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

To: Chair Edmund K. Haitzuka and
Members of the Hawai'i County Charter Commission

From: Levi K. Hookano, Attorney

Date: January 19, 2010

RE: Relating to CA-15: Land Fund Amendment

Dear Chair Haitzuka and Members of the Hawai'i County Charter Commission,

This memo will address legal concerns regarding CA-15, relating to setting aside one-half percent of the county's operating budget to go towards the purchase of certain lands in accordance with the amendment's provisions. There are some concerns regarding the following provisions in this proposed amendment and each will be discussed separately.

Establishment of the Public Access, Open Space, and Natural Resources Preservation Commission

Separation of Powers

In the third section, subsection (b) appears to be contrary to the separation of powers doctrine. That section states

As a vacancy occurs on the commission, the council member representing the district of that vacant seat shall nominate at least one person. Persons nominated must reside in the district of the vacancy. The Mayor shall do a background check of each person, make a report of findings and make recommendations to the council. The nomination shall be placed on the council agenda at the first meeting at which the matter can be legally agendaized. The County Council without delay shall vote upon this nomination.

The interaction between the executive and legislative branches of government forms a basis of "checks and balances" to insure that no one branch of government can dominate or exercise power not within its enumerated scope of authority. An example of the checks and balances on the Federal level is found in the Presidential authority to veto legislation passed by Congress. According to the U.S. Supreme Court in *INS v. Chadha*, although the authority to

enact laws is an act of Congress, the Presidential veto “establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.”¹ In turn, the framers of the Constitution included a check on the President’s unilateral veto power by granting the power of a “veto override” to both Houses of Congress.² This was to prevent “arbitrary action” by a single person.³ As quoted by James Madison in The Federalist No. 47, “there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates[.]”⁴

The same principle of checks and balances are found at the county level where the county council has the authority to pass legislation and the mayor has the veto power. Yet, the county council has a check on the mayor by having the power to override the mayor’s veto by a two-thirds vote. Such checks and balances are essential in a democratic government. The above referenced section of the land fund amendment is contrary to the principles of separation of powers because it unites in the county council the nomination and confirmation authority of an executive commission. I recommend that this provision of the proposed amendment be deleted to conform to the method of appointment and confirmation as currently provided in section 13-4 of the charter with the mayor having the authority to nominate commission members and the county council possessing the confirmation authority. This would be consistent with the separation of powers and the current procedure of filling membership on executive boards and commissions. Additionally, if this provision is removed by the commission, the first sentence in subsection (c) should also be removed to remain consistent with other appointment and removal provisions of the charter.

Duplicated Charter Provisions

In this same section, much of the language relating to establishing the open space commission duplicates the language found in Section 13-4 of the charter. Therefore, these provisions, from the second sentence of subsection (c) through (m) should be deleted. Additionally, it should be noted that the word “agendize” is not a word found in the English dictionary. Therefore, it should be replaced with the phrase “placed on the agenda.”

Privacy Concerns

Subsection (o), part (2) may have privacy implications since it requires that the website for the open space commission contain the “name, a short biography and resume of each commissioner.” A provision should be added to this section that reads “subject to applicable laws.” Although Hawai‘i Revised Statutes (“HRS”) § 92F-12(a)(14) specifically requires disclosure of this type of information, certain information may be exempted. Certain personal information is exempted from disclosure that may be contained within a person’s resume or other

¹ *INS v. Chadha* at 948, 103 S.Ct. at 2782.

² *Id.* at 951, 103 S.Ct. at 2784.

³ *Id.*

⁴ The Federalist No. 47, p. 325 (J. Cooke ed. 1961).

biographical information. This includes a person's home address, home phone number, social security number, and other information specifically enumerated in HRS § 92F-14.

Duties and Responsibilities of the Commission

Ambiguous Provision

Paragraph (d) may create some confusion among commission members. That paragraph states that the commission is to “[c]onduct island wide meetings once per year to obtain input from citizens advocating for properties for preservation and acquisition by the County of Hawaii.” Given that membership on the commission is by council district, this section could be read to mean that the commission is to have a meeting in each district at least once per year. This could also be read, however, that the commission shall have one meeting per year in a single location and advertise it as an “island-wide” meeting by asking that members of the public from across the island come to participate, thus satisfying the requirement of this section. Thus, if the intent is for the commission to meet at least once per year in each council district, then that should be spelled out in this section to avoid confusion.

Prioritized List of Qualifying Lands Worthy of Preservation; Land Acquisition Process

Separation of Powers

Subsection (c) allows the county council, by resolution, to select the land or lands to be preserved and requires the director of finance to enter into negotiations for the acquisition of the lands in the order of the prioritized list developed by the commission. Because of the separation of powers doctrine, the council generally cannot direct the head of an executive branch department to carry out a specific task via resolution.⁵ Instead, a separate provision should provide for the duties of the finance director as it relates to the administration of the land fund and the director's role in acquiring any properties using the land fund.

General Concerns Regarding the Proposed Land Fund Amendment

Transitional Provisions

I highly recommend that the commission include a transitional provision in this charter amendment so that it is clear how this amendment is to interact with the current ordinance relating to the land fund. For example, currently there is a two-year moratorium on payments being made into the land fund.⁶ If this amendment were to take effect upon approval by the electorate, it is unclear what effect that will have on the suspension of payments into the land fund. Therefore, I recommend specific language be included in the charter amendment to clearly indicate the commission's intention on how this proposal is to interact with the current land fund ordinance contained in the county code. An effective date of July 1, 2011 is recommended due to the moratorium and so that there are no conflicts with the next fiscal year's budget.

Formatting

There are some drafting issues with the way this amendment is currently formatted so attached is a proposed amendment in ramseyer format.

⁵ See *City Council of the City and County of Honolulu v. Fasi*, 52 Haw. 3, 467 P.2d 576 (1970).

⁶ Ord. 09-66.

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

A handwritten signature in black ink, appearing to read "Levi Hookano". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Levi Hookano
Charter Commission Attorney

Attachments

CHARTER AMENDMENT NO.

BE IT ENACTED BY THE PEOPLE OF THE COUNTY OF HAWAI'I:

Section 1. Article X, Hawai'i County Charter, is amended to add a new section to read as follows, with added language underscored and deleted language bracketed and stricken through:

“Section 10-___. ___. Public [~~access, open space, and natural resources preservation fund or the Land Fund~~] Access, Open Space, and Natural Resources Preservation Fund.”

- (a) A public access, open space, and natural resources preservation fund is hereby established. This special fund shall be administered and managed by the finance department for the specific purpose of property acquisition and shall not be part of the county budget. Monies deposited in this fund shall be invested in a conservative, interest-bearing account that will allow monies to be available for property acquisition and prevent any erosion of the fund's principal amount. This fund may also be referred to as the “land fund.”
- (b) The fund shall consist of monies from:
- (1) The proceeds from the sale of any general obligation bonds, authorized and issued for the purposes of this article;
 - (2) Council appropriations for the purposes of this article;
 - (3) Any source of revenue dedicated by the Hawai'i County Charter or the Hawaii County Code for the purposes of this article;
 - (4) Grants and private contributions intended for the purposes of this article;
 - (5) Not less than one-half of one percent of Hawai'i County real property tax revenues collected annually, [~~(including penalties and interest)~~]. Deposits will be made to the fund on December 30, 2010, [~~(initially prorated and calculated from November 3, 2010 to December 30, 2010)~~], and then the period from December 30, 2010 to June 30 2010, and on December 30 and June 30, in successive years, with deposits being calculated on all real property tax revenue, [~~(including penalties and interest)~~], received in the time since the last deposit.
 - (6) Monies from items numbered (1), (2), (3), and (4) above, shall be deposited as received[;].
- (c) Monies in this fund may be used to pay the principal and interest payments on a [~~Bond~~] bond used to acquire lands according to the purposes and procedures of this section.
- (d) Any balance remaining in the fund at the end of any fiscal year shall not lapse, but shall remain in the fund accumulating interest from year to year. The monies in this fund shall not be used for any purpose except those listed in this section.

Section 10[~~13.2~~]-___. ___. The [~~purpose~~] Purpose of the Land Fund. [~~The highest and best use of this fund is to leverage funding to attract matching funds and grants~~]

The highest and best use of this fund is to leverage funding to attract matching funds and grants. The fund shall be used for acquiring lands or property entitlements in the County of Hawai'i for the following purposes:

- (a) Public outdoor recreation and education, including access to beaches and mountains;
- (b) Preservation of historic or culturally important land areas and sites;
- (c) Protection of natural resources, significant habitat or eco-systems, including buffer zones;
- (d) Preservation of forests, beaches, coastal areas, natural beauty and agricultural lands; and
- (e) Protection of watershed lands to preserve water quality and water supply.

Section 10[~~.-~~]. Access, Open Space, and Natural Resources Preservation Commission

- (a) There is an established a public access, open space, and natural resources preservation commission.
- (b) As a vacancy occurs on the commission, the council member representing the district of that vacant seat shall nominate at least one person. Persons nominated must reside in the district of the vacancy. The [~~Mayor~~] mayor shall do a background check of each person, make a report of findings and make recommendations to the council. The nomination shall be placed on the council agenda at the first meeting at which the matter can be legally [~~agendized~~] placed on the agenda. The [~~County Council~~] county council without delay shall vote upon this nomination.
- (c) A member may be removed upon recommendation by the mayor or the council and [~~approved~~] approval by the other entity. The members shall serve staggered terms of five years.
- (d) No member shall be eligible for a second appointment to the commission until two years have passed.
- (e) No member whose term has expired shall continue to serve on the commission, except that if no successor has been appointed and confirmed, the member shall continue to serve for ninety days or until a successor is appointed and confirmed, whichever comes first.
- (f) Any vacancy occurring in the commission shall be filled for the unexpired term.
- (g) Not more than a bare majority of the members shall belong to the same political party.
- (h) Members shall receive no compensation but shall be reimbursed for necessary expenses incurred in the performance of their duties. Necessary expenses may be paid in advance as per [~~Diem~~] diem allowance pursuant to [~~article 16~~] Section 13-4(g).
- (i) A chairperson shall be elected from the commission members annually.
- (j) The commission shall have the power to establish its rules of procedure necessary for the conduct of its business, which rules shall contain the time and place of all regular meetings, and which shall specify that a quorum shall be a majority of the members to which the commission is entitled.

- (k) The affirmative vote of a majority of those members present shall be necessary to make any action valid.
- (l) No person shall, by reason of occupation alone, be barred from serving as a member of this commission.
- (m) The redrawing of the council district boundaries during a member's term shall not affect the remainder of their term.
- (n) Staff shall be provided by the department of [~~Finance~~] finance. The [~~Finance~~] finance department shall give a written update of the progress of property acquisition and a financial report of the [~~Land Fund~~] land fund balance to the [~~Open Space~~] open space commission at each of their monthly meeting.
- (o) Staff shall be required to maintain a [~~Public Access, Open Space and Natural Resources Commission~~] public access, open space and natural resources commission website which shall be easily available to the public. The website shall provide:
 - (1) The criteria for selection of commissioners
 - (2) The name, a short biography and resume of each commissioner.
 - (3) The name, phone number and email of the secretary of the commission, who shall be the contact for the commission.
 - (4) A form that shall be used to submit properties to be considered for acquisition by the commission.
 - (5) A monthly update report on the deposits made to the fund, the principal balance of the fund, expenditures and any interest earned.
 - (6) A monthly update report on the acquisition of prioritized lands listed for acquisition, including but not limited to current negotiations and matching funds sought and any other information deemed important by the commission.
 - (7) Annual reports to the [~~Mayor~~] mayor and [~~Council,~~] council.

Section 10[~~]~~___. Duties and [~~responsibilities of the commission~~] Responsibilities of the Commission.

- The duties and responsibilities of this commission are:
- (a) To develop and submit to the mayor and council, a prioritized list of at least ten qualifying lands worthy of preservation by December 31 of each year. Priorities shall be listed on an island-wide rather than district basis.
 - (b) To explore methods of funding land acquisition and make recommendations to the mayor.
 - (c) The commission shall give emphasis to land acquisitions where the [~~County's~~] county's contribution can be leveraged to obtain State, Federal, and/or private funds. [(2005, Ord. No. 05-166, sec. 4.)]
 - (d) Conduct island wide meetings once per year to obtain input from citizens advocating for properties for preservation and acquisition by the County of [~~Hawaii~~] Hawai'i.

Section 10[~~]~~___. Prioritized [~~list of qualifying lands worthy of preservation; land acquisition process~~] List of Qualifying Lands Worthy of Preservation; Land Acquisition Process.

- (a) The prioritized list of qualifying lands worthy of preservation developed by the commission shall be submitted to the mayor and council for comments and recommendations by December 31 of each year. The list shall contain ~~[40]~~ ten properties listed in order of priority, the significance and the reason for the priority, the common name of the property, whether it is currently for sale, the community's anticipated use after acquisition, the council district of the property's location, the ~~[TMK]~~ tax map key number, the approximate acreage and the number of any resolution that has been passed regarding the acquisition of this property.
- (b) Within forty-five days after receipt, the mayor ~~[will]~~ shall submit the list to the council with comments and recommendations.
- (c) The council shall, by resolution, select the land or lands to be preserved and require the ~~[Director of Finance]~~ director of finance to enter into negotiations for the acquisition of these lands in the order of the prioritized list developed by the commission. Such resolutions shall remain in effect only until such time as the new updated prioritized list is received by the county; ~~[provide]~~ provided however those resolutions involving lands for which the negotiation process has already begun shall remain in effect until the director of finance has exhausted all efforts of negotiating the purchase of such lands.
- (d) Under no circumstances shall the purchase price paid for a property exceed the appraised market value as prepared by an independent appraiser engaged by the ~~[County]~~ county.
- (e) Negotiations for acquisition of lands to be preserved shall occur between the ~~[County]~~ county and the seller or its commissioned agent, or a licensed broker only. The commission shall have no role in the negotiations other than in its advisory capacity.
- (f) Appraisals, title reports, surveying and other costs incidental to the acquisition of land shall be permitted uses of this fund.
- (g) Management ~~[and/]~~ or development of properties shall not be an expense of this fund.
- (h) Adequate staff to carry out the provisions of this article and to manage the land acquired shall be provided ~~[it]~~ by the department of finance to maximize the use of available funds by minimizing the payment of commission to outside agents to put together funding plans and to ensure that the ~~[County]~~ county is a good steward of any land that comes under its control through this article.”

Section 2. The revisor shall renumber charter chapter numbers, section numbers, and cross references pursuant to amendments approved by the electorate that replace existing or newly-enacted charter provisions.

Section 3. This amendment shall take effect upon approval by the electorate.