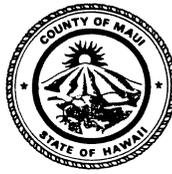


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June 17, 2004

Robert Carroll, Chair
Committee of the Whole
c/o 200 S. High Street
Wailuku, Hawaii 9793

Re: PERSONAL LIABILITY OF COUNCIL MEMBERS (COW-5)
Request for Legal Opinion Regarding Conditioning an
Application for a Conditional Permit on Waiver of an
Applicant's Right to Sue

Dear Councilmember Carroll:

The purpose of this letter is to respond to a question posed in your memorandum dated February 10, 2003. The question was posed in the context of matters relating to conditional permits and Kaahumanu v. County of Maui.

Question Posed: Could the applicant for a conditional use permit be required to waive his or her right to sue individual council members for allegedly violating his or her civil rights?

Analysis.

Relevant federal law, 42 U.S.C. § 1983, enacted in 1871, states, in part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory ... subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

...

The United States Supreme Court has held that a municipal corporation is a "person" subject to the provisions of 42 U.S.C. § 1983. Of course individual council members are "persons" as

well.¹ Individual council members are absolutely immune from suit when acting in their legislative capacity. However, absolute immunity does not apply to actions that are administrative or executive rather than legislative. In those instances, individual council members are subject to suit unless entitled to qualified immunity.²

You have asked whether or not council members may avoid the potential for such individual liability by requiring an applicant to waive the right to sue individual council members pursuant to 42 U.S.C. § 1983.³ We have not found controlling precedent that would answer your question definitively. In some cases the waiver of rights to obtain a benefit has been upheld by the courts, in other cases it has been overturned.

For example, as a condition of the benefit of employment, Federal employees give up their right to participate fully in political campaigns.⁴ And students can be denied federal financial aid if they fail to register for the draft.⁵

On the other hand, there are situations where the government cannot condition benefits on the surrender of constitutional rights. An out-of-state corporation cannot be required to relinquish its right to access the federal court in order to do business.⁶ And citizens cannot be required to sign a loyalty oath in order to obtain a tax exemption.⁷

¹Monell v. Dep't of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

²Kaahumanu v. County of Maui, 315 F.3d 1215 (9th Cir. 2003).

³The applicant would not be asked to waive the right to sue the County of Maui, only the right to sue the individual council members.

⁴United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

⁵Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984).

⁶Terral v. Burke Construction Co., 257 U.S. 529 (1922).

⁷Speiser v. Randall, 357 U.S. 513, 529, 78 S. Ct. 1332, 1344, 2 L. Ed. 2d 1460 (1958).

In Ancheta v. Watada, 135 F. Supp.2d 1114 (D. Hawai'i 2001), a case involving a challenge to Hawaii's Code of Fair Campaign Practices, Judge Helen Gilmore of the U.S. District Court for the District of Hawai'i held that the State "cannot constitutionally force its candidates for public office to choose between alternate perils."⁸ The Code provided that a candidate for public office who refused to sign a pledge of "fair campaign practices" would be placed on a list posted on the State of Hawaii Campaign Spending Commission's website. The Court held that this was tantamount to branding the candidate as a person who was unwilling to uphold "basic principles of decency, honesty and fair play." Thus, the court held, a candidate was required to choose between protected fair speech and his right to run for office. In other words, the State was conditioning the fundamental right to run for office on a waiver of the candidate's fundamental right to free speech. The Court acknowledged that constitutional rights can be waived, but emphasized that the waiver cannot be coerced.

The question you have posed presents a different situation because the right to apply for a conditional use permit is not a fundamental right. Nevertheless, Ancheta is instructive in that it points out that courts are reluctant to find a waiver of a constitutional right.

Some courts have decided cases involving the waiver of constitutional rights by using a balancing test. Essentially, the court weighs the importance of the relinquished right and balances that against the sum of the importance of the interest that the government is trying to protect and the benefit offered to the citizen in exchange for the waiver.

First, the plaintiff must establish that a constitutional right is implicated; second, the plaintiff must demonstrate that the right is being impinged upon ...; third, ... the government must demonstrate the propriety of seeking a waiver of a constitutional right in light of both its legitimate interest in a waiver, if any, and the benefit to be conferred upon the adverse party.⁹

⁸Ancheta v. Watada, 135 F. Supp.2d 1114 (D. Hawai'i 2001).

⁹Louisiana Pacific Corp. v. Beazer Materials & Services, Inc., 842 F. Supp. 1243, 1249-1250 (E.D. Cal. 1994).

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As Judge Carlton, Chief Judge Emeritus, Eastern District of California said:

[T]he absence of a tenable theoretical basis and what frequently appear to be inconsistent results, renders decision-making an uncertain task.¹⁰

In conclusion, because the law in the area of "unconstitutional conditions" is not well settled, there is no definitive answer to your question. Further discussion of this matter would involve your powers, duties, privileges and immunities and should take place in executive session.

Sincerely,

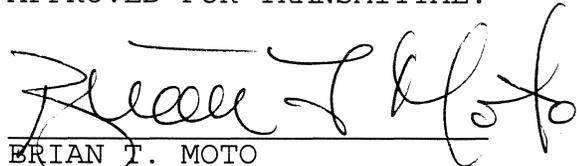


MADELYN S. D'ENBEAU
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APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

¹⁰Louisiana Pacific Corp., 842 F. Supp. at 1249.