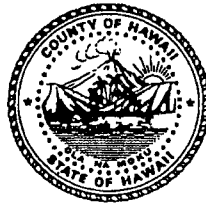


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June 6, 2018

Honorable Valerie Poindexter  
Chair and Members of the  
Hawai'i County Council  
25 Aupuni Street  
Hilo, Hawai'i 96720

RE: *Communication No. 755.23 Dated June 4, 2018.*  
*Proposed Amendment to Bill No. 110 Draft 2; Proposed Operating Budget for*  
*Fiscal Year 20018-2019. Creation of Department Reserves.*

Dear Chair Poindexter and Councilmembers:

I offer this legal opinion for the County Council's consideration upon review of Communication No. 755.23.

I. Background and Presumptions.

Communication No. 755.23 seeks to amend the proposed Operating Budget for fiscal year 2018-2019 by:

- 1) creating a new account within the Office of the County Clerk entitled, "Department Reserves";
- 2) decreasing the Mass Transit Agency's OCE, Equipment and Taxicab Investigations accounts in the amount of \$1,893,572.50; and
- 3) funding the new "Department Reserves" account in the amount of \$1,893,572.50.

I did not speak with Council Member Richards but it is presumed that the Council will administer this "Department Reserves" account, and that the funds would be returned to the Mass Transit operating budget should the Council find sufficient progress is made within Mass

Transit in a mile-stone or reward type of budgeting program. If this is the intent of the introducer, there most likely will be a separation of powers violation.

II. Separation of Powers as to the administration of departments.

The Hawai'i County Charter (Charter) has served as the "constitution" of the government of the County of Hawai'i since its initial effective date of January 2, 1969. *See, "Foreword" Section of Charter (2016)*. The Charter has as its basic scheme a clear and definite separation of executive power and legislative power of the county, vesting the former in the executive branch headed by the mayor and the latter in the legislative branch represented by the council. Under the separation of powers provided in the Charter, each branch must coordinate with the other, and neither may exercise the power vested in the other. *See Akahane v. Fasi, 58 Haw. 74, 565 P.2d 552 (1977)*.

A. Executive Branch

The Charter provides 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." Charter, Article V, Section 5-1.3. With respect to the administration of departments, the mayor, through the managing director shall "supervise and coordinate all executive agencies of the county, except as otherwise provided by this charter." *Charter Article V, Section 5-1.3*. Further, Charter Section 6-1.3(e) states that the managing director shall (e) Prescribe standards of administrative practice to be followed by all agencies under the managing director's supervision." *Charter Article V, Section 6-1.3(e)*.

B. Legislative Branch

The County Council (hereinafter "Council"), on the other hand, is provided with the legislative powers of the County and has the primary function of "legislation and public policy formation, as distinct and separate from the executive administration of county government." *Charter Article III, Section 3-1*. With respect to authorized Council action on the annual operating budget, it may submit amendments to the budget, hold public hearings, and adopt the operating budget as amended with or without further amendments. *Charter Article X, Section 10-5*. The Council is not authorized to administer the departments or their accounts.

The Charter is clear that the Council's legislative and public policy functions are separate from those of the executive and administrative functions of county government. If the Council creates an account and controls the performance of Mass Transit through an achievement based program via the operating budget, it would be encroaching upon the powers vested in the executive branch as defined by the Charter.

III. Hawai'i Caselaw.

When one branch of government seeks to perform the functions of another, the Hawaii Supreme Court has found a violation of the doctrine of separation of powers. In *Akahane v. Fasi*, 58 Haw. 74, 565 P.2d 552 (1977), the Hawai'i Supreme Court relied upon the doctrine of separation of powers to strike a council ordinance for a council requested consultant's study, finding that the initial responsibility for such studies within the county was the county department established for that purpose, namely, an executive function under the charter. *Akahane*, 58 Haw. at 86, 565 P.2d at 560. The court held that the council must first defer to the executive branch in carrying out a planning study before it attempts to do so itself and reasoned as follows:

"The above procedure would avoid duplication of costs which the taxpayers of this State would sustain if each branch of government had an independent power to proceed with the primary responsibilities and duties of the other. . . .

Our opinion herein would further avoid a competitive situation between the branches and would also prevent a complete bypassing of the executive responsibility thereby diluting or damaging to a point of impotency the executive responsibility."

*Akahane*, 58 Haw. at 85, 565 P.2d at 559-560.

In *Fasi v. City and County of Honolulu*, 52 Haw.3, 467 P.2d 576(1970), the Hawaii Supreme Court held that the separation of powers doctrine was violated in a similar issue of one branch of government over extending its authority. In the *Fasi* case, the County Council directed the Director of Finance to offer a county owned parcel for a concession as either a restaurant or nightclub where the parcel was under the authority of the Department of Parks and Recreation. The Court, *supra*, found that such overreaching was an unlawful violation of the separation of powers doctrine.

In *Pray v. Judicial Selection Comm'n. of State*, 75 Haw. 333, 353, 861 P.2d 723, 732 (1993), the Hawaii Supreme Court again found a violation of the separation of powers doctrine and explained that "[t]he separation of powers doctrine is intended "to preclude a commingling of essentially different powers of government in the same hands and thereby prevent a situation where one department would be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.'" *Pray v. Judicial Selection Comm'n of State*, 75 Haw. 333, 353, 861 P.2d 723, 732 (1993).

IV. Charter violation as to Operating Budget.

Here, with respect to the operating budget, the powers exercised by the Mayor and the powers exercised by the Council are clear and distinct. The Mayor must submit an operating budget that represents a complete financial plan for the current operations of the County, its agencies and executive agencies in the ensuing fiscal year, showing all funds and reserves.

Honorable Valerie Poindexter  
Chair and Members of the Hawai'i County Council  
June 6, 2018  
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Charter Article X, Section 10-3(a). The Council may submit amendments to the operating budget, and may adopt the operating budget with or without the amendments. Charter Article X, Section 10-5. However, once the operating budget has been adopted, the Council may not initiate any amendments. This system provides the checks and balances between the two branches of government and provides stability for planning, reporting and making financial decisions.

The operating budget must be relatively predictable and stable for planning, reporting and expenditure decisions while staying in compliance with Charter Section 10-11, which requires funding be in place prior to contracting. Accordingly, a "Department Reserve" fund seeking mile-stone measures of performance would impede or "damage to the point of impotency the executive responsibility" of presenting a complete financial plan for the current operations of the county. *Akahane, 58 Haw. at 87, 565 P.2d at 559-560.*

V. Conclusion.

Assuming that the proposed amendment to the budget is intended to manage the operations or functioning of Mass Transit through a mile-stone or reward type of program, such an amendment would be viewed as an unlawful violation of the Separation of Powers doctrine and violate the County Charter on two grounds. First, such a mile-stone or achievement based payment plan intrudes on the administrative authority of the Mayor and managing director and is therefore in violation of the Separation of Powers Doctrine. Second, such a mile-stone or achievement based program wrongfully presumes that mid-fiscal year changes to the operating budget can be initiated by Council when Council does not have this authority over the operating budget. Further, the Charter mandates funds to be in place before contracting.

Please let me know if you have any questions.

Sincerely,



JOSEPH K. KAMELAMELA  
Corporation Counsel

JKK:emc  
c: Mayor Harry Kim  
Wil Okabe, Deputy Director  
Deanna Sako, Finance Director