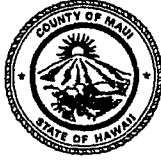


ALAN M. ARAKAWA  
Mayor



PATRICK K. WONG  
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL  
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October 24, 2012

MEMORANDUM

T O: Michael P. Victorino, Chair  
Water Resources Committee

F R O M: Edward S. Kushi, Jr.  
First Deputy Corporation Counsel

A handwritten signature in black ink, appearing to read "E. Kushi, Jr.", is written over the name of the sender.

SUBJECT: ESTABLISHING A LANAI WATER ADVISORY COMMITTEE (WR-16)

Pursuant your request of October 19, 2012 (copy with enclosures attached), but due to the limited time allowed to respond, below are our responses, albeit brief, to your inquires.

1. Notwithstanding amendments made to the Revised Charter of the County of Maui, as amended (1983) in 2002 to mandate that the authority of the Board of Water Supply ("Board") is advisory to the Department of Water Supply, does the Board of Water Supply Resolution No. 5 (1999) still have the force and effect of law?

Short answer: Yes.

With respect to the Board, prior to 2003, Section 8-11.4 of the Charter, in pertinent part, stated:

EXHIBIT I-22

"Section 8-11.4. Powers, Duties and Functions. The board of water supply shall:

. . . .  
3. Adopt rules and regulations which shall have the force and effect of law relating to the management, control, operation, preservation and protection of the water works of the county, as well as the establishment and adjustment of rates and charges for furnishing water; such rules and regulations shall be adopted as provided under Section 8-11.8 below."

Subsequently and as a result of the referenced charter amendment, the powers, duties and functions of the previously semi-autonomous Board became that of an "advisor" to the Director of the Department of Water Supply, the Mayor and the Council, and specifically, the power and authority to adopt rules and regulations having the force and effect of law were deleted.<sup>1</sup>

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<sup>1</sup>Current Section 8-11.3 of the Charter states, in pertinent part:

"Section 8-11.3. Board of Water Supply . . . The board of water supply shall act as advisor to the director of the department of water supply, the mayor and the council in all matters concerning the county's water system."

Current Section 8-11.4 of the Charter states:

"Section 8-11.4. Powers, Duties and Functions. The board of water supply shall:

1. Review and submit to the mayor the department of water supply's request for an annual appropriation for operations and capital improvements.

2. Recommend the establishment and adjustment of rates and charges for furnishing water; such rates and charges shall be submitted to the mayor for review and approval. If approved by the mayor, proposed

Based on the above, it is, at a minimum, questionable whether the current Board has the power or authority to promulgate and adopt rules or regulations that would affect on-going operations of the Department of Water Supply (the "Department"), let alone adopt a rule to amend or repeal a previously authorized rule. Here, however, we are not dealing with a previously authorized rule<sup>2</sup>, but a duly adopted resolution by the then semi-autonomous Board in 1999. Notwithstanding the distinction between a rule and a resolution, we opine that the subject resolution, Board of Water Supply Resolution No. 5 (1999), continues to be in full force and effect, until repealed or superseded, and therefore the Board-established Lanai Water Advisory Committee (the "LWAC") continues to exist.

2. Does the Board have the authority to pass a resolution to abolish the LWAC?

Short answer: No.

As discussed above, based on the clear and intended language of the 2002 charter amendment that stripped the Board's power and authority with respect to adopting rules and regulations having the force and effect of law, and which also converted said Board to an advisory agency, we respond in the negative.<sup>3</sup> As further noted above, the question concerns a duly adopted resolution, not a duly adopted rule. Notwithstanding the generally lower case status of resolutions as compared to rules, regulations and/or ordinances, the subject Resolution No. 5 (1999) did specifically establish the LWAC, and further stated that "The LWAC is established and shall

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rates and charges shall be submitted to the council for enactment by ordinance.

3. Perform such other duties and functions as shall be prescribed by law."

<sup>2</sup>There still exists various Board "rules" which have not been codified into ordinances which are found in Title 14, Maui County Code ("MCC"), which Board rules continue to be in full force and effect. State v. Kimball, 54 Haw 83, 503 P.2d 176 (1972).

<sup>3</sup>We note that the Board is authorized to hear and determine appeals from decisions of the Director, pursuant to Chapter 14.11, MCC, which chapter was enacted in 2007, pursuant to Section 8-11.4(3) of the Charter, which states "3. Perform such other duties and functions as shall be prescribed by law."

remain in existence until otherwise determined by the Board by subsequent resolution."<sup>4</sup>

Accordingly, because the subject resolution created a sitting body (i.e., the LWAC), we are of the position that said resolution should be treated and analyzed as a rule. An administrative agency can only wield powers expressly or implicitly granted to it by statute. Haole v. State, 111 Haw 44, 140 P.3d. 377 (2006).

3. Does the Council have the authority to pass an ordinance to replace and supersede a Board resolution?

Short answer: Yes.

In the hierarchy of municipal law, "The charter supersedes all municipal laws, ordinances, rules or regulations that are inconsistent with its provisions."<sup>5</sup> "A charter is, in effect, a local constitution.....The basic function of a charter is to distribute power among the various agencies of government, and between the government and the people who have delegated that power to their government." County of Kauai v. Baptiste, 115 Haw 15, 165 P.3d 916 (2007).

"Municipal ordinance must conform to, be subordinate to, not conflict with, and not exceed municipal charter, and just as legislative act may not modify or supersede provision of State Constitution, nor may ordinance change or limit charter's effect." Harris v. DeSoto, 80 Haw 425, 911 P.2d 60 (1996). An ordinance "... imports a command or prohibition, usually designed to compel or prevent action of some sort ..." and "... imports a local rule of general and permanent character, enacted to regulate continuing conditions, and it has the force of law over the community in which it is adopted."<sup>6</sup>

Based on the above, and our understanding of the Council's intent and proposal to legislatively, by ordinance, establish an LWAC, we opine that the proposed ordinance would satisfy any underlying concerns as:

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<sup>4</sup>Paragraph 4, at page 2 of Resolution No. 5 (1999).

<sup>5</sup>McQuillin, Municipal Corporations, Chapter 9, Section 9:3.

<sup>6</sup>Id., Chapter 15, Section 15:12.

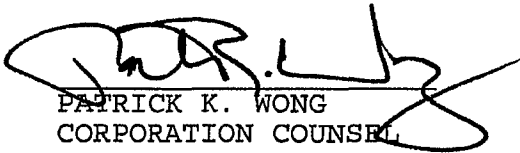
Michael P. Victorino, Chair  
Water Resources Committee  
October 24, 2012  
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1) The ordinance is consistent with the language of the charter provisions, as amended in 2002, specifically with respect to the powers, duties and functions (or lack thereof) of the Board; and

2) Any question as to the Board's power or authority to now adopt a resolution dissolving the LWAC which was established by a duly adopted resolution in 1999 will be settled by the passage of a legislative ordinance, which then supersedes any rule, regulation and/or resolution of the Board.

Call if further discussion/clarification is needed.

Reviewed and approved  
for transmittal:



PATRICK K. WONG  
CORPORATION COUNSEL

S:\ALL\ESK\COUNCIL\Memos\Lanai Water Advisory Committee.wpd

cc: David Taylor, Director, Department of Water Supply  
Paul J. Meyer, Deputy Director, Department of Water Supply

Enclosures

Council Chair  
Danny A. Mateo

Vice-Chair  
Joseph Pontanilla

Council Members  
Gladys C. Baisa  
Robert Carroll  
Elle Cochran  
Donald G. Couch, Jr.  
G. Riki Hokama  
Michael P. Victorino  
Mike White



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Director of Council Services  
Ken Fukuoka  
RECEIVED  
CORPORATION COUNSEL

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October 19, 2012

MEMO TO: Patrick K. Wong  
Corporation Counsel

F R O M: Michael P. Victorino, Chair  
Water Resources Committee

*Michael P Victorino*

SUBJECT: **ESTABLISHING A LANAI WATER ADVISORY COMMITTEE (WR-16)**

At its meeting of October 2, 2012, the Water Resources Committee recommended that a revised proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING TITLE 2, MAUI COUNTY CODE, TO ESTABLISH A LANAI WATER ADVISORY COMMITTEE", be passed on first reading. The purpose of the revised proposed bill is to establish a Lanai Water Advisory Committee ("LWAC"), by ordinance, to monitor the implementation of the "LANA'I ISLAND WATER USE & DEVELOPMENT PLAN" and advise the Lanai Planning Commission on water-related matters.

Attached is Board of Water Supply Resolution No. 5 (1999), which also established a Lanai Water Advisory Committee. The fourth "BE IT RESOLVED" clause of the resolution states "The LWAC is established and shall remain in existence until otherwise determined by the Board by subsequent resolution."

May I please request a written legal opinion on the following:

1. Notwithstanding amendments made to the Revised Charter of the County of Maui, as amended (1983) in 2002 to mandate that the authority of the Board of Water Supply ("Board") is advisory to the Department of Water Supply, does the Board of Water Supply Resolution No. 5 (1999) still have the force and effect of law?
2. Does the Board have the authority to pass a resolution to abolish the LWAC?
3. Does the Council have the authority to pass an ordinance to replace and supersede a Board resolution?

I would appreciate receiving a response not later than **Wednesday, October 24, 2012**, to meet the posting deadline for the Council meeting of November 2, 2012. To ensure efficient

Patrick K. Wong  
October 19, 2012  
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processing, please include the relevant Committee item number in the subject line of your response.

Should you have any questions, please contact me or the Committee staff (Kimberley Willenbrink at ext. 7761, Gina Gormley at ext. 7687, or Yvette Bouthillier at ext. 7758).

wr:ltr:016acc02:srg/kcw

Attachment

cc: Edward Kushi, Deputy Corporation Counsel

**COUNTY OF MAUI BOARD OF WATER SUPPLY  
RESOLUTION NO. 05 (1999)**

**ESTABLISHING THE LANAI WATER ADVISORY COMMITTEE**

WHEREAS, the preparation of the Maui County Water Use and Development Plan (WUDP) is the responsibility of the Board of Water Supply (Board); and

WHEREAS, Board Rule §16-02-17 enables the Board to appoint standing committees and select committees to discharge its responsibilities and functions; and

WHEREAS, the Board wishes to formalize and establish consistent guidelines for implementation of community participation in Water Use and Development Planning; and

WHEREAS, water use issues on the island of Lanai have arisen because the island has limited water resources; and

WHEREAS, the Board is committed to public involvement in planning and decision-making efforts as it relates to the Lanai WUDP; and

WHEREAS, the establishment of the Lanai Water Advisory Committee (LWAC) will enable the Board to complete the WUDP for the island of Lanai;

NOW, THEREFORE, BE IT RESOLVED by the Board of Water Supply and the County of Maui:

1. The Lanai Water Advisory Committee (LWAC) is hereby established. The LWAC shall consist of the following members selected by their respective organization (where appropriate):
  - (1) Two (2) voting members from Lanai Company;
  - (2) Two (2) voting members from Lanaiians for Sensible Growth;
  - (3) One (1) voting member from the Lanai Planning Commission;
  - (4) Councilmember from the island of Lanai, or his representative, with voting rights on the LWAC;



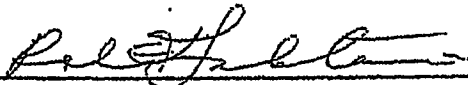
Resolution No. 05 (1999)

- (5) Three (3) residents of Lanai who are not affiliated with any of the above referenced organizations and who are entitled to vote on LWAC matters. The residents shall be selected by six (6) affirmative votes cast by the LWAC voting members from Lanai Company, Lanai'ians for Sensible Growth, the member of the Lanai Planning Commission, and the Lanai Councilmember or his representative. In the event that six (6) votes can not be obtained as to any resident, the Director is hereby authorized to make the selection of the resident(s) from among those considered. The Director's decision shall be final.
- (6) One (1) non-voting member from Lanaiians for Economic Growth and Stability.
2. The Department of Water Supply, through the Director, shall be the lead agency and shall provide appropriate staffing for the LWAC. The Department of Planning, Department of Public Works and Waste Management, Commission on Water Resources Management, Department of Land and Natural Resources, and other appropriate county or state agencies shall be consulted and may participate in the Lanai WUDP process. Staff personnel from these departments or agencies shall not have any vote in any LWAC proceedings.
3. The purpose and intent of the LWAC is to provide public input and involvement during the development of the Lanai WUDP and to monitor the Lanai WUDP implementation. The LWAC may organize itself as it deems appropriate to accomplish its purpose, including the adoption of by-laws for its own internal governance.
4. The LWAC is established and shall remain in existence until otherwise determined by the Board by subsequent resolution.
5. In consultation with the LWAC, the Director shall determine the meeting dates of the LWAC.
6. All communications between the Board and the LWAC shall only be through the Director.
7. The Director may propose amendments to the composition, purpose, and term of the LWAC, which may be approved by the Board by resolution. The Director shall notify the LWAC members prior to proposing any such amendments to the Board.

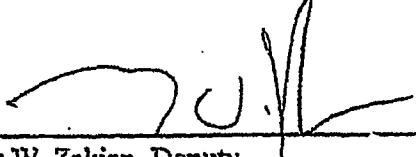
Resolution No. 05 (1999)

8. The Director is authorized to take any and all appropriate action necessary to carry out the purpose and intent of this Resolution that does not require Board approval.
9. That this resolution shall apply only to the process of drafting, reviewing, updating and implementing Water Use and Development Plans, and does not supersede any powers the Board, Administration, or other agencies already have... to appoint advisory committees.
10. The Director shall notify each member of their selection to the LWAC.

IN WITNESS WHEREOF, and by proper vote of the Board of Water Supply, I have hereunto subscribed my name and affixed the seal of the Board of Water Supply this 16th day of March, 1999.

  
\_\_\_\_\_  
Robert K. Takitani, Chairman  
Maui County Board of Water Supply

Approved as to form and legality:

  
\_\_\_\_\_  
Gary W. Zakian, Deputy  
Corporation Counsel