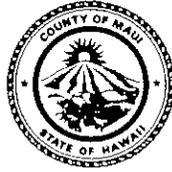


CHARMAINE TAVARES
Mayor



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June 8, 2010

MEMO TO: Michael P. Victorino
Council Member

FROM: Brian T. Moto
Corporation Counsel

A handwritten signature in black ink, reading "Brian T. Moto", is written over the typed name of the Corporation Counsel.

SUBJECT: Election of the Council (PAF 10-107)

Introduction.

The purpose of this memorandum is to respond to your memorandum, dated May 26, 2010, requesting that I review, and approve as to form and legality, a draft resolution entitled, "Proposing an Amendment to the Revised Charter of the County of Maui (1983), as Amended, Related to the Election of the Council". A copy of the draft resolution is attached hereto as Exhibit "A".

The draft resolution would amend Section 3-1, Revised Charter of the County of Maui (1983), as amended ("Charter"), pertaining to composition of the Council, and Section 3-2 of the Charter, pertaining to election of the Council.

In brief, the proposed amendments in the draft resolution would provide that the first special election (i.e., primary election) for Council seats be held "by residency areas, as defined in Section 3-1", rather than at-large, and that the second special election for Council seats (i.e., the general election) be held at-large.

Short answer.

The proposed amendments would violate the "one person, one vote" doctrine of the Equal Protection Clause of the United States Constitution. Therefore, I cannot approve as to form and legality the draft resolution.

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Analysis and discussion.

The United States Supreme Court has held that the Equal Protection Clause of the United States Constitution requires "substantial equality of population among ... districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."¹ The Court has stated:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.... And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.... Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.... Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.²

This principle of population equality applies to state and local elections, including elections for county legislators.³ However, the Court has also stated:

In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs, and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. These observations, along with the fact that local legislative bodies frequently have fewer representatives

¹ Reynolds v. Sims, 377 U.S. 533, 579 (1964).

² *Id.* at 562-563.

³ Abate v. Mundt, 403 U.S. 182, 185 (1971) ("It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections.").

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than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes. Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.⁴

In reviewing whether population disparities among districts exceed constitutional limits, the Court has stated:

Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not.⁵

Therefore, whether a particular scheme of apportionment is constitutional or not will depend on relevant facts and circumstances, and a case-by-case analysis.⁶ Among factors courts will consider are the degree of deviations from population equality among districts, the desire to preserve the integrity of political subdivisions and provide for contiguous areas, and whether there is evidence of built-in bias tending to favor particular geographic areas or political interests.⁷

Under the proposed Charter amendment, voting in the first

⁴ *Id.* at 185 (citations omitted).

⁵ Mahan v. Howell, 410 U.S. 315, 329 (1973).

⁶ See Reynolds v. Sims, 377 U.S. at 578 ("Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case.")

⁷ See Abate v. Mundt, 403 U.S. at 185-186.

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special election would be by Council residency areas. In preparing this memorandum, our Department was unable to obtain resident population data by Council residency areas.⁸ However, based on an informal review of available population and voter registration data,⁹ it is clear that existing Council residency areas differ substantially in population.

For example, as of April 1, 2000, the island of Lana`i had a resident population of 3,193 and, as of February 25, 2010, a registered voter count of 1,577.¹⁰ By comparison, as of April 1, 2000, the island of Moloka`i had a resident population of 7,257, and, as of February 25, 2010, a registered voter count of 3,836. By further comparison, House District 12, which roughly approximates the contours of the Upcountry (Pukalani-Kula-

⁸ Maui County resident population data are available in reference sources such as the Maui County Data Book 2008, but the data are by census tracts, which do not coincide with Council residency areas as described in Section 3-1 of the Charter.

⁹ See Haw. Const. art. IV, § 4 (requiring that apportionment among "basic island units", as defined in the Hawaii Constitution, be done using "the total number of permanent residents in each of the basic island units"); Haw. Const. art. IV, § 6 (requiring that apportionment within basic island units be based on the number of "permanent residents"); see also Burns v. Richardson, 384 U.S. 73, 91-92 (1966) ("We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured.... Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.").

¹⁰ Statistics relating to resident population are taken from the Maui County Data Book 2008 (March 2009), published by the Office of Economic Development, County of Maui, and the Hawaii Small Business Development Center Network, Hawaii Business Research Library. Statistics relating to 2010 registered voter counts, as of February 25, 2010, were obtained from the Office of the County Clerk, County of Maui.

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`Ulupalakua) Council residency area, had a total registered voter count of 14,677, as of February 25, 2010.

The foregoing data, though incomplete, support the conclusion that the current nine Council residency areas are not substantially equal in population, but differ from each other by factors of two times, four times, or more. Given such large disparities in population, it is unlikely that a court would find voting by Council residency areas to be constitutionally permissible.

Further, we have found no support in case law for distinguishing between primary elections and general elections when applying Equal Protection Clause requirements. The fact that the proposed Charter amendment provides for at-large voting in the second special election does not insulate the first special election from scrutiny or from the general principle of population equality among districts.

BTM:lak

Attachment: Exhibit "A"

c: Jeffrey Kuwada, County Clerk
Webpage

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Resolution

No. _____

PROPOSING AN AMENDMENT TO THE REVISED
CHARTER OF THE COUNTY OF MAUI (1983), AS
AMENDED, RELATED TO THE ELECTION OF THE
COUNCIL

BE IT RESOLVED by the Council of the County of Maui:

1. That, pursuant to Section 14-1(1), Revised Charter of the County of Maui (1983), as amended ("Charter"), it hereby proposes that Section 3-1 of the Charter, pertaining to the powers of the Council, be amended to read as follows:

"Section 3-1. Composition. There shall be a council composed of nine members who shall be elected[-at large] pursuant to section 3-2. Of the nine members elected to the council, one shall be a resident of the Island of Lāna`i, one a resident of the Island of Moloka`i, one a resident of the residency area of East Maui, one a resident of the residency area of West Maui, one a resident of the residency area of Makawao-Ha`ikū-Pā`ia, one a resident of the residency area of "Upcountry" comprising Pukalani-Kula-`Ulupalakua, one a resident of the residency area of South Maui, one a resident of the residency area of Kahului, and one a resident of the residency area of Wailuku-Waihe`e-Waikapū. The county clerk shall prepare the nomination papers in such a manner that candidates desiring to file for the office of council member shall specify the residency area from which they are seeking a seat. The ballots shall, nevertheless, be prepared to give every voter in the county the right to vote for each and every council seat.

1. The East Maui (Hana-Keanae-Kailua) residency area shall be described as follows:

Beginning at shoreline and Kakipi Gulch
Proceed to Kepuni Gulch
North along Kepuni Gulch to Kahikinui Forest Reserve boundary
Easterly along Kahikinui Forest Reserve boundary to
Haleakalā National Park boundary
Northwest, west, northerly, then southeast along Haleakalā
National Park boundary to Waikamoi Stream
North along Waikamoi Stream and continuing due west to

EXHIBIT " A "

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Ka`ili`ili Road

West on Ka`ili`ili Road to Opana Gulch

North along Opana Gulch to jeep trail

Easterly on jeep trail to Pālama Gulch then northeasterly to
Halehaku Gulch

North along Halehaku Gulch to Kakipi Gulch

North along Kakipi Gulch to point of beginning

2. The West Maui residency area shall be described as follows:

Beginning at shoreline and Lahaina-Wailuku District boundary
at Po`elua Bay

Proceed south along boundary to shoreline (Manawainui
Gulch)

Northwest, north, then northeast along shoreline to point of
beginning

(includes the islands of Molokini and Kaho`olawe)

3. The Wailuku-Waihe`e-Waikapū residency area shall be
described as follows:

Beginning at shoreline and Lahaina-Wailuku District boundary
Proceed southeast along shoreline to Kanaloa Avenue
extension

Southwest on Kanaloa Avenue extension to Kahului Beach
Road

Southeast on Kahului Beach Road to Ka`ahumanu Avenue

West on Ka`ahumanu Avenue to Mahalani Street

Southwest on Mahalani Street to Pu`umele Street

Southwest on Pu`umele Street to Wai`inu Road

West on Wai`inu Road to Wai`ale Road

South on Wai`ale Road to East Waikō Road

East on East Waikō Road to Kū`ihēlani Highway

Southwest on Kū`ihēlani Highway to Honoapi`ilani Highway

South on Honoapi`ilani Highway to Pohākea Gulch

West, then northwest along Pohākea Gulch to point of
beginning

4. The Kahului residency district area shall be described as
follows:

Beginning at shoreline and Kanaloa Avenue extension

Proceed east along shoreline to Kanahā Beach Park boundary

Southeast along Kanahā Beach Park boundary to Kalialinui
Gulch

Southeast along Kalialinui Gulch to Haleakalā Highway

Southeast on Haleakalā Highway to Lowrie Ditch

Southwest along Lowrie Ditch to Spanish Road

West, then northwest on Spanish Road to East Waikō Road

Resolution No. _____

West on East Waikō Road to Wai`ale Road
North on Wai`ale Road to Wai`inu Road
East on Wai`inu Road to Pu`umele Street
North on Pu`umele Street to Mahalani Street
East, then north on Mahalani Street to Ka`ahumanu Avenue
East on Ka`ahumanu Avenue to Kahului Beach Road
Northwest on Kahului Beach Road to Kanaloa Avenue
extension

- Northeast on Kanaloa Avenue extension to point of beginning
5. The South Maui residency area shall be described as follows:
Beginning at Lahaina-Wailuku District boundary and Pohākea
Gulch

Proceed southeast, then east along Pohākea Gulch to
Honoapi`ilani Highway

North on Honoapi`ilani Highway to Kū`ihēlani Highway

Northeast on Kū`ihēlani Highway to East Waikō Road

East on East Waikō Road to Spanish Road

Southeast, then east on Spanish Road to Lowrie Ditch

South along Lowrie Ditch to Pūlehu Gulch

Southeast along Pūlehu Gulch to Waiakoa Road

South on Waiakoa Road to Kīhei CDP boundary

South along Kīhei CDP boundary to unnamed road

Southwest, then south on unnamed road to unnamed stream
(west of Keonekai Road)

East on unnamed stream to Kula Highway

Southwest on Kula Highway to jeep trail (abutting Tiger 2000
line 85098642)

West, then south on jeep trail to Kanaio-Kalama Park Road
(`Ulupalakua Road)

Southeast along Kanaio-Kalama Park Road to Pi`ilani
Highway

Southeast, then east on Pi`ilani Highway to Kepuni Gulch

Southeast along Kepuni Gulch to shoreline

Southwest, west, north, northwest, southwest then northwest
along shoreline to Lahaina-Wailuku District boundary
(Manawainui Gulch)

North along boundary to point of beginning

6. The Makawao-Ha`ikū-Pā`ia residency area shall be described as
follows:

Beginning at shoreline and Kanahā Beach Park boundary

Proceed east along shoreline to Kakipi Gulch

South along Kakipi Gulch to Halehaku Gulch

South along Halehaku Gulch to Pālama Gulch

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Southeast along Pālama Gulch to unnamed jeep trail
Northwest, then southwest along jeep trail to Opana Gulch
South along Opana Gulch to Ka`ili`ili Road
East on Ka`ili`ili Road to Waikamoi Stream
South along Waikamoi Stream to Haleakalā National Park
boundary
Northwest, then southwest along Haleakalā National Park
boundary to Kailua Gulch
Northwest along Kailua Gulch to Lowrie Ditch
Southwest along Lowrie Ditch to Haleakalā Highway
Northwest along Haleakalā Highway to Kalialinui Gulch
Northwest along Kalialinui Gulch to `Āmala Place
Northwest along Kanahā Beach Park boundary to point of
beginning

7. The Upcountry (Pukalani-Kula-`Ulupalakua) residency area shall be described as follows:

Beginning at Lowrie Ditch and Kailua Gulch
Proceed southeast along Kailua Gulch to Haleakalā National
Park boundary
Southwest, southeast, east, then southwest along Haleakalā
National Park boundary to Kahikinui Forest Reserve
boundary
Southwest along Kahikinui Forest Reserve boundary to Kepuni
Gulch
South along Kepuni Gulch to Pi`ilani Highway
West on Pi`ilani Highway to Kanaio-Kalama Park Road
(`Ulupalakua Road)
Northwest along Kanaio-Kalama Park Road to jeep trail
Northeast on jeep trail to Kula Highway (abutting Tiger 2000
line 85098642)
Northeast along Kula Highway to unnamed stream
Northwest, then west along unnamed stream to unnamed jeep
trail
North on unnamed jeep trail to unnamed road
North on unnamed road to Kīhei CDP boundary
North on Kīhei CDP boundary to Waiakoa Road
North on Waiakoa Road to Pūlehu Gulch
Northwest along Pūlehu Gulch to Lowrie Ditch
North, then northeast along Lowrie Ditch to point of
beginning”

Resolution No. _____

2. That, pursuant to Section 14-1(1), Revised Charter of the County of Maui (1983), as amended ("Charter"), it hereby proposes that Section 3-2 of the Charter, pertaining to the powers of the Council, be amended to read as follows:

1. Council members shall be elected by nonpartisan special elections. Such special elections shall be held in conjunction with the primary and general elections every two (2) years [commencing in 2000]. The special election held in conjunction with the primary election every two (2) years shall be known as the first special election. The special election held in conjunction with the general election every two (2) years shall be known as the second special election.

2. The first special election shall be held by residency areas, as defined in Section 3-1. The second special election shall be held at-large.

[2]3. The names of all candidates for each council seat shall be placed on the ballot for the first special election; provided, that for any council seat with two or fewer candidates, the names of the candidates shall appear only on the ballot for the second special election.

[3]4. For any council seat with three or more candidates, the names of the two candidates receiving the highest number of votes for each council seat in the first special election shall be placed on the ballot for the second special election; provided, that if two or more candidates tie for the highest number of votes received in the first special election, the names of the candidates tied for the highest number of votes shall be placed on the ballot for the second special election; and further provided, that if a single candidate receives the highest number of votes in the first special election and two or more candidates tie for the second-highest number of votes received, the names of the candidate receiving the highest number of votes and the candidates tied for the second-highest number of votes shall be placed on the ballot for the second special election.

[4]5. At the second special election, the candidates receiving the highest number of votes for each council seat shall be deemed elected. If there is no more than one candidate for a council seat, such person shall be deemed elected regardless of the number of votes received.

[5]6. The term of office of council members shall be for two (2) years, beginning at twelve o'clock meridian on the second day of January following their election. No member of the county council shall serve more than five consecutive full terms of office."

3. That material to be repealed is bracketed and new material is underscored;

Resolution No. _____

4. That, pursuant to Section 14-2(1) of the Charter, this Resolution be submitted to the voters of the County of Maui at the next general election;

5. That the County Clerk prepare the necessary ballot for presentation to the voters at the 2010 General Election;

6. That the ballot question relating to the amendment be set forth as follows:

“Should the Charter be changed to establish that the first special election for council members shall be by residency area, with the two candidates receiving the highest number of votes to be placed on the ballot for the second special election; and the second special election shall be at-large?”

7. That, upon approval of the majority of the voters as indicated by the number of votes cast, and upon official certification of such result, the amendment proposed herein shall take effect; and

8. That certified copies of this Resolution be transmitted to the Mayor and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY

Department of the Corporation Counsel
County of Maui

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