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MEMO TO: Michael P. Victorino, Chair
Water Resources Committee

F R O M: Edward Kushi, Jr., First Deputy Corporation Counsel
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D A T E: December 5, 2012

SUBJECT: **UPCOUNTRY WATER METER ISSUANCE** (WR-14)

We respond to your request of November 26, 2012 regarding whether Bill 94 (2012) constitutes a moratorium on the issuance of water meters, or water meter reservations, to applicants requesting water service from the Upcountry Water System.

A. Background.

The relevant amendment contained in Bill 94 that gives rise to the subject inquiry is found in Section 14.13.040(A), Maui County Code, which proposes:

> "**14.13.040 Water service requests.** A. On March 16, 1993, the upcountry water system was found to have insufficient water supply developed for fire protection, domestic, and irrigation purposes to take on new or additional water services without detriment to those already served in the regulated area. Since November 2, 1994, the department has maintained a priority list of premises, organized by the date applications for new or additional water service were received for such premises. Effective as of January 1, 2013, the department will not accept any new applications to be placed on the priority list."

In essence, the amended section would establish a firm and definitive priority list as of January 1, 2013, with no additions thereafter. Applicants desiring new or additional water service

for premises not on the priority list as of January 1, 2013 would have to wait until all premises on said priority list have been served and/or deleted therefrom.

B. What is a "moratorium"?

A moratorium is defined as the "period of delay" or the "suspension of a specific activity."[1] The current priority list is not a moratorium, per se, as there has been no suspension of the issuance of water meters, rather there is a chronological list as to who will receive a water meter first by the date applications for new or additional water service were received for premises. Further, as the Department of Water Supply ("DWS") has issued water meters since the establishment of the list in 1994, the current Priority List is not a moratorium.

However, as proposed in Bill 94, as of January 1, 2013, DWS will not accept any new applications to be placed on the Priority List. Accordingly, after January 1, 2013, there would be a "period of delay" or a "suspension" of water meter issuance for all new or additional water meter service, and therefore would be considered a moratorium.

C. A water meter moratorium may be permissible.

Although there have been challenges, albeit unsuccessful, to the denial of water meters in the Upcountry area, there is no published caselaw on point from the Hawaii courts. However, mainland cases have challenged the failure to provide water meters or the moratoria on new water connections based on causes of action such as procedural due process, substantive due process, and equal protection.

1. Procedural Due Process Claims

The due process clause of the Fourteenth Amendment protects individuals against government deprivations of life, liberty or property without due process of law.[2] The due process clause does not prohibit every deprivation by a state of an individual's property.[3] Generally, due process of law requires notice and an

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[1] Black's Law Dictionary (9th ed. 2009).

[2] U.S. Const. amend. XIV, §1.

[3] Halverson v. Skagit County, 42 F.3d 1257, 1260 (1994).

opportunity for some kind of hearing prior to the deprivation of a significant property interest.[4]

However, when the action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law.[5] In seeking to define when a particular governmental action is "legislative in nature" the courts have eschewed the formalistic distinctions between "legislative" and "adjudicatory" or "administrative" government actions and instead focused on the character of the action, rather than its label.[6] Cases have determined also that governmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice as provided by law is sufficient.[7]

In a Washington state case, real estate developers sued a water district for unlawfully denying water meters and connections to their development.[8] The district encountered a water supply shortage and after several public meetings and much discussion, a moratorium on new water connections was adopted.[9] A year later the district enacted a resolution which established a full moratorium on new connections except those already "committed".[10] "Committed" users were those who had paid for a connection but had not installed it or who had a system extension project under construction.[11] With regard to the procedural due process claim, the court found that the district's actions were clearly

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[4] Id.

[5] Id.

[6] Id.

[7] Id. at 1261.

[8] Covington Greens Associates II, et al., v. Covington Water District, et al., 931 F.Supp. 738 (1996).

[9] Id. at 740.

[10] Id.

[11] Id.

legislative in nature.[12] The moratoria and the definitions of "committed" and "uncommitted" were general enactments affecting a large number of current and potential water users; they were directed not at the developer nor any other individual, but to the overall problem of a water shortage.[13] Due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law. [14] As that was done, the procedural due process claim was dismissed.[15]

Similarly, the enactment of Bill 94 is clearly legislative in nature, affecting a large group of Upcountry landowners, and not directed at any particular individual. General notice is sufficient and as there were multiple opportunities to be heard at the Water Resources Committee meetings and Council meetings, procedural due process has been satisfied.

2. Substantive Due Process Claims

Substantive due process guards against arbitrary and capricious government action having no substantial relation to the public health, safety, morals, or general welfare.[16]

In a California case, landowners argued that a city's one year water moratorium and its one year lag in passing a formal development code excessively delayed the development of their property and claimed that the general plan and the temporary water moratorium denied them substantive due process and equal protection.[17] The court stated that to establish a violation of substantive due process, a person was required to prove that the city's general plan or temporary water moratorium was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. [18] Legislative acts that do not impinge on fundamental rights or employ suspect

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[12] Id. at 741.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (1994).

[18] Id. at 1234.

classifications are presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality.[19] In a substantive due process challenge, it does not require that the city's legislative acts actually advance its stated purposes, but instead looks to whether the governmental body could have had no legitimate reason for its decision.[20] The court said that the city's general plan did not violate substantive due process as long as it advances any legitimate public purpose and if it is at least fairly debatable that the decision to adopt the general plan and the water moratorium was rationally related to legitimate governmental interests, the city's actions must be upheld.[21]

Kawaoka also supported the city's decision to enact the water moratorium as a rational one.[22] There were estimates by its Department of Public Works that if all pending development applications were approved, it would face a water shortage of 637 to 833 acre feet per year.[23] The court stated that given the serious drought conditions and water shortages, it could not say that the city's efforts to temporarily limit development while it studied its future water supply was irrational.[24]

Here, the enactment of Bill 94 serves to establish a firm priority list as of a date certain. The DWS Director has formulated a plan on how to provide water connections to Upcountry residents on the priority list, and possibly allow neighboring properties to group together to contribute to the infrastructure needed for water service. Therefore, as the purpose and intent of Bill 94 advances and is rationally related to a legitimate public purpose, i.e. providing much needed and requested water connection to Upcountry, a substantive due process claim against Bill 94 is defensible.

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[19] Id.

[20] Id.

[21] Id.

[22] Id. at 1237.

[23] Id.

[24] Id.

3. Equal Protection Claims

In Kawaoka, the landowners also presented an equal protection cause of action. "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, courts presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."[25]

Therefore, absent a showing of invidious race or class-based discrimination, a government action violates equal protection only if it contains a classification "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[26]

To satisfy this low-scrutiny test, the landowners had to show their property was treated differently than other similarly situated property, and that there was no rational basis for such differential treatment.[27] On its face, the water moratorium in Kawaoka applied to all citizens and races equally. [28] The landowner's equal protection claim failed because there was no evidence that property similar to the landowners were treated differently.[29]

Also, in Swanson v. Marin Mun. Water Dist., 56 Cal.App.3d 512 (1976), a landowner filed with the district an application for a pipeline extension and proposed pipeline extension agreement and paid the required engineering fee. The application and fee were conditions precedent to the approval of water service to his property. He previously obtained planning commission approval of the architectural plans for his house, obtained a building permit and cleared the building site for the construction of a foundation.[30] Following public hearings, various ordinances where enacted which confirmed the existence of a threatened water

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[25] Id. at 1238, (quoting New Orleans v. Dukes, 427 U.S. 297 (1976)).

[26] Kawaoka v. City of Arroyo Grande, 796 F.Supp. 1320, 1330 (1992).

[27] Id.

[28] Id. at 1331.

[29] Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1240 (1994).

[30] Id. at 516.

shortage, that ordinary demands and requirements of water consumers within the district could not be satisfied without depleting the water supply of the district to the extent that there would be insufficient water for human consumption, sanitation, and fire protection, and provided that no new water service would be granted or installed, with certain limited exceptions.[31]

Among other claims, the landowner argued that the water code provisions giving the authority to stop providing new water service were unconstitutional because they discriminate between individuals already receiving water service from the district and those who wish to obtain water service in the future, even though all of those individuals would use the water solely for human consumption and domestic purposes.[32] The court held that the landowner's claim that he had an absolute right to be treated in the same manner as existing water consumers within the water district was not valid since it was evident that a potential water user does not possess any absolute right to be afforded water service and that the Constitution does not require that he be treated in the same manner as established users of the water system.[33] The court found that since actual water consumption was already in excess of the district's safe water yield, it was neither unreasonable nor an invasion of the landowner's constitutional rights for the district to enact a moratorium on new water service.[34]

Here, the provisions of Bill 94 do not amount to invidious race or class-based discrimination, nor discriminate between those applicants desiring new or additional water service and owners of premises already receiving water service, but to the contrary, are

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[31] Id. at 516-17.

[32] Id. at 522.

[33] Id.; See also, Gilbert v. State of California, 218 Cal.App. 3d 234, 258 (1990) (Appellants had no recognized property interest in the very improvement (access to potable water).); Hollister Park Investment Company v. Goleta County Water District, 82 Cal.App.3d 290 (1978), (citing Swanson (A potential water user does not possess an absolute right to be treated in the same manner as existing water consumers within a district.)); Sherman v. County of Maui, 191 Fed. Appx. 535, 537 (2006) ([Appellant's] argument that he was deprived a service ...is also unavailing because [Appellant] never had a water meter to begin with and thus did not accrue a property interest in water services.)

[34] Id. at 523.

rationally related to a legitimate state interest, to-wit, to protect and preserve the County's limited water resources.

D. Although water meter moratoria have been upheld in federal courts and other jurisdictions, such litigation is inevitable and can be costly to defend.

In California, a utility district enacted a moratorium in 1971 on new water hookups and continued to reenact that moratorium until its last re-enactment in 1977.[35] The county also conditioned the grant of building permits on first securing water hookups from the utility districts for their residentially zoned land. The utility district's refusal to grant them a water hookup prohibited the landowners from building anything on their land.[36]

The plaintiffs against the utility district were organized and financed by the Pacific Legal Foundation, a Sacramento-based non-profit group of attorneys with average annual income from deductible contributions at 2.5 million dollars. The plaintiffs wanted to end the moratorium on water connections and wanted over $33,000,000 in damages, plus attorneys fees. After eleven years, all the lawsuits finally ended in either the utility district's favor or have settled, but there was more than 1.6 million dollars in costs to the utility district to defend the suits.[37]

E. Alternative.

As discussed above, we believe that the provisions of Bill 94, specifically creating a moratorium on the issuance of new or additional water service until a firm, definitive priority list has been exhausted, is defensible.

However, as we further believe that the deletion from Bill 94 of establishing a firm, definitive priority list will not operationally nor systematically affect DWS' goal of obtaining and providing added source capacity, in the alternative, the Council may consider adopting a *status quo* position with respect to the current, existing priority list, which then would continue to allow new applicants to register their premises for new or additional water service. Such a *status quo* position should thereby eliminate and/or reduce the risks of any challenges

[35] Lockary v. Kayfetz, 917 F.2d 1150 (1990).

[36] Id. at 1155.

[37] The Pacific Legal Foundation Versus BCPUD, http://www.bcpud.org/plfvspud.htm.

regarding moratoria, and any attendant fees and costs in defense thereof.

F. Conclusion.

The proposed provisions of Bill 94 to establish a firm, definitive, date certain priority list will constitute a moratorium. However, such a moratorium is defensible.

Call if further clarification or discussion is needed.

APPROVED FOR TRANSMITTAL:

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cc: David Taylor, Director, Department of Water Supply