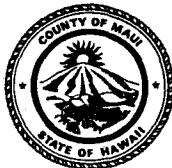


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October 12, 2007

MEMO TO: Joseph Pontanilla, Chair  
Budget and Finance Committee

FROM: Brian T. Moto, Corporation Counsel

A handwritten signature in black ink that reads "Brian T. Moto". The signature is written in a cursive, flowing style.

SUBJECT: Residency Requirements for Real Property Tax Homeowner's  
Exemption (BF-52)

I. Introduction.

The purpose of this memorandum is to respond to your memorandum, dated August 28, 2007, requesting legal advice regarding the Homeowner classification and the Homeowner real property tax exemption.

Your memorandum posed the following questions:

1. May the Council establish a durational residency requirement for the Homeowner classification and exemption? If so, is there a minimum or maximum length of time that may be required?
2. May the Council require an individual or individuals to provide proof of the filing of an income tax return as a resident of the State of Hawai'i with a reported address in the County when applying for the Homeowner classification and exemption?

II. Analysis and discussion.

- A. For reasons discussed below, we believe there is a material risk that, if challenged, a durational residency requirement for the Homeowner classification and exemption would be invalidated as a violation of equal protection.

Pursuant to Article VIII, section 3 of the Hawai'i

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Constitution<sup>1</sup> and Section 246A-2, Hawai'i Revised Statutes ("HRS"),<sup>2</sup> the functions, powers, and duties of real property taxation were transferred from the State to the counties. The Hawai'i Supreme Court has observed that "the purpose of the [constitutional] amendment was to place the burden of the real property taxation system at the county level".<sup>3</sup>

Section 246A-2(2), HRS, required counties to "enact by ordinance and adopt as law for the county all of the real property tax exemptions ... as now provided by law." By its own terms, Section 246A-2(2), HRS, lapsed after a period of eleven years, in November 1989. Since that time counties have been "free to exercise ... [their] exclusive authority to increase, diminish, enact, or repeal any exemptions involving real property taxes without interference by the legislature."<sup>4</sup> The Hawai'i Supreme Court has observed that the Proceedings of the Constitutional Convention of Hawai'i of 1978 "repeatedly underscore the understanding that the power to tax real property encompassed matters of strictly local concern and that this power included the power to grant or repeal exemptions from real property taxation."<sup>5</sup> Accordingly, the Hawai'i Supreme Court has held that "the power to set exemptions from real property taxation is not a matter of statewide concern reserved to the legislature under article VIII,

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<sup>1</sup> Article VIII, section 3 of the Hawai'i Constitution states, in part, that "all functions, powers and duties relating to the taxation of real property shall be exercised exclusively by the counties".

<sup>2</sup> Section 246A-2, HRS, states, in part:

**Transfer of functions.** Effective July 1, 1981, the functions, powers, duties and authority heretofore exercised by the department of taxation relating to the taxation of real property shall be exercised by the respective counties, except the County of Kalawao as provided by Article VIII, Section 3 of the State Constitution.

<sup>3</sup> Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i 334, 341 (1999).

<sup>4</sup> State ex rel. Anzai v. City and County of Honolulu, 99 Hawai'i 508, 521 (2002).

<sup>5</sup> *Id.*

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section 6 of the Hawai'i Constitution."<sup>6</sup>

The power of counties to grant or repeal real property tax exemptions is subject to constitutional limitations, including the equal protection clauses of the Hawai'i and United States Constitutions. In reviewing an alleged violation of the equal protection of the law, the Hawai'i Supreme Court has stated as follows:

It is well-settled that, in analyzing alleged equal protection violations, classifications that are neither "suspect" nor "quasi-suspect" are subject to the rational basis test. Under the rational basis test, "the court essentially asks whether a statute rationally furthers a legitimate state interest."

In analyzing tax classifications under the equal protection clause, this court has stated that "where ... discrimination is of a 'non-suspect' or 'non-invidious' variety, such discrimination is not unconstitutional if there is any rational basis for such classification. Such discrimination is only a violation of equal protection if it is totally arbitrary or capricious. Under this "rational basis test," it is the court's function "only to seek to adduce any state of facts that can reasonably sustain the classification statute ... challenged."<sup>7</sup>

The Hawai'i Supreme Court has not had occasion to decide the constitutionality of a durational residency requirement for a real property tax home exemption. None of the counties in Hawai'i currently differentiate between short-term and long-term residents for home exemption purposes.

Although there are no Hawai'i cases directly on point, at least one state court has struck down as a violation of equal protection durational residency requirements for real property tax home exemptions. In Osterndorf v. Turner, 426 So.2d 539 (1982), the Supreme Court of Florida reviewed a Florida statute that granted (1) an enhanced homestead exemption of \$25,000 to homeowners who were residents of the state for five consecutive years immediately prior to claiming the exemption, and (2) a \$5,000

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<sup>6</sup> *Id.* at 521-522.

<sup>7</sup> Gardens at West Maui Vacation Club, 90 Hawai'i at 342 (citations omitted).

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exemption for homeowners with less than five years residency. The Florida court reviewed the statute under the equal protection "rational basis" test and found that it violated the equal protection clause of the Florida Constitution. Citing various court decisions on the constitutionality of residency requirements,<sup>8</sup> the Florida court held that the state's equal protection clause did not allow the Florida legislature to establish two classes of permanent residents for homestead exemption, and that there was "no rational basis for distinguishing between bona fide residents of more than five consecutive years and bona fide residents of less than five consecutive years in the payment of taxes on their homes."<sup>9</sup> The court observed that "[t]he reason for the equal protection clause was to assure that there would be no second class citizens."<sup>10</sup>

In reviewing the validity of a home exemption ordinance, Hawai'i courts would not be bound by a decision of a high court of another state; however, the similarity of issues and circumstances indicate that, if a durational residency requirement for the Homeowner classification and exemption were adopted, and if such requirement were challenged on equal protection grounds, there is a material risk that it would be found unconstitutional.

B. The Council may by ordinance require an individual or individuals to provide proof of the filing of an income tax return as a resident of the State of Hawaii with a reported address in the County for Homeowner classification and exemption purposes.

We believe that the Council may by ordinance require taxpayers applying for a Homeowner classification or exemption to submit a copy of an income tax return showing that the taxpayer filed as a

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<sup>8</sup> Among the cases discussed by the court in Osterndorf were Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (holding that a one-year residency requirement for voting violated the equal protection clause of the Fourteenth Amendment because it was not necessary to further a compelling state interest); Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (holding that Alaskan dividend distribution program which paid adult residents according to years of residency since statehood did not meet equal protection rational basis test).

<sup>9</sup> Osterndorf, 426 So.2d at 545.

<sup>10</sup> Osterndorf, 426 So.2d at 545-546.

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resident of the State of Hawaii with an address in the County of Maui.

A requirement to provide proof in the form of an income tax return is not unusual. Indeed, Section 3.48.780, Maui County Code, pertaining to the circuit breaker real property tax credit, requires that applicants for the credit submit with the application copies of their federal or state income tax returns.<sup>11</sup> Moreover, the County of Kauai, County of Hawai'i, and City and County of Honolulu already have ordinances authorizing their respective directors of finance to require submission of a resident income tax return as a condition for a home exemption.<sup>12</sup>

cc: Traci F. Villarosa, First Deputy Corporation Counsel  
Adrienne N. Heely, Deputy Corporation Counsel  
✓ Michele White, Legal Assistant  
Kalbert Young, Director of Finance  
Scott Teruya, Real Property Tax Division

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<sup>11</sup> Section 3.48.780(C), MCC, states, in part:

An applicant required under federal or state law to file federal or state income tax returns for the year preceding the year in which an application is submitted shall submit with the application copies of such returns. If copies of such income tax returns are not submitted or if taxes on the property are delinquent, the director shall deny the application.

<sup>12</sup> See Section 5A-11.4(d)(4), Kauai County Code; Section 19-71(e), Hawaii County Code; Section 8-10.4(a)(2)(E), Revised Ordinances of Honolulu.