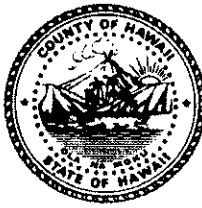


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August 12, 2020

Honorable Rick Robinson, Chairman
and Members of the Board of Ethics
Hilo Lagoon Center
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720

Dear Chair Robinson and Members of the Board of Ethics,

RE: Board of Ethics Request to Hire Special Counsel

The Hawai'i County Board of Ethics ("Board") has requested that Special Counsel be hired to provide an opinion on the Board's initiation of an investigation into an alleged unfairness of the lack of enforcement of laws at a protest site or public sites on or near the Mauna Kea Access Road ("MKAR"). The Office of the Corporation Counsel, through its deputies corporation counsel, has opined that the Board lacks authority or jurisdiction to conduct a hearing and/or investigation concerning the alleged lack of enforcement of laws at a protest site or other public sites on near the MKAR. Because the Board disagrees with the opinion of the Corporation Counsel, it now asserts a conflict of interest, and requests Special Counsel to resolve the disagreement.

For the reasons stated below, the Board's request for a Special Counsel is denied.

I. BACKGROUND

The Board is currently in the process of discussing the drafting of a resolution to conduct a hearing and/or investigation as to whether the Hawai'i County Code of Ethics is violated when a county officer or employee does not enforce the law at a protest site or other public sites on or near the MKAR on Hawai'i Island.

Moreover, this hearing and/or investigation involves the exercise of the First Amendment Rights by the citizens of this State of Hawai'i who have been peacefully protesting against the construction of the Thirty Meter Telescope on Mauna Kea.

II. QUESTION PRESENTED

Whether there is a real necessity to hire Special Counsel for the Board because it disagrees with the opinion of the Corporation Counsel that the Board has neither the authority nor the jurisdiction to pass a resolution to conduct a hearing and/or investigation regarding the alleged lack of enforcement of laws by County employees and officials at a protest site or other public sites near the MKAR.

III. SHORT ANSWER

The Board's disagreement with the opinion of the Corporation Counsel does not create a real necessity to hire Special Counsel in this matter.

IV. DISCUSSION

1. Applicable law.

The relevant duties and responsibilities of the Board, County Council, Mayor, Police Chief and Police Commission, and relevant Code provisions are as follows:

a. Board of Ethics.

The authority and functions of the Board are set forth in Section 14-5 of the Hawai'i County Charter ("Charter") which states, in pertinent part,

Without limitation of its functions, the board shall:

- (a) **Interpret the code of ethics for both county officials and the public and on its own may initiate and render opinions with respect thereto.**
- (b) Render advisory opinions to county officers and employees with respect to the code of ethics pursuant to written requests by officers and employees.
- (c) Receive and initiate complaints of violations of the code of ethics and transmit such complaints to the council or the appropriate appointing authority, along with any pertinent advisory opinion thereto.

- (d) **Hold hearings or conduct investigations concerning the application of the code of ethics and make public such violations of the code that come to its attention.**
- (e) Publish advisory opinions with such deletions as may be necessary to prevent disclosure of identity of persons involved where such opinions are rendered pursuant to subsection (b) above.
- (f) Propose revisions to the code of ethics where not inconsistent with this charter.

(Emphasis added.)

b. Relevant Hawai'i County Code provisions

Section 2-83. Fair treatment.

(a) Officers and employees of the County, while discharging their duties and dealing with the public, shall adhere to the following precepts:

(1) All public property and equipment are to be treated as a public trust and are not to be used in a proprietary manner or for personal purposes without proper consent.

(2) No person in a supervisory capacity shall engage in personal or business relationships with subordinates, which might intimidate said subordinates in the discharge of their official duties.

(3) All persons shall be treated in a courteous, **fair, and impartial manner.**

(Emphasis added.)

Here, the Board's authority is to investigate the discharge of duties which is "to carry out or perform one's duties," not the perceived failure to discharge duties.

Section 2-86. Informal advisory opinions.

...

b) Alleged Conduct of Someone Other than Inquirer. Any person or the board itself may petition the board for an informal advisory opinion on an alleged violation of the code of ethics by an officer or employee. The petition shall be filed within six years of the alleged violation. A petition shall be deemed to have been filed when it is received by the board or when a majority of the members to which the board is entitled sign the petition. Nothing herein shall bar proceedings against a person who, by fraud or other device, prevents the discovery of a violation of the code of ethics. This opinion shall be informal in nature and all proceedings

involving the investigation and deliberation of such inquiry shall, upon the request of the County officer or employee involved, be confidential, provided, the board determines that personal matters affecting the privacy of the County officer or employee are to be considered. Upon receipt of the petition, the board:

(1) Through its chairman, shall notify the County officer or employee involved and shall request a statement indicating whether or not the officer or employee wishes a closed hearing.

(2) Shall notify the officer or employee against whom a charge is received and afford the officer or employee an opportunity to explain the conduct alleged to be in violation of this article. The board may investigate, after compliance with this section, such charges and render an informal advisory opinion on the alleged conduct. The officer or employee involved shall comply with the informal advisory opinion issued by the board.

...

c. Hawai'i County Board of Ethics, Rule 5. Investigations and Investigatory Hearings

5.2. When Initiated

- a. Before the Board shall exercise any of the powers authorized in the Charter or HCC with respect to any investigation or hearings, it shall make a formal resolution to conduct such hearing or investigation.
- b. The resolution shall be supported by a majority of the members of the Board and shall define the nature and scope to be made.

d. Authority of the County Council

The powers and functions of the County Council are provided for in Section 3-1 of the Charter and states that "[t]he legislative powers of the county shall be vested in the county council." The County Council's "primary function shall be legislation and public policy formulation."

The Board has no authority to investigate future action by the County Council to de-fund the police for any enforcement action relating to a peaceful protest on Mauna Kea. The Ethics Code does not include invalidation of ordinances or resolutions, prospective de-funding of County projects or services, or directives for the County Council for re-votes.

e. Authority of the Mayor

The powers, duties and functions of the Mayor are provided for in Section 5-1.3 of the Charter and states in pertinent part that “[t]he mayor shall be the chief executive officer of the county vested with all the executive powers of the county, **except as otherwise provided by this charter**. The mayor shall have the power to: (a) Through the managing director supervise and coordinate all executive agencies of the county, **except as otherwise provided by this charter**.” (emphasis added).

The Board has no authority to investigate future executive action by a Mayor who considers the interests of all the stake-holders on Mauna Kea and seeks to find a path forward through dialogue rather than force.

f. Authority of the Chief of Police

The powers, duties and functions of the Chief of Police are provided for in Section 7-2.4 of the Charter which states:

The chief of police shall be the administrative head of the police department and shall:

- (a) Be responsible for the preservation of the public peace, prevention of crime, detection and arrest of offenders against the law, protection of the rights of persons and property, and enforcement and prevention of violations of all laws of the state and ordinances of the county and all regulations made in accordance therewith.
- (b) Train, equip, maintain, and supervise the force of police officers and employees.
- (c) Promulgate rules and regulations for the organization and administration of the police force.
- (d) Make periodic reports to the police commission about the activities of the police department and about actions taken on cases investigated by the police commission.
- (e) Have such other powers, duties, and functions as may be required by the police commission or provided by law.

Clearly, it's the Chief of Police and his personnel, not the Board, that has the authority to plan and implement its operations in an event involving multiple dynamic situations to ensure peace and safety to the public, as a whole, on Mauna Kea.

g. Authority of the Police Commission

The Chief of Police shall be appointed by the Police Commission (“Commission”) and may also be removed by the Commission at its sole discretion. See, Section 7-2.3 of the Charter. Among its powers and duties, the Commission shall “[r]eceive, consider, and investigate charges brought by the public against the conduct of the department or any of its members and submit a written report of its findings to the police chief.” Section 7-2.3 (4) of the Charter.

The Police Commission, not the Board, has oversight of the conduct of the Police Department and its members. Any action by the Board could be confusing and conflicting with the mission and goals of the Police Department and the Police Commission.

2. The Board does not have jurisdiction over the MKAR

The Board does not have jurisdiction over the MKAR because it is under the control and jurisdiction of the state Department of Transportation pursuant to Hawai'i Revised Statutes Section 26-19.¹ While the Hawai'i County Police Department is responsible to enforce the laws on our highways, the primary jurisdiction of MKAR is with the State of Hawai'i. On August 30, 2019, a joint statement on the jurisdiction of the MKAR was issued by the Department of the Attorney General, Department of Hawaiian Home Lands (“DHHL”), and the Department of Transportation (“DOT”) stating in pertinent part, MKAR is under the control and jurisdiction of DOT. Pursuant to HRS Section 26-19 and HRS CH. 264, DOT has control and jurisdiction over all state highways and MKAR is designated to DOT's State Highway System as Route 210. This includes any portions of the road that cross over DHHL land.” It should also be noted that the DOT exercised its authority over the MKAR when it restricted access to preserve public health and safety on July 15, 2019.

Furthermore, the Board does not have jurisdiction over the surrounding land near the MKAR because the land is owned by the State Department of Hawaiian Homelands and any violation of its rules and regulations is enforced by the State of Hawai'i.

3. The Hawai'i County Police Department has enforced the law on the Daniel K. Inouye Highway

On December 27, 2019, the Hawai'i County Police Department issued a media release for the Daniel K. Inouye enhanced traffic enforcement update that indicated the

¹ Section 26-19. Department of Transportation. The department of transportation shall be headed by a single executive to be known as the director of transportation. The department shall establish, maintain, and operate transportation facilities of the State, including highways...

department issued 8,324 citations and 78 people were arrested for 143 offenses from August 15, 2019 to December 18, 2019. The citations included speeding, excessive speeding, seatbelt, child restraint, no driver's license, no insurance no license plates, and having an unsafe vehicle. The arrested offenses included: contempt/failure to appear warrants, revocation of probation release warrants, driving under the influence of intoxicants, reckless driving, driving with a revoked license, promoting a dangerous drug, and open container of alcohol. There is no question that the Hawai'i County Police Department has enforced the law on the Daniel K. Inouye Highway.

4. The Board cannot rule on issues involving a political question

The Board cannot rule on issues involving a political question under the "political question doctrine." In *Nelson v. Hawaiian Homes Commission*, 277 P.3d 279, state citizens brought an action for declaratory and injunctive relief against state officials for allegedly failing to provide sufficient levels of funding to DHHL. The Hawai'i Supreme Court held that the determination of what constitutes "sufficient sums" for administrative and operating expenses, as legislature is required under the state constitution to provide to DHHL is not barred as a nonjusticiable political question. However, the Court also held that what constitutes "sufficient funds" is a nonjusticiable political question to the extent the term is applied to three other purposes identified in the constitution for which sufficient funds must be provided to DHHL.

It its decision, the Court stated:

The political question doctrine is often considered "the most amorphous aspect of justiciability[.]" *Nishitani v. Baker*, 82 Hawai'i 281, 290, 921 P.2d 1182, 1191 (App.1996) (citation omitted). The doctrine is the result of the balance courts must strike in preserving separation of powers yet providing a check upon the other two branches of government. *Yamasaki*, 69 Haw. at 171, 737 P.2d at 456. This court adopted the test enunciated by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) as its own test in *Yamasaki*, 69 Haw. 154, 737 P.2d 446. The test states:

Prominent on the surface of any case held to involve a political question is found[:](1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [(5)] an unusual need for

unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Yamasaki, 69 Haw. at 170, 737 P.2d at 455 (quoting Baker, 369 U.S. at 217, 82 S.Ct. 691)*. Unless any of these formulations is inextricable from the case at bar, dismissal for nonjusticiability is unwarranted. See *id*

In the instant case involving the MKAR, the governor, mayor, state and county officials have the statutory authority to make decisions in the best interest of the public. These decisions involve discretion and political considerations that is inherent in their positions as government officials. Therefore, the first prong of the test is satisfied as the statutory responsibility of dealing with the MKAR rests with government officials. Furthermore, there is a lack of judicially discoverable and manageable standards to resolve these issues because this involves political considerations that are not addressed in the Hawai'i County Code of Ethics. Moreover, the policy decisions made by government officials, made in the best interests of the public, should not be subject to review and criticism by the Board under the guise of an ethics investigation.

5. The Police Commission has the authority to hear complaints from the public

Pursuant to Section 7-2.2 (c) of the Hawai'i County Charter, the Police Commission shall "[r]eceive, consider, and investigate charges brought by the public against the conduct of the department or any of its members and submit a written report of its findings to the police chief." Any concerns regarding the conduct of the police should be brought before the Police Commission. Please also note that the Chief of Police is appointed by the Police Commission and may also be removed by the Commission. As such, the Chief of Police does not act under the direction of the Mayor.

6. The Board's Request for Special Counsel is denied

The Board's request for special counsel to advise it regarding this matter is denied because the legal basis has not been met.

Section 6-5.3 of the Hawai'i County Charter states:

The corporation counsel shall be the chief legal advisor and legal representative of all county agencies, the council and all officers and employees in matters related to their official powers and duties. The corporation counsel shall represent the county in civil legal proceedings and shall perform all other services incident to the office as may be

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required by law. The corporation counsel shall, however, be prohibited from representing any elected officer in impeachment proceedings.

Based upon the foregoing, the Corporation Counsel is the chief legal advisor and legal representative of all County agencies, the Council and all officers and employees in matters related to their official powers and duties. Thus, with a few limited exceptions, no County agency, County Council or officer or employee may hire an attorney to advise or represent it in matters related to their official powers and duties without obtaining County Council approval as outlined in section 6-5.5 of the Hawai'i County Charter.

Section 6-5.5 of the Hawai'i County Charter states:

The council may, by two-thirds vote of its entire membership, authorize the employment of special counsel for any special matter presenting a **real necessity** of such employment. Any such authorization shall specify the compensation, if any, to be paid for said services. (emphasis added).

Examples of what might constitute a real necessity include but are not limited to the following: if the office of the Corporation Counsel lacks the requisite expertise, has a real conflict of interest, has an adverse interest or is otherwise disqualified or incapable of representing the County.

In the instant case, the Board's request for special counsel is based on the belief that our office has a conflict of interest in advising the Board, County Council, Mayor as well as other County agencies. While we note the Board's concern, it does not rise to the level of a real necessity to hire special counsel as required in the Charter. First, as stated in Section 6-5.3 of the Charter, the Corporation Counsel is chief legal advisor and legal representative for all County agencies. There is no conflict of interest for our office to advise the Board as well as the Mayor and other County agencies in this matter. The legal advice our office provides is the same and is not affected by our duty and obligation to the County of Hawai'i.

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VI. **CONCLUSION**

In conclusion, for the reasons stated above, there is no real necessity for the Board to be requesting special counsel.

If you have any questions or if I may be of further assistance, please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Joseph K. Kamelamela', written over a horizontal line.

Joseph K. Kamelamela
Corporation Counsel

JKK:cf