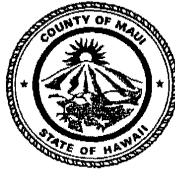


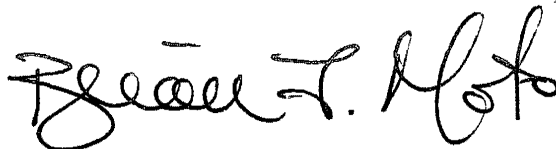
ALAN M. ARAKAWA
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May 10, 2006

MEMO TO: Roy T. Hiraga, County Clerk
FROM: Brian T. Moto, Corporation Counsel 
SUBJECT: Initiative Power - Article 11, Revised Charter of the
County of Maui (1983), as amended

Introduction.

The purpose of this memorandum is to respond to your memorandum, dated March 30, 2006, requesting legal advice regarding the initiative power under Article 11 of the Revised Charter of the County of Maui (1983), as amended ("Charter").

Your memorandum posed seven questions relating to the initiative power. This memorandum addresses what appears to be the most time-sensitive questions posed, question numbers 3, 4, and 5.

Question No. 3:

May a petitioners' committee enlist non-committee members to circulate a petition to obtain signatures in support of a proposed ordinance or must the circulators of the petition be limited to the members of the petitioners' committee?

Question No. 4:

If the committees may enlist non-committee members to circulate the petitions, must these individuals be registered voters?

Question No. 5:

Can the committees pay persons who circulate the petition forms an amount per signature collected/obtained?

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Short answer.

Although a plain reading of Charter Sections 11-2 and 11-3 indicates that the five members of the petitioners' committee are responsible for circulating the initiative petition, U.S. Supreme Court and other court decisions on initiative hold that states (and political subdivisions) that confer upon their citizens the right to an initiative may not implement procedures that unduly restrict the First Amendment rights of citizens who support the initiative. A limitation on the number of circulators of an initiative petition, a requirement that the circulators be registered voters, and a prohibition against paid circulators could, individually or in conjunction with each other, be construed as impermissible infringements on freedom of speech and political expression.

Therefore, we advise that, notwithstanding Charter Sections 11-2 and 11-3 and any interpretation thereof to the contrary, the petitioners' committee be allowed to enlist non-committee members to circulate the initiative petition. The circulators need not be registered voters and may be paid.

Summary of facts.

As discussed in your March 30, 2006 memorandum, on February 22, 2006, two petitioners' committees filed with the Office of the County Clerk their respective affidavits to commence initiative proceedings pursuant to Article 11 of the Charter. One committee was (and still is) named "Maui Crime Reduction/Alcohol-Marijuana Equalization". This committee proposes an ordinance entitled "Maui County Crime Reduction/Alcohol-Marijuana Equalization Ordinance". The second committee was named "Maui County Compassionate Choice/Family Farmer Regulation and Revenue". This committee proposed an ordinance entitled "Maui County Compassionate Choice/Family Farmer Regulation and Revenue".

The County Clerk reviewed the affidavit of the "Maui Crime Reduction/Alcohol-Marijuana Equalization" committee and determined that all five members were qualified voters (*i.e.*, duly registered voters in the County of Maui). However, upon reviewing the affidavit of the second committee, "Maui County Compassionate Choice/Family Farmer Regulation and Revenue", the County Clerk determined that one of the five members of the petitioners' committee, Mr. Ray Ennis, was not a qualified voter (*i.e.*, Mr. Ennis was not a duly registered voter in the County of Maui), and, therefore, the County Clerk notified the committee that its affidavit was defective.

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On March 2, 2006, another petitioners' committee, entitled "Maui County Citizens For Democracy In Action" ("MCCFDIA"), submitted an affidavit and an ordinance entitled "Maui County Compassionate Choice/Family Farmer Regulation and Revenue Ordinance".

Relevant Charter provisions.

Section 11-2 of the Charter states:

Any five qualified voters may commence initiative proceedings by filing with the county clerk an affidavit stating their names and addresses and specifying the address to which all notices to the committee are to be sent, and setting out in full the proposed ordinance, or citing the ordinance or portion thereof sought to be reconsidered. In addition the affidavit shall state that they:

1. Will constitute the petitioners' committee;
 2. **Will be responsible for circulating the petition;**
- and
3. Will file it in proper form.

Promptly after such affidavit is filed, the clerk shall issue the appropriate petition blanks to the petitioners' committee. (Emphasis added.)

Section 11-3 of the Charter states:

1. Petitions shall be filed as one instrument and shall contain or have attached thereto throughout their circulation the full text of the ordinance proposed or sought to be reconsidered.

2. Such petitions must be signed by not less than twenty percent (20%) of the total number of voters who cast ballots in the last mayoral general election.

3. Each signature shall be followed by the printed or typewritten identification of the name of the individual signing the petition and that individual's place of residence.

4. To each such petition paper there shall be attached an affidavit of the circulator stating:

- a. That he or she personally circulated the paper;
- b. The number of signatures thereon;
- c. That all the signatures were affixed in his or her presence and that he or she believes them to be the

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genuine signature of the person whose name it purports to be; and,

d. That each signer had an opportunity before signing to read the full text of the ordinance proposed or sought to be reconsidered.

Applicable law regarding the interpretation of the Charter.

On the subject of the interpretation of a county charter, the Hawaii Supreme Court has stated:

The interpretation of the charter is similar to the interpretation of a statute. And

[t]he standard of review for statutory construction is well-established. The interpretation of a statute is a question of law which this court reviews de novo. In addition, our foremost obligation is to ascertain and give effect to the intention of the legislature[,] which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.¹

Analysis of Charter provisions on initiative.

The questions posed in your memorandum are ones of first impression, there being, to our knowledge, no cases or opinions addressing the particular Charter provisions at issue.

Charter Section 11-2, set forth above, provides that any five qualified voters may commence an initiative proceeding by filing with the county clerk an affidavit stating, among other things, their names and addresses and setting out in full the proposed ordinance. In the affidavit, these five voters are also required to make three representations: that they will constitute the petitioners' committee; that they will be responsible for circulating the petition; and that they will file the petition in proper form. Further, Section 11-2 directs the County Clerk to issue the appropriate petition blanks to the petitioners'

¹Maui County Council v. Thompson, 84 Hawai'i 105, 106, 929 P.2d 1355, 1356 (1996) (citations omitted).

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committee.

Charter Section 11-3, also set forth above, requires that each petition paper be accompanied by an affidavit of the "circulator" stating, among other things, that "he or she personally circulated the paper", that the signatures were affixed in his or her presence, and that he or she believes the signatures to be genuine.

Charter Section 11-3 does not define the term "circulator", and, therefore, it is not entirely clear whether the circulator referenced in Section 11-3 may be a person other than one of the five qualified voters who constitute the petitioners' committee.

Under the rules of statutory (and charter) construction summarized above, the language of the Charter is the primary starting point for interpreting its meaning. Given the plain language of Charter Section 11-2 and its requirement that the members of the petitioners' committee "be responsible for circulating the petition" and that petition blanks be issued "to the petitioners' committee" (and, by implication, not to any other persons), there is a reasonable basis for concluding that the Charter, as written, envisions that the circulators of the petition be one of the five members of the petitioners' committee. Neither Section 11-2 nor Section 11-3 expressly and unambiguously provides for, or authorizes, the circulation of petitions by persons who are not committee members.

Although the foregoing reading is restrictive, it is faithful to a literal reading of Section 11-2 and is consistent with the concern, manifested in Charter Sections 11-2 and 11-3 and other Sections, in protecting the integrity of the initiative process by specifying how initiative proceedings are initiated and signatures obtained. The language of Charter Sections 11-2 and 11-3, which remains in substantial part unchanged since 1967,² may reflect the assumptions and expectations of an earlier era with a much smaller resident and registered voter population.³

²See A Statement of the Activities, Findings and Recommendations of the Charter Commission to the Board of Supervisors of the County of Maui (February 6, 1967), at 9.

³No census data is apparently available for 1967, but, according to information provided by the Hawai'i Business Research Library, the resident population of Maui County in 1970 was 46,156. The number of registered voters in Maui County in 1966 was 18,320.

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The history of the Charter provisions on initiative does not shed much light on the precise meaning and application of Sections 11-2 and 11-3. A review of the various Charter commission reports and Council resolutions issued since the adoption of the County's first Charter does not reveal any details that would clarify the issue of who may or may not serve as a circulator of an initiative petition.⁴ Although Charter provisions on initiative have been amended over the years (generally in a manner designed to facilitate the initiative process),⁵ no amendments have been made to delete or modify the requirement for a petitioners' committee whose members are responsible for circulating the petition.⁶

Court decisions regarding initiative and the First Amendment.

Notwithstanding the foregoing discussion on Charter initiative provisions, we conclude that, based on U.S. Supreme Court and other court decisions, a limit on the number of circulators of an initiative petition, a requirement that the circulators be registered voters, and a prohibition against paid circulators could, individually or in conjunction with each other, be deemed abridgments of the right of initiative proponents to engage in political speech and, therefore, violations of the First and Fourteenth Amendments of the U.S. Constitution.

In Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886 (1988), the U.S. Supreme Court reviewed a Colorado statute that allowed state

⁴See, e.g., A Statement of the Activities, Findings and Recommendations of the Charter Commission to the Board of Supervisors of the County of Maui (February 6, 1967); Report of the Charter Commission of the County of Maui (October 18, 1982); Resolution 02-101 Proposing Amendments to the Revised Charter of the County of Maui (1983), as Amended, Relating to Initiative.

⁵*Id.*

⁶We have reviewed other county charters in Hawaii as they pertain to initiative. Although the initiative provisions have similar elements, each county charter differs in details. For example, the Revised Charter of the City and County of Honolulu 1973, as amended, does not require the formation of a petitioners' committee. The initiative provisions in the charters of Kauai and Hawaii differ in subtle ways from those in the Maui Charter, and permit a different reading of the procedures allowed.

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constitutional amendments to be proposed by initiative petition, but which also made it a felony to pay petition circulators.⁷ The Court held that the statutory prohibition against the use of paid circulators abridged the citizens' right to engage in political speech in violation of the First and Fourteenth Amendments.⁸ The Court observed that the statute at issue was subject to exacting scrutiny, since the circulation of an initiative petition involved the type of interactive communication concerning political change that is "core political speech."⁹ The Court found that the statute restricted political expression in two ways: by limiting the number of voices who could convey petitioners' message and the size of the audience they could reach; and by making it less likely for petitioners to garner the number of signatures necessary to place the matter on the ballot.¹⁰

The Court rejected the State of Colorado's argument that, because the power of initiative is a state-created right, the State was free to impose limitations on the exercise of that right. The Court held that the State's power to ban initiatives entirely did not include the power to limit political speech regarding issues raised in initiative petitions.¹¹ Further, the Court held that the State's interest in protecting the integrity of the initiative process did not justify the prohibition because the State failed to demonstrate that it was necessary to burden petitioners' ability to

⁷The Supreme Court's decision in Meyer v. Grant did not apparently turn on the fact that Colorado enforced its prohibition by criminal statute. In another election-process strict-scrutiny case, the Supreme Court described Meyer v. Grant as involving an "absolute bar against the use of paid circulators", and attached no significance to the fact that Meyer concerned a criminal statute. Burson v. Freeman, 504 U.S. 191, 210, 112 S.Ct. 1846, 1857 (1992); Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291 (1993) (applying Meyer to Michigan civil statutes on initiative, but holding state procedures constitutional); Bernbeck v. Moore, 936 F.Supp. 1543, 1559 (1996).

⁸Meyer v. Grant, 486 U.S. at 428.

⁹*Id.* at 421-22.

¹⁰*Id.* at 422-23.

¹¹*Id.* at 424-25.

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communicate their message in order to meet the State's concerns.¹²

In Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636 (1999), the U.S. Supreme Court again reviewed Colorado statutes relating to initiative, striking down State requirements that initiative-petition circulators be registered voters and that they wear identification badges bearing the circulator's name. However, the Court upheld, as reasonable regulations of the ballot-initiative process, statutory provisions that required petition circulators to be at least 18 years old, that limited the petition circulation period to six months, and that required circulators to attach to each petition section an affidavit containing, among other things, the circulator's name and address and a statement that "he or she has read and understands the laws governing the circulation of petitions".¹³

Conclusion.

Based on U.S. Supreme Court and other court decisions, we conclude and advise that members of the petitioners' committee be allowed to enlist non-committee members to circulate the initiative petition and obtain signatures. The circulators need not be registered voters and may be paid.

cc: Traci F. Villarosa, First Deputy Corporation Counsel
Jeffrey Kuwada, Deputy County Clerk
Michele White, Legal Assistant

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¹²Id. at 426.

¹³Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S.Ct. 636 (1999).