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January 21, 2003

MEMO TO: The Honorable Wayne K. Nishiki
Councilmember
Maui County Council

FROM: Ed Kushi, Jr., Deputy Corporation Counsel 

SUBJECT: REVIEW OF DECEMBER 4, 2002 BOARD OF WATER SUPPLY ACTIONS
(PAF 02-274)

Responding to your December 18, 2002 request as follows:

- 1) Did Section 8-11.4(4) of the Charter or any other rule or law in effect on December 4, 2002, include authority on the part of the Board to adopt amendments to the budget ?

Short answer: Yes.

As recognized and acknowledged in your December 18, 2002 memo, prior to December 5, 2002, the Board of Water Supply ("Board") had the power and authority to "Adopt an annual operating and capital budget." Old Charter, Section 8-11.4(4)¹. Further, the department was empowered with "full and complete authority to manage, control and operate water systems and properties used in connection with such water systems." (emphasis added) Old Charter, Section 8-11.2(2). Organizationally, the Board and the department constitute a single entity, to-wit: "There shall be a department of water supply consisting of a board of water supply, a director, a deputy director and the necessary staff." (emphasis added). Charter, Section 8-11.1.

¹By "Old Charter", we mean that Revised Charter of the County of Maui (1983) in effect before December 5, 2002.

In addition to and in conjunction with the pre-December 5, 2002 power and authority vested in the Board, Chapter 54, Hawaii Revised Statutes ("HRS"), enabled county water supply boards with distinct and autonomous powers and functions. See attached copy of relevant HRS sections. Specifically, Chapter 54, HRS empowered the Board to:

"...manage, control, and operate the waterworks of the county and all property thereof,....., and shall collect, receive, expend, and account for all sums of money derived from the operation thereof..." Section 54-15, HRS."

"...locate and determine the character and type of all construction and additions, extensions, increases, betterments, and improvements to the waterworks, and" Section 54-19, HRS.

"...may provide for the accumulation of a fund for the purpose of financing major replacements, or extensions and additions, ..." Section 54-21, HRS.

"... may make appropriations and allowances from the fund for the following purposes:

- (1)
- (2) For repairs, replacements, additions, and extensions;
- (3)
- (4)" Section 54-24, HRS.

Although there is no charter provision, county ordinance, HRS statutory provision, or Board rule that specifically empowers or authorizes the Board to amend an annual budget which the same Board established and adopted, we opine that such power and authority, in the absence of any third party agency so vested, must be implied. To this writer's knowledge and information, the Board's past practice and operating procedure of processing interim budget amendments have, to date, never been questioned. Prior to December 5, 2002, except for rates and fees codified as Board rules which required Mayor and Council approval by Charter, the power to adopt the annual operating and capital budget of the department of water supply, and any fiscal year interim amendments thereto, was vested in the Board. Further, the proposal by the Council and adoption by the voters of the new charter amendment (i.e., amendment 9a), which divested the Board of all final budgetary authority, supports the implication that the Board had the authority to amend its own budget. Lastly, to opine otherwise would create an unworkable and impractical situation wherein the department may be saddled and/or burdened with a defective budget for an entire fiscal year. We observe also that the word, "annual", as used in Old Charter Section 8-11.4(4), is an adjective, not an adverb, meaning that it

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describes the budget as a budget for a fiscal year, but not necessarily limiting or prohibiting action on the department's budget at various times (as circumstances may require) throughout said fiscal year.

As requested, we have reviewed your reference to Section 9-9 of the Charter, and respond that said Charter provision speaks for itself, is applicable to past and current budget proceedings of the administration and the Council, and, because not directly relevant, should not be referenced in the instant discussion concerning the pre-December 5, 2002 power and authority of the Board.

2) a) What is the status of the underlying acquisitions referred to in items IV.B through D, i.e.?

Except for the matter addressed briefly below, our office does not have detailed information on all of the acquisitions referenced in your memorandum and, therefore, we cannot respond to the above question. We advise that you consult directly with the Director of Water Supply and the Mayor.

We are informed that, with regard to the possible acquisition of office space, Mayor Alan Arakawa recently signed and issued a letter to Mr. Earl Stoner informing him, among other things, that Mayor Arakawa's administration seeks rescission and/or termination of the Purchase Agreement entered into by Mayor James Apana and Mr. Stoner and other parties for office space.

b) Has the board already authorized acquisition of these properties by eminent domain, purchase, lease or otherwise in the name of the board of water supply under prior Section 8-11.4(6) ?

No. At its December 4, 2002 meeting, the Board authorized negotiations on its behalf to acquire the subject properties, but to our understanding, did not specifically approve any acquisition itself, by purchase, lease, condemnation or otherwise.

c) If not, may the Board amend the budget to allow for "possible" acquisitions not otherwise approved ?

Now that Charter Amendment 9A has taken effect, matters relating to the department's budget are subject to oversight by the mayor and council. The board now serves in an advisory capacity.

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- 3) If the Board was not authorized to amend the budget, what becomes of the motions carried by the Board under Items IV.B through D ? Are they void ?

As discussed above, as of December 4, 2002, the Board had the power and authority to amend its own budget. Therefore the approved motions and actions stand and are not void. However, as of December 5, 2002, administration of the fiscal budget of the Department of Water Supply rests ultimately with the mayor and director of finance, subject to the Council's legislative oversight. Accordingly, we opine that said amendment actions may be further amended and/or superseded, and therefore are voidable, by proper action and procedure of the mayor and/or council.

Call if further discussion/clarification is needed.

APPROVED FOR TRANSMITTAL:


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