

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
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August 12, 2011

MEMO TO: Mike White, Chair
Economic Development, Agriculture, and Recreation Committee

F R O M: Adrienne N. Heely, Deputy Corporation Counsel *Adrienne Heely*

SUBJECT: ESTABLISHMENT OF AN ECONOMIC DEVELOPMENT SPECIAL REVOLVING FUND (EDR-16)

This response is in response to your August 5, 2011 letter regarding the above referenced subject.

I. Brief Background:

At your Committee's August 4, 2011 meeting, after some discussion, a motion was voted and unanimously approved to add a second sentence at the end of the proposed Subsection 3.81.030(D), to read: "Prior to the adoption of any administrative rules, the Council shall have an opportunity for review and final approval." ("Proposed Sentence")

II. Issues:

A. Whether it is legally permissible for the Council to grant itself, by ordinance, "final approval" authority over administrative rules;

B. If it is not legally permissible, please suggest alternative language to meet the Committee's intent;

C. If it is legally permissible, please transmit the revised proposed bill, approved as to form and legality.

III. Brief Answers:

A. Council has the authority to enact ordinances, however, if said ordinance conflicts with existing state law, or usurps the administration's vested authority, there may be a question and/or challenge to the legality of said ordinance. Hawaii Revised Statutes

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("H.R.S.") section ("§") §91-3¹ explains the procedure for adoption, amendment or repeal of rules. H.R.S. §91-3(c) vests approval authority of the adoption, amendment, or repeal of any rule with the mayor of the county.

B. If the Proposed Sentence is not deleted in its entirety, suggested alternative language (underlined) to capture the Committee's intent is as follows: "Prior to the adoption of any administrative rules, pursuant to section 91-3, Hawaii Revised Statutes, the Council shall have an opportunity for review and final approval of the proposed administrative rule."²

C. Because of the questions you raise in your August 5, 2011 request and the discussion below, our office did not sign and transmit the revised proposed bill you attached to your request, however, we attach two revised proposed bills with our signature affixed as approved as to form and legality: (1) bill with Proposed Sentence deleted; and (2) bill with the suggested alternative language.

IV. Discussion:

In researching your requests, I reviewed existing laws; treatises on municipal corporations; and case law discussing Council's authority and limitations in dealing with statutory construction and enacting ordinances.

A. Council's authority and limitations in enacting ordinances.

Generally, the functions of a municipal legislative body fall into the following categories: legislative, administrative, fiscal, investigative, and judicial or quasi-judicial. It is well within the Council's authority to enact laws and ordinances, however, there are some limitations. This depends on the law of the body's organization.³

The United States and State Constitutions; H.R.S.; and the Revised Charter of the County of Maui (1983), as amended ("Charter") explain the general powers and limitations of the Counties and their respective Councils.

¹ A copy of H.R.S. §91-3 is attached hereto as Exhibit "1".

² The revised proposed bills: (1) with the deletion of the Proposed Sentence; and (2) with the alternative suggested language, for Council's consideration are attached as Exhibit "2".

³ The Law of Municipal Corporations, 3rd Edition §13:3 Functions of council.

H.R.S. §46-1.5 explains the general powers and limitations of the counties. H.R.S. §46-1.5(1) states: "Each county shall have the power to frame and adopt a charter for its own self-government that shall establish the county executive, administrative, and legislative structure and organization,..."

1. Proposed Sentence Conflicts with Existing State Law.

H.R.S. §46-1.5(13) explains in relevant part:

"Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State."
(Emphasis added).

Sections 3-6 and 3-8 of the Charter discuss the powers of Council and Article 4 of the Charter discusses ordinances and resolutions and the actions of the Council.

Nothing in Section 3-6 or 3-8 of the Charter specifically addresses council's power to give "final approval authority" of administrative rules. However, as discussed at your Committee meeting, the legal authority for an agency's adoption, amendment or repeal of administrative rules is in Chapter 91, H.R.S.

H.R.S. §91-3 requires, among other things, thirty days notice for public hearing; and affording all interested persons opportunity to submit data, views, arguments, orally, or in writing.⁴ Although H.R.S. §91-3 is silent as to the final approval of administrative rules being vested in the respective county councils, H.R.S. §91-3(c) states:

"(c) The adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor. The adoption, amendment, or repeal of any rule by any county agency shall be subject to the approval of the

⁴ H.R.S. §91-3(2) does allow all interested persons [including a legislative body] the opportunity to submit data, views or arguments, orally or in writing; H.R.S. §91-3(2) further states that the agency shall fully consider all written and oral submissions respected the proposed rule.

mayor of the county. This subsection shall not apply to the adoption, amendment, and repeal of the rules of the county boards of water supply." (Emphasis added).

Because existing state law explains not only the procedure, but that the adoption, amendment, or repeal of any rule by any county agency shall be subject to the approval of the mayor, the proposed legislation giving the Council final approval authority may be perceived as conflicting, and may be preempted, challenged and/or held as being invalid.

In Richardson v. City and County of Honolulu⁵, the Hawaii Supreme Court explained, "[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." The Court further explained, "if local ordinance truly conflicts with state statute that is of statewide concern, then the ordinance is necessarily invalid because it violates state's supremacy provision."⁶

The Richardson Court confronted the task of interpreting general statutes that may appear to be in conflict with specific statutes relating to the same subject matter. The court explained three rules of statutory construction: First, legislative enactments are presumptively valid and "should be interpreted [in such a manner as] to give them effect."⁷ Second, "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other."⁸ Third, "where there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply

⁵ Richardson v. City and County of Honolulu, 76 Hawai`I 46, 886, P.2d 1193 (1994).

⁶ Id. at 47, 868 P.2d at 1194. (citing H.R.S. §50-15 and Const. Art. 8 §6) (The Court explained a conflict exists if local legislation duplicates, contradicts, or enters area fully occupied by general law, either expressly or by legislative implication.)

⁷ Id. (citing State v. Spencer, 68 Haw. 622, 624, 725 P.2d 799, 800 (1986)).

⁸ Id. (citing H.R.S. §1-16 (1985); Kam v. Noh, 70 Haw. 321, 325, 770 P.3d 414, 417 (1989))

overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored."⁹

2. Proposed Sentence Usurps Administration's Vested Power.

Not only does the Proposed Sentence, if enacted, conflict with existing state law, but it also, if enacted, would effectively usurp the administration's ability to exercise its powers vested to it by the express provisions of H.R.S. §91-3(c). The Hawaii Supreme Court addressed the usurping of powers in Harris v. DeSoto.¹⁰ In Harris, after the city council, over mayor's veto, passed an ordinance that effectively vested exclusive power in council to settle claims in excess of \$5,000, as well as suits for injunctive, declaratory, and extraordinary relief, mayor filed complaint for declaratory and injunctive relief, seeking declaration that ordinance was unlawful and void because it violated city charter. The Harris Court held that the ordinance was invalid to the extent that it vested power in city council that was vested exclusively for the administration.

The enactment of the proposed ordinance with the Proposed Sentence granting the Council "final approval authority" of administrative rules, would perceivably conflict with the provisions of state law, and possibly subject the Council to legal challenge of usurping the administration's powers vested to it by H.R.S. §91-3(c). Accordingly, the passing of said legislation with the Proposed Sentence, arguably would not be legally permissible.

B. Alternative Suggested Language.

The Proposed Sentence states: "Prior to the adoption of any administrative rules, the Council shall have an opportunity for review and final approval". Although said sentence implies that there is another mechanism (be it H.R.S. §91-3) for the adoption of the administrative rule, and that Council shall have "the opportunity" for review and final approval prior to the adoption, some may argue including reasons stated herein, the legality of said proposed legislation if enacted. Accordingly, to avoid the confusion, it is suggested that: (1) the Proposed Sentence be deleted in its entirety; or (2) the following underlined text be added to the Proposed Sentence:

⁹ Id. (citing Mahaia v. Suwa, 69 Haw. 349, 356-57, 742 P.2d 359, 366 (1987)).

¹⁰ 80 Hawai'i 425, 911 P.2d 60 (1996).

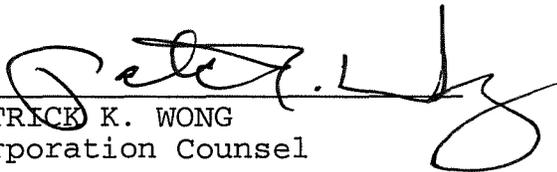
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"Prior to the adoption of any administrative rules, pursuant to section 91-3, Hawaii Revised Statutes, the Council shall have an opportunity for review and final approval of the proposed administrative rule."

We attach two revised proposed bills, signed off as to approval as to form and legality for Council's consideration.

Should you have any questions please feel free to contact me.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

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Attachments: Exhibits "1" and "2"
xc: Alan M. Arakawa, Mayor
Keith A. Regan, Managing Director
Sananda K. Baz, Budget Director
Jock Yamaguchi, Executive Assistant
Webpage

§91-3 Procedure for adoption, amendment, or repeal of rules.

(a) Except as provided in subsection (f), prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

(1) Give at least thirty days' notice for a public hearing.

The notice shall include:

- (A) A statement of the topic of the proposed rule adoption, amendment, or repeal or a general description of the subjects involved; and
- (B) A statement that a copy of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed will be mailed to any interested person who requests a copy, pays the required fees for the copy and the postage, if any, together with a description of where and how the requests may be made;
- (C) A statement of when, where, and during what times the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed may be reviewed in person; and
- (D) The date, time, and place where the public hearing will be held and where interested persons may be heard on the proposed rule adoption, amendment, or repeal.

The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its rulemaking proceedings, given at least once statewide for state agencies and in the county for county agencies. Proposed state agency rules shall also be posted on the Internet as provided in section 91-2.6; and

(2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency, if requested to do so by an interested person, shall issue a concise statement of the principal reasons for and against its determination.

(b) Notwithstanding the foregoing, if an agency finds that an imminent peril to the public health, safety, or morals, or to livestock and poultry health, requires adoption, amendment, or repeal of a rule upon less than thirty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing, including posting the abbreviated notice and hearing on the Internet as provided in section 91-2.6, as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

(c) The adoption, amendment, or repeal of any rule by any state

EXHIBIT " | "

agency shall be subject to the approval of the governor. The adoption, amendment, or repeal of any rule by any county agency shall be subject to the approval of the mayor of the county. This subsection shall not apply to the adoption, amendment, and repeal of the rules of the county boards of water supply.

(d) The requirements of subsection (a) may be waived by the governor in the case of the State, or by the mayor in the case of a county, whenever a state or county agency is required by federal provisions to adopt rules as a condition to receiving federal funds and the agency is allowed no discretion in interpreting the federal provisions as to the rules required to be adopted; provided that the agency shall make the adoption, amendment, or repeal known to the public by:

- (1) Giving public notice of the substance of the proposed rule at least once statewide prior to the waiver of the governor or the mayor; and
- (2) Posting the full text of the proposed rulemaking action on the Internet as provided in section 91-2.6.

(e) No adoption, amendment, or repeal of any rule shall be invalidated solely because of:

- (1) The inadvertent failure to mail an advance notice of rulemaking proceedings;
- (2) The inadvertent failure to mail or the nonreceipt of requested copies of the proposed rule to be adopted, the proposed rule amendment, or the rule proposed to be repealed; or
- (3) The inadvertent failure on the part of a state agency to post on the website of the office of the lieutenant governor all proposed rulemaking actions of the agency and the full text of the agency's proposed rules as provided in section 91-2.6.

Any challenge to the validity of the adoption, amendment, or repeal of an administrative rule on the ground of noncompliance with statutory procedural requirements shall be forever barred unless the challenge is made in a proceeding or action, including an action pursuant to section 91-7, that is begun within three years after the effective date of the adoption, amendment, or repeal of the rule.

(f) Whenever an agency seeks only to repeal one or more sections, chapters, or subchapters of the agency's rules because the rules are either null and void or unnecessary, and not adopt, amend, or compile any other rules:

- (1) The agency shall give thirty days' public notice at least once statewide of the proposed date of repeal and of:
 - (A) A list of the sections, chapters, or subchapters, as applicable, being repealed; and
 - (B) A statement of when, where, and during what times the sections, chapters, or subchapters proposed to be repealed may be reviewed in person;
- (2) The agency shall post the full text of the proposed sections, chapters, or subchapters to be repealed on the

Internet as provided in section 91-2.6; and

- (3) Any interested person may petition the agency regarding the sections, chapters, or subchapters proposed to be repealed, pursuant to section 91-6.

This subsection does not apply to the repeal of one or more subsections, paragraphs, subparagraphs, clauses, words, phrases, or other material within a section that does not constitute the entire section to be repealed. [L 1961, c 103, §3; am L 1965, c 96, §139a; Supp, §6C-3; HRS §91-3; am L 1973, c 13, §1; am L 1979, c 64, §1; am L 1985, c 68, §2; am L 1989, c 64, §2; am L 1998, c 2, §§27, 28; am L 1999, c 301, §2(2); am L 2000, c 283, §6]

Cross References

Additional requirements for publication of notice of public hearings, see §92-41.

Attorney General Opinions

The "General Requirements and Covenants" of public works contracts are rules as defined by section 91-1 and any amendments require notice and a public hearing. Att. Gen. Op. 66-10.

Section is limited to rules having the force and effect of law; AG Opinion 66-10 superseded. Att. Gen. Op. 72-5.

State agency required by subsection (a)(1) to publish notice of hearing must in addition comply with publication requirements of section 92-41. Att. Gen. Op. 73-12.

Board cannot adopt "policy" which would have the effect of amending a rule, without following HAPA requirements. Att. Gen. Op. 81-11.

Notices are not required to be in the legal section of a newspaper. Att. Gen. Op. 89-4.

Substantial changes in proposed rules made after public hearing require additional hearing where material is included on subject not covered in original notice or change was not advocated or discussed at original hearing. Att. Gen. Op. 91-05.

For the repeal of rules, this section and §92-41 did not require individual notice to all property owners potentially affected by the change in the rules but only notice by publication, and a mailing to those persons who requested advance notice of department's rulemaking proceedings. Att. Gen. Op. 97-4.

Case Notes

Where defendant did not give notice and hold public hearing pursuant to subsection (a) before issuing approval of use of wood preservative, defendant's approval, together with defendant's conditions of approval, would appear to be rulemaking. 939 F. Supp. 746.

Department provided adequate notice under this chapter of its intent to hold public hearings on proposed amendments to its

administrative rules; nothing in chapter or case law requires that notice of public hearings on proposed amendments be published only after the effective date of the statute authorizing such amendments. 88 H. 307, 966 P.2d 619.

Where city appraiser's unwritten methodology for determining imparted value fell within definition of a rule for purposes of §91-1 (4), city needed to follow rulemaking procedures set forth in this section prior to applying imparted value deductions toward golf course assessments. 89 H. 381, 974 P.2d 21.

Changes may be made in a rule between the original proposed and presented at a public hearing and as finally adopted. Substantial change in a rule after a public hearing may require another public hearing. 50 H. 156, 434 P.2d 516.

Notice should fairly apprise interested parties of what is being proposed so they can formulate and present rational responses to the proposal. 64 H. 389, 642 P.2d 530.

"Substance" of proposed rules defined. 64 H. 389, 642 P.2d 530.

Rule enabling insurance commissioner to prescribe endorsements did not give carte blanche authority to sidestep the independent requirements of chapter 91. 67 H. 148, 682 P.2d 73.

Adoption by reference of future amendments unlawful. 67 H. 451, 691 P.2d 365.

No waiver of notice and hearing requirements allowed where agency had discretion to interpret federal provisions as to required rules. 68 H. 80, 705 P.2d 17.

Inadequate notice, discussed. 70 H. 135, 764 P.2d 1233.

Notice of public hearing met all requirements of this section; no merit to points on appeal that court erroneously dismissed claims that proposed hearing room was too small and that separate hearings should be held on neighbor islands. 10 H. App. 210, 863 P.2d 344.

Sections 183D-22 and 183D-10.5 provided the authority for the department of land and natural resources to require payment of a fee for a hunting-related article such as a stamp; however, since game bird hunting was an activity permitted under chapter 183D, the department was required under §183D-3 to adopt a rule pursuant to this section when setting the stamp fees for hunting. 117 H. 16 (App.), 175 P.3d 126.

Since the addition of two extra hunting days to each week of the hunting season concerned "conditions for entry into game management areas, and public hunting areas designated by the department of land and natural resources" and "open seasons" for hunting, the express language of §183D-3 mandated that in order to add the two weekdays for bird hunting, the department had to amend Hawaii administrative rule 13-122-4 pursuant to chapter 91. 117 H. 16 (App.), 175 P.3d 126.

Hawaii Legal Reporter Citations

Public hearing necessary before rules can be adopted. 77-2 HLR 77-793.

Substance of proposed rules. 78-2 HLR 781.

[Previous](#)

[Vol02_Ch0046-0115](#)

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ORDINANCE NO. _____

BILL NO. _____ (2011)

A BILL FOR AN ORDINANCE AMENDING TITLE 3, MAUI COUNTY CODE,
PERTAINING TO THE ESTABLISHMENT OF AN
ECONOMIC DEVELOPMENT REVOLVING FUND

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Title 3, Maui County Code, is amended by adding a
new chapter to be appropriately designated and to read as follows:

"Chapter 3.81

ECONOMIC DEVELOPMENT REVOLVING FUND

Sections:

3.81.010 Fund establishment.
3.81.020 Purpose.
3.81.030 Administration.
3.81.040 Use of fund.

3.81.010 Fund establishment. There is established and created a fund known as the economic development revolving fund.

3.81.020 Purpose. The purpose of the economic development revolving fund shall be to provide funds for economic development and economic development programs in the County of Maui. The administration and council find that the creation of the fund is necessary to strengthen and diversify the County's economy; to support existing County businesses; to promote job creation; to attract new business, industry, construction, and events that will foster economic development in the County; and to improve the overall economic and social well-being of the County.

3.81.030 Administration. A. The director of finance shall establish a separate account to record all revenues and expenses as a result of the economic development programs established in the County.

B. There shall be deposited into the economic development revolving fund any council appropriations to the fund and all moneys donated to the County for economic development programs.

C. Any proposed appropriation shall be submitted to the Council for approval as a budget appropriation in either the annual budget or a proposed amendment to the budget ordinance. In adopting each fiscal year's budget and capital program, the council may make appropriations to the fund.

D. The director of finance with the coordinator for the office of economic development may adopt administrative rules necessary to carry out the purpose of this chapter.

3.81.040 Use of fund. Council appropriations from the economic development revolving fund shall be for the public purposes set forth in section 3.81.020. Such appropriations may include authorizing grants or loans to any nonprofit or for-profit organization; leveraging funds provided by federal, state, nonprofit, or for-profit organizations and other non-County entities to expand economic development program opportunities in the County; and other economic development initiatives."

SECTION 2. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:


ADRIANNE N. HEELY
Deputy Corporation Counsel
County of Maui

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ORDINANCE NO. _____

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C. Any proposed appropriation shall be submitted to the Council for approval as a budget appropriation in either the annual budget or a proposed amendment to the budget ordinance. In adopting each fiscal year's budget and capital program, the council may make appropriations to the fund.

D. The director of finance with the coordinator for the office of economic development may adopt administrative rules necessary to carry out the purpose of this chapter. Prior to the adoption of any administrative rules, pursuant to section 91-3 Hawaii Revised Statutes, the Council shall have an opportunity for review and final approval of the proposed administrative rule.

3.81.040 Use of fund. Council appropriations from the economic development revolving fund shall be for the public purposes set forth in section 3.81.020. Such appropriations may include authorizing grants or loans to any nonprofit or for-profit organization; leveraging funds provided by federal, state, nonprofit, or for-profit organizations and other non-County entities to expand economic development program opportunities in the County; and other economic development initiatives."

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