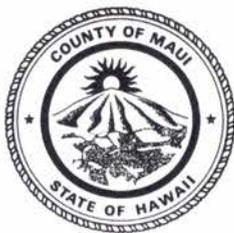


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April 17, 2015

**MEMO TO:** Riki Hokama, Chair  
Budget and Finance Committee

**FROM:** Jeffrey Ueoka, Deputy Corporation Counsel *JU*

**SUBJECT:** **FISCAL YEAR ("FY") 2016 BUDGET (CC-5) (BF-1)**

We are in receipt of your memorandum dated April 10, 2015, posing the following questions:

1. Provide the status of your Department's review of the proposed bill transmitted by the Department of Transportation relating to advertising within County public transit buses, including the anticipated date when this review will be completed. (EC)

The bill for an ordinance relating to advertising within County public transit buses is currently being reviewed by a Deputy Corporation Counsel and review shall be completed by the end of this fiscal year. It is my understanding that part of the delay, in the review, was due to the County awaiting results of another Hawaii jurisdiction's implementation of its bus advertising policy.

2. The Real Property Assessment Division, Department of Finance, has identified numerous building modification through its use of change detection software. As a result, an increase in after-the-fact permit applications is anticipated. The Department of Planning charges a minimum fee of \$1,000 plus up to 50 per cent of project valuation as determined by the Planning Director to

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review an after-the-fact permit application (page 26 of Ramseyer version of Appendix B, Revenues – Fees, Rates, Assessments and Taxes, Fiscal Year July 1, 2015 to June 30, 2016). Provide a written legal opinion as to whether the fee for review of after-the-fact permit applications conflicts with Section 13-10 of the Revised Charter of the County of Maui (1983), as amended, relating to penalties. (MW)

Section 13-10 of the Revised Charter of the County of Maui (1983), as amended (“Charter”), relates to penalties and not fees, therefore, we do not see a conflict. We will use this opportunity to generally go over the basic structure authorizing the County to assess fees. The County has, “the power to fix the fees and charges for all official services not otherwise provided for[.]”<sup>1</sup> and generally speaking, the Council sets the rates and fees through the annual budget ordinance. The Hawai‘i Constitution (1978) reserves the taxing power to the State, however, it does authorize the State to delegate the authority to the political subdivisions, the most notable delegation of authority being the power to levy real property taxes. The State of Hawaii has recognized the difference between user fees and regulatory fees:

Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as a proprietor of the instrumentalities used, or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities.<sup>2</sup>

In determining whether a charge is a user fee or a tax, one should analyze whether the charge, “(1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate of the benefit received.”<sup>3</sup>

The Hawaii Supreme Court has adopted the three prong test set forth in *San Juan Cellar Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1<sup>st</sup> Cir. 1992), in determining whether an assessment is a regulatory fee or tax<sup>4</sup>:

1. Whether a regulatory agency assesses the fee;

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<sup>1</sup> Haw. Rev. Stat. 46-1.5(8)

<sup>2</sup> *State v. Medeiros*, 89 Hawai‘i 361, 366, 973 P.2d 736, 741 (1999) (quoting *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1105 (1984))

<sup>3</sup> *Medeiros*, 89 Hawai‘i at 367, 973 P.2d at 742

<sup>4</sup> *Hawaii Insurers Council v. Lingle*, 120 Hawai‘i 51, 66, 201 P.3d 564, 579 (2008)

2. Whether the agency places the money in a special fund; and
3. Whether the money is not used for a general purpose but rather to defray the expenses generated in specialized investigations and studies, for the hiring of professional and expert services and the acquisition of the equipment needed for the operations provided by law.

It is also recognized that, “[t]he classic “regulatory fee” is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency’s regulation – related expenses.”<sup>5</sup>

The “after-the-fact” permit application fee appears to meet the test for a regulatory fee and “deliberately [discourages] particular conduct by making it more expensive.” If the Council feels that this matter would be more appropriately addressed through a penalty provision, a revision to the Maui County Code may be required.

APPROVED FOR TRANSMITTAL:

  
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PATRICK K. WONG  
Corporation Counsel

cc: Alan M. Arakawa, Mayor  
Sananda K. Baz, Budget Director  
Jo Anne Johnson Winer, Director of Department of Transportation

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<sup>5</sup> *Hawaii Insurers Council*, 120 Hawai`i at 60, 201 P.3d at 573 (quoting *San Juan Cellular*, 967 F.2d at 685)