appoint, evaluate and remove the director of the department of water supply.] Review and submit to the mayor the department of water supply's request for an annual appropriation for operations and capital improvements.

[2. Have the authority to create and abolish positions.

3. Adopt rules and regulations which shall have the force and effect of law relating to the management, control, operation, preservation and protection of the water works of the county, as well as the establishment and adjustment of rates and charges for furnishing water; such rules and regulations shall be adopted as provided under Section 8-11.8 below.]

2. Recommend the establishment and adjustment of rates and charges for furnishing water; such rates and charges shall be submitted to the mayor for review and approval. If approved by the mayor, proposed rates and charges shall be submitted to the council for enactment by ordinance.

[4. Adopt an annual operating and capital budget.

5. Have the authority to issue revenue bonds under the name of the board of water supply.

6. Have the authority to acquire by eminent domain, purchase, lease or otherwise, and to sell, lease, or otherwise convey real property in the name of the board of water supply.

7.] 3. Perform such other duties and functions as shall be prescribed by law.

Section 8-11.5. Director and Deputy Director of Water Supply.

Amendment 9A does not explicitly address the transition from the current Board and Department of Water Supply to the reorganized Board and Department of Water Supply. Nevertheless, we believe that, as of the effective date of Charter amendment 9A, December 5, 2002, the term of office of the current Director terminates by operation of law, inasmuch as Charter amendment 9A effects a comprehensive reorganization of the Board and Department of Water Supply involving, among other changes, a change in the powers and responsibilities of the Board and the Department as well as a change in the manner of appointment of the Director.⁸

Charter Section 6-2(4) authorizes the Mayor to appoint, on a temporary basis, an administrative head of any department, provided that such department is one where the administrative head is appointed by the Mayor. Therefore, pursuant to Charter amendment 9A and Charter Section 6-2(4), the current Mayor, James "Kimo" Apana, may, on or after December 5, 2002, the effective date of Charter amendment 9A, appoint an acting⁹ Director of the Department

The director of the department of water supply shall be appointed [and evaluated] by the [board of water supply] mayor with the approval of the council, and may be removed by the [board of water supply] mayor with the approval of the council. The director of the department of water supply shall have a minimum of [three] five years of experience in [an administrative] a management capacity, either in public service or private business, or both. The deputy director of the department of water supply shall be appointed by the mayor and may be removed by the mayor. The director or [his] deputy of the department of water supply shall be a registered engineer.

⁸See McQuillin Mun. Corp. § 12.113 (3rd ed.) (stating that, in some cases, reorganization will work a change in official terms). See also McQuillin Mun. Corp. § 12.118 (3rd ed.) (stating that a charter office may be abolished by amendment of the charter, even though the effect may be to curtail an incumbent's unexpired term).

Further, although Charter § 6-2(3) provides that the administrative head of a department may hold over for a period not exceeding sixty days, we interpret Charter § 6-2(3) as referencing an administrative head who was appointed by the Mayor. Because the incumbent Director of the Department of Water Supply was appointed by the Board of Water Supply and not the Mayor, we do not believe Charter § 6-2(3) to be applicable in this case.

⁹The Director, if appointed, is referenced as serving in an "acting" capacity because, under the Charter as amended, such an appointment will be subject to Council approval, and, given the Council's schedule of meetings for the remainder of the calendar

of Water Supply. Pursuant to Charter Section 6-2(3), the term of office of any administrative head of a department who is appointed by the Mayor ends with the term of office of the Mayor. Therefore, the term of office of the acting Director would end on January 2, 2003, concurrent with the end of the current Mayor's term of office.¹⁰ The current Mayor may also, on or after December 5, 2002, and pursuant to Charter amendment 9A, appoint a Deputy Director for a term ending on January 2, 2003.¹¹

The individuals appointed by Mayor Elect Alan Arakawa to serve as Director and Deputy Director of the Department of Water Supply will assume office on January 2, 2003.

3. Revised Chapter 11 also eliminates all references to the Board of Water Supply's rule-making authority. What is the legal status of the Board's existing rules? That is, were they impliedly repealed by the Charter amendment, or are they still in effect? May the Council by ordinance repeal the existing rules?

In summary, administrative rules validly adopted have the force and effect of law and continue to have effect until repealed or superseded by other law.¹² As discussed above, Charter amendment 9A makes extensive changes to the structure and respective powers and responsibilities of the Board and Department of Water Supply. Among other revisions, Charter amendment 9A repealed those provisions relating to the Board's rule-making authority, but did not explicitly address the status of the Board's existing rules.

We believe that, to the extent that the Board's existing rules are not inconsistent with, or contrary to, Chapter 11 of the Charter, as amended, such rules remain effective. Conversely, to the extent that any of the Board's rules are inconsistent with, or contrary to, Chapter 11, as amended, such rules have been

year, it is unlikely that Council confirmation of the appointment would or could be achieved before the end of the current Mayor's term of office.

¹⁰Charter § 7-2 provides that the Mayor's term of office begins at twelve o'clock meridian on the second day of January following the Mayor's election.

¹¹Pursuant to Charter § 8-11.5, as amended, the appointment of a Deputy Director would not be subject to Council approval.

¹²See HRS Chapter 91.

superseded by the Charter amendments and are no longer effective. Inasmuch as we have not been presented with, or had opportunity to consider, each of the many substantive and procedural rules that have been adopted by the Board of Water Supply to date, we reserve opinion at this time as to the legal status of any particular rule.

In the meantime, we have been informed that Council staff has prepared, and Acting Council Chair Dain Kane has submitted, a bill for an ordinance that would clarify the status of the Board's rules by expressly providing that such rules shall continue to have the force and effect of law and that they may be amended or repealed by ordinance.¹³

4. Revised Chapter 8 (or Article 8) uses many undefined terms (including "land use ordinance") and is silent on many procedural issues (e.g., when deadline periods are triggered and tolled). May the Council by ordinance, with the intention of implementing the subject Charter amendment, define necessary terms and establish procedural standards?

Charter Section 2-2, pertaining to exercise of powers, states:

All powers of the county shall be carried into execution as provided by this charter, or, if the charter makes no provisions, as provided by ordinance or resolution of the county council.

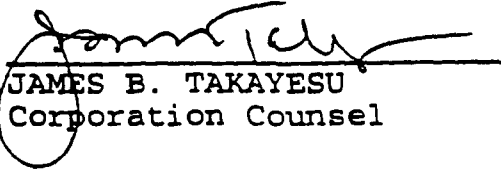
Therefore, pursuant to Charter Section 2-2, the Council may, by ordinance, implement Charter amendments and define necessary terms and establish procedures. Any implementing ordinances should conform to, not conflict with, and not exceed the confines of the Charter, as amended.¹⁴

¹³Charter § 8-11.4(3), as amended, provides that the Board of Water Supply may perform "such other duties and functions as shall be prescribed by law."

¹⁴McQuillin Mun. Corp. § 15.19 (3rd ed.)

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APPROVED FOR TRANSMITTAL: --


JAMES B. TAKAYESU
Corporation Counsel

BTM
cc: Mayor James "Kimo" Apana
Mayor Elect Alan M. Arakawa
James B. Takayesu, Corporation Counsel
✓ Edward Kushi, Deputy Corporation Counsel
Peter Rice, Chair, Board of Water Supply
David Craddick, Director of Water Supply
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