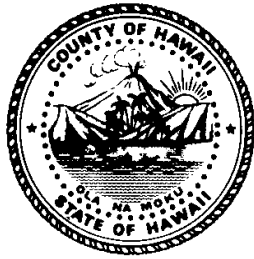


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**2009-2010
HAWAI‘I COUNTY
CHARTER COMMISSION**

To: Chair Edmund Haitsuka and
Members of the Hawai‘i County Charter Commission

From: Levi K. Hookano, Commission Attorney

Date: March 10, 2010

Re: CA-16 (Draft 2) Legal Issues

Dear Chair Haitsuka and Members of the Charter Commission,

There are several issues with CA-16 (Draft 2) which must be corrected. These issues are as follows:

Brief Answers

1. The Definition of the Term “Ballot Summary” in Section 15-2 should be Clarified Because “Impartial Explanation” and “Major Effects” May Lead to Confusion.
2. A Completed Petition Form, as Provided in Section 15-4(b)(2), Cannot Be Submitted to the County Clerk Prior to Circulating the Petition so the word “Completed” should be Removed
3. Section 15-4(f) Does not Permit Flexibility in Finalizing the Language of the Petition Form, Ballot Title, Ballot Question, and Ballot Summary and Does not Provide for Any Review by Corporation Counsel
4. Section 15-4(g) and Section 15-5(c)(2) Must Be Amended to Specify Who Makes the Determination of Whether a Proposed Charter Amendment or Revision is within the Authority of the Charter
5. CA-16 (Draft 2) does not Provide for Notice to Signers of a Petition that a Petition has been Amended or Filed by the Petitioners’ Committee

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6. Section 15-9 likely Violates the State Law’s Requirement that Proposed Charter Amendments be Published in a General Circulation Newspaper at least Twenty-One Days Prior to the Election
7. The Provision that a Petitioners’ Committee May Withdraw a Petition So Long as it is Not Later Than the Thirtieth Day Immediately Preceding the Day Scheduled for a Vote in the County on a Measure Concerned is Ambiguous and may Conflict with State Law
8. The Council Cannot Adopt a Petitioners’ Committee’s proposal as a Charter Amendment or Revision
9. According to State Law, the General Election Ballot Cannot Contain the Ballot Summary and Ballot Title

Discussion

The Definition of the Term “Ballot Summary” in Section 15-2 should be Clarified Because “Impartial Explanation” and “Major Effects” May Lead to Confusion.

The definition of “Ballot Summary” in Section 15-2 includes the language “impartial explanation of the measure and its major effects” thereby including two distinct parts of a ballot summary. This means that the impartial explanation and its major effects are two different things. This creates a problem for what is contained in the ballot summary since it cannot be impartial with the “major effects” provision.

The definition of the word “effect” means “to cause to come into being” and its usage refers to “actual achievement of a final result.”¹ Essentially, the “major effect” of a proposal would be the argument in favor of a proposal, and thus it cannot be impartial. For example, a proposed law to prohibit the use of hand held electronic devices while driving to reduce traffic accidents would amend certain parts of the county code. Amending the county code is the actual effect of the proposal. To say that the proposal would reduce the number of traffic accidents is an argument in favor of its passage. Thus, by including an argument in favor of passage in the ballot summary, it can no longer be considered impartial. Therefore, this section should be clarified as to what “major effects” may be included in the ballot summary or this provision should be removed from the definition.

A Completed Petition Form, as Provided in Section 15-4(b)(2), Cannot Be Submitted to the County Clerk Prior to Circulating the Petition so the word “Completed” should be Removed

The proposed definition section of CA-16 (Draft 2) includes the term “petition form” that means “a petition without voter signatures and other voter identifying information.” Therefore, a “completed petition form” as provided in Section 15-4(b)(2) must be different from a “petition form” by having the signatures and identifying information included. Of course, this is not possible since the petition has not yet been circulated. This may be remedied by amending this section to delete the word “completed.”

¹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 397 (11th ed. 2003).

Section 15-4(f) Does not Permit Flexibility in Finalizing the Language of the Petition Form, Ballot Title, Ballot Question, and Ballot Summary and Does not Provide for Any Review by Corporation Counsel

According to proposed Section 15-4(f), if the clerk proposes alternative language for the petition form, ballot title, ballot question, and ballot summary, and the petitioners' committee objects to the alternative language, the petitioners' committee can then resubmit language to the clerk and the clerk must accept whatever language is resubmitted. This will likely cause problems for the amendment and revision process because this language may still be flawed. There needs to be a process where the language can be finalized through a meeting of the minds and not from a one-sided decision. There is also no provision that any of the language is to be reviewed by the corporation counsel for legality. A more flexible process should be included so that the final language of the petition form, ballot title, ballot question, and ballot summary is in the best form possible and has been reviewed for legality by the county's attorney.

Section 15-4(g) and Section 15-5(c)(2) Must Be Amended to Specify Who Makes the Determination of Whether a Proposed Charter Amendment or Revision is within the Authority of the Charter

The two sections mentioned above must be amended to specify who makes the determination of whether a proposed charter amendment or revision is within the authority of the charter. It is unclear whether it is the county clerk who makes this determination or if the corporation counsel is to review the proposal. This must be clarified to avoid any potential legal conflicts in the future.

There is also an additional problem with the timing of determining whether a proposed charter amendment or revision is within the authority of the charter. According to Section 15-4(g), this is to occur prior to circulation of the petition form. According to Section 15-5(c)(2), however, this determination is made during certification of the petition. This conflict must be resolved by clearly indicating at what point in time this determination is to be made.

CA-16 (Draft 2) does not Provide for Notice to Signers of a Petition that a Petition has been Amended or Filed by the Petitioners' Committee

Section 15-3 of the proposal as well as Section 15-4(l) provides that the petitioners' committee has the authority and may amend a petition. This could pose a problem because there is no provision that a signer of the petition is notified of any changes to the language of the original petition that they signed on to. Put simply, a signer of a petition may support the original petition, but not an amended petition and the proposed CA-16 (Draft 2) does not provide for any notice to signers of a petition that it has been amended.

Additionally, Section 15-5(e) states that an individual may withdraw their signature by submitting a written request to the clerk within fifteen days after the filing of a petition. There is no requirement, however, that an individual receive notice that the petition has been filed, thereby allowing them the opportunity to withdraw their signature.

Section 15-9 likely Violates the State Law's Requirement that Proposed Charter Amendments be Published in a General Circulation Newspaper at least Twenty-One Days Prior to the Election

CA-16 (Draft 2) would likely violate State law because it would violate the state requirement that charter amendments be published in general circulation newspapers at least twenty-one days prior to the general election. Hawai'i Revised Statutes § 50-10 provides that the "commission shall provide for the publication of the proposed charter with any alternatives twenty-one days before the election, in a newspaper of general circulation within the county." Section 15-9, however, provides that the commission shall publish the "ballot titles, the ballot questions and ballot summaries in the Sunday paper of two Hawai'i Island (sic) daily papers...for three consecutive Sundays preceding the election." Charter questions will appear on the general election ballot per proposed Section 15-7. Additionally, the general election is always held on the first Tuesday following the first Monday in November according to Article II, Section 8, of the State Constitution. Therefore, the published notice would first be made *sixteen* days prior to the general election in violation of state law.

As another note on this topic, CA-16 (Draft 2) actually provides less advance notice to the general public than the current wording of the charter. Section 15-4(p) and Section 15-9 provide for notice to be published in the newspaper for the three consecutive Sundays preceding the election." The current charter requires publication at least *forty five* days prior to the election.

The Provision that a Petitioners' Committee May Withdraw a Petition So Long as it is Not Later Than the Thirtieth Day Immediately Preceding the Day Scheduled for a Vote in the County on a Measure Concerned is Ambiguous and may Conflict with State Law

There are two problems with Section 15-6 as it relates to the timing for a petitioners' committee to withdraw a petition. First, it is ambiguous as to what it means by a "vote in the county on a measure concerned." It must be clarified if this is a vote by the electors or a vote by the county council. Either could be a reasonable interpretation of that provision.

Second, if the intent is that a petition may be withdrawn up to thirty days before the general election, this runs into problems with State Law because the State office of elections requires that charter questions be submitted to them at least sixty days before the general election.

The Council Cannot Adopt a Petitioners' Committee's proposal as a Charter Amendment or Revision

Proposed Section 15-6 states that "a petitioners' committee shall be requested to withdraw its petition and the committee must comply, if the aims of the petition are resolved by intermediate council action to the satisfaction of the committee such that the initiative proposal is adopted as a charter amendment or revision." The county council cannot, on its own, adopt a charter amendment or revision. Any proposed amendment or revision to the charter can only be adopted by a vote of the county's electorate. Therefore, it is recommended that this provision be deleted.

According to State Law, the General Election Ballot Cannot Contain the Ballot Summary and Ballot Title

Proposed Section 15-7 states that "the ballot for such measures shall contain the ballot summary and shall have below the ballot title designated spaces in which to mark the ballot YES or NO." State law, however, dictates what can be contained on a ballot. Hawai'i Revised Statutes § 11-

112 determines what can be contained on a ballot. Subsection (b) clearly states that charter amendment *questions* may be placed on the ballot, but there is no mention of ballot summaries or ballot titles being placed on the general election ballot. Therefore, it is recommended that this provision be removed.

Conclusion

I highly recommend that this commission thoroughly review CA-16 (Draft 2). There are numerous issues that must be resolved if the commission desires to pass this proposal for submission to the electors. Additionally, I highly recommend that the input of the county clerk be solicited because of the significant role the clerk plays in this proposal and whether the process proposed is practical. I will be available for questions by the commission during the regular meeting on March 12, 2010.

/s/ Levi K. Hookano
Commission Attorney