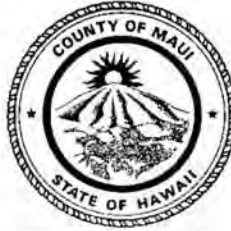


MICHAEL P. VICTORINO
Mayor

Moana M. Lutey
Corporation Counsel

EDWARD S. KUSHI, JR.
First Deputy


LYDIA A. TODA
Risk Management Officer



DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
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DATE: October 3, 2019

MEMO TO: Kelly King, Chair
Maui County Council

FROM: Peter A. Hanano 
Deputy Corporation Counsel

SUBJECT: Opinion on Authority to Settle

MEMORANDUM OF LAW

I. QUESTION PRESENTED.

WHETHER PURSUANT TO MAUI COUNTY CODE SECTION 3.16.020, THE MAYOR AND/OR COUNTY COUNCIL HAVE THE AUTHORITY TO ACCEPT THE MAY 9, 2019 SETTLEMENT PROPOSAL BY PLAINTIFFS IN COUNTY OF MAUI V. HAWAII LIFE FUND, ET AL., CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT DOCKET 18-260.

II. LEGAL ANALYSIS.

Our analysis is based on the inter-relationship between the County's Charter provisions, the Maui County Code provisions relating to settlement of claims against the County, and the applicable common law.

A. County Charter Provisions.

The county's delegation of authority from the state to “frame and adopt a charter for its own self-government” is expressly set forth in Article VIII of the Hawai'i Constitution which delineates, and limits, the grant of power from the state to its political subdivisions. Haw. Const. art. 8, § 2. Pursuant to the constitution, once adopted, charter provisions with respect to the county's “executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.” *Id.*

A basic tenet of municipal corporation law is that an ordinance which conflicts with an express provision in a charter is invalid. Fasi v. City Council of City & Cty. of Honolulu, 72 Haw. 513, 518–19, 823 P.2d 742, 744 (1992). “The proposition is self-evident ... that an ordinance must conform to, be subordinate to, not conflict with, and not exceed the charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state. Ordinances must not only conform with the express terms of the charter, but they must not conflict in any degree with its object or with the purposes for which the local corporation is organized[.]” *Id.* (Citation omitted). It is also a fundamental tenet of municipal corporation law that a charter may not be amended except by properly initiated and enacted charter amendments. *Id.*

Moreover, where the very structure of the charter itself anticipates separation of legislative and executive power, council may not directly contradict or nullify a charter provision by ordinance. Fasi v. City Council of City & Cty. of Honolulu, 72 Haw. 513, 519, 823 P.2d 742, 745 (1992). Further, as a comprehensive general rule, an ordinance may not conflict with the express provisions, purposes, or object of the City Charter, particularly the principle of separation of powers dictated by the charter, in that neither branch may exercise the powers vested in the other by the charter. Harris v. DeSoto, 80 Hawai'i 425, 432, 911 P.2d 60, 67 (1996).

Here, the question presented should be considered in light of the basic scheme of the Maui County Charter ("Charter"). Indeed, the Charter has as its basic scheme, a clear and definite separation of the legislative and the executive power. On the one hand, executive power is vested in the executive branch headed by the mayor. The mayor's powers, duties and functions are specified in Section 7-5 of the Charter, which includes exercising "supervision directly or through the managing director over all departments enumerated in Article 8 of this charter and other agencies as provided by law." Under the Charter, the mayor has the sole authority to remove certain directors.¹ Additionally, also under Section 7-5, "the mayor shall . . . enforce the

¹ For example, the Mayor alone may remove the Directors of Environmental Management (Section 8-15.3), Public Works (Section 8-5.2), and Parks and Recreation (Section 8-6.2).

provisions of this charter, the ordinances of the county and all applicable laws.”

Further, Article 8 of the Charter includes, but is not limited to, the Departments of Corporation Counsel, Planning, Environmental Management, and Public Works. Section 8-2.3 of the Charter, provides in pertinent part:

Section 8-2.3. Powers, Duties, and Functions. The corporation counsel shall:

* * *

2. Be the chief legal advisor and legal representative of the County of Maui; of the council, the mayor, all departments, and all boards and commissions; and of all officers and employees in matters relating to their official duties, except as otherwise provided in this charter.

3. Represent the county in all legal proceedings.

* * *

Charter, at 20. Further, Section 8-2.3 of the Charter, provides in pertinent part:

Section 8-15.3. Powers, Duties, and Functions. The director of environmental management shall:

1. Supervise waste management and control of pollution, including recycling, litter control, and protection of the unique beauty of Maui county.

2. Plan, design, build, operate, and maintain solid waste collection, processing and disposal systems, including recycling programs.

3. Plan, design, build, operate, and maintain the county's sewer treatment plants, pump stations, sewer lines, reclaimed water distribution systems, and related programs.

4. Guide efforts to optimize opportunities for environmental, natural resource protection, sustainability, conservation, and restoration.

Charter, at 36.

On the other hand, the legislative power is vested in legislative branch represented by council. Section 3-6 of the Charter specifies the powers of the council, which includes the power “to legislate appropriations for county purposes subject to the limitations provided by this charter.” Section 3-8 provides restrictions on the council and council members. That section provides in pertinent part that:

Section 3-8. Restrictions on Council and Council Members.

* * *

2. Neither the council nor its members shall give orders to any county employees or county officers other than those appointed pursuant to Section 3-7 or Article 5, either publicly or privately. Any willful violation of the provisions of this subsection by a member of the council shall be sufficient grounds for the councilmember's removal from office by impeachment.

Charter, at 9. Charter Section 3-7 pertains to the Office of Council Services, while Article 5 relates to the County Clerk.

Under the separation of powers so provided, each branch is coordinate with the other, and neither may exercise the power vested in the other. See City Council of City & Cty. of Honolulu v. Fasi, 52 Haw. 3, 5-6, 467 P.2d 576, 578 (1970) (the exercise of executive power by the council via resolution was inconsistent with the principle of separation of powers, and therefore constituted an outright usurpation and exercise of executive power). However, this does not mean that the wall of separation is complete and either branch is

free to exercise its power as it pleases without any say by the other. Id.

(Citations omitted).

B. Maui County Code Provisions.

The question presented involves the application of Maui County Code (MCC) Section 3.16.020. That section provides in pertinent part:

3.16.020 - Settlement of claims and other civil litigation.

Other Claims or Civil Litigation. The corporation counsel, with the approval of the mayor, may settle, compromise, or otherwise resolve any claim not described in subsection A of this section, now existing or which may hereafter arise, requiring payment of a total amount not exceeding \$7,500; provided, that the fund to settle claims has been appropriated and is available therefor. Any settlement in excess of \$7,500 shall require council authorization.

MCC, Section 3.16.020 B.

In Harris v. DeSoto, the Hawai'i Supreme Court considered whether an ordinance (No. 93-78), similar to MCC Section 3.16.020, which effectively vested exclusive power in the City and County of Honolulu Council to settle claims in excess of \$5,000 as well as suits for injunctive, declaratory, and extraordinary relief, was unlawful and void because it violated the city charter. In its analysis, the Harris court noted that Ordinance No. 93-78 is ostensibly not limited to the power to settle claims with city funds, but that the council has the power to "accept" *any* offer made by a claimant and, should the council "accept" the offer on its terms, the council's acceptance is binding on the city, and the city is bound to comply with the terms of the offer or be in breach of

the settlement agreement. Id., at 437, P.2d 60, 72. In rendering its decision, the Hawai'i Supreme Court opined that:

Under the scheme as set out by the Ordinance, potential conflicts with the object and purposes of the charter arise. As previously noted, at the heart of the form of government prescribed by the charter is the principle of separation of powers, in that each coordinate branch of municipal government is charged with particular governmental functions, largely free from interference by the others. As written, Ordinance No. 93-78 violates the principle of separation of powers to the extent that it essentially grants to the council the power to bind the city to *any* terms, whether or not the terms fall within the powers of the council, by granting the power to the council to accept any offer of settlement for a claim against the city, thereby binding the city to the terms of the agreement.

Pursuant to this logic, the council could potentially affect and/or control any aspect of city government that happens to be the subject of a "claim" against the city—a situation clearly in conflict with the system of separation of powers mandated by the charter. . . Under the power granted to the council by Ordinance No. 93-78, the council could similarly affect and/or control myriad other aspects and functions of city government, seemingly limited only by the topic of the dispute.

Harris v. DeSoto, at 437, P.2d at 72. Finally, in its holding the Harris court stated the following in pertinent part:

It is axiomatic that, as a general principle, the scope of authority of a branch of municipal government to settle a claim on behalf of the city is limited by the authority vested in that branch to pledge, grant, or commit the consideration sought by the claimant or offered by the city in settlement. Thus, where the consideration for settlement involves the commitment of city funds or an exercise of municipal authority *exclusively* vested in the council by the charter, the council may *alone* pledge, grant, or commit the settlement consideration. Similarly, where the consideration for settlement involves an exercise of municipal authority *exclusively* vested in the executive, the executive may *alone* pledge, grant, or

commit the settlement consideration. However, where the consideration for settlement of a claim requires (1) both an exercise of municipal authority vested exclusively by the charter in the council and an exercise of municipal authority vested exclusively by the charter in the executive, or (2) an exercise of municipal authority vested by the charter in both the council and the executive, the council and the executive must concur in order to accept or make an offer of settlement.

Harris v. DeSoto, at 439, P.2d at 74.

Based upon the above, the application of Maui County Code Section 3.16.020, as it pertains to settlements in civil suits, must be interpreted as follows:

1. Where the consideration for settlement involves the commitment of County of Maui funds in excess of \$7,500, or an exercise of municipal authority *exclusively* vested in the Council by the charter, the Council may *alone* pledge, grant, or commit the settlement consideration.
2. Where the consideration for settlement involves the commitment of County of Maui funds not exceeding \$7,500, or where the consideration for settlement involves an exercise of municipal authority *exclusively* vested in the Mayor, the Mayor may *alone* pledge, grant, or commit the settlement consideration.
3. Where the consideration for settlement of a claim requires (1) both an exercise of municipal authority vested exclusively by the Charter in the Council and an exercise of municipal authority vested exclusively by the Charter in the Mayor, or (2) an exercise of municipal authority vested by the Charter in both the Council and the Mayor, the Council and the executive must concur in order to accept or make an offer of settlement.

C. Terms of Plaintiffs' May 9, 2019 Settlement Proposal.

The question is whether each of the eight (8) terms of the Plaintiff's May 9, 2019 settlement proposal requires: 1) Council's approval only; 2) Mayor's approval only; 3) both Council's and Mayor's approval. As discussed below, some of the settlement terms require only the Council or Mayor's approval, while others require both.

Settlement Term #1: The parties would jointly dismiss the County's pending appeal to the U.S. Supreme Court pursuant to Supreme Court Rule 46.1. Each party would bear its own costs of litigation (including attorneys' fees) for proceedings before the Supreme Court.

This settlement term involves "controlling of the litigation" in the case, which involves an exercise of municipal authority *exclusively* vested in the Mayor. While this specific issue has not been considered by the Hawaii appellate courts, other jurisdictions have recognized that "[t]he executive branch generally has the power and authority to control litigation as part of its power to execute the laws, and a law that removes from the executive branch sufficient control of litigation may well violate separation of powers." Perdue v. Baker, 277 Ga. 1, 14, 586 S.E.2d 606, 615 (2003). Additionally, others have stated that "council 'approval' of legal proceedings instituted by the Mayor does not strictly require 'prior approval' of each decision in the prosecution of a suit. Washington Pub. Tr. Advocates v. City of Spokane, 120 Wash. App. 892, 901, 86 P.3d 835, 840 (2004).

Here, pursuant to the Charter's Section 8-2.3(b), the Corporation Counsel shall "be the chief legal advisor and legal representative of the County of Maui; of the council, the mayor, all departments, all boards and commissions, and of all officers and employees in matters relating to their official duties . . . represent the county in all legal proceedings." Therefore, a settlement offer which includes an agreement not to pursue an appeal of an adverse court ruling involves "controlling the litigation" in a case; and therefore, rests solely with the executive and corporation counsel.

Moreover, withdrawal of the case from United States Supreme Court review cannot be viewed as simply a "ministerial executive action." Indeed, the far reaching impacts of a withdrawal of the case from further appellate review will undoubtedly result in very significant administrative and operational impacts upon certain departmental operations, facilities and functions.²

Finally, this settlement term does **not** involve the commitment of County of Maui funds exceeding \$7,500; and therefore, consistent with Maui County Code, Section 3.16.020 B, the settlement term involves an exercise of municipal authority *exclusively* vested in the Mayor. Thus, as to Term #1, the Corporation Counsel, with the approval of the Mayor, may alone accept or reject Term #1.

² See Exhibit A, which is a true and correct copy of a letter from Eric A. Nakagawa, P.E., Director of Environmental Management, dated September 30, 2019.

Settlement Term #2. Pursuant to the previously entered Settlement Agreement and Order Re: Remedies in Hawai'i Wildlife Fund, et al. v. County of Maui, Civ. No. 12-000198 SOM BMK (D. Haw. Nov. 17, 2015), the County:

(1) would make good faith efforts to secure and comply with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit for the LWRF injection wells;

(2) would fund and implement one or more projects located in West Maui, to be valued at a minimum of \$2.5 million, the purpose of which is to divert treated wastewater from the LWRF injection wells for reuse, with preference given to projects that meet existing demand for freshwater in West Maui; and

(3) would pay a \$100,000 penalty to the U.S. Treasury.

As a whole, this settlement term involves both an exercise of municipal authority vested exclusively by the Charter in the Council and an exercise of municipal authority vested exclusively by the Charter in the Mayor. Clearly, portions of Term #2 require the County to commit to funds exceeding well over \$7,500. This requires Council approval under MCC Section 3.16.020 B. Likewise, because Term #2 requires operational adjustments and requirements mostly by the Department of Environmental Management, this is an "administrative duty" which involves an exercise of municipal authority

exclusively vested in the Mayor.³ Thus, as to Term #2 as a whole, the Council and the Mayor, must concur in order to accept Term #2.

Settlement Term #3: Pursuant to the parties' prior agreements, which have been entered as court orders, the County would reimburse the Community Groups' costs of litigation (including attorneys' fees) for litigation in the district court and the Ninth Circuit Court of Appeals. (Citation omitted.) As mentioned above, each party would bear its own costs of litigation for all proceedings before the U.S. Supreme Court.

This settlement term involves the commitment of County of Maui funds in excess of \$7,500; and therefore, the Council alone may accept or reject Term #3.

Settlement Term #4: As long as the County makes good faith efforts to reduce its reliance on the LWRF injection wells to dispose of treated wastewater, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit – which could be “an equivalent control document” (see HAR 11-5-01) – for the LWRF injection wells, the Community Groups will not bring litigation seeking additional penalties based on the Clean Water Act.

This settlement term involves an exercise of municipal authority *exclusively* vested in the Mayor. While this term incorporates one category of the obligations assigned to the Department of Environmental Management under Settlement Term #2 (“secure and comply with the terms of an NPDES permit”), it adds additional executive branch obligations to *reduce reliance on*

³ See *Hawaii Insurers Council v. Lingle*, 117 Hawai'i 454, 459, 184 P.3d 769, 774 (Ct. App.), as amended (Apr. 15, 2008), aff'd in part, rev'd in part, 120 Hawai'i 51, 201 P.3d 564 (2008) (the power to tax must not be confused with the administrative duties which are necessarily involved in the assessment and collection of taxes . . . the legislature itself cannot attend to all the details involved in the enforcement of the law . . . those must of necessity be entrusted to administrative officers).

*LWRF injection wells and increase the beneficial reuse of treated wastewater, as conditions precedent in order to avoid further litigation, both of which are exclusive executive functions related to the planning, permitting, design, construction, and operation of significant infrastructure. Furthermore, this settlement term does **not** involve the commitment of County of Maui funds exceeding \$7,500. Thus, as to Term #4, the Corporation Counsel, with the approval of the Mayor, may alone accept or reject Term #4.*

Settlement Term #5: As long as the County makes good faith efforts to reduce its reliance on injection wells to dispose of treated wastewater at its other wastewater treatment facilities, to increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for its injection wells where legally required, the Community Groups will not bring litigation seeking penalties based on the County's lack of Clean Water Act compliance for use of those injection wells.

This settlement term involves an exercise of municipal authority *exclusively* vested in the Mayor. Specifically, this settlement term requires the County to, as a condition precedent to not being sued again, “*reduce its reliance on injection wells to dispose of treated wastewater at its other wastewater treatment facilities, increase the beneficial reuse of that treated wastewater, and to secure and comply with the terms of an NPDES permit for its injection wells*” at **all** of its wastewater reclamation facilities, and not only the Lahaina facility, which was the subject of the lawsuit. Clearly, this settlement term imposes administrative and enforcement obligations on the executive branch, but does **not** involve the commitment of County of Maui

funds exceeding \$7,500. Thus, as to Term #5, the Corporation Counsel, with the approval of the Mayor, may alone accept or reject Term #4.

Settlement Term #6: The Community Groups further commit that they will not bring Clean Water Act litigation against any end users of recycled water from the LWRF, as long as those consumers are irrigating responsibly, so as not to cause pollution of waters of the United States.

This settlement term involves an exercise of municipal authority *exclusively* vested in the Mayor. This term requires the County's executive departments (including Parks and Public Works) *irrigate responsibly* as a condition precedent to not being sued. However, this settlement term does **not** involve the commitment of County of Maui funds exceeding \$7,500. Thus, as to Term #6, the Corporation Counsel, with the approval of the Mayor, may alone accept or reject Term #6.

Settlement Term #7: The parties recognize that various factors contribute to stresses on the marine environment, including climate change, ocean acidification, and other human-caused pollution. In settling this case, the County makes no admission regarding whether the LWRF injection wells have an adverse effect on the nearshore marine environment.

This settlement term involves an exercise of municipal authority *exclusively* vested in the Mayor. In withdrawing this case from the United States Supreme Court, the County is essentially accepting and agreeing to comply with the Ninth Circuit's decision. Regardless that this condition states that the County makes "no admission," the Mayor is still required to "enforce the provisions of this Charter, the ordinances of the County, and all applicable

laws” (Charter §7-5(17)). This settlement term does **not** involve the commitment of County of Maui funds exceeding \$7,500. Thus, as to Term #7, the Corporation Counsel, with the approval of the Mayor, may alone accept or reject Term #7.

Settlement Term #8: The parties recognize that, apart from this case specifically regarding the LWRF, any other cases would depend on their own specific factual circumstances, which are not at issue in this case. The parties reserve their positions and all rights on the merits of any other case.

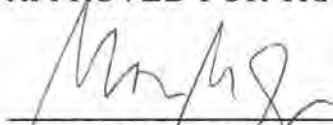
This settlement term involves an exercise of municipal authority *exclusively* vested in the Mayor. The term puts the County and others on notice that the agreement only restricts the Plaintiffs from bringing legal action identical to that brought against the County’s Lahaina facility. This settlement term does **not** involve the commitment of County of Maui funds exceeding \$7,500. Thus, as to Term #8, the Corporation Counsel, with the approval of the Mayor, may alone accept or reject Term #8.

III. CONCLUSION.

Based upon the foregoing, pursuant to the application of Maui County Code Section 3.16.020, some terms of the May 9, 2019 settlement proposal require only the Council or Mayor’s approval, while others require both the Council and the Mayor’s approval. Therefore, the Council and the Mayor must concur in order to accept Plaintiffs’ May 9, 2019 settlement proposal.

Kelly King, Chair
Maui County Council
October 3, 2019
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APPROVED FOR TRANSMITTAL:



MOANA M. LUTEX
Corporation Counsel

cc. Mayor Michael P. Victorino, Mayor
Sandy Baz, Director, Department of Management

MICHAEL P. VICTORINO
Mayor

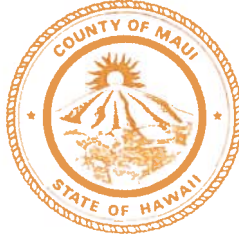
ERIC A. NAKAGAWA, P.E.
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SHAYNE R. AGAWA, P.E.
Deputy Director

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Solid Waste Division

SCOTT R. ROLLINS, P.E.
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TAMARA L. FARNSWORTH
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**COUNTY OF MAUI
DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**
2050 MAIN STREET, SUITE 2B
WAILUKU, MAUI, HAWAII 96793

September 30, 2019

Honorable Michael P. Victorino, Mayor
County of Maui
Kalana O Maui Building, 9th Floor
200 S. High Street
Wailuku, Hawaii 96793

Dear Mayor Victorino:

**Re: Withdrawal of County of Maui v. Hawai'i Wildlife Fund et al.
Injection Well Appeal**

If the County of Maui withdraws our injection wells appeal and the 9th Circuit Court ruling stands, the uncertainty of the interpretation and application of the Clean Water Act (CWA) would impact the following:

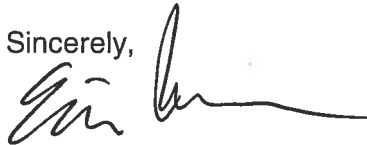
1. It is likely that the Ninth Circuit's "fairly traceable" test for Clean Water Act liability would mean that all four of the County's wastewater reclamation facilities utilizing injection wells (Kahului, Lahaina, Kihei, and Kaunakakai) are currently in violation of the CWA.
2. The CWA also includes provisions for possible criminal penalties; departmental personnel may be personally named in future lawsuits.
3. All of the following Department of Environmental Management (DEM) Capital Improvement Projects (CIP) will be put on hold: Recycled Water Projects (roughly \$35M budgeted), Soil Aquifer Treatment project (roughly \$3M budgeted), and Injection Well and Infiltration Pond projects (Future projects). Most of these projects have known groundwater connections.
4. DEM Reuse Program will be suspended and all future hook ups will be put on hold until clarification of the CWA is determined. We already have a private property owner who has appealed the Maui County Code's requirement to use our recycled water because it would subject them to possible violation of the CWA should the recycled water come into contact with groundwater and migrate to the ocean.
5. Existing operational activities of injection wells and infiltration ponds (every facility), pump stations/facilities with seepage pits/drainage basins to drain rain water into ground during storm events (up to 42 pump stations and 5 plants), irrigation using reuse water (Kihei, Kahului, Lahaina, Kaunakakai) will be suspended until clarification of the CWA is determined.

EXHIBIT A

6. Over the next 6-9 years, budget roughly \$23M for design of outfalls for all treatment facilities with injection wells (Kihei, Kahului, Kahului, and Kaunakakai) and another approximately \$600M to construct them, excluding land acquisition. The Department has determined that ocean outfall is the only disposal method with regulatory certainty.
7. All future development that wants to tie into our municipal wastewater system throughout the County will be put on hold/stalled until clarification of the CWA is determined.

These are just a few of the department's facilities and ongoing operations that will be affected until further clarification of the CWA can be determined. The full effect is not known. If you have any questions or concerns, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Nakagawa", with a long horizontal flourish extending to the right.

ERIC A. NAKAGAWA, P.E.
Director of Environmental Management