

To: Members of the Charter Commission  
From Margaret Wille 65-1316 Lhipali Road Kamuela, Hawaii 96743  
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Re: Proposed Amendments to the Hawaii County Charter To be Proposed at the  
Commission's next regular meeting – September 11<sup>th</sup>.  
Date: September 3, 2009

Dear Chairman Huitsuka and Members of the Hawaii County Charter Commission:

Greetings. From 2007 to 2008 I was a member of the South Kohala Community Development Steering Committee. During that time I thought about various concerns relating to the County Charter. Based on those concerns I am suggesting a number of revisions. For your information, I am an attorney with a small private practice. I also dedicate a significant amount of time addressing various community concerns. I am a Board of Director of the Waimea Community Association, and co-chair of its Waimea Planning and Design Review Committee.

I will attend the Charter Commission's regular meeting on September 11<sup>th</sup> and will discuss these revisions in more detail. In general these suggestions relate to the public's reserved rights and associated interests, including promoting ethical standards by our County officials, avoiding conflicts of interest that directly or indirectly affect the public, and providing for a more open government. I will also suggest several changes that relate to the concept of sustainability and protection of our island's natural resources based on a Supreme Court decision decided subsequent to the last Charter commission review. Likewise I recommend incorporating a new provision to address the new Community Development Plans – which plans incorporated by reference into the County's General Plan which is the subject of Article 3, Chapter 15.

Background:

The Charter is the County's constitution and, accordingly, organizes the distribution of power among the various governmental divisions and subdivisions. These Charter provisions are meant to provide a fair balance of power between the various divisions of government and, at the same time, reserve to the people certain basic rights – such as protection from arbitrary government decision-making by those in power.

Some constitutions, whether of a nation or of a governmental subunit only refer to the public's rights (or the people's rights) obliquely – as the “spaces” between the distributed powers. That is the situation with the Hawaii County Charter as currently drafted. Other constitutions, at some point in their evolution, are amended to spell out some of the people's reserved rights. This is what happened in the history of the U.S. constitution-- which was later amended to further define the people's rights, i.e. the Bill of Rights. Other rights may be considered so essential (so obvious) they are simply considered implied: for example, the right to privacy. Most questions arise as to the boundaries of various rights and their interrelationship.

What I am suggesting is that the Hawaii County constitution – its Charter - be amended to provide citizens with some sense that the Hawaii Charter recognizes certain rights that encourage democratic principles of open and ethical government, and promotes a

“stewardship” awareness of our common responsibility to the needs of both present and future generations, such as by recognition of the need to promote environmental stewardship of our natural resources to protect our land and coastal waters.

I realize that the September meeting is focused on Articles XIV (Code of Ethics) through the end of the Charter. I will therefore begin with changes to Article XIV-Code of Ethics. Also I am suggesting adding a new Article, so I will refer to that proposed Article as Article XVIII. My other suggestions would more likely be incorporated in other Chapters of the Charter, but all of them relate to ethics and accountability.

**PROPOSED AMENDMENTS:** Proposed new language is underlined.

**A. ARTICLE XIV CODE OF ETHICS (proposed new subsection (b) and renumber current subsection (b) )**

Section 14-3. Disclosure of Interest.

It shall be incumbent upon all employees or officers of the county to:

(a) Make full disclosure in writing to the appointing authority or to the council in the case of an elective officer, the possession or acquisition of any interests, financial or otherwise as might reasonably tend to create a conflict with the public interest. Any member of the council who knows of a personal interest, direct or indirect, in any action proposed or pending before the council shall disclose such interest prior to the taking of any vote thereon.

(Proposed) (b) It shall be incumbent upon members of any County boards or commissions who have a decision-making capacity to fully disclose any personal or business interest that relates to the official business of that board or commission that could affect that individual's ability to focus on the needs of the community as a whole rather than giving preference to any special or self interest. This disclosure shall be writing and shall be stated verbally prior to any discussion of the topic concerned. The person with the potential conflict of interest shall not participate in any discussion or vote on the affected agenda item.

~~(b)~~ (c) File a copy of such disclosure with the county clerk which shall become a matter of public record.

**B. ARTICLE XVII TRANSPARENCY AND OPEN GOVERNMENT (Proposed new Article)**

1. All required notices of public meetings shall be placed on the County website within the period that notice of that meeting is required.

2. All proceedings of policy making boards, including the County Council, the Planning Commission, and Charter Commissions, shall be broadcast live on the internet as well as made available “on demand” within 48 hours on the County’s website- subject to where that is not possible or inappropriate (for example executive sessions would not be broadcast; or if the internet feed is lost).

**C. ARTICLE XVIII THE PUBLIC TRUST (Proposed new article)**

In all decisions affecting the land or waters, including coastal waters within the geographic boundaries of the County, or other natural resources, all decisions shall be based on the precautionary principle, which requires that in case of uncertainty the decision-making body shall err on the side of conservation, for the sake of both present and future generations.

**D. ARTICLE III LEGISLATIVE BRANCH CHAPTER 3 Proposed Section 3-16 (Proposed new section)**

Community Development Plan and Community Development Plan Action Committees” [renumber current section 3-16 and all chapter 3 subsections thereafter.]

1. In those areas of the County that have adopted a Community Development Plan, as provided for in the County’s General Plan, decisions made by the legislative body of the County Council shall specifically consider the Community Development Plan for the affected District, as well as the corresponding sections of the General Plan. For any area of the County that does not have a Community Development Plan, decisions made by the legislative body of the County Council shall specifically consider the General Plan related to that area of the County.

a. In the event a provision of the General Plan and the Community Development Plan conflict, the provisions of the General Plan control unless and/or until the General Plan is amended.

b. In the event policies in the Community Development Plan are not completely consistent, the underlying polices shall be considered so as to interpret the provisions in a consistent manner.

c. A Community Development Plan Action Committee shall be appointed within one year of completion of any community development to oversee implementation of the Community Development Plan. After that date, no development application by either a private or public party shall be considered unless and/or until considered by a Community Development Action Committee.

d) Recommendations and concerns raised by the Community Action Committee shall be forwarded to the Planning Director in a timely manner for consideration and review.

**E. ARTICLE VI EXECUTIVE BRANCH  
CHAPTER 7. “The Planning Director” (amend subsection 6.7-6)**

Subsection 6.7-6 Render decisions on proposed development applications after consulting with the relevant Community Development Plan Action Committee. Other existing municipal-like boards, such as neighborhood or design review committees, shall also be consulted. In rendering decisions, the Planning Director shall take into account community input provided it is submitted in a timely manner.

**F. ARTICLE VI THE EXECUTIVE BRANCH CHAPTER 10- Department of Environmental Management (amend subsection 6-10.2)**

Subsection 6-10.2: The Department of Environmental Management is established to protect, preserve, and enhance our environment by promoting the wise management of our waste, and by promoting a policy of long term environmental sustainability. The Director shall review all proposed developments to prevent undue harm to the environment.

Note: The Department of Environmental Management should not be limited to enhancing our environment solely by way of wise management of our waste. This amendment would provide a platform for an expanded scope that would be consistent with our State constitution and recent Hawaii Supreme Court case law, and would be more consistent with the current State Plan, the County General Plan, and the relevant provisions of the Community Development Plans passed in 2008.

**G. ARTICLE VI EXECUTIVE BRANCH Chapter 5 “CORPORATION COUNSEL”**  
Proposed Amendment Previously submitted.

**H. ARTICLE IX PROSECUTING ATTORNEY**  
Proposed Amendment Previously submitted.

Respectfully submitted.

Margaret Wille

**Fr: Margaret Wille, 65-1316 Lihipali Road Kamuela Hi 96743**

**Re: Role and Responsibility of the Prosecuting Attorney:**

**Emphasis on Enforcement of the Sunshine Laws**

**I suggest the following change be made in the Charter in order to emphasize the importance of the Sunshine Laws and the Role the Prosecuting Attorneys Office plays in preserving Public Trust in the County Government. It is transparency of the process that provides the forum for citizen participation. I also ask that you encourage live stream coverage over the internet of County Council meetings, planning Commission meetings, and your Charter Commission meetings.**

### **PROSECUTING ATTORNEY**

#### **Section 9-3. Powers, Duties and Functions.**

The prosecuting attorney shall:

- (a) Attend all courts in the county and conduct on behalf of the people all prosecutions therein for offenses against the laws of the State and the ordinances and regulations of the county.
- (b) Prosecute offenses against the laws of the State under the authority of the attorney general of the State.
- (c) Appear in every criminal case where there is a change of venue from the courts in the county and prosecute the same in any jurisdiction to which the same is changed or removed. The expense of such proceeding shall be paid by the county.
- (d) Institute proceedings, or direct the chief of police to do so, before the district judges for the arrest of persons charged with or reasonably suspected of public offenses, when the prosecuting attorney has information that any such offenses have been committed, and for that purpose take charge of criminal cases before the district judges, either in person or by a deputy or by such other prosecuting officer as the prosecuting attorney shall designate.
- (e) Draw all indictments and attend before and give advice to the grand jury whenever cases are presented to it for its consideration. Nothing herein contained shall prevent the conduct of proceedings by private counsel before district judges or courts of record under the direction of the prosecuting attorney.
- (f) Investigate all matters which may properly come before the prosecuting attorney.

#### **Section 9-4. Staff.**

The prosecuting attorney may appoint deputies and other necessary staff. The deputy who is designated as first deputy shall, during the temporary absence or disability of the prosecuting attorney, assume the power and perform the duties of the prosecuting attorney. **The first deputy shall assume the primary responsibility of prosecuting matters relating to HRS Chapter 92 “Public Agency Meetings and Records” [the “Sunshine Laws”] and shall perform those duties in coordination with the Director of the Office of Information Practices.**

**The Hawaii County Charter (the County's Constitution) defines the role and responsibilities of the Office of Corporation Counsel. In order avoid real or perceived conflicts of interest I am suggesting this section of the Charter be revised. Here is a redraft of Chapter 5 of the Charter "Corporation Counsel" To better understand my reason for proposing these changes, refer to my blog of July 18, 2009 : "The Difficult Role of the Corporation Counsel"**

## **HAWAII COUNTY CHARTER: CHAPTER 5: CORPORATION COUNSEL**

### Section 6-5.1. Organization.

There shall be a department of the corporation counsel consisting of the corporation counsel, associate ~~assistant~~ corporation counsel and the necessary staff.

### Section 6-5.2. Appointment and Removal.

The corporation counsel and the associate corporation counsel shall be appointed by the mayor, confirmed by the council and may be removed by the mayor with the approval of the council. The corporation counsel shall be an attorney licensed to practice and in good standing before the Supreme Court of the State of Hawaii.

### Section 6-5.3. Powers, Duties and Functions.

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 all civil legal proceedings and shall perform all other services incident to the office as may be required by law. The corporation counsel shall, however, be prohibited from representing any elected officer in impeachment proceedings.

### Section 6-5.4. ~~Assistant~~ Associate Corporation Counsel.

~~The assistant corporation counsel shall be appointed by the corporation counsel and may be removed by the corporation counsel.~~ The associate corporation counsel shall have primary responsibility for matters relating to the county council and shall not be subordinate to corporation Counsel concerning proposed legislation or other matters specific to the county council. The ~~assistant~~ associate corporation counsel shall be an attorney licensed to practice and in good standing before the Supreme Court of the State of Hawaii.

### Section 6-5.5. Special Counsel.

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 for such employment. Any such authorization shall specify the compensation, if any, to be paid for said services. In the case of a conflict of interest between members of the county council either the corporation counsel or the associate corporation counsel may approve and appoint separate counsel for that member or members solely to advise with regard to the issue of conflict of interest.

### Section 6-5.6. Term of Office.

Notwithstanding Section 13-8, the term of office of the corporation counsel, ~~assistant~~ associate corporation counsel and deputies shall be co-terminous with that of the mayor; provided that where a successor has not been appointed and confirmed, the corporation counsel shall continue in office pending such appointment and confirmation, but in no event shall the corporation counsel continue in office beyond three months, whether acting or otherwise. The term of office for any corporation counsel or associate corporation counsel is limited to a maximum of eight years and three months.

## **The Choice between Open Government versus Government Decision**

### **Making by a Handful of Elite Powerbrokers**

Richard Pratt and Zachary Smith in their book "Hawaii Politics and Government" (University of Nebraska Press 2000) speak of the dominance of the "good 'ol boy" dominated rule in Hawaii. They see the current choice as one between greater institutional openness versus continuing the status quo of government decision-making based on privileged insider relationships. To advance towards a more open and democratic society they stress insistence on transparency of process and the expansion of opportunities for civic participation. They explain:

" Residents must see themselves as participants, and government must welcome their involvement. Neither of these qualities is likely to be supported by the political culture of the rural Big Island . . . ." [Chapter "Local Government, Hawaii Style" page 230]

If we are to prevent this type of conduct from reoccurring, it is critical those who knowingly engaged in intentional violations of the Sunshine Law are subjected to appropriate penalties. And second, as suggested by Pratt and Smith we must think about ways to create more "public space" in our individual lives. As explained by Pratt and Smith:

The public spaces in the average person's life – the time and energy available to share concern outside of work and family – must be enlarged if Hawai'i's future is to be made of vibrant communities and involved citizens. Without such an expansion, these efforts will be left to a circumscribed group of the financially successful and retired, or those employed to lobby for particular interests, far too small a portion of the population to meet a definition of community." [Chapter "Images of the Future of Paradise" pages 261-262]

The point here is that we need to insist on open government meetings that are accessible to a significant segment of the population. Today, given the challenges of merely surviving economically, it is difficult for most everyone to

attend the Council's meetings or even to catch one of the several rebroadcasts of the meeting on public TV. One idea that has been suggested is to insist on live stream broadcasting of County Council meetings and its committee meetings. Doing so would allow for timely involvement by those who can not attend the meetings. Additionally the County website could provide "library links" to watch previous broadcasts. But frankly if we can't prevent decision-making by way of "behind closed door" meetings, what's the point of even having a "Sunshine Law"?

In moving forward, one must keep in mind that those in government who have been party to this status quo "good 'ol boy" process are simply part of an established culture, and that eliminating this paternalistic mindscope of "we the elite powerbrokers know what's best" is in essence a cultural revolution.

Whether or not we succeed at making these folks accountable for their actions is uncertain. But, no matter, an open government that encourages public participation should remain our goal. This goal is cogently stated in the Sunshine Law's "Declaration of policy and intent":

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation in the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible. " HRS §92 "Public Agency Meetings and Records" Part 1 "Meetings" subsection 92-1 "Declaration of policy and intent"

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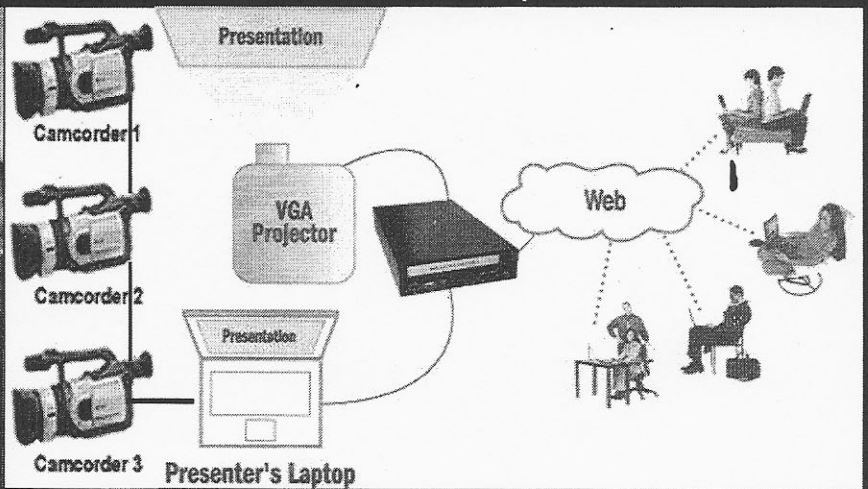
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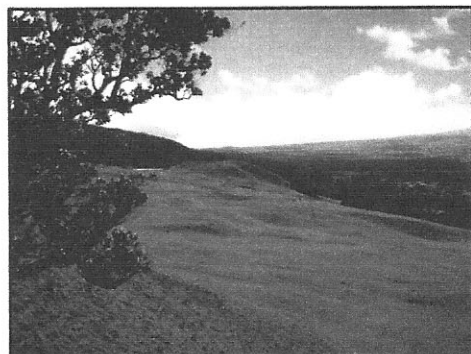


## 1.5 PRECAUTIONARY PRINCIPLE

Recently the Hawai'i Supreme Court provided some guidance for those engaged in this balancing process at the County level. The Court articulated a public trust framework for natural resource decisions both at the State and County level. The Court clarified the constitutionally mandated "Public Trust Doctrine" imposes upon the Counties the stewardship responsibility to "future generations" to conserve and protect Hawai'i's natural beauty and all natural resources. On this point, the Hawai'i Constitution Section XI subsection 1 provides:

*"For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of all people."*

It is on the basis of this constitutional "Public Trust" provision that decisions involving land and water must be guided by the "Precautionary Principle" when we weigh our private wants against the ability of the environment to accommodate those wants. The precautionary principle requires long-term vision and mandates that government entities favor caution and conservation in any case in which information is uncertain. The burden of proving that the resource is adequate and that its proposed use is consistent with the sustainable health of the ecosystem falls on the party proposing to use the resource.



View from the pu'u above Waimea Town

We must also be mindful that if a privately owned resource is of significant value and is worthy of preservation for the benefit of the community at large, that it may well be appropriate for the community to compensate the property owner for the loss in value resulting from significant limitations imposed upon their use of the property.

In its efforts to draft this CDP, the Steering Committee has sought to balance these interests consistent with its stewardship role in preserving the beauty and natural resources of South Kohala for the welfare of both present and future generations.