

COUNTY OF MAUI DEPARTMENT OF THE CORPORATION COUNSEL
200 SOUTH HIGH STREET WAILUKU, HI 96793

INTER-OFFICE CORRESPONDENCE

D A T E: February 21, 2003

MEMO TO: Holly Perdido, Fiscal Officer
Department of Water Supply

F R O M: Ed Kushi, Jr., Deputy Corporation Counsel 

SUBJECT: **Estimated water service charge; Service No. 1030560; Service location 307 West Kuiaha Road**

Per your request, we have reviewed your October 9, 2002 letter to Luana Delvecchio with attachments, and Ms. Michelle Smythe's response letter to you of November 21, 2002. In response to your specific inquiry, we do not believe that the consumer has a valid claim or defense to the action taken by the department for the following reasons:

1) In providing water service to consumers, there is no explicit, expressed "contract" that is entered into by and between the consumer and the department, but rather, as in any services offered by a utility, the consumer's use of the department's facilities (including our meter) is subject to the department's duly promulgated rules and regulations. Specific to this matter, Sections 3-6(b) and 3-8 of your departmental rules and regulations provide for the imposition of an estimated or averaged charge. See Section 16-102-75, *et seq.*, of your rules.

Further, under the law of contracts, there are circumstances in which contracts will be implied in fact.¹ In the subject

¹17A Am Jur 2d, Contracts §15 ("Thus, where a person performs services, furnishes property, or extends money for another at the other's request and there is no express agreement as to compensation, a promise to pay the reasonable value of the services or property or to reimburse for money expended may properly be implied where, but only where, the circumstances warrant such an inference.

Generally, there is an implication of a promise to pay for valuable services rendered with the knowledge and approval of the recipient, in the absence of a showing to the contrary. A promise to pay the reasonable value of the service is implied where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the latter

circumstances there is every indication that the Department of Water Supply provided water service to Ms. Smythe with her knowledge and assent. This service was useful and beneficial and of a character that is usually charged for. She accepted and availed herself of such service. Further, such service was provided in circumstances in which it was reasonable for the Department of Water Supply to entertain an expectation of payment from Ms. Smythe, the party benefitted. Therefore, there is a strong basis for asserting that an implied contract exists between the Department of Water Supply, County of Maui, and Ms. Smythe.

2) The consumer's reference to the terms "lapse", "estoppel" and "statute of limitations" is misplaced and not relevant.

a) Lapse involves the loss of some right or privilege by failing to timely exercise such right or privilege. Lapse is more commonly used or expressed as a verb, rather than a legal concept or doctrine. The use of the term lapse is also associated with the legal concepts/defenses of waiver and limitation of action (see discussion below). As applied to my understanding of the facts of this situation, at no time did the department knowingly waive its right and administrative duty to issue service charges associated with the subject meter, all in accordance with its rules and regulations. Lapse does not apply to the instant situation.

b) From reviewing Ms. Smythe's November 21, 2002 letter, I can only assume that she is referring to the doctrine of equitable estoppel, which has been described as a rule of equity that "he who hath committed iniquity shall not have equity" or, conversely, that "suitors who invoke relief from a court of equity must come into court with clean hands." In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary or inconsistent with his prior action or conduct. However, equity will not enable a person to make a profit which he could not otherwise obtain by estopping another from asserting his legal rights. The party claiming estoppel must show that there was i) a lack of knowledge and of the means of knowledge of the truth as to the facts in question; ii) reliance, in good faith, upon the conduct or statements of the party to be estopped; and iii) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment or prejudice. Since the function and purpose of estoppel are the prevention of fraud and injustice,

expresses no dissent or avails himself of the service. However, a promise to pay for services can only be implied when they are rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefitted.")

there can be no estoppel where there is no loss, injury, damage, detriment, or prejudice to the party claiming it. Lastly, in general, government agencies may not be estopped from discharging their statutory duty, nor will estoppel be applied to preclude agencies from enacting and enforcing police measures, or from the performance of governmental functions. Accordingly, in recognition of the heavy burden on someone seeking to estop the government, courts have held that, in addition to the traditional elements of estoppel, the party pleading estoppel must prove affirmative misconduct or wrongful conduct by the agency or its official. 28 *Am Jur 2d*, Sections 28, 31, 80, 83, 140 and 146.

Here, we submit that the consumer cannot show or prove that:

- although water was used, she was not aware that for over 3 years she did not receive a bill for said water service.
- in good faith, she relied on this fact, and based on this reliance, she would not receive another bill for such water service.
- not receiving a bill for such water service changed her position to her injury, detriment or prejudice.
- by not paying the estimated/averaged bill, she would not profit or sustain a windfall by receiving free water service.
- the department is chargeable with affirmative misconduct or wrongful conduct.

Based on the above, we believe that the doctrine of equitable estoppel would not apply, nor would be allowed by any court of competent jurisdiction reviewing this matter.

c) Finally, Ms. Smythe's reference to any applicable statute of limitation period that may apply to the instant case is likewise misplaced. We believe the applicable limitation period would be set forth in Section 657-1, Hawaii Revised Statutes ("HRS"), which in relevant part states:

"§ 657-1. Six Years. The following actions shall be commenced within six years next after the cause of action accrued, and not after:

- (1) Actions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court; excepting further that actions for the recovery of any debt founded upon any contract, obligation, or liability made pursuant to chapter 577A shall

be governed by chapter 577A;

- (2) . . .
- (3) . . .
- (4) . . ."

(emphasis added)

My understanding is that as set forth on the "Service Request -Closed" report attached to your October 9, 2002 letter, the problem with the subject meter was identified in June 2002, with action being taken resulting in the meter being replaced on September 5, 2002. The cause of action for non-payment of water service therefore accrued as of June 2002. Read literally, Section 657-1, HRS, would permit the department to commence an action on the debt within six years of June 2002². Ms. Smythe's argument/allegation as to this defense is not warranted.

In conclusion, we believe that no reconsideration of the position as set forth in your October 9, 2002 to the consumer should be undertaken, nor is required.

Call if further clarification/discussion is needed.

cc: George Tengan
Director, Department of Water Supply

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

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²Even assuming, for the sake of argument, that the debt began accruing as of May or June of 1999, the six-year statute of limitations would not bar the Department's claim against Ms. Smythe.