

CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7741
FACSIMILE: (808) 270-7152

August 20, 2007

MEMO TO: G. Riki Hokama
Council Chair

FROM: Brian T. Moto
Corporation Counsel

A handwritten signature in black ink, appearing to read "Brian T. Moto", is written over the typed name in the "FROM:" field.

SUBJECT: Public Hearing Requested by Three Council Members
(PAF 07-224)

Introduction.

The purpose of this memorandum is to respond to your memorandum, dated August 20, 2007, requesting legal advice pertaining to written requests made by three Council members for a public hearing on the proposed Honua'ula/Wailea 670 development (LU-38) pursuant to Section 4-2(3) of the Revised Charter of the County of Maui (1983), as amended ("Charter").

Attached to your memorandum was a copy of a letter to the members of the Council, dated August 14, 2007, informing them of the Council Chair's intention to entertain a motion at the Council's August 21, 2007 meeting to discharge the Land Use Committee from further consideration of County Communication No. 01-334 and provide the Council with the opportunity to comply with the Charter requirement.

Questions posed.

Your memorandum posed the following questions:

1. Section 4-2(3) of the Charter provides: "Upon the request of three members of the council, a public hearing shall be held on any proposed ordinance or resolution." Does the Charter provision require that the public hearing be held immediately after three members have requested it?

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2. May the Council delegate the duty to hold the public hearing to a hearings officer, three Council members, or a Council committee?

Analysis and discussion.

1. Section 4-2(3) of the Charter does not require that the public hearing be held immediately after three members have requested it; therefore, the date, time, and location of the public hearing are matters to be determined by the Council, its Chair and members.

By memoranda dated December 17, 2001, to Patrick S. Kawano, Council Chair, and February 13, 2003, to Jo Anne Johnson, Council Member, this Department opined on legal issues relating to Section 4-2(3) of the Charter and the convening of a public hearing pursuant to request made by three members of the Council.

As discussed in our earlier memoranda, Section 4-2(3) of the Charter is part of a series of provisions generally relating to the introduction, consideration, and passage of ordinances and resolutions by the Council. Section 4-2(3) has its origins in the very first Charter of the County of Maui, which was adopted by the voters in the election of 1967, and its wording has remained unchanged since then. The reports and minutes of early charter commissions do not reveal much regarding the original intent or purpose of the provision; however, they do indicate that it represented a change from prior practice.¹

As also discussed, Section 4-2(3) antedates the Hawaii Sunshine Law,² and, therefore, was adopted at a time when it was not required practice, as is the case now, to permit persons to present written or oral testimony on Council agenda items, including proposed ordinances and resolutions.

¹ Memorandum to Patrick S. Kawano, Council Chair (Dec. 17, 2001), at 1-2.

² Part I, Chap. 92, Hawaii Revised Statutes. Chapter 92 was enacted in 1975.

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Section 4-2(3) is silent with regard to the timing of the public hearing on a proposed ordinance.³ The placement of Section 4-2(3) within a series of provisions relating to the passage of bills and resolutions and the requirement of Council readings, suggest that the framers of the Charter may have assumed that Section 4-2(3) was most likely to be invoked, if at all, during Council deliberations on a bill or resolution; however, as already noted, Section 4-2(3) is devoid of details and does not specify how or when requests for the public hearing are to be made or how and when the public hearing is to be conducted.

In our memorandum to Patrick S. Kawano, Council Chair, dated December 17, 2001, we opined, in response to questions posed by Council Chair Kawano, that, based on the context of Section 4-2(3), the public hearing was intended to occur sometime before the Council passed a bill at second and final reading (and that Section 4-2(3) did not apply to bills that have already passed second and final reading). However, we left open the question, not then posed, as to the timing of the public hearing when requests for such a hearing are made well in advance of Council action at first or second reading.

In light of the foregoing discussion, we believe that Section 4-2(3) of the Charter does not require that the public hearing be held "immediately" after three members have requested it; rather, we opine that issues related to the date, time, and location of the public hearing, availability of quorum, and any other logistical issues related to the public hearing, are matters to be determined by the Council, its Chair and members.

In so concluding, we observe, as we have in past, that the interpretation and application of the rules and order of business of the Council are matters within the purview of the Council and its Chair, and not matters upon which Corporation Counsel normally opines. The Council's internal rules of procedure do not have the force of law and, unless there is a showing of a violation of some statutory or other requirement, a court of law is unlikely to void or otherwise invalidate an action of the Council based on any alleged violation of internal rules.⁴

³ Memorandum to Patrick S. Kawano, Council Chair (Dec. 17, 2001), at 3.

⁴ Memorandum to Jo Anne Johnson, Council Member (Feb. 13, 2003), at 4; See Bremner v. City & County of Honolulu, 96 Hawai'i 134, 146 (App. 2001).

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2. In the absence of a Charter provision, statute, ordinance, or rule allowing Council to delegate its duty to hold the public hearing required under Section 4-2(3) of the Charter, Council should not so delegate, but should itself hold the public hearing.

No Charter provision, statute, ordinance, or rule currently authorizes the Council to delegate its duty to hold the public hearing required under Section 4-2(3) to a hearings officer, three Council members, or a Council committee. Indeed, nowhere in the Charter are committees of Council or hearings officers or panels even mentioned. All references in the Charter to the Council are understood to be the nine-member legislative body described in Section 3-1 of the Charter.

Therefore, we are of the opinion that Council may not delegate the duty to hold the public hearing to a hearings officer, three Council members, or a Council committee.

✓cc: Michele White, Legal Assistant

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