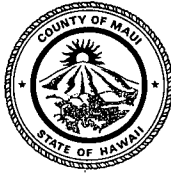


CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7742
FACSIMILE: (808) 270-7152

March 3, 2010

MEMORANDUM

T O: Michael J. Molina, Chair
Committee of the Whole

F R O M: Adrienne N. Heely, Deputy Corporation Counsel *Adrienne N. Heely*

SUBJECT: NOMINATIONS TO BOARDS, COMMITTEES, AND COMMISSIONS
(COW-2)

I. Introduction.

This memorandum is in response to your memorandum dated February 12, 2010, requesting advice regarding the proper procedure for subsequent appointments to certain boards, commissions, and committees, where the Mayor has not made a subsequent nomination to fill a vacancy and the Council has not made a subsequent appointment within the prescribed time period.

Your memorandum identified the following boards, commissions, and committees: Animal Control Board; Commission on Children and Youth; Commission on Culture and the Arts; Maui County Outdoor Lighting Standards Committee; and Subdivision Engineering Standards Committee.

II. Factual Background.

We summarize the facts provided to us as follows:

- A. Animal Control Board - Veterinarian's term expired March 31, 2009. The Mayor did not nominate anyone to fill the vacancy within the period prescribed in Section 13-2(16), Revised Charter of the County of Maui (1983), as amended

("Charter").¹ Council did not nominate anyone within the sixty-day period prescribed in Section 13-2(16) of the Charter and Section 2.41.050(A), Maui County Code ("MCC").²

- B. Commission on Children and Youth - Member Rafael Boritzer resigned, effective October 9, 2009. By letter dated October 14, 2009, the Mayor notified Council of Boritzer's resignation. The Mayor did not nominate anyone to fill the vacancy within the thirty-day period prescribed in Section 13-2(17) of the Charter.³ Council did not nominate anyone within the sixty-day period prescribed in Section 13-2(17) of the Charter and Section 2.41.050(A), MCC. However, by letter dated February 25, 2010, the Mayor submitted the name of a nominee, Janet Bernejo Barrera, to fill the vacancy resulting from Boritzer's resignation.
- C. Commission on Culture and the Arts - Member Veronica Yamanoha resigned, effective June 25, 2009. By letter dated June 26, 2009, the Mayor notified Council of Yamanoha's resignation. The Mayor did not nominate anyone to fill the vacancy within the thirty-day period prescribed in Section 13-2(17) of the Charter. Council did not nominate anyone within the sixty-day period prescribed in Section 13-2(17) of the Charter and Section 2.41.050(A), MCC.
- D. Maui County Outdoor Lighting Standards Committee - Member Margie Grace Kelm resigned, effective September 1, 2009. By letter dated September 2, 2009, the Mayor notified Council of Kelm's resignation. The Mayor did not nominate anyone to fill the vacancy within the thirty-day period prescribed in Section 13-2(17) of the Charter.

¹ Section 13-2(16) of the Charter relates to vacancies on a commission or board due to the expiration of a member's term. See *infra*, Analysis and Discussion.

² Section 2.41.050(A), MCC, relates to the nomination of members of boards and commissions by the Council. See *infra*, Analysis and Discussion.

³ Section 13-2(17) of the Charter relates to vacancies on a commission or board due to death, resignation or removal of a member. See *infra*, Analysis and Discussion.

Council did not nominate anyone within the sixty-day period prescribed in Section 13-2(17) of the Charter and Section 2.41.050(A), MCC.

- E. Subdivision Engineering Standards Committee - Member Brooks Aoki resigned, effective March 24, 2009. By letter dated April 1, 2009, the Mayor notified Council of Aoki's resignation. The Mayor did not nominate anyone to fill the vacancy within the thirty-day period prescribed in Section 13-2(17) of the Charter. Council did not nominate anyone within the sixty-day period prescribed in Section 13-2(17) of the Charter and Section 2.41.050(A), MCC.

III. Analysis and Discussion.

Section 13-2(16) of the Charter states:

A vacancy on a commission or board due to the expiration of a member's term shall be filled as follows:

Not more than seventy (70) days nor less than sixty (60) days before the vacancy is to occur the mayor shall submit to the council the name of the mayor's nominee to fill the vacancy. Within sixty (60) days thereafter the council shall act to approve or disapprove the nominee. If the council disapproves the nominee, it shall immediately so notify the mayor of its action. The mayor shall then submit the name of a second nominee to the council within ten (10) days and the council shall act thereon within sixty (60) days. *The process shall continue until the vacancy is filled.* In the event that the council fails to approve or disapprove a nominee within the time periods provided for herein, the nominee shall be deemed appointed to fill the vacancy upon its occurrence. If the mayor fails to submit the name of a nominee within the times provided for herein, the council may within sixty (60) days nominate and approve the appointment of an individual to fill the vacancy. (Emphasis added).

Section 13-2(17) of the Charter states:

A vacancy on a commission or board due to death, resignation or removal shall be filled as follows:

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Committee of the Whole
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Within thirty (30) days of the occurrence of a vacancy the mayor shall submit to the council the name of the mayor's nominee to fill the vacancy. Within sixty (60) days thereafter the council shall act to approve or disapprove the nominee. If the council disapproves the nominee it shall immediately so notify the mayor of its action. The mayor shall then submit the name of a second nominee to the council within ten (10) days and the council shall act thereon within sixty (60) days. *This process shall continue until the vacancy is filled.* In the event that the council fails to approve or disapprove a nominee within the time periods provided for herein, that nominee shall be deemed appointed to fill the vacancy upon its occurrence. If the mayor fails to submit the name of a nominee within the times provided for herein, the council may within sixty (60) days nominate and approve the appointment of an individual to fill the vacancy. (Emphasis added).

Section 2.41.050(A), MCC, states:

In accordance with section 13-2, Revised Charter of the County of Maui (1983), as amended, should the mayor fail to submit the name of a nominee within the times provided for by law, the council may, within sixty days after the expiration of the times so provided, nominate and approve the appointment of an individual to fill a vacancy. If the mayor submits the name of a nominee within the sixty-day period, the mayor's submittal shall be deemed invalid.

Sections 6.04.095, 2.39.010, 2.37.020, 20.35.110, and 18.40.010, MCC, relating to the Animal Control Board, Commission on Children and Youth, Commission on Culture and the Arts, Maui County Outdoor Lighting Standards Committee, and Subdivision Engineering Standards Committee, respectively, provide that members be appointed by the Mayor with the approval of the Council.

The Charter and MCC do not specifically address procedures for the appointment of persons to boards, commissions, and committees where the Mayor and the Council have not made appointments within the periods prescribed by the Charter and MCC. However, MCC sections pertaining to the boards identified in this memorandum do state that members are to be appointed by the Mayor, and neither the Charter nor the MCC explicitly authorize or empower another officer or entity, such as the Council, to nominate persons in the circumstances described herein.

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Further, neither the Charter nor the MCC prohibit the Mayor from making subsequent appointments in circumstances where both the Mayor and Council failed to nominate individuals within the periods provided by law, and there are no Charter or MCC provisions that would invalidate or void mayoral appointments made in such circumstances. Sections 13-2(16) and 13-2(17) of the Charter (in particular, the portions italicized for emphasis above) appear to anticipate continued mayoral action to fill vacancies.

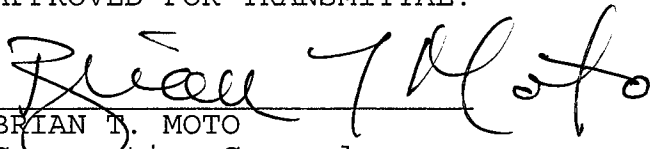
A leading publication on municipal law has observed:

Where the power of appointment exists the rule usually is that, in a proper case, it may be exercised at any time during the term of the officer or the board or body authorized to act in the premises. Thus, a mayor whose term expires at a certain hour of a certain day has the power at any time prior to the expiration of his or her term to fill any position which his or her successor in office might fill if left vacant.⁴

IV. Conclusion.

For the foregoing reasons, we advise that, where the Mayor and Council have not made nominations to fill a vacancy within the periods provided by law, the Mayor may subsequently make a nomination to fill the vacancy, subject to Council approval, and that the procedures in Sections 13-2(16) and 13-2(17) of the Charter and Chapter 2.41, MCC, should be followed until the vacancy is filled.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

cc: Mayor Charmaine Tavares
Marian Feenstra, Executive Assistant
Webpage

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⁴ McQuillin Mun. Corp. § 12.83 (3^d ed.).