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Hawaii County Charter Commission
101 Aupuni Street, Suite 230
Hilo, Hawaii 96720

Re: Meeting of October 31, 1989

Dear Commission Members:

I was asked to "frame the issues" concerning the two major agenda items on the October 31, 1989 agenda: the "mayor-council" vs. the "council-manager" form of government and the issue of Council representation. I thought it would also be helpful to briefly give some background on these subjects and summarize the testimony which the Commission has received so far.

1. "Mayor-Council" vs. "Council-Manager" Form of Government.

The government of Hawaii County (and the other counties in the state) is presently organized under a "mayor-council" system. Under this system the Mayor has the primary executive functions and appoints the department heads and commission members. The Council is given legislative functions. It enacts ordinances and confirms (or rejects) the appointments of the mayor. We have a full-time Mayor and a part-time Council.

Under the "council-manager" system, the Council appoints a Manager who is responsible for the administrative functions of the County. The Manager supervises all of the County departments. Generally, the Council is responsible for all significant policy decisions; the Manager's role is to implement these decisions. There is no "separation of powers" under the council-manager system. The council-manager system is very common in small to medium-sized cities on the Mainland, but is very uncommon in large cities (over 500,000 in population).

The council-manager system differs somewhat from the Board of Supervisors system which was used in Hawaii County before the adoption of the Charter in 1968. In the pre-Charter period, the County Chairman, who was elected island-wide, served as both the chair of the Board of Supervisors and as chief executive officer of the County government as a whole. Some of the offices which are now appointed were filled by direct election under the old system (County Clerk, Attorney, and Auditor).

We have received a considerable amount of testimony on both sides of the question of the adoption of a council-manager

system. Without taking sides on the merits of the arguments, I think it is fair to summarize the testimony as follows:

Proponents of the council-manager system argue that the office of chief executive ought to be filled by a professionally trained individual with experience in administration. They also maintain that the division of functions and powers between the executive and legislative branches leads inevitably to wasteful conflict between Council and Mayor over their respective powers and responsibilities and to disagreements which detract from the County's ability to pursue a consistent and uniform policy.

Opponents of the council-manager system argue that an elected Mayor makes the government more responsive to the voters; that the appointed County Manager is vulnerable to shifts in Council coalitions; and that adequate professionalism can be assured within the present system.

If this Commission decides to place the council-manager system on the ballot for approval by the voters, it will have to extensively rewrite the Charter. The most practical approach would be to present an entirely new Charter to the voters for consideration rather than to amend the present Charter to conform to a council-manager plan because there are too many sections which would have to be changed simultaneously. A number of subsidiary questions would have to be decided, including:

--whether to eliminate the office of Mayor entirely, or to have a Mayor for ceremonial purposes, and if so, how to select the Mayor;

--whether appointments to boards and commissions would be made by the Manager or by the Council. (In council-manager communities, the Manager usually makes all appointments, including boards, commissions, and department heads);

--the job tenure of the County Manager. (The manager typically serves "at will." Some jurisdictions require a hearing or some special majority for removal);

--the procedure for appointment of the Manager, and the required qualifications;

--whether to retain the present structure of departments and commissions (especially whether to place the departments that are now under the control of commissions under the Manager instead).

There are "model" charters based on the council-manager system which we can use for guidance in drafting a new charter if the Commission decides to place this proposal on the ballot.

From a strictly legal point of view, the County has the authority to switch to a council-manager system by enacting a new charter. However, there are innumerable references in State law to functions that are supposed to be exercised by the mayor of the county. I would not interpret these references as a

requirement that the county have a mayor: the decision whether to have a mayor-council form or a council-manager form of government would appear to pertain to the "executive, legislative and administrative structure and organization" of a county, for which the county's charter is superior to inconsistent provisions of state law. Haw. State Const. art. VIII, §2. If a council-manager charter is drafted that does not include a mayor, or has a "ceremonial" mayor, the charter should contain a provision that the Manager shall exercise the functions and powers that are assigned by state law to the Mayor.

2. Council Representation.

At present, the Council consists of nine members, all of whom are elected at-large. Six members must reside in districts: one each from the districts (presumably the judicial districts) of Puna, Ka'u, North and South Kona combined, North and South Hilo combined, North and South Kohala combined, and Hamakua. A candidate for a district seat must be a "resident voter" of the district at least 90 days before the primary election. Residency is defined in terms of being a registered voter from the district. (See Hawaii County Charter §3-3 and §13-1(f)(4)).

The districts have very uneven populations. However, a system of at-large elections, with district residency requirements, has been held by the United States Supreme Court not to violate the constitutional mandate of one person/one vote, even though the districts are not of the same population size.

We have received some testimony about possible legal challenges to the at-large voting system based upon the possible discriminatory effect. As your counsel, I thought it appropriate for me to comment briefly on this. The Voting Rights Act of 1965, as amended, prohibits voting arrangements which have the effect of discriminating against minority racial groups. (42 U.S.C. §1973.) Such practices also violate the Constitution if done with discriminatory intent. In a number of court cases on the U.S. Mainland, courts have held that specific at-large voting arrangements had the effect of preventing candidates preferred by minority groups from being elected. Thornburg v. Gingles, 478 U.S. 30 (1986); Citizens for a Better Gretna v. City of Gretna, Louisiana, 834 F.2d 496 (5th Cir. 1987); United States v. Dallas County Commission, 636 F. Supp. 704 (S.D. Ala. 1986). To prove such a claim, the party opposing the at-large system must demonstrate that (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that the minority is politically cohesive, and (3) that the majority has in past elections voted sufficiently as a bloc to usually defeat the candidate preferred by the minority. Thornburg.

In my opinion, a challenge to Hawaii County's at-large voting system based on election results in the past few elections could not succeed. It would be difficult to prove that there has been racial bloc voting against a minority that has significantly decreased the representation which the minority would have had with a single-member district system. In the Mainland cases where an at-large system was successfully challenged, there has been fairly clear racial bloc voting in ethnically polarized communities (for example, in Gretna, no black had ever been elected although blacks comprised 30% of the population).

Several modifications to the present system of selecting the Council have been proposed: (1) all members to be elected from single-member districts (nine districts have been proposed as the specific number); (2) six single-member districts with three at-large districts; (3) all to be elected at-large, with no residency requirements; and (4) district elections in the primary, with at-large elections in the general election.

Any Council election system which involves election from a district, including the proposal for district elections in the primary only, would come under the constitutional one person/one vote requirement: the districts would have to contain approximately equal resident populations. Deviations of up to about 15% have been upheld by courts if necessary to achieve some important policy; for example, to preserve existing political units. If the County adopted district council elections, it would have to establish a reapportionment commission to draw the district boundaries for the 1992 election because the boundaries should be based upon the most recent census, and the results of the 1990 census will not be available until sometime well after the Charter Commission has disbanded.

As an aid to members of this Commission who might be trying to determine the approximate sizes and boundaries of single-member districts, I will enclose under separate cover a tally of registered voters by precinct. While districts must be based upon resident population, not registered voters, the number of registered voters probably bears a close enough relationship to population for the Commission to get a general idea of what districts might look like given various assumptions.

The supporters of single-member districts have argued, generally, that the district council member will more truly represent the district if elected solely from the district and that island-wide campaigning is too difficult and expensive. Advocates of the at-large system have stated that council members elected from only one district will tend to look at issues only from the perspective of their district and that the individual voter has more power if he or she can vote for nine Council members rather than just one.

More stringent residency requirements have also been proposed. I was asked whether a longer pre-election requirement for residency within a particular district would be legally permissible. Residency requirements for public office for state and local elections have been frequently challenged on constitutional grounds. Unfortunately there is no consensus among the courts, and the United States Supreme Court has never ruled on the issue. The Hawaii Supreme Court upheld the state's requirement that members of the Legislature have three years' in-state residency against constitutional challenge in Hayes v. Gill, 52 Haw. 251, 473 P.2d 872 (1970), appeal dismissed as moot 401 U.S. 968 (1970), but this decision would not be controlling against a challenge in federal court.

After reviewing the applicable law, in my opinion a requirement that a candidate for a district seat have more than a few months' residency in the district would probably be unconstitutional if the candidate were actually elected at-large, as is the case under the present Charter. The usual justification for residency requirements is that they allow the voters to get to know the candidate better; this justification does not hold if the candidate is not actually elected from the district. Courts have not been sympathetic to the justification that long-time residents are likely to be better acquainted with the needs of the district.

If the candidate were actually elected by the district, the residency requirement would have a better chance of being upheld, but it would still be questionable. With periodic reapportionment, an incumbent councilmember's home may be put in another district, and a lengthy residency requirement might make it impossible for the councilmember to move a mile and continue to represent the bulk of the old district.

I hope my comments will assist the Commission in arriving at its decision.

Yours truly,

CHRISTOPHER J. YUEN

Christopher J. Yuen

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