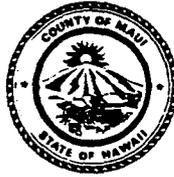


JAMES "KIMO" APANA
Mayor



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December 4, 2002

TO: Dain P. Kane
Acting Council Chair

FROM: Brian T. Moto
First Deputy Corporation Counsel *Brian T. Moto*

**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.

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.

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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
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David Craddick, Director of Water Supply
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