


September 19, 2019

MEMO TO: Michael J. Molina, Chair
Governance, Ethics, and Transparency Committee

F R O M: David Raatz, Supervising Legislative Attorney 

SUBJECT: **COUNTY OF MAUI v. HAWAII WILDLIFE FUND, ET AL., CIVIL 12-00198 SOM BMK, U.S. SUPREME COURT DOCKET 18-260**
(PAF 19-316)

Issue presented

You have asked me whether the Council has the exclusive authority to settle County of Maui v. Hawaii Wildlife Fund, et al., pending before the United States Supreme Court, under the terms stated in the proposed resolution recommended for adoption by Committee Report 19-112. In response, I will summarize some applicable legal principles and judicial opinions, and then apply them to this issue.

Settlement authority as legislative power, executive power, or both

The settlement of legal cases has commonly been regarded as an exercise of legislative power in municipal governments, as reported in legal treatises. See, e.g., 15 A.L.R.2d 1359 (“[T]he power to compromise usually exists in the governing legislative body, generally denominated the common council.”); 64A C.J.S. Municipal Corporations § 2552 (“Usually, the municipal council or other governing body is authorized to compromise a pending action by or against a municipal corporation.”)

But when a proposed settlement agreement includes terms committing the exercise of executive power, the Mayor may have exclusive or joint authority to settle the case. Harris v. DeSoto, 80 Hawai`i 425, 438, (1996).

The Harris case has been the leading authority on the delineation of legislative and executive power for more than 20 years. Three years after Harris was decided, the Council codified some of the case’s principles by enactment of Ordinance 2786, which established a procedure allowing the Council to designate, by resolution, certain cases for which the Corporation Counsel would transmit all settlement proposals to the Council for approval or disapproval. The ordinance was modeled after Honolulu Ordinance 93-78, which was the law at issue in Harris, as seen in a review of the Committee of the Whole’s public files during the 1999-2001 Council term.

Settlement agreements generally

Settlement agreements are contracts, by which actual or potential legal disputes are resolved with the parties making a series of promises to each other. Wong v. Cayetano, 111 Hawai'i 462, 481 (2006) (stating that settlement agreements are "simply a species of contract law"). Settlements, like other contracts, include an implied promise of good faith. See, e.g., Best Place Inc. v. Penn America Insurance Co., 82 Hawai'i 120, 124 (1996) (stating that "in every contract there is an implied covenant of good faith and fair dealing"). Contracts may include both binding promises and non-binding "recitals." See, e.g., In re Taxes, Aiea Dairy, Ltd., 46 Hawai'i 292, 305, 380 P.2d 156, 163 (1963).

Maui County Charter

The Revised Charter of the County of Maui (1983), as amended, generally grants the County's legislative power to the Council and executive power to the Mayor and various agencies. See §§ 3-6 ("The council shall be the legislative body of the county.") and 6-1 ("The executive power of the county shall be vested in and exercised by the executive branch, which shall be headed by the mayor, except as otherwise provided by this charter."). The Supreme Court of Hawai'i has noted the structural similarity of Maui County Charter to the Revised Charter of Honolulu (1973), as amended. Maui County Council v. Thompson, 84 Hawai'i 105, 107 (1996). Thus, judicial opinions interpreting the City & County of Honolulu's Charter generally provide useful guidance when seeking to interpret the Maui County Charter. Id.

Legislative power and executive power generally

As noted in the McQuillin treatise on municipal law, legislative power is "discretionary" policy making, while executive power or administrative power is policy implementation:

The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence. In

other words, if the legislative function is principally law creation, the executive function is chiefly law enforcement.

2A McQuillin Mun. Corp. § 10:6 (3d ed.).

Specific examples of legislative and executive power

In Harris, the Supreme Court of Hawai`i provided the following examples of executive power:

- Appointing Mayor's staff
- Assessing fines for violation of zoning ordinance
- Assessing real property tax
- Issuing Special Management Area use permits
- Managing contract bidding process
- Managing drug-screening programs
- Re-hiring a police officer suspected of criminal conduct
- Applying riparian water rights
- Enforcement of policy requiring rock concert promoters to conduct inspections of patrons for bottles and cans prior to entry of arena
- Awarding contract for provision of municipal bus services

Harris, 80 Hawai`i at 438 (citations omitted).

A legislative body could not unilaterally settle a case with an agreement including promises on the government's behalf in those and similar areas of executive power.

The Supreme Court of Hawai`i also generally distinguished executive and legislative powers in Hawaii Insurers Council v. Lingle, holding that the State

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government's executive branch possesses power to administer and enforce tax laws, but not to levy new taxes. 120 Hawai'i 51, 70 (2008).

Also, in deliberations regarding the bill that became Ordinance 2786, Corporation Counsel James Takayesu advised the Council's Committee of the Whole on May 20, 1999, that settlement not including the commitment of public funds was a matter of executive power, as seen on page 2 of the attached minutes. He said the settlement of cases "including claims for injunctive, declaratory, and extraordinary relief" would involve the exercise of executive power. The committee expressed agreement and amended the bill on the advice of Mr. Takayesu, who stated his support for the Council's ability to exercise its legislative power settle cases even when contrary to the current or future Corporation Counsel's advice. As seen on page 10 of the minutes, he cited a theoretical settlement with the Environmental Protection Agency including "a special environmental project costing \$600,000" as the type of case within the Council's purview. On page 15 of the minutes, after providing an overview of Harris v. DeSoto, Mr. Takayesu stated:

DeSoto is very clear that it's the legislative branch that's gonna, has [*sic*] the final say in settling cases involving money. So . . . that's where the authority lies, and again the case is very clear.

The Supreme Court in Harris referenced the City Council's budget-making authority and control of the municipality's "purse" as bases for its exclusive authority to settle certain cases. 80 Hawai'i at 435 ("[T]he ultimate issue of settlement authority cannot be resolved without reference to the council's control over the city's purse.").

The 1966-67 Maui County Charter Commission, in its final report on February 6, 1967, used similar language. On page 18 of its report recommending establishment of the Council-Mayor form of government that remains in existence, the Charter Commission stated:

The Council is a powerful body. The Council exercises a great deal of authority in fiscal matters. The Council controls the county "purse strings."

A copy of the report is attached for your reference.

Promises to expend public funds and to take other policy-making actions are exercises of legislative power.

In addition, McQuillin advises: “Also deemed legislative in nature is the power to . . . settle litigation.” 2A McQuillin Mun. Corp. § 10:7 (3d ed.).

Paperwork necessary to effectuate settlements

The implementation of a settlement agreement on the County’s behalf necessarily requires the execution and submission of documents by the Corporation Counsel and, if applicable, Special Counsel.

The Supreme Court of Hawai`i stated: “If authorized in writing by the council, the corporation counsel could, in compliance with HRS § 605-7 (1993) and Hawai`i Rules of Professional Conduct (HRPC) Rule 1.2(a) (1995), affix his or her signature on a settlement agreement on behalf of the city.”

Harris, 80 Hawai`i at 433-34.

The cited provision of Hawai`i Revised Statutes reads:

The practitioners licensed by the supreme court shall have control to judgment and execution, of all suits and defenses confided to them; provided that no practitioner shall have power to compromise, arbitrate, or settle such matters confided to the practitioner, unless upon special authority in writing from the practitioner’s client.

The cited provision of the Hawai`i Rules of Professional Conduct states: “A lawyer shall abide by a client’s decision whether to settle a matter.”

Under Harris, the Council is the client for settlements solely involving the exercise of legislative power. Thus, the Mayor’s potential objection is immaterial in such instances.

Characterization of settlement terms as legislative power, executive power, both, or neither

As shown in Committee Report 19-112 on pages 5-6, the proposed settlement includes seven enumerated terms. The following chart summarizes and analyzes the terms. Some of the proposed terms are recitals without new or legally promises and, therefore, are not exercises of either legislative or executive power.

Summary of terms	Legislative or executive?	Explanation
1. Parties agree to dismiss case.	Neither.	The ministerial paperwork necessary to dismiss the case is of the same nature as the paperwork needed to settle any case, as referenced in <u>Harris</u> . If this kind of paperwork were considered an exercise of executive power, a case could never be settled over the Mayor's objection. That would be contrary to <u>Harris</u> .
2. County promises to: (1) seek and comply with NPDES permit; (2) fund and implement projects in West Maui to divert treated wastewater; and (3) pay \$100,000 to U.S. Treasury	Legislative power.	The permitting requirement in (1) does not appear to constitute a new or legally relevant promise. It is a statement of the County's existing responsibility under the holding of <u>Hawaii Wildlife Fund, et al. v. County of Maui</u> , 881 F.3d 754 (9 th Cir. 2018), which will remain in effect if the Supreme Court case is dismissed. Showing its legal irrelevance, this element could be eliminated, and the parties' rights and responsibilities would not change. The expenditures of public funds in (2) and (3) are quintessential exercises of legislative power under <u>Harris</u> .
3. County promises to reimburse the plaintiffs' costs.	Legislative power.	The expenditure of public funds is a quintessential exercise of legislative power under <u>Harris</u> .
4. Plaintiffs conditionally promise not to sue County on certain grounds.	Neither.	This term is a promise by the plaintiffs, not the County.
5. Plaintiffs conditionally promise not to sue County on certain grounds.	Neither.	This term is a promise by the plaintiffs, not the County.
6. Parties recognize factors contributing to marine environment stresses and commit to addressing impacts as stated above.	Neither.	This term includes a general statement of good faith, which is implied in all contracts, but does not otherwise include a promise by either party.
7. Parties "recognize" various other factors and reserve future rights.	Neither.	This term does not appear to include a promise by either party.

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Conclusion

Based on the foregoing analysis, it appears the proposed settlement in this matter appears to be a policy-making matter within the Council's exclusive authority as the County's legislative body.

I hope this is helpful. Please let me know if you have any questions or need anything else.

paf:dmr:19-316

Attachments

MINUTES

COMMITTEE OF THE WHOLE

May 20, 1999

Council Chamber

CONVENE: 1:30 p.m.

PRESENT: Councilmember Dain P. Kane, Chair
Councilmember Patrick S. Kawano, Vice Chair
Councilmember Michael A. Davis, Member
Councilmember J. Kalani English, Member (ar 1:35)
Councilmember John Wayne Enriques, Member
Councilmember G. Riki Hokama, Member (ar 1:31)
Councilmember Wayne K. Nishiki, Member
Councilmember Charmaine Tavares, Member

EXCUSED: Councilmember Dennis Y. Nakamura, Member (WIR)

STAFF: David Raatz, Legal Analyst
Yvette Bantilan, Committee Secretary

ADMIN.: James Takayesu, Corporation Counsel

PRESS: Brian Perry, The Maui News

**ITEM 11 SETTLEMENT AUTHORIZATION OF CLAIMS AND
LAWSUITS (BILL NO. 13 (1999), ENTITLED "A BILL FOR AN
ORDINANCE RELATING TO THE SETTLEMENT OF CLAIMS
AGAINST THE COUNTY")**

CHAIR KANE: The Committee of the Whole will come to order. (gavel) Good afternoon. Thank you for joining us, members. For the record present are Councilmembers Kawano, Davis, Enriques, Nishiki, Tavares. Excused is Councilmember Nakamura and Councilmember Hokama. We also have with us Corporation Counsel Mr. Jimmy Takayesu, and of course staff David Raatz and Yvette Bantilan.

Um. . . members, we have two items on the agenda today. Item No. 11 settlement authorization of claims and lawsuits, uh, and this will be referring to Bill No. 13 of this year 1999, entitled "A BILL FOR AN

ORDINANCE RELATING TO THE SETTLEMENT OF CLAIMS AGAINST THE COUNTY”.

Let the record show that Councilmember Hokama is present. Uh . . . we don't have anybody for public testimony. So we'll go ahead and proceed with the agenda.

Members, before the Committee is Bill No. 13 which would establish in the County Code the Council's right to settle claims even in cases in which Corporation Counsel recommends against settlement. The bill is modeled after a Honolulu ordinance which is upheld by the Hawaii Supreme Court three years ago. Bill No. 13 was passed on first reading March 5th of this year and recommitted to this Committee for further review at the request of Mr. Takayesu, Corporation Counsel. So at this time I'd like to ask Jimmy to provide any additional comments that he intended to share with us on this particular matter. Jimmy, go ahead.

MR. TAKAYESU: One of the concerns I had was, uh, let's see this would be on the second page the first paragraph, paragraph C to transmit within three working days, uh . . . the offer. I guess my concern was three days was too short for us to go ahead and really analyze the offer, but on further reflection, uh, I believe if all that requires that we go ahead and notify the Council that we have an offer, uh, or a demand made upon us, uh, uh, we can go ahead and do that. Again because once we made the . . . given the notification it's not like we can go ahead and hear the matter in Committee within a few days. We have to still comply with the, um, Sunshine Law and, uh, with those additional six or so days we should be able to handle most matters. Again if it was three days and we would have to meet with you that is just too short a time.

Um . . . the other concern I have is definition of claim. As, as the ordinance currently exist we, we referring to claims and it makes a distinction in the first paragraph 3.16.020, uh, you're looking at a monetary amount that seems to be used to divide the, uh, authority of the Administration to settle claims that those not in excessive of \$3,000 and then all other claims in excessive of 3,000 would be, uh, we would require Council approval. My concern about the definition of claim that you have on Page 3 is that it refers to not only monetary claims but basically any claim, including claims for injunctive, declaratory and extraordinary relief. My reading of DeSoto is that what gave the City Council the authority under the Charter to resolve the, the monetary type claims, uh, did not extend authority of the Council to non-monetary matters. And I think that was the distinction under DeSoto.

Now, there's, there also gonna be instances where there is a, um, a mixed type of--say you have an injunction that would require expenditure of

monies. Those of course will be considered of claims involving money. The authority of the Council to have final authority on the compromising of claims was based on the Council's authority to control the, the purse strings of the City & County in that case.

CHAIR KANE: Let the record show that Councilmember English is with us. Good afternoon, Kalani.

COUNCILMEMBER ENGLISH: Aloha.

CHAIR KANE: Questions? Councilmember Tavares.

COUNCILMEMBER TAVARES: Yes, Mr. Takayesu, in the first section, Section 1, it states that this is regarding things that involved payment of County funds in excess of \$3,000. So that's all this is. Section 2 would then follow the same or Section 2 can be different than Section 1 in regards to other payments besides monetary payments?

MR. TAKAYESU: Well, my understanding of the existing ordinance it deals with monetary type claims, yeah.

COUNCILMEMBER TAVARES: Uh-huh.

MR. TAKAYESU: And again the distinction was, uh, was to I guess if it was less than \$3,000 the Council was granting to the Administration--

COUNCILMEMBER TAVARES: Uh-huh.

MR. TAKAYESU: --the authority to go ahead and settle these smaller types claims without requiring Council approval. It's just grant of authority that permits the Mayor to approve the smaller type claims. If this statute, if this ordinance was not here, then I guess the Council would be looking at all claims even if they were for a \$10 claim and we have some very small claims too.

COUNCILMEMBER TAVARES: Again, maybe I got lost in the explanation.

MR. TAKAYESU: Okay.

COUNCILMEMBER TAVARES: When you were talking about things other than money, injunctive relief or whatever, but that injunctive relief or things other than a monetary payment are not in this section now or not in this bill?

MR. TAKAYESU: It would be if the definition of claim were adopted as, uh, as proposed.

COUNCILMEMBER TAVARES: But can we have a definition that is contrary to the purpose as stated in Section 1? I mean I guess what I'm saying is what I had thought this bill was about was about money, dollar amounts or payments, uh, cash payments, and I hadn't considered that there were other types of, um, mitigation or whatever settlements that would be included in here, but if the definition therefore isn't clear then I could see fixing it unless other members had a different, uh . . . you know maybe I'm only the one that has this interpretation of what we were doing or trying to do.

MR. TAKAYESU: Okay. Again, the definition of claim the last sentence where you're dealing with claims for injunctive declaratory and extra ordinary relief, that does not necessarily include monetary claims or the payments of any monies.

COUNCILMEMBER TAVARES: So could, could, um . . . in other thing other than money could it be something like, um . . . where we restore the person's sick leave days or . . . oh, that's an employee thing or something that is, um . . . that we're gonna offer to replace something that's not a cash payment. Let's say we're gonna replace somebody's car. That would be something that would fall onto this other than . . .

MR. TAKAYESU: Right. An example would be if somebody challenges the practices of the County dealing with certain matters under a specific law. They feel that we are not interpreting the law correctly and so they go to court asking for a declaratory ruling, and they're just asking for the Judge to indicate what does the law really say, and it's not gonna require the payment of any monies, you know, I guess that's a clear example of a declaratory type ruling. Um . . . injunctive relief would be where they go to court to ask that say, um . . . that we not be permitted to do a certain act and they go in for injunctive relief, and so again they're not asking for any type of money.

COUNCILMEMBER TAVARES: Uh-huh.

MR. TAKAYESU: So, um, again, my reading of DeSoto was that the authority of the City Council to have the final say in the settlement of any claim, uh, was due to, uh, their control of the purse strings.

CHAIR KANE: Jimmy, if we deleted the last sentence of the claim definition, specifically the term includes claims or for injunctive declaratory and extraordinary relief, if we deleted that would that satisfy your concern as far as just deleting that last sentence in that claim definition on Page 3?

MR. TAKAYESU: My suggestion is that we just simply delete that definition and then also, um . . . then keep the first paragraph under 3.16.020 as it currently reads and then it's clear that we're dealing with these financial matters over which the Council has final authority.

CHAIR KANE: So just delete the word "claim" all together as far as definition?

MR. TAKAYESU: That would be my suggestion.

?: The full paragraph, Mr. Chair?

COUNCILMEMBER TAVARES: Just the definition.

CHAIR KANE: No, just, uh . . . the suggestion by Corp. Counsel, members, is to delete the definition of claim which you can find on Page 3. It's the third line down, uh . . .

?: No objections.

CHAIR KANE: . . . the word "claim," members. Any questions? Any concerns? Yes, member Tavares.

COUNCILMEMBER TAVARES: Yeah, I can see where Mr. Takayesu is coming from because claim is actually defined in that Section 1 that was kind of why I was referring to it. And as I said, my interpretation was that we were concerned about money or cash settlements that was our prime concerns that those things would come before the Council. So I'm fine with deleting that definition all together.

CHAIR KANE: Yes, Jimmy.

MR. TAKAYESU: Also in paragraph B that, um, my suggestion is that also be deleted the new language, but that we also keep, uh . . . go ahead and delete "without court approval" so that, um, in that sense that could be used, uh, by department to circumvent the Council. So you should get rid of the "without court approval".

CHAIR KANE: Okay, so in, members, 3.16.020 claim and settlement of civil litigation part B or Section B, the suggestion is to delete what's in the parentheses or brackets "without court approval", Jimmy?

MR. TAKAYESU: That's correct. So we will be striking that language from, uh, paragraph B and I'm recommending that we not add the additional new language. So any new settlement in excess of 3,000 shall be, shall require Council authorization.

CHAIR KANE: And just leave it plain and simple just like that?

MR. TAKAYESU: Right. 'Cause you see without court approval, a Corp. Counsel could go to court and say yeah, go ahead and approve this settlement and I'll take it back to Council and say well, you no longer have authority 'cause I already got the court to approve it so ha-ha, you know, and I think that would be wrong.

CHAIR KANE: Members, questions? Anybody? Yes, member Enriques.

COUNCILMEMBER ENRIQUES: Yeah, thank you. Jim, all these underline the second and third pages, why is it underlined? Are you deleting that portion?

MR. TAKAYESU: No, this is, uh . . . this is Ramseyer method that would be new language.

COUNCILMEMBER ENRIQUES: Okay.

MR. TAKAYESU: And things that are bracketed are words that are to be deleted.

COUNCILMEMBER ENRIQUES: Okay. When does the claim come to you--uh, small claims doesn't come to you right?

MR. TAKAYESU: Um . . . they have a procedure where they are required to file their claims, large and small, okay. Under the current practice the smaller claims are being handled by Finance, and the larger claims that might result in a lawsuit or where an attorney has, it appears that an attorney has assisted in the filing of the claim, those matters are sent directly to our office.

COUNCILMEMBER ENRIQUES: So what do you consider a small claim?

MR. TAKAYESU: Um . . . well, under the ordinance if it's under \$3,000.

COUNCILMEMBER ENRIQUES: Okay, thank you.

CHAIR KANE: Questions? Councilmember Hokama.

COUNCILMEMBER HOKAMA: Thank you, Chairman. You know, Jimmy for me this is a very philosophical, yeah, issue because of my idea of how government is, the three branches and what the role of us as a legislative branch is. But let's say this does get adopted and be a part of the County Code, and again the Council in its review claims that, uh, decides that the claim is again not worthy and decides to . . . I don't know what's the right

word . . . deny the claim, that individual or party still has an additional judicial route to take. It could still go to court, right?

MR. TAKAYESU: Well, that's correct. Normally we're looking at offers where a lawsuit has already been filed. So if a settlement is rejected then in an ordinary course it would then proceed to trial.

COUNCILMEMBER HOKAMA: Because my understanding of this proposal as such as DeSoto was to consider claims that Corporation Counsel or Department of Finance has rejected or denied. 'Cause if it's been accepted, you know, there's nothing further more to do except for us to review the appropriate financial considerations if it requires our approval, but other than that this is only for matters that are rejected that the individual feels suit to pursue is why we're doing this?

MR. TAKAYESU: Uh, no, I think it's, uh, larger than that. As long as we receive an offer to settle a claim, then under this, uh, these new procedures we are required to notify the Council that an offer has been presented to us. I think the problem that people had and that which resulted in Honolulu going ahead in asking an ordinance like this was that, um, if Corp. Counsel were to go ahead and reject the offer, um, the Council would never be aware of it, and say we were being a little, um, we had looked at the case and we're being a little too hard line, um . . . the Council would never know about it. There was not a procedure which would, uh, permit these matters being presented to the Council in a normal fashion. Now under our Charter we do require everyone to go ahead and file a claim with County Clerk, and again, uh, most of those claims are not very large and we're able to handle them in-house. But again, in terms if a citizen or a claimant feels that they're not being treated fairly by our Department and that we're not really looking at their claim in the correct light and this will provide them with an opportunity to go ahead and require that we meet with you to discuss the offer.

COUNCILMEMBER HOKAMA: During the . . . even without this ordinance approval or adoption, hasn't it been your practice to try and keep us as well-informed as possible regarding potential settlements or claims against the company?

MR. TAKAYESU: Uh . . . yeah, that's, that has been the practice. A lot of times you will not see the, uh, original demand because you were like in a bartering mode. Things go back and forth, and a lot of times what we come down with are things that appear to, uh, be, uh, a solution that's acceptable to two sides, yeah, otherwise it would be a waste of time.

COUNCILMEMBER HOKAMA: Okay. Okay.

MR. TAKAYESU: But you see, once we . . . say we receive a demand our feeling is that we'll, uh, that we shouldn't accept it, uh, we will submit it to you and we will come down and meet with you to explain why we feel at this time we cannot really go along with their demand.

COUNCILMEMBER HOKAMA: My only concern is that, and again I brought this up, share this with the Chairman, Mr. Kane, that it could be situations and this is one of my big concerns is that we could possibly be going back our own legal advice which would be from you or your office, uh . . . and, you know, I have a hard time, um, thinking that you wouldn't be representing, your office will not be representing what is the best interest of the County, and here we are as a Council going against your, your opinion or your ruling on a claim. So, you know, that's some of the . . . it's a difficulty that I have. I don't know about the other members. I only speak for myself, but I share that with you that I have a concern that I will be, I will be going against what would be considered your best advice for the County.

MR. TAKAYESU: Okay. You know when we're dealing with money, um, what is the value of a claim. We come out with a figure say, uh, 15,000 . . . \$15,000 to a particular claim, uh, what we're doing is we're picking a figure within a range because there's no way to really precisely determine what the claims were. So we're looking at the range and probably (inaudible) on the strength and weakness of the case, uh, will diminish what we think is a good settlement, but it's not so precise that when we suggest 15 that, uh, a better figure might not be 16 or 14. Now if there are questions where we feel that, um, we don't have, we should not be held liable then of course we might ask you for additional time to go ahead and file say a motion on, uh, for summary judgment on a legal issue, uh, to establish whether or not we should be held liable, and I think that's how we can handle the legal, uh, legal issues, but when it comes down to just a money amount, um, as, as you know when we've gone into executive session to discuss these figures, a lot of times we come in with, uh, an amount, and by the time we leave here, um, we come to a different type of solution. Again, it's not so precise where you know (inaudible) 15. If you say 16 that's going against my legal advice and so you're saying oh, no, it's only worth 15 so go back and see if you can settle it for 14.

COUNCILMEMBER HOKAMA: Uh-huh.

MR. TAKAYESU: Again, we're dealing with ranges.

COUNCILMEMBER HOKAMA: I understand that, I understand that. If I can continue, please, Chairman. I thank you for your, your patience on this. And again, you know, uh . . . I'm just one member so, you know, what the majority will decide is gonna be decided, but again, you know, I just share my difficulty and concern that unless the people of this County had

decided that the Council shall have some judicial authority that they want, you know, I always felt that if the complainant did not agree with what would be our position or our decision, that they still have a judicial alternative to take us to court and have it resolved in the judicial branch, and that my concern was that as the legislator controls the funds of this County that is what I wanna be more concerned with not rather the claim is valid or invalid. That's what I think because our attorney and the judicial process is to deal whether the validity is legal or binding or not. So I just appreciate the time to express my thoughts Chairman and I yield the floor.

CHAIR KANE: Members, any other questions?

COUNCILMEMBER NISHIKI: Not in this area, but I got a question.

CHAIR KANE: Go ahead, member Nishiki.

COUNCILMEMBER NISHIKI: Um . . . Jimmy, you know what? You eliminated that whole page 3 claim and, and in it you eliminated "the term includes claims for injunctive, declaratory and extraordinary relief". How do we . . . I'm just thinking about through the Bertram case. That was what injunctive relief?

MR. TAKAYESU: Yeah, that--

COUNCILMEMBER NISHIKI: There's no money, yeah?

MR. TAKAYESU: No, it's for a declaratory ruling and I guess injunctive relief, right.

COUNCILMEMBER NISHIKI: Okay. So, in those situations, is it dealt with in another area where we can become a party or when we deal with it because you eliminated this area and the claim?

MR. TAKAYESU: Okay.

COUNCILMEMBER NISHIKI: In other words, now you can independently settle this and then tell the Planning Commission members you can't come before the Council and testify?

MR. TAKAYESU: Okay, again my reading of DeSoto you're looking back to the separation of power, the balance of authority, um . . . I believe in certain grounds you have the administrative prerogative and then you have the legislative. Um . . . it's something like the Bertram case . . . I believe under the Charter that are in existence in Hawaii that would be more a matter for the administrative branch of government to deal with. Again, you know, I'm, uh, my position is based basically on the DeSoto decision.

COUNCILMEMBER NISHIKI: Yeah, but I wanna understand (inaudible) in claims where there is injunctive, declaratory or extraordinary relief. If we take that out is there another venue for us to look at this? Or are you saying it's an administrative area?

MR. TAKAYESU: I'm saying it's primarily a administrative area. I mean, you know, uh . . . injunctive relief that would require again any expenditure--

COUNCILMEMBER NISHIKI: Explain what--

MR. TAKAYESU: --of County monies.

COUNCILMEMBER NISHIKI: Explain to me what injunctive, declaratory and extraordinary relief are. Give me some area--

MR. TAKAYESU: Okay, uh . . .

COUNCILMEMBER NISHIKI: --outside the money situation and why you don't feel that the Council should be involved in that, just give us areas of how this happens to the Bertram situation.

MR. TAKAYESU: Okay, there's a, uh, Maui Land & Pine was asking for an injunction against Bertram to sit on the Planning Commission.

COUNCILMEMBER NISHIKI: What, what does that mean?

MR. TAKAYESU: To prevent him from doing something.

COUNCILMEMBER NISHIKI: Okay.

MR. TAKAYESU: It can also be a mandatory injunction which would require somebody to do something. Now if that, whatever that something is require the expendi . . . the expenditure of County monies, then of course we would be required to come back, come through the Council and obtain approval and too like if . . . we couldn't go ahead and say oh, we'll settle with EPA to, uh, to do, uh, environmental, a special environmental project costing \$600,000 without Council approval.

COUNCILMEMBER NISHIKI: Right.

MR. TAKAYESU: I mean that was you know . . . it's the money aspect that triggers of the requirement for us to get approval for something like that.

COUNCILMEMBER NISHIKI: So by taking this out we in no way can . . . I guess we can still challenge you and take you to court like the past Council did with J. P.

MR. TAKAYESU: Yeah, when he . . . say when he went ahead and, uh, with hiring an attorney.

COUNCILMEMBER NISHIKI: What was that case, David? Where they hired, uh . . .

COUNCILMEMBER ENGLISH: Authority of special counsel.

MR. RAATZ: It was the Thompson v. Maui County Council case and there's a dispute as to how to interpret a provision in the County Charter.

COUNCILMEMBER NISHIKI: So is that . . . if what we're . . . what you're telling us to do now under claims to take that sentence out . . . I, I guess my question is are you saying that it's an illegal act so therefore we shouldn't do that--

MR. TAKAYESU: Okay, um--

COUNCILMEMBER NISHIKI: (inaudible)

MR. TAKAYESU: Yeah, I believe if it's worded it would intrude(?) into the administrative branch authority--

COUNCILMEMBER NISHIKI: Well, David, is this in the Honolulu Council?

MR. RAATZ: Nope. This definition is in the Honolulu ordinance. The Corporation Counsel's correct that, um, the Supreme Court decision DeSoto v. Harris did delineate between legislative functions and authority, and executive functions and authority.

COUNCILMEMBER NISHIKI: Okay.

MR. RAATZ: And basically, um . . . when it comes to money that is in the Council's prerogative because the Council has control over the County's purse strings. So, um . . . for lawsuits or claims not involving an exercise of the legislative function like that, then the courts said it is left with the Administration. So essentially even though this language is in the Honolulu ordinance, the courts found that that language is really not effective. It didn't accomplish what the Council intended 'cause the Council did wanna have authority over all settlements whether it regarded a payment of money or not.

COUNCILMEMBER NISHIKI: Okay, thank you. Jimmy, go ahead.

MR. TAKAYESU: In terms of like how this, um, particular provision since it's in the City & County code, it's been interpreted by the court, um . . . it would seem to me that, you know, we would probably interpret it not in a literal sense. Again if there's a mandatory injunction where it requires us to do something and it requires money, then even though the word is injunctive relief, then I think we have to come in. If it's injunctive relief that does not require us to expend money then, uh, I would construe this to say we are not required to come in. So even though the word is there, um, it, um, we won't, there will be definitely times when I say that even though there's no money amount being spelled out we have to come in to, uh, Council to get some approval for expenditure of money. Again, that's a mandatory type injunction.

COUNCILMEMBER NISHIKI: I'm done, thank you.

CHAIR KANE: Members, any other questions? Member Tavares.

COUNCILMEMBER TAVARES: Yeah. You know this, some of this all came up with, um, I think cases where the Corporation Counsel had determined that there was no liability on behalf of the County of Maui and therefore denied all the claims and at the same time, um, the Council at that time felt that we should be able to do something even though Corporation Counsel offered zero on the claims. So under this situation, because you are reporting all claims to us, even if your recommendation is zero, this Council would have an opportunity to set a value. Is that true?

MR. TAKAYESU: That is correct. And that was my understanding of they had some say the flood damage cases--

COUNCILMEMBER TAVARES: Right.

MR. TAKAYESU: --where people definitely could show that there had been damages and the County position was that there was no liability.

COUNCILMEMBER TAVARES: Yeah. And I think this raises the concern that Mr. Hokama is, is, um, has brought forth and that Corporation Counsel supposedly represents the best interest of the County of Maui being all the citizens. And yet on the other hand you want Corporation Counsel to be apolitical, but sometimes in the past some of the decisions you wonder if they are political, politically influenced also. So you got the political on the Administration side and then you're gonna be handling the political on the Council side. So I think what we were trying to do is somehow find a balance, you know, between those or among those kinds of claims, and that sometimes there's something more to a claim than just dollars and

cents and damage and replacement and all that. Sometimes it's faith, it's credibility, support of the people who are in office, and expecting that the people who are in office whether they be Administration or Council actually are looking out for the best interest of the people in the County that we supposedly represent. So if this does pass, um, you know, I would certainly be looking at each case that comes up in the light that we have to achieve that balance and that we cannot ignore what Corporation Counsel's advice is regarding each individual claim, but there may be times that they are overriding things other than that which you can quantify and therefore we would be given the opportunity to look at it and then make a recommendation, but it shouldn't be looked at something looked at to me as something that we can use to knuckle under the Administration or knuckle under Corp. Counsel. It's just that you represent a point of view, the Mayor represents a point view, we represent a point of view and all of those have to be in the mix somehow, and that's where I look at you know. So I was thinking that maybe some of these things where we are gonna override a no claim or whatever, that it take more than just a simple majority to pass that's contrary to what Corporation Counsel is recommending. I don't know if that's something we can consider or if that's something that we can legally put in here that we need a super majority to act on something other than either more or less than what Corporation Counsel advises us or leave it alone and hope we'll have this discussion and remember the discussion as it comes up with each case. I don't see this happening a lot by the way. This is very, um, you know, far and few.

CHAIR KANE: Jimmy, go ahead.

MR. TAKAYESU: Yeah, when I first, uh, read the bill I had some concerns along those lines, but I believe the Council Service staff checked with Honolulu and there was something flood(?) of, uh, uh . . . demands or offers that were, um . . . where the Corp. Counsel was overridden in the sense where the City Council wanted to go ahead and give a lot more money than what the legal staff was recommending. So, you know, um . . . so again because they had checked and that was not the result of something like this I can see it as being something that would be good, and if there's any problems we can always work on it in the future. There was also the fear that maybe Council, uh, would, uh, in making their decisions would be affected by political factors and would be overly generous, but on, in these austere times, okay, there's, uh, we, you know, everybody's conscience of our money situation and I don't see that as a problem either, you know. Again, it looks like Honolulu went ahead and passed an ordinance like this and it has not had any real negative impact on the operations of their, of their government, and it would make it easier for all of us to be on the same page.

COUNCILMEMBER TAVARES: Uh-huh. Thank you for your comments.

CHAIR KANE: Councilmember English.

COUNCILMEMBER ENGLISH: Thank you, Mr. Chair. You know Jimmy one of the things that I think we are discussing here is the lines of authority and, you know, we've been trying to quantify it in our discussions in terms of dollars. In other words we've been saying that we'd like the final authority to determine the dollar amount of the settlements, but that's really not the meat of it. The meat of it is the lines of authority and that's the meat here, is the final decision making mechanism as spelled out in the Charter for certain things rest with this body, you know, so--I mean I think we're talking for matters of convenience we're talking in terms of the settlements, but really what this is doing is defining the lines of authority, and the lines of authority, as I understand it, you know, since we control the purse strings, the purse strings then logically we would control the disbursement of that. And the way I see it as the set up now what we've done is we've, I don't know if we legally done this. I mean if it's done by as a matter of practice and past custom as oppose to any policy decision, but allow that to be made by your office, you know, because by Charter we are the only ones that can disburse money. And I don't know if we found anything that says we are granting you the authority to disburse monies on this body's behalf. So that's one of the issues here, and we can talk about it in our discussion in terms of finalizing the settlements. I mean, what Charmaine was getting towards at by saying it's more than just the settlements that's one thing. And just, uh, you know, food for thought and I'd like your comments after on that.

The second thing is a really a small, little, little issue, but it's something that, um, sometimes the smallest things reflect the larger, um, underlying premise, and underlying relationships and structures, and I'm referring to your letterhead. You represent both the Council and the Administration. Yet if you look on your letterhead and if you will see how it's presented, it has your name on the upper right side and the Mayor's name on the upper left side, but by all accounts that message that we're sending out there is that you are for the Administration. I would propose to you that you need ten names there. There are ten elected people in this body, in this government, the Council and the Mayor. The message you will be sending then is that you work for ten of us, the Mayor and his Administration and the Council. It's the smallest little thing, but that alone, the symbology on that reflects the perhaps past attitude and past operating procedures. I put that to you to consider because, you know, your department is very special. You serve two masters. You serve ten people. Ten of us are elected in this County--one Mayor, nine Council members--and the symbology you sent out on that is very germane to what we're talking about here, the lines of authority. So it's related, it's a

little bit congruent to this but it's related and, um . . . you know I bring this up because it's a very thin line that you have to walk and also with us, delineating the lines of authority. We don't wanna cut you off at the knees and say we will decide every settlement, but at the same time we haven't made a policy decision whether or not to shift the disbursement of funds to you. So your comments on that, Jimmy.

MR. TAKAYESU: Well, again, you know, DeSoto is very clear that it's the legislative branch that's gonna, has the final say in settling cases involving money. So it's, uh, that's where the authority lies and again the case is very clear. I didn't even notice the letterhead but, uh--

COUNCILMEMBER ENGLISH: I did.

MR. TAKAYESU: -- I'll go along with that. In terms of the Council granting to the Administration authority to settle cases again they are using the claims not in excess of \$3,000 and I think that's just as a practical matter 'cause we do have many, many cases like claims like that where the amounts are very small and I think you'd be, um . . .

?: Overwhelmed.

MR. TAKAYESU: Overwhelming, yeah, and time-consuming and probably even make it more cumbersome so the public would probably be, uh, be inconvenienced if we made the procedure more cumbersome and then again we need to be, report these things to the Council on a periodic basis so that you are aware of it, and I'm sure, um, when claims are not handled properly people will contact you directly to let us know, let you know.

COUNCILMEMBER ENGLISH: Yeah. I mean that, I mean that grant, uh, section in the code that talks about the \$3,000 limit is a grant, really a grant of authority.

MR. TAKAYESU: From the legislative branch to the administrative branch.

COUNCILMEMBER ENGLISH: Right. And so what's the discussion here is a further grant of authority for the revamping of the procedure that we walk this fine line between legislative/executive. And your recommendation to us is simply to revert back to the original language, yeah?

MR. TAKAYESU: Yeah, that is correct in terms of, uh, paragraph A and B, but then from C on where we incorporate a more specific procedure for handling these type of matters--

COUNCILMEMBER ENGLISH: That's fine.

MR. TAKAYESU: --that's fine.

COUNCILMEMBER ENGLISH: Okay. Thank you, Jimmy.

CHAIR KANE: Members, any other questions? Um . . . member Tavares, the point that you made, you know, under the bill the Council may make counter-offers and I believe it's located in Section D in Section 2, part D, uh, and it specifies in the language that after deliberation we can accept, reject the offer or propose a counter-offer and so that's part of the negotiating process. And I, what I took from what you said was that any time that we reject the opinion or the recommendation of Corp. Counsel in a case where money is involved that you are looking at a two-third majority, um . . . and I would tend to shy away from that because I believe the language states that we can in fact look at counter-offers as far as an agreement of this body, but point well taken. If you'd like to respond to that, I'd be more than happy to . . .

COUNCILMEMBER TAVARES: Yeah. I think because if a claim is rejected by Corporation Counsel in the past we don't even see it.

CHAIR KANE: Uh-huh.

COUNCILMEMBER TAVARES: But now that these claims will be at least presented to us, then a zero is an offer so it could qualify under this. So we would be reviewing and doing that. I just threw that out for, you know, consideration, and if we you know we feel it's not a big deal and that, um, we're all gonna look at this wisely as we have done in the past already then, you know, so be it. We'll leave it at the simple(?) majority, and if we run into problems maybe we can change it later.

CHAIR KANE: Cross the bridge when we get to it.

COUNCILMEMBER TAVARES: Yeah. Thank you.

CHAIR KANE: Thank you. Um . . . and just a final note on that and then I'll also be asking Jimmy a question, but right now if it's a zero or a reject we don't see it and it could cost us big money and then we wouldn't know about it until it comes to us saying this is what we owe these people that went through the judicial sector, and so this is only allowing us a backstop to allowing us to review it one more time before it actually goes out into that judicial (**change of tape**) you need to clarify that there are some cases that don't involve money that the Council approval is required, maybe some other legislative power. Can you make some clarification on that because I believe there is, there might be a situation and, and just to clarify the Council doesn't lose the right even if the claim definition is taken out because it's an inherit right. Can you respond to that.

MR. TAKAYESU: Um . . . yeah, that's correct, you know, um . . . I basically wanted to have the claim definition, uh, deleted and go back to the, uh, again paragraph . . . the first paragraph there's a term claim there.

CHAIR KANE: Uh-huh.

MR. TAKAYESU: And then also claim appear in B under the new language, uh . . . the Council would not be giving up any of its authority, and in terms of what type of claims are gonna be required to be a . . . subject to these new procedures that you're looking at C whereby resolution from time to time the Council's gonna be able to modify, uh, these procedures so that, uh, as things come up it'll be an evolving process.

In terms of, um . . . other types of lawsuits where the Council would get involved, I'm not sure what you were thinking about.

MR. RAATZ: Mr. Chair, if I may. Maybe, um--

CHAIR KANE: Yeah, please, go ahead, David.

MR. RAATZ: --uh, there's some language from the Supreme Court decision we talked about Harris v. DeSoto that if I may maybe I'll just briefly read an excerpt from it, um . . . where a settlement involves a commitment of city funds--or county funds in our case--or an exercise of authority exclusively vested in the Council by the Charter, the Council alone has the settlement authority . . . and then they go onto say similarly where the authority is vested by the Charter exclusively in the executive then the executive alone has the authority but if, there are certain powers that both the executive and the legislative are involved in and in such a case you need a concurrence of both branches of government. So the opinion does clarify that there are instances beyond just the expenditure of funds where Council authority would be appropriate, that's just one example of the Council's legislative authority.

CHAIR KANE: Thank you, David. Members, questions?

COUNCILMEMBER NISHIKI: Yeah, I've got a question. So David what, what that essentially . . . Mr. Chairman, if I may.

CHAIR KANE: Please.

COUNCILMEMBER NISHIKI: That essentially says is that within this bill it doesn't really have to so state because in the Charter it dictates the power.

MR. RAATZ: Well, I believe that the Charter of course is, um, preeminent over the Code.

COUNCILMEMBER NISHIKI: Right.

MR. RAATZ: So any inherit powers that exist and are provided to the Council in the Charter would still be in effect regardless of the specific language of this Code of the ordinance. I think--again, the ordinance is designed to, um, establish a procedure for the Council's review of settlements that come in from claimants or settlement offers.

COUNCILMEMBER NISHIKI: Thank you.

CHAIR KANE: Okay, any other questions? Members Tavares.

COUNCILMEMBER TAVARES: Yes, thank you. Um . . . we are taking out the sections . . . well, it's from C down and replacing it, and in Section C in the existing ordinance it says the Director of Finance shall file with the Council a quarterly report of all settlements. Will that requirement still be met under, um, the new section E? Will we still get a report from the Finance Director of all claims against the County, you know, from one cent to whatever? 'Cause I believe we get that report now and I think that we should still get that report.

CHAIR KANE: Jimmy.

MR. TAKAYESU: Okay, yeah, I, I believe you should get that report. I guess one way to handle it would be to take that language in the existing C and maybe move it up to Section A. Oh, excuse me, um . . . maybe we should just renumber the paragraph, but definitely keep in paragraph C.

CHAIR KANE: So your suggestion, Jimmy, is to remove the brackets?

MR. TAKAYESU: That is correct.

COUNCILMEMBER TAVARES: I guess just remove the brackets from C and then start the brackets from D.

MR. TAKAYESU: D, right.

COUNCILMEMBER TAVARES: And then renumber or re, re-alpha. (chuckled)

CHAIR KANE: Okay. Okay, members I'm gonna take a short recess so we can put together the changes that were recommended to us. So give me a few minutes. I'll get that for us and then we'll make motions to make those

changes and, uh, finally make the recommendation that we move this bill on second and final reading. Recess--

COUNCILMEMBER TAVARES: Yeah, Mr. Chair. Before you make--

CHAIR KANE: Oh, I'm sorry, go ahead, member Tavares.

COUNCILMEMBER TAVARES: Yeah, before you recess maybe Jimmy can take another look at that Section E the proposed and see if that will fit in there and then we just have to add section, something to Section E rather than renumber the whole mess.

CHAIR KANE: Your suggestion is to plug in that bracketed C into Section E.

COUNCILMEMBER TAVARES: Yeah, the intent of it anyway.

CHAIR KANE: Okay.

COUNCILMEMBER TAVARES: See if it can go into E if that's easier.

CHAIR KANE: Okay, so noted. Recess.

RECESS: 2:15 p.m.
RECONVENE: 2:20 p.m.

CHAIR KANE: Okay, members, I'd like to reconvene. Members, I'll be asking for a motion for three things. So I'll go ahead and read out the details of it and if I can, uh, get your support on this.

First of all, I'd like to get a motion to delete the definition of "claim" on Page 3 of Bill 13 and that would be deleting, uh . . . "Claim" includes any claim, demand, debt, dispute or other matter in favor of or against the county, its departments, officers or employees, initiated, brought or made by any person, or any federal or state agency. The term includes claim for injunctive, declaratory and extraordinary relief". Okay, so the removal of that--

COUNCILMEMBER TAVARES: So move--oh. So move.

VICE CHAIR KAWANO: Second.

CHAIR KANE: Okay, any discussion? If not all in favor say aye?

COUNCIL MEMBERS: Aye.

CHAIR KANE: Opposed? Carried.

VOTE: AYES: Councilmember Davis, English, Enriques, Hokama, Kawano, Nishiki, Tavares and Chair Kane.

NOES: None.

EXC.: Councilmember Nakamura.

ACTION: APPROVE MOTION TO DELETE THE PROPOSED DEFINITION OF "Claim"

CHAIR KANE: Another motion member that we, um, clean up Section B to read: "Any settlement in excess of \$3,000 shall require Council authorization".

COUNCILMEMBER TAVARES: So move.

COUNCILMEMBER ENGLISH: Second.

CHAIR KANE: Thank you. It's been moved by member Tavares, seconded by Councilmember English. For discussion? If not, all in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR KANE: Opposed? Carried.

VOTE: AYES: Councilmember Davis, English, Enriques, Hokama, Kawano, Nishiki, Tavares and Chair Kane.

NOES: None.

EXC.: Councilmember Nakamura.

ACTION: APPROVE MOTION TO DELETE THE PROPOSED NEW SENTENCE IN SUBSECTION 3.16.020.B

COUNCILMEMBER TAVARES: Mr. Chair.

CHAIR KANE: Yes.

COUNCILMEMBER TAVARES: Before you go on.

CHAIR KANE: Yes.

COUNCILMEMBER TAVARES: Um, are we doing this correctly? Do we need to make a motion to actually amend and by deleting rather than amend by just including? Is this still a bill in draft?

MR. RAATZ: Well, we don't consider it a draft bill anymore since it's passed first reading.

COUNCILMEMBER TAVARES: Okay.

MR. RAATZ: But, um . . . I think the amendments I heard so far are clear enough that we can ask Corp. Counsel to redraft the bill accordingly for second reading.

COUNCILMEMBER TAVARES: So we don't have to formally delete a section?

MR. RAATZ: No, I mean, I, I understood what the motions have been.

COUNCILMEMBER TAVARES: Okay, fine, thank you.

CHAIR KANE: Okay, thank you, member Tavares. Thank you, David. The final motion members would be to, uh, take off the brackets from Section C and so that language would now be included as part of the bill. The brackets would now be moved to Sections D and E only, and then continuing from that point on, Section C would change to D, Section D would change to E, Section E would change to F, Section F would change to G, and Section G would change to H. Members I need a motion.

COUNCILMEMBER TAVARES: So move.

VICE CHAIR KAWANO: Second.

CHAIR KANE: Thank you. It's been moved and seconded. Any discussion?

COUNCILMEMBER HOKAMA: Mr. Chairman, I got a question, please.

CHAIR KANE: Yes, member, uh . . . let me give the maker of the motion member Hokama, thank you. Member Tavares you have the floor.

COUNCILMEMBER TAVARES: Yeah, just for clarification, um, before the break I had asked if we should, if we could incorporate the . . . Section C into E, but through discussion it's actually easier to have this stand alone by itself--

?: Correct.

COUNCILMEMBER TAVARES: --and that would continue the practice of the Council receiving a quarterly report from the Department of Finance that list all settlements of claims, you know, from one cent on up as we are getting now.

CHAIR KANE: Yes. Thank you, member Tavares. It was discussed and that was the determination it would be better that it stand alone as you suggested. Thank you. Member Hokama.

COUNCILMEMBER HOKAMA: Thank you, Chairman. Since, you know, I've been listening intently of the discussion from the various members, then maybe for C, I don't know if we might wanna say . . . broaden it a little bit more and have the Finance Director not only add reports of settlements, why not say report on all claims within the quarter?

COUNCILMEMBER TAVARES: No, that's what it is.

COUNCILMEMBER HOKAMA: 'Cause . . . is that what it is? Because the reason I ask this member Tavares is because it's only for settlements but, you know, so maybe the Finance Director's report, I would assume, and again I may be wrong, is that in the quarter we had ten settlements, we would have a report of ten settlements, but maybe there was 100 claims against the County in the quarter, but we didn't know about this other 90 'cause it wouldn't be part of the Director's report. So I don't know if I'm hearing from the sense of the other members the concern of the claims and what not, that we may wanna ask the Director to add how many claims has come against the County in his quarterly report.

CHAIR KANE: Member Hokama, I entertain a motion to that effect.

COUNCILMEMBER HOKAMA: I so move, Chairman, to add in that provision that the Finance Director add all claims and all settlements in his quarterly report.

COUNCILMEMBER NISHIKI: Second.

CHAIR KANE: Okay, I have a motion by Councilmember Hokama to include claims into the settlement provision in the bill and it has been seconded by Councilmember Nishiki. For discussion, Mr. Hokama.

COUNCILMEMBER HOKAMA: Uh, no, Chairman, I think, you know, if this is the way we wanna go then I think, you know, let's just do it the right way and do it well.

CHAIR KANE: Thank you, Mr. Hokama. Member Tavares.

COUNCILMEMBER TAVARES: Yeah, I have a question for Mr. Hokama. Was your intention for them just to report the number or to actually report the claim and the amount claimed and then the zero following in the column?

COUNCILMEMBER HOKAMA: For me . . . if I may respond--

CHAIR KANE: Please do.

COUNCILMEMBER HOKAMA: --please, Chairman. Thank you. My thoughts on that members was that, you know, I would rather have it broken down because as some members have indicated and shared their thoughts with me, Chairman, is that there's also the other side of a claim picture whereby maybe our office, our Corporation Counsel may wanna settle and for various reasons the Council has decided it shouldn't settle and then we need to, uh, pursue the legal avenue further than accept a settlement offer. So I think for us to, if, that's part of the direction we wanna go, then I think we need to have all the information from the Finance Director.

CHAIR KANE: Thank you, Mr. Hokama. Jimmy, go ahead.

MR. TAKAYESU: The claims are on, um, computerized now. So I think it'd be real easy for them to go ahead and make those part of their quarterly report. It's also helpful to the Council to know what's pending, not only what has been expended, but what additional matters are outstanding, and again you know you just finish a budgetary, uh, going into this budgetary process by getting these quarterly reports so when we get back to that phase of the year again, uh, it'd be easier, you're pretty much updated already.

COUNCILMEMBER TAVARES: Uh-huh.

MR. TAKAYESU: You know so there are fewer surprises.

CHAIR KANE: Okay.

COUNCILMEMBER TAVARES: Thank you.

CHAIR KANE: Any other questions? Members, we have a motion on the floor to add to Section C the words, uh, "and claims" to the end of the sentence of Section C. So it would read now the Director of Finance shall file with the Council a quarterly report of all settlements and claims. Okay, any other discussion? If not all in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR KANE: Opposed? Carried.

VOTE: **AYES:** *Councilmember Davis, English, Enriques, Hokama, Kawano, Nishiki, Tavares and Chair Kane.*

NOES: *None.*

EXC.: *Councilmember Nakamura.*

ACTION: **APPROVE MOTION** to retain Subsection 3.16.020.C as it currently exists in the code, with the addition of "and claims" at the end of the sentence

CHAIR KANE: Members at this point I will be recommending that this be passed on second and final reading.

COUNCILMEMBER TAVARES: Mr. Chair.

CHAIR KANE: Yes, Councilmember Tavares.

COUNCILMEMBER TAVARES: I think that was an amendment to a motion so we still have the main motion for Section C.

COUNCILMEMBER HOKAMA: Yeah, that's right.

CHAIR KANE: Oh, okay, I'm sorry. We took a vote on the amendment so onto the main motion. Any discussion? Okay. All in favor in the motion as amended, say aye.

COUNCIL MEMBERS: Aye.

CHAIR KANE: Opposed? Carried.

VOTE: **AYES:** *Councilmember Davis, English, Enriques, Hokama, Kawano, Nishiki, Tavares and Chair Kane.*

NOES: *None.*

EXC.: *Councilmember Nakamura.*

ACTION: **APPROVE MOTION** to reclassify the proposed new subsections as "D", "E", "F", "G", and "H"

CHAIR KANE: Members, I will entertain a motion that we move this out of Committee and onto the full Council for second and final reading.

COUNCIL MEMBERS: So move.

COUNCILMEMBER TAVARES: Second.

COUNCILMEMBER ENGLISH: Second.

CHAIR KANE: It's been moved by the body and seconded by Councilmember English since it was in unison.

COUNCILMEMBER TAVARES: (laughter)

CHAIR KANE: Sorry, Yvette. Any discussion? And for the record we'll just make it moved by John Wayne Enriques. No discussion, all in favor of the motion say aye.

COUNCIL MEMBERS: Aye.

CHAIR KANE: Opposed? Carried.

VOTE: AYES: Councilmember Davis, English, Enriques, Hokama, Kawano, Nishiki, Tavares and Chair Kane.

NOES: None.

EXC.: Councilmember Nakamura.

ACTION: SECOND AND FINAL READING OF BILL NO. 13 (1999), AS AMENDED

ITEM 22 REQUESTING ESTABLISHMENT OF A SUBCOMMITTEE TO UPDATE THE MAUI COUNTY CODE (C.C. 96-249)

CHAIR KANE: Let's move on, members. We have before us our final item of the day Item No. 22 and the subject is requesting establishment of a Subcommittee to Update the Maui County Code.

Members, during the prior Council term the Committee of the Whole formed a Subcommittee to Update the County Code. Excuse me. The

Subcommittee, uh . . . several . . . uh, excuse me. The Subcommittee suggested several technical improvements to the County Code because there are so many suggested changes before us and we did have, put into your binders, members, a list of recommendations of the Subcommittee to Update the Maui County Code. There is a list of approximately . . . there's three pages and a list of 46 recommendations. And at this time, members, because there are so many suggested changes before us, my recommendation would be that we use today's meeting to try to review as many of the changes as possible, but I would recommend that for each suggestion we simply decide whether the matter should 1) be referred to another committee; 2) kept in the Committee of the Whole; or 3) be filed, and that's what I'd like to do today. Unless any of you see a need for immediate action I would recommend that we refrain from actually approving any bills at this time, and so I'd just like to take a step otherwise we'd be here for a marathon and I don't intend on doing that. We can always move on at another Committee of the Whole meeting to do so. But at this time I'd like to just merely figure which one's will go where, whether it stay in committee, refer to another committee, or be filed. Okay, again, I circulated that summary of the Subcommittee's recommendations and recommend that we begin our review of the list at this time.

Members are you all, uh, do you all have the recommendations before you?

COUNCILMEMBER TAVARES: Yes. (chuckled)

CHAIR KANE: Okay. Councilmember English for discussion?

COUNCILMEMBER ENGLISH: Yeah, for discussion, this list here is pretty comprehensive and, you know, actually watching the working of the group last year part of it was getting bogged down page by page review. This is a lot of stuff, and I think that what we should do is send it to the, um, each item to the appropriate committee.

CHAIR KANE: And that's what I'm recommending.

COUNCILMEMBER ENGLISH: Right.

CHAIR KANE: So if you'd like Councilmember English, I do have some recommendations and . . .

COUNCILMEMBER ENGLISH: Is that, that's what you did at the end of these?

CHAIR KANE: Um, nope. Uh . . . yes. I believe . . . do you have written in after each one?

COUNCILMEMBER ENGLISH: Some.

CHAIR KANE: Okay, so I can go ahead and go through the list if there are no objections then that way we can move through this quite quickly, um, and again not to take away from us getting into detail later on, but I'd like to make the recommendations to move each item to the appropriate committees and therefore be able to address them at those, at those committees and that will lessen the list here for the Committee of the Whole and give other Chairman's of other committees a chance to review these items.

VICE CHAIR KAWANO: Mr. Chair.

CHAIR KANE: I'm sorry, Councilmember Kawano.

VICE CHAIR KAWANO: I was gonna ask you Mr. Chairman if you needed a motion on this your recommendation on that?

CHAIR KANE: Uh, I'd like to read the recommendations and then ask for the motion.

VICE CHAIR KAWANO: Okay.

CHAIR KANE: So maybe if we can follow along and note down what recommendations I might have and before I do that Councilman Nishiki you have the floor.

COUNCILMEMBER NISHIKI: Yeah, um, if you've got it, rather than read it out, I would just accept whatever your recommendations are and move.

CHAIR KANE: Okay, members, are there any objections?

COUNCIL MEMBERS: No objections.

COUNCILMEMBER ENGLISH: Yes.

CHAIR KANE: Councilmember English, go ahead.

COUNCILMEMBER ENGLISH: Forty four and 45.

CHAIR KANE: Yes.

COUNCILMEMBER ENGLISH: I noticed that these are going to Committee of the Whole, but these are actually land use issues. So I'd like these two come to Land Use.

COUNCILMEMBER HOKAMA: What was the numbers, Mr. English.

COUNCILMEMBER ENGLISH: In the last list 44 and 45.

COUNCILMEMBER TAVARES: Forty four and 45.

COUNCILMEMBER ENGLISH: If you look at the very last item in number item 22 in your folders, it's the May 20th communication which Mr. Kane has outlined all of the recommendations and which committee he's proposing that they go to.

CHAIR KANE: David.

MR. RAATZ: Well, just to clarify, Mr. Chair, um . . . for these 46 items whenever there's a reference in there that an item be referred to a specific committee that was actually a recommendation from the Subcommittee to Update the Maui County Code. So, um . . . the recommendations in here are not being proposed by the Chair, but by the Subcommittee to Update the Maui County Code but it's, uh, of course up to this Committee to decide how they'd recommend that these matters be pursued.

COUNCILMEMBER ENGLISH: So, if I may, Mr. Chair . . . David . . . actually, Yvette can you put that thing down, please. Thank you. Um . . . David, this is actually based on the prior Council then. So some of these what's listed here is to committee's that . . . subject areas that no longer exist in certain committees. So it's referred to the correct subject matter area. Would that how . . . that should be how the motions worded then 'cause otherwise we, we've, the motion is to send it to the committees as referred here, but those committees no longer exist.

MR. RAATZ: Well, I--

CHAIR KANE: (inaudible)

MR. RAATZ: I'm sorry, Mr. Chair. Um . . . I think the only committee that has actually mentioned in this for whatever reason is, um, the Committee of the Whole based on again last term's recommendations from the Subcommittee to Update the Maui County Code. I think, um . . . they were, 'cause they were actually formed under the Committee of the Whole so I think their initial point of reference was to the Committee of the Whole. That was their way of moving something out of their jurisdiction. So just because Committee of the Whole is mentioned here I don't think that that was meant to be the final destination necessarily for any of these matters.

COUNCILMEMBER ENGLISH: Okay. So this would go to the appropriate subject matter committees, yeah, David?

MR. RAATZ: Well, again, it's up to this Committee to make, um, whatever recommendation that would be appropriate--

COUNCILMEMBER ENGLISH: Thank you. Yeah, I would think that would be the best understanding for all of us.

CHAIR KANE: Okay, so member English are you still recommending that we move items number 44 and 45 to the Planning Committee?

COUNCILMEMBER ENGLISH: Land Use and--

CHAIR KANE: Excuse me, Land Use. I'm sorry.

COUNCILMEMBER ENGLISH: Yes. I mean that's the subject matter so . . .

CHAIR KANE: Any objections, uh, to that request, members, numbers 44 and 45?

COUNCIL MEMBERS: No objections.

CHAIR KANE: Okay, uh . . .

COUNCILMEMBER HOKAMA: Mr. Chairman.

CHAIR KANE: Yes, Councilmember Hokama.

COUNCILMEMBER HOKAMA: I would rather have . . . if you're gonna do it that way then I would like, uh . . . where's the copies of the letters, Mr. Chairman, that he's referring to?

CHAIR KANE: I'm gonna call a one minute recess.

RECESS: 2:45 p.m.
RECONVENE: 2:46 p.m.

CHAIR KANE: (gavel) Members, I'd like to reconvene, please. I think before all of you you have the recommendations, uh, of the Chair written in after each item and I'll specifically go through, um, all the items that are marked. COW I will not refer to. I will only refer to the item and its recommendation to the committee, the appropriate committee. Um, starting with number 2, the recommendation is to the Planning Committee. Item number 7 is recommended to the Housing . . .

MR. RAATZ: Human Services and Parks.

CHAIR KANE: Excuse me, Human Services and Parks. Thank you, David. Number 8, 9, 10 are recommend to refer to Government Relations and Finance; number 11 to Budget; 12 Government Relations Finance; 13, 14, 15 to Budget; 16 Government Relations Finance; 18 Government Relations Finance; 19 to Budget; numbers 21 and 22 to Public Works and Water Committee; number 32 Budget Committee; and, uh, numbers 44 and 45 as requested by Councilmember English to the Land Use Committee. All other items, members, will stay in this Committee and be looked at the appropriate time. Are there any objections to these recommendations? Councilmember Tavares.

COUNCILMEMBER TAVARES: Yeah, no objections but, um, could we make sure that the appropriate background information also gets transmitted to the appropriate committees.

CHAIR KANE: Absolutely. We'll make sure that that's done for you, Councilmember Tavares--

COUNCILMEMBER TAVARES: Thank you.

CHAIR KANE: --for everybody that is. Okay, so if there are no objections I'd like to . . .

COUNCILMEMBER TAVARES: So move.

VICE CHAIR KAWANO: Second.

CHAIR KANE: . . . uh, refer the aforementioned items to the appropriate committees and hold onto the other items for, uh, the recommendations of the Subcommittee.

COUNCILMEMBER TAVARES: So move.

CHAIR KANE: Thank you.

COUNCILMEMBER ENRIQUES: Second.

CHAIR KANE: There are no objections?

?: No discussion.

CHAIR KANE: Okay there's, uh, okay, so we'll take the motion by member Tavares and a second by Enriques. For discussion? If not, all in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR KANE: Opposed? Carried.

**VOTE: AYES: Councilmember Davis, English, Enriques,
Hokama, Kawano, Nishiki, Tavares and
Chair Kane.**

NOES: None.

EXC.: Councilmember Nakamura.

**ACTION: APPROVE MOTION TO REFER PROPOSED REVISIONS
TO THE MAUI COUNTY CODE TO THE APPROPRIATE
COMMITTEES**

CHAIR KANE: Members, thank you very much for your attendance today. This meeting is adjourned. (gavel)

ADJOURNED: 2:50 p.m.

APPROVED BY:

DAIN P. KANE, Chair
Committee of the Whole

cow:min:990520:yb

Transcribed by: Yvette Bantilan

Presented to the Board of
Supervisors - meeting of: 2/9/67

**A STATEMENT OF THE ACTIVITIES, FINDINGS AND
RECOMMENDATIONS OF THE CHARTER COMMISSION TO
THE BOARD OF SUPERVISORS OF THE COUNTY OF MAUI**

**To: The Honorable Chairman
and Members of the Maui
County Board of Supervisors**

The Second Maui County Charter Commission was appointed by the Maui County Board of Supervisors on February 10, 1966, under the provisions of Chapter 143A, Revised Laws of Hawaii 1955, as amended by Act 65, Session Laws of Hawaii 1965. On June 16, 1966, after a thorough examination of the existing structure of county government, and several public hearings, the Commission agreed to proceed to prepare a charter for proposal to the Board of Supervisors and the people of the County of Maui. You were informed of the action taken by the Charter Commission by letter dated June 29, 1966. This is an analysis of the final draft of the charter proposed by the Commission.

There will be no radical change in county government under the proposed charter. The proposed charter incorporates several new concepts and procedures that should make county government more efficient and responsive. This statement sets forth the reasons for these proposed changes. The proposed charter and this statement should be read together.

Board of Supervisors and the Chairman are directly responsible for the administration of the Public Works Department, the Department of Parks and Playgrounds and the Fire Department.

The Board and Chairman also exercise certain legislative authority. They adopt the county budget, set the real property tax rate and enact ordinances and resolutions. The Chairman sits and votes with the Board upon these essentially legislative matters.

The Police Commission and the Board of Water Supply are responsible for the management of the police and water supply for the county. These commissions are responsible for the administration of two of the largest and most important departments of the county. The members of the Police Commission and the Board of Water Supply are appointed by the Chairman and Board.

The Liquor Commission, Planning Commission and Civil Service Commission are not administrative commissions. These commissions do not operate departments. These commissions perform staff, rule-making and adjudicatory functions. The members of these commissions are appointed by the Chairman and Board.

There are several other executive officers of the county who are responsible for administration, but these officers are not responsible to the Board or the Chairman, nor are they members of any commission. These are the Auditor, Treasurer,

PROPOSED CHANGES IN THE BASIC FORM OF COUNTY GOVERNMENT

The Commission recognizes several defects in the existing administrative structure of county government. The proposed charter attempts to correct these defects.

The Board and Chairman jointly exercise administrative and legislative authority. The administrative and legislative functions are not differentiated. These functions should be separated.

The American political doctrine that there must be "checks and balances" between the various branches of government rests on the basic premise that government is, in fact, composed of several separate branches. There are no "checks and balances," and government can become inefficient, arbitrary or even corrupt, if the executive and legislative functions are lumped together and performed by one monolithic body.

The proposed charter establishes a separate executive branch of government responsible to an elected Mayor. The proposed charter continues the Board of Supervisors (called the Council) as the legislative branch of county government.

There is widespread popular support for this proposal. This separation of the powers and functions of the present Chairman and Board will strengthen county government.

The proposed charter eliminates the elected executive offices of Auditor, Treasurer, County Attorney and Clerk. The

the Mayor with the approval of the Council. The Clerk will be appointed by the Council. The people favor the elimination of these elected administrative offices.

The people wish to retain the principal administrative commissions: the Police Commission and the Board of Water Supply. The proposed charter makes little change in the structure and authority of these commissions.

The existing Planning and Liquor Commissions perform important rule-making (legislative) and adjudicatory (judicial) functions. The proposed charter separates these functions.

RELATION BETWEEN THE COMMISSIONS AND THE ELECTED OFFICIALS

The various commissions are responsible for a large and important portion of the business of the county. These commissions affect all of us. Yet the commissioners who serve are not selected by the people.

These commissioners cannot be entirely independent of the popularly elected Mayor and Council. The proposed charter establishes certain definite relations between these commissions and the Mayor and Council.

First, the rules and regulations adopted by these commissions that have the effect of law must be ratified by the Council and Mayor.* (Section 13-10). Each commission can adopt its own rules of procedure for the conduct of its

business. (Section 13-2(14)). Such rules of procedure need not be ratified by the Council and Mayor.*

Second, the members of any commission may be removed from office upon the recommendation of the Mayor and the approval of six members (2/3rds) of the Council. (Section 13-2(4)). Such removal must be "for cause."**

Third, the Mayor has the power to require a department administered by a separate commission, such as the Department of Water Supply, to cooperate and coordinate its work, personnel and equipment with that of a department directly responsible to the Mayor, such as the Department of Public Works, to achieve a more efficient use of county resources. (Section 13-15). This may create friction between an independent commission and the Mayor. On the other hand, the limited resources of the county must be employed efficiently. The departments administered by independent commissions are a part of county government. These departments must cooperate with the departments directly responsible to the Mayor.***

The Commission recognizes the fact that the people wish to preserve these commissions because, it is believed,

*Department heads responsible to the Mayor can promulgate rules for the organization and internal operation of their respective departments. Such rules must be ratified by the Mayor. (Section 6-4(3)).

these commissions are one step removed from the "hurly burly" that surrounds the public life of elected officials. Thus, the proposed charter contains provisions that will make it more difficult for the Mayor and Council to directly influence the activities of these commissions.

First, each commission, not the Mayor or Council, appoints its own department head, i.e. the chief of police, planning director, director of personnel services, director of department of water supply, director of department of liquor control. These department heads are responsible for the operation of their departments. They are each responsible to an independent commission.

Second, no member of a board or commission is eligible for an immediate second appointment to the same board or commission.* This will enhance a commissioner's independence. Since a commissioner cannot be reappointed, it is hoped that commissioners will not respond to improper suggestions from the Mayor or members of the Council. (Section 13-2).

Third, not more than a bare majority of the members of any commission can belong to the same political party.** (Section 13-2(2)). This does not mean that the two major political parties must be equally represented on a commission.

*Upon the expiration of his term of office, a member of

On a five member commission, three commissioners can be members of party A, and two commissioners may have no party affiliation.

The Board of Water Supply must adopt an annual operating and capital budget for the Department of Water Supply. (Section 8-8.2(3)). The revenues received by the Department of Water Supply must be kept separate from the other funds of the county. (Section 8-8.4). The Department of Water Supply has the power to issue bonds. Such bonds may be secured by its revenues. (Section 8-8.2(5)). The Department of Water Supply will continue as a separately financed semi-autonomous body.*

None of the other commissions are separately financed. All of the revenues received by the other commissions must be transferred to the general funds of the county. The commissions responsible for the administration of these departments do not have the power to adopt a separate budget. Each of these commissions must request an annual appropriation for its department. Each appropriation allocated to a department administered by a commission must be a part of the county's operating budget or capital program.

Commissions are also important and desirable because they make it possible for private citizens to participate directly in government. This is healthy. Several commissions have been increased in size. More people can serve. Residents of Molokai, Lanai, Hana, and women, should be appointed to

these enlarged commissions. Since these commissions make it possible for private citizens to participate in the business of government, the proposed charter prohibits the appointment of a salaried government employee to a commission.* (Section 13-2(6)).

CREATION OF ADDITIONAL DEPARTMENTS

The proposed charter establishes a basic organizational structure for the government of the county. The proposed charter describes the structure and functions of the more important existing executive agencies.**

The people may hereafter demand that the county furnish additional services. The State of Hawaii may subsequently grant the county additional powers and functions. The United States may establish programs that must be administered by the county.

The proposed charter does not create an inflexible organization. The Mayor and the Council can create additional departments.*** (Section 6-2). The Mayor and the Council can

*Under Section 13-1(6)(b) a member of a commission is an "officer." Section 13-2(6) prohibits the appointment of an "officer" to a commission. There is no conflict between these provisions, for a person is not an "officer" prior to his appointment. These provisions, taken together, do mean, however, that a person cannot serve on two commissions at the same time.

**The proposed charter does not refer to many relatively unimportant existing agencies, offices and commissions. This

also change, abolish, continue and rearrange the departments created by the proposed charter. For example, if the State of Hawaii should return the hospitals to county control, the Mayor and Council can create a Hospital Department.*

POPULAR CONTROL OF GOVERNMENT

All of the provisions mentioned above, relative to the organization of the administrative agencies of the county, were designed to develop popular control of county government. In addition, the proposed charter creates several agencies, and provides procedures, for more direct control of county government by the people. The proposed charter puts government in the hands of the people. If government under the charter is inefficient or arbitrary, the people will be to blame.

The proposed charter provides Initiative and Referendum, and Recall. The proposed charter also provides for the impeachment of elected officers for malfeasance, misfeasance or nonfeasance in office. (Section 13-14).

The proposed charter creates a Board of Appeals to hear disputes between any member of the public and any officer

*The Commission has asked the Attorney-General of the State of Hawaii whether, in the light of Act 97, S.L.H. 1965, the proposed charter should provide for the administration of the county hospitals. The Attorney-General has not answered

or employee of the county. The Board of Appeals will hear such disputes, arrive at a decision, then, if the decision indicates that the employee or officer involved has erred, the Board of Appeals will recommend to the Mayor or independent commission that the employee or officer be ordered to comply with the decision. The Board of Appeals can also recommend that disciplinary action be imposed against an errant employee or officer of the county.

The Board of Appeals, a three man commission, will act as the county Ombudsman.* The Board of Appeals may find it necessary to employ an Executive Secretary and a small staff. For the near future, it is hoped that the Board of Appeals will be able to function without a salaried staff.

*The "Ombudsman" originated in Sweden. The Ombudsman concept has been widely discussed and copied by New Zealand and other Scandinavian countries. The Ombudsman concept is new in the United States.

The charter proposed by the First Maui County Charter Commission created a Board of Appeals. The First and Second Charter Commissions have thoroughly discussed these provisions. The Board of Appeals is the product of a need recognized by both commissions to provide the public with a forum to hear disputes over administrative matters.

The commissions did not propose the creation of an Ombudsman-type Board of Appeals in an attempt to take advantage of the favorable publicity surrounding the Ombudsman concept. In fact, most of the popular and scholarly articles and books on the Ombudsman were written after the First Charter Commission proposed a Board of Appeals.

In Scandinavia and New Zealand the Ombudsman is a single person, appointed for a long term. The Board of Appeals is composed of three persons, each appointed for a term of five years. The Commission believes that the decision of three persons will be more persuasive than the opinion of a single person. The Mayor will find it relatively difficult to refuse to comply with the recommendations of a three member board.

The Ombudsman concept will not work unless the Mayor and Council appoint persons of absolute integrity, competence and intelligence to the Board of Appeals. The Board of Appeals should not be a spring-board for a political career.

The proceedings of the Board of Appeals should be informal. In many cases the Board of Appeals will be able to resolve the grievance within a department by discussing the problem with a senior employee or the department head. In such a case the Board of Appeals need not send the Mayor or independent commission formal recommendations.

There are several restrictions upon the powers of the Board of Appeals. (Section 8-16.3). For example, the Board of Appeals cannot "restrict or supersede the discretionary authority of any employee or officer of the county." This provision will probably be the subject of controversy. The officer or employee whose acts are the subject of a complaint will probably argue that he acted within the scope of his

discretionary authority. The Board of Appeals should bear in mind that employees at the lower civil service levels exercise little or no discretionary authority. Moreover, even though an employee has discretionary authority, it is wrong to exercise such authority arbitrarily. The Board of Appeals must protect the public against an arbitrary exercise of discretionary authority.

The Board of Appeals is also responsible for the enforcement of the Code of Ethics (Article X) and the implementing rules and regulations to be promulgated by the Civil Service Commission. The Board of Appeals can also exercise any additional power granted by law. (Section 8-12.2(7)). The Board of Appeals should not be charged with the enactment of rules and regulations or the active administration of the business of the executive branch. The Board of Appeals must stand apart from the executive branch.

The proposed charter also creates an ad hoc Commission on Organization of the Executive Branch. This Commission will function periodically, at ten year intervals. The provisions that establish the functions of this Commission are based upon the enabling act that created the federal Hoover Commission.

This Commission must study the agencies of the executive branch, then recommend such changes as may be necessary to promote economy, efficiency and improved service in the transaction of county business. The recommendations of this

the proposed charter so that it can assist with the development of the necessary administrative code.

The proposed charter provides for the codification of the continuing ordinances of the county. (Section 4-5). The county has been enacting ordinances for more than sixty years. There is no compilation of these ordinances that a person can examine. No one really knows what the law is in the county. Some of the early ordinances may still be in effect. A complete code of the ordinances of the county must be prepared and enacted within two years after the effective date of the charter.* (Section 4-5).

THE ADJUDICATORY COMMISSIONS

The Civil Service Commission, the Planning Commission and the Liquor Commission enact rules and hear disputes. These commissions thus exercise quasi-legislative and quasi-judicial powers.

The proposed charter does not change the existing civil service structure. The Civil Service Commission is required to issue regulations implementing the standards of conduct

stated in the Code of Ethics.* The Civil Service Commission will continue to enact civil service rules and hear employee grievances.

The proposed charter establishes a Department of Liquor Control composed of a Liquor Control Commission, Liquor Control Adjudication Board and a Director of the Department of Liquor Control. The Liquor Control Commission shall appoint the director (the department head), enact rules regulating the sale of liquor and grant liquor licenses. The director is responsible for the administration of the department and the investigation of alleged violations of any rule or law regulating the sale of liquor. The Liquor Control Adjudication Board shall hear complaints charging a violation of a rule or law regulating the sale of liquor.

The proposed charter sharply separates the rule-making power (quasi-legislative) from the adjudicatory (quasi-judicial) power of the present Liquor Commission. The Liquor Control Adjudication Board is independent of the rule-making authority (Liquor Control Commission) and the administrator/prosecutor (Director). The Liquor Control Adjudication Board will

*The proposed charter requires full disclosure by councilmen, other officers, and senior employees of the county of their financial interests. Every employee of the county should not be required to disclose his financial interests. Disclosure should be required of senior officers and employees who hold sensitive positions.

determine whether a violation of the liquor control rules and laws has occurred, and, if so, what the penalty should be. The people favor such a separation of the powers of the present Liquor Commission.

The proposed charter establishes a Department of Planning composed of a Planning Commission, Planning Director and Board of Adjustment and Appeals. The structure of the existing Planning Commission has been modified.

The Planning Director, who is appointed by the Planning Commission, is the administrative head of the department, and responsible for the initial preparation of the general plan, subdivision and zoning ordinances. The planning director is also responsible for the administration of the subdivision and zoning ordinances.

The Planning Commission must review the proposed plans and ordinances prepared by the Planning Director. The Planning Commission also has the power to adopt rules and regulations implementing the subdivision and zoning ordinances. This rule-making authority is an important function of the Planning Commission. The Council can enact relatively brief subdivision and zoning ordinances, then direct the Planning Commission to adopt detailed rules implementing the general statements of policy set forth in the subdivision and zoning ordinances. (Such rules must be ratified by the Mayor and Council). This approach should provide flexibility, eliminate the need for

For example, the board will consider petitions for variances from the zoning and subdivision ordinances, appeals from any order made by any officer responsible for the administration of the zoning, subdivision and building ordinances, and applications for special permits.

The Board of Adjustment and Appeals exercises quasi-judicial functions. Only persons of unquestioned integrity should be appointed to this board. The members of this board, like judges, must avoid any act which suggests bias or improper influence. The members of this board must refuse to hear any ex parte communication.

The Board of Adjustment and Appeals has the power to adopt rules regulating its procedure. Since the petitions the board will hear affect not only the petitioner, but also the owners of adjoining land, these rules should provide that the owners of adjoining land receive notice of the petition and be afforded an opportunity to be heard if they wish to oppose the petition.

COUNCIL

The County Council is elected at large. However, of the nine seats, one must be filled by a resident of Molokai, and another must be filled by a resident of Lanai.

This means that two or more residents of Molokai, and two or more residents of Lanai, may be members of the Council at the same time. For example, if A and B, both of whom are

number of votes at the general election, then both of them would be elected to the Council, even though both of them are residents of Molokai. This result follows because the provision that one member of the Council must be a resident of Molokai, and another must be a resident of Lanai, establishes a minimum requirement. Moreover, this requirement does not alter the basic principle that the Council is elected at large.

The Mayor and Council serve for two year terms. Each term of office begins on the second day of January following the election. The business of the county will not be interrupted at the close of a completed term of office. Any bill or resolution introduced during one term of office continues and may be considered by the succeeding Council and Mayor.* (Section 4-2(9)). Since the county's fiscal year will begin on the first day of July, a newly elected Mayor and Council will have almost six months to prepare a budget and capital program for the next fiscal year.** (Section 9-1).

*This precludes any "pocket veto" by the Mayor.

Department heads appointed by a Mayor* whose term of office has expired will continue in office until their successors have been appointed by the newly elected Mayor. This is because the term of each of these department heads continues until "removed by the Mayor." Consequently, a newly elected Mayor need not appoint all of his department heads immediately upon taking office.

The Council is the county's legislative body. The Council exercises general legislative powers.

The Mayor, not the Council, is responsible for the execution of the laws and policies established by ordinance and resolution. The Council cannot interfere with the administration of county business by the executive branch. (Section 3-10). The Council can investigate the operations of a department and call for reports from the executive departments. (Section 3-7).

The Council is a powerful body. The Council exercises a great deal of authority in fiscal matters. The Council controls the county "purse strings." The Council has the power to add, increase, decrease or delete items from the budget proposed by the Mayor. (Section 9-5). Although the Mayor has the power to item veto portions of the budget, the Council can separately reconsider each item vetoed. (Section 4-3(2)).

The administrative code should specify the form of the operating budget.* (Section 9-3(1)). The operating budget should be set up in terms of "programs" to be accomplished. For example, dollars should be appropriated for the maintenance of Park A and Road B, as well as to the departments responsible for the expenditure of the funds. In this way the Council and the public will know what services are to be provided for the money appropriated.

After the Council adopts the budget, the Mayor cannot transfer an unencumbered appropriation balance within a department, that is, from Program A to Program B (even though both programs are administered by the same department), without the consent of the Council. Nor can the Mayor transfer an unencumbered appropriation balance from one department to another. (Section 9-9(2)). This is an important restriction upon the power of the Mayor. The Council establishes the county's fiscal objectives. The Council takes this action by adopting the budget. If the Mayor desires to reallocate funds from one program to another (even though both programs are administered by the same department), the Mayor must obtain the consent of the Council. For example, if the budget calls for the expenditure of X dollars for the repair of Road A, if the Mayor desires to use half of this money for the repair of Road B, he must obtain the consent of the Council.

The proposed charter establishes the Office of Council

fiscal watchdog. The Council Auditor is not responsible to the Mayor. He is the agent of the Council. The Council Auditor should assist the Council as the Comptroller General of the General Accounting Office of the United States acts for the Congress (31 U.S.C. Sec. 41), and as the Auditor of the State of Hawaii assists the Legislature (Constitution of the State of Hawaii, Art. VI, Sec. 8). There is virtually no restriction on the scope of the tasks the Council can assign to its Auditor.

To be effective, the Council Auditor must be removed from politics. For this reason he has a term of eight years.* The Council can remove its Auditor for cause by a vote of seven or more members (Section 3-8). The Council Auditor must be a certified public accountant. He should also be a dedicated, aggressive and intelligent public servant. The effectiveness of the Council will be largely determined by its Auditor.

The Council may, in its discretion, require an audit of county funds and accounts by an outside certified public accountant. (Section 3-9). The holders of the county's bonds may require such an audit. There may be other occasions for such an audit.

The Council appoints the Clerk. The Clerk is an agent of the Council.

Although the Council appoints the Auditor and Clerk, the Auditor and Clerk, like other department heads (Section

staff assistants. Of course, the Council has the power to determine the size of the staff of each of these offices.

The Council has the power to determine the number of personnel positions each department is authorized.*

(Sections 6-4(1) and 7-4(2) and 7-4(3)). This includes the power to provide a general job description for each position.**

The Council can hold its meetings at such times and places as it shall prescribe by rule. (Section 3-6(2)). The Council should hold several meetings each year in the outlying districts of the county.

AMENDMENTS TO CHARTER

Amendments to the proposed charter can be initiated by the Council, by Charter Commissions to be appointed at intervals of ten years, and by petitions presented to the Council. The proposed charter also provides for a special referendum, six years after the adoption of the charter, upon the question "shall a charter commission be appointed to propose amendments to the charter." (Section 14-3). The Commission is not infallible. Such a referendum will permit a complete review of the charter within a reasonably short time after its adoption,

*The power of the Council to create and eliminate personnel positions is based upon the Council's power to appropriate money. Since the Department of Water Supply is a semi-autonomous agency, which does not rely upon appropriations made by the Council, the Council does not have the power to determine the number of personnel positions authorized for

for time and experience may reveal the need for a general revision of the charter.

FINDINGS AND RECOMMENDATIONS

The members of the Commission have thoroughly enjoyed working together for the good of the people of the County of Maui. The charter we have prepared, and do hereby propose, represents our common effort and collective good judgment.

The members of the Commission are not from a common mold. We differ in age, background, temperament and experience; we come from different parts of the county. None of us are alike. Yet we agree that the proposed charter should be adopted as the organic law for the government of the people of the County of Maui. We speak to you with one voice.

Moreover, we have found, and do report to you, that the public favors the proposed charter. The public understands the defects that exist in our present form of county government.

Under R.L.H., 1955, Section 143A-8, as amended, you have the right to propose alternatives to the proposed charter. We respectfully request that you propose no such alternatives. The charters proposed by the Second Charter Commissions of Hawaii and Kauai were defeated by the electorate of each county largely because the proposed charters were submitted with alternatives. The submission of alternatives may make it impossible to obtain a majority vote upon the proposed charter or any alternative. In this event, though it might appear that a majority of the electorate favor a charter, the proposed

We therefore recommend for your approval the draft of the proposed charter for the County of Maui submitted herewith.

Dated this 6th day of February, 1967.

Respectfully submitted,

Nadao Honda

Nadao Honda

Douglas Sodeani

Douglas Sodeani
Chairman

Harry Kobayashi

Harry Kobayashi

William F. Crockett

William F. Crockett
Vice-Chairman

George Kondo

George Kondo

Emil Balthazar

Emil Balthazar

Paul Pladera

Paul Pladera

Edward L. Cluney

Edward L. Cluney

Keith Tester

Keith Tester

Shiro Hokama

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James S. Ushijima
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