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**2009-2010
HAWAI'I COUNTY
CHARTER COMMISSION**

To: Edmund K. Haitsuka, Chair
Members of the Hawai'i County Charter Commission

From: Levi K. Hookano, Commission Attorney

Date: April 30, 2009

Re: Article III, Section 3-7: Council Action

Chair Haitsuka and Members of the Charter Commission,

At the April 9, 2009 Charter Commission meeting, a question was raised regarding what the phrase "affirmative vote of a majority of the entire membership shall be necessary for council action" means and a brief of the case *Hawaii Electric Light Company, Inc. v. Department of Land and Natural Resources*, 102 Hawai'i 257, 75 P.3d 160 (2003), was requested.

In that case, *Hawaiian Electric Light Company, Inc. v. Department of Land and Natural Resources*, the Board of Land and Natural Resources (hereinafter "Board") was to take action on an application by Hawaiian Electric Light Company (hereinafter "HELCO") to use lands in Keahole, North Kona, Hawai'i to modernize and expand an electric generating station.¹ According to the Board's rules, any action by the Board must be by a simple majority of the members of the board.² The issues (relevant to us here) was does the phrase "simple majority of the board" refer to all the members of the Board or to those members present and voting at a hearing; and whether it is considered a final action where the board rendered a decision with a vote of 3-2, short of a majority of all members of the board when denying HELCO's application.³

The Court held that according to Hawai'i Revised Statutes (hereinafter "HRS") § 171-5, any action by the Board requires a majority vote of all members that the Board is statutorily entitled.⁴ (Emphasis added). Therefore, on a Board that is statutorily entitled to 6 members, 4

¹ *Hawaiian Electric Light Company, Inc. v. Department of Land and Natural Resources*, 102 Hawai'i 257, 262, 75 P.3d 160, 165 (2003).

² Haw. Rev. Stat. § 171-5.

³ *HELCO v. DLNR* at 264, 75 P.3d at 167.

⁴ *Id.* at 261, 75 P.3d at 164.

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affirmative votes are required for action.⁵ The Court reasoned that although the common law rule is that a majority of a quorum is sufficient for a decision before an administrative or legislative body, a legislative body is free to enact statutes and rules modifying the common law.⁶

The Department of Hawaiian Home Lands, as a party to the case, argued that the recusal of a board member is akin to a temporary resignation, thereby reducing the number of board members. The Court in a previous decision held that “a majority of the board is a majority of the members of the board as constituted by law, irrespective of the number of member present at the time of the vote.”⁷ The Court reasoned that to allow differently would lead to serious problems in the event that all members of a board except one or two were to resign, leave, or die.⁸ This would allow the remaining members to have the power to administer the municipality and bind it unilaterally.⁹ Absent any statutory provisions directing board business in the event of the above scenario, a court is powerless to direct the legislative functions of the board since it is purely a legislative concern.¹⁰

The situation with the County Council is distinguishable from the above referenced case in that there is no “automatic approval” provision for bills or resolutions before the Council. It is clear, however, that the phrase “affirmative vote of a majority of the entire membership shall be necessary for council action” precludes action by a majority of those present, when that majority does not equal at least a quorum of the Council.

If you have any questions regarding this matter please do not hesitate to contact me.



Levi Hookano
Commission Attorney

Cc: Karen Eoff, Commission Secretary

⁵ *Id.*

⁶ *Id.* at 267, 75 P.3d at 170.

⁷ *Id.* at 268, 75 P.3d at 171, citing *Lymer v. Kumalae*, 29 Haw. 392 (1926).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 269, 75 P.3d at 172.