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September 16, 2019

MEMO TO: Alice L. Lee
Councilmember

FROM: Peter A. Hanano, Deputy Corporation Counsel

A handwritten signature in blue ink, appearing to be "Peter A. Hanano".

SUBJECT: **COUNCIL'S AUTHORITY TO SETTLE A COUNTY LAWSUIT**
(PAF 19-304)

We respond to your memo of September 10, 2019 as follows:

I. QUESTION PRESENTED.

**WHETHER THE COUNCIL HAS THE LEGAL AUTHORITY TO
SETTLE A LAWSUIT ON BEHALF OF THE COUNTY.**

II. ANALYSIS.

Our analysis is based on the inter-relationship between the County's charter provisions and the Maui County Code provisions relating to claims against the County.

A. County Charter Provisions

The County's delegation of authority from the state to “frame and adopt a charter for its own self-government” is expressly set forth in Article VIII of the Hawai'i Constitution which delineates, and limits, the grant of power from the state to its political subdivisions. Haw. Const. art. 8, § 2. Pursuant to the constitution, once adopted, charter provisions with respect to the County's “executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.” *Id.*

A basic tenet of municipal corporation law is that an ordinance which conflicts with an express provision in a charter is invalid. Fasi v. City Council of City & Cty. of Honolulu, 72 Haw. 513, 518–19, 823 P.2d 742, 744 (1992). “The proposition is self-evident . . . that an ordinance must conform to, be subordinate to, not conflict with, and not exceed the charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state. Ordinances must not only conform with the express terms of the charter, but they must not conflict in any degree with its object or with the purposes for which the local corporation is organized[.]” *Id.* (Citation omitted). It is also a fundamental tenet of municipal corporation law that a charter may not be amended except by properly initiated and enacted charter amendments. *Id.*

Moreover, where the very structure of the charter itself anticipates separation of legislative and executive power, council may not directly contradict or nullify a charter provision by ordinance. Fasi v. City Council of City & Cty. of Honolulu, 72 Haw. 513, 519, 823 P.2d 742, 745 (1992). Further, as a comprehensive general rule, an ordinance may not conflict with the express provisions, purposes, or object of the City Charter, particularly the principle of separation of powers dictated by the charter, in that neither branch may exercise the powers vested in the other by the charter. Harris v. DeSoto, 80 Hawai'i 425, 432, 911 P.2d 60, 67 (1996).

Here, the question presented above should be considered in light of the basic scheme of the Maui County Charter ("Charter"). Indeed, the Charter has as its basic scheme, a clear and definite separation of the legislative and executive power. On one hand, the executive power is vested in the executive branch headed by the mayor.¹ The mayor's powers, duties and functions are specified in Section 7-5 of the Charter, which includes exercising "supervision directly or through the managing director over all departments enumerated in Article 8. . . and other agencies as provided by law"², as well as "Sign instruments requiring execution by the County, including deed and other conveyances, except those which the director of finance or other officer is authorized by this

¹ Section 6-1, Charter.

² Section 7-5.1, Charter.

charter, ordinance or resolution, to sign.”³ Additionally, also under Section 7-5, “the mayor shall . . . enforce the provisions of this charter, the ordinances of the county and all applicable laws.”

On the other hand, the legislative power is vested in legislative branch represented by council. Section 3-6 of the Charter specifies the powers of the council, which includes the power “to legislate appropriations for county purposes subject to the limitations provided by this charter.” However, Section 3-8 mandates restrictions on the council and council members. That section states in pertinent part that:

Section 3-8. Restrictions on Council and Council Members.

* * *

2. Neither the council nor its members shall give orders to any county employees or county officers other than those appointed pursuant to Section 3-7 or Article 5, either publicly or privately. Any willful violation of the provisions of this subsection by a member of the council shall be sufficient grounds for the councilmember’s removal from office by impeachment.⁴

Under the separation of powers so provided, each branch is coordinate with the other, and neither may exercise the power vested in the other. See City Council of City & Cty. of Honolulu v. Fasi, 52 Haw. 3, 5–6, 467 P.2d 576, 578 (1970). However, this does not mean that the wall of separation is complete and

³ Section 7-5.11, Charter.

⁴ Charter Section 3-7 pertains to the Office of Council Services, while Article 5 relates to the County Clerk.

either branch is free to exercise its power as it pleases without any say by the other. Id. (Citations omitted).

B. Maui County Code Provisions

The question presented involves the application of Maui County Code Section (MCC) 3.16.020. Subsection B of Section 3.16.020 provides in pertinent part:

3.16.020 - Settlement of claims and other civil litigation.

B. Other Claims or Civil Litigation. The corporation counsel, with the approval of the mayor, may settle, compromise, or otherwise resolve any claim not described in subsection A of this section, now existing or which may hereafter arise, requiring payment of a total amount not exceeding \$7,500; provided, that the fund to settle claims has been appropriated and is available therefor. Any settlement in excess of \$7,500 shall require council authorization.

In Harris v. DeSoto, the Hawai'i Supreme Court considered whether an ordinance (No. 93-78), similar to MCC Section 3.16.020, which effectively vested exclusive power in the City and County of Honolulu Council to settle claims in excess of \$5,000 as well as suits for injunctive, declaratory, and extraordinary relief, was unlawful and void because it violated the city charter. The Harris court noted that Ordinance No. 93-78 is ostensibly not limited to the power to settle claims with city funds, but that the council has the power to "accept" *any* offer made by a claimant and, should the council "accept" the offer on its terms, the council's acceptance is binding on the city, and the city is bound to comply with the terms of the offer or be in breach of the settlement agreement.

Id., at 437, P.2d 60, 72. In rendering its decision, the Hawai'i Supreme Court opined that:

Under the scheme as set out by the Ordinance, potential conflicts with the object and purposes of the charter arise. As previously noted, at the heart of the form of government prescribed by the charter is the principle of separation of powers, in that each coordinate branch of municipal government is charged with particular governmental functions, largely free from interference by the others. As written, Ordinance No. 93-78 violates the principle of separation of powers to the extent that it essentially grants to the council the power to bind the city to *any* terms, whether or not the terms fall within the powers of the council, by granting the power to the council to accept any offer of settlement for a claim against the city, thereby binding the city to the terms of the agreement.

Pursuant to this logic, the council could potentially affect and/or control any aspect of city government that happens to be the subject of a "claim" against the city—a situation clearly in conflict with the system of separation of powers mandated by the charter. . . . Under the power granted to the council by Ordinance No. 93-78, the council could similarly affect and/or control myriad other aspects and functions of city government, seemingly limited only by the topic of the dispute.

Harris v. DeSoto, at 437, P.2d at 72 (emphasis added). Finally, the Harris court stated the following in pertinent part:

It is axiomatic that, as a general principle, the scope of authority of a branch of municipal government to settle a claim on behalf of the city is limited by the authority vested in that branch to pledge, grant, or commit the consideration sought by the claimant or offered by the city in settlement. Thus, where the consideration for settlement involves the commitment of city funds or an exercise of municipal authority exclusively vested in the council by the charter, the council may *alone* pledge, grant, or commit the settlement consideration. Similarly, where the consideration for settlement involves an exercise of municipal authority exclusively vested in the executive, the executive may *alone* pledge, grant, or commit the settlement consideration. However, where the consideration for settlement of a claim requires (1) both an exercise of municipal

authority vested exclusively by the charter in the council and an exercise of municipal authority vested exclusively by the charter in the executive, or (2) an exercise of municipal authority vested by the charter in both the council and the executive, the council and the executive must concur in order to accept or make an offer of settlement.

Harris v. DeSoto, at 439, P.2d at 74 (emphasis added).

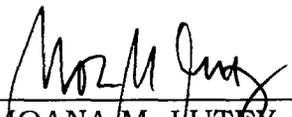
III. CONCLUSION.

Based on the foregoing, we conclude and opine as follows:

DOES THE COUNCIL HAVE THE LEGAL AUTHORITY TO SETTLE A LAWSUIT ON BEHALF OF THE COUNTY:

- A) **YES**, when the consideration for settlement involves the commitment of county funds in excess of \$7,500, or an exercise of municipal authority exclusively vested in the council by charter.
- B) **NO**, when the consideration for settlement does not exceed \$7,500, or where settlement involves an exercise of municipal authority exclusively vested in the executive branch by charter.
- C) **NO**, when the consideration for settlement requires both an exercise of municipal authority vested exclusively by charter in the council and the executive branch, **UNLESS** the council and the executive branch concur.

APPROVED FOR TRANSMITTAL:



MOANA M. LUTEY
Corporation Counsel
LF2019-1502

cc: Mayor Michael P. Victorino