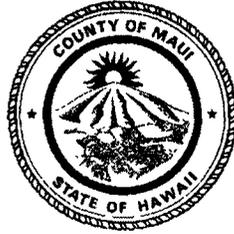


MICHAEL P. VICTORINO  
Mayor

MOANA M. LUTEY  
Corporation Counsel

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First Deputy

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DEPARTMENT OF THE CORPORATION COUNSEL  
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January 6, 2020

MEMO TO: Keani Rawlins-Fernandez  
Council Vice-Chair

FROM: Edward Kushi, Jr., First Deputy Corporation Counsel

SUBJECT: **CHARTER AMENDMENT PROPOSAL RELATING TO THE  
CORPORATION COUNSEL** (PAF 19-306)

Responding to your request of December 9, 2019, for "APPROVAL AS TO FORM AND LEGALITY" of a proposed resolution entitled "PROPOSING AN AMENDMENT TO THE REVISED CHARTER OF THE COUNTY OF MAUI (1983), AS AMENDED, RELATING TO THE CORPORATION COUNSEL". We herein return the proposed resolution unsigned, for the following reasons.

1. Amendment to Section 8-2.2, regarding the appointment and removal of the Corporation Counsel.

Unlike the appointment and removal of the Mayor's other cabinet nominees, this amendment would specifically provide that the Council, without the Mayor's recommendation nor approval, may unilaterally remove the Corporation Counsel by resolution. Albeit at first glance, this proposal would be in violation of Section 3-8.1 of the Charter (i.e., "Restrictions on Council and Council Members"), said subsection is prefaced as follows:

"Unless otherwise provided in this charter, neither the council nor any of its members shall, in any manner, dictate the appointment or removal of any officer or employee appointed by the mayor or by the mayor's subordinates." (emphasis added)

Accordingly, we would sign-off on such a proposed resolution, as the amendment, if passed, would conform to the prefaced phrase “Unless otherwise provided in this charter, .....

2. Amendment to Section 3-8.2 regarding restrictions on council and council members.

The current subsection restricts the council or any of its members from giving orders, publicly or privately, to any county employees or officers other than those in the Office of Council Services (Section 3-7, Charter) or the County Clerk (Article 5, Charter). The proposed amendment would include employees and officers in the Department of the Corporation Counsel.

The Office of Council Services is part and parcel of the legislative branch of the County of Maui, and is created pursuant to Article 3 (County Council), Section 3-7 (Office of Council Services).

Although not included in Article 3, the Office of the County Clerk is created pursuant to Article 5 (County Clerk), but like the Office of Council Services, is definitely part and parcel of the legislative branch of the County of Maui.

The legislative branch of the County of Maui is headed by the Council.<sup>1</sup>

Unlike the above-referenced offices of Council Services and County Clerk, the Department of Corporation Counsel is part and parcel of the executive branch of the County of Maui, and is created pursuant to Article 8 (County Departments), Chapter 2 (Department of the Corporation Counsel).

The executive branch is headed by the mayor.<sup>2</sup>

Accordingly, the mayor directly, or through the managing director, supervises all departments listed in Article 8 (County Departments).<sup>3</sup>

The amendment to Section 3-8.2 would revise said section to read:

<sup>1</sup> Section 3-6, Charter, states in part:  
“3-6. Powers of Council. The council shall be the legislative body of the county.....  
.....”

<sup>2</sup> Article 6, Section 6-1:  
“Section 6-1. Executive Power. 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 in this charter.”

<sup>3</sup> Article 7 (Office of the Mayor), Section 7-5 (Powers, Duties and Functions), subsection 1:  
“1. Exercises supervision directly or through the managing director over all departments enumerated in Article 8 of this charter and other agencies as provided by law.”

“2. Neither the council nor its members shall give orders to any county employees or officers other than those appointed in the Office of the County Clerk, the Office of Council Services, or the Department of the Corporation Counsel, either publicly or privately. ....” (emphasis added)

The act of “giving any orders” to any county employee or officer is akin to “supervising” or “supervision over” said county employee or officer.

Accordingly if approved, such an amendment would be in direct conflict with the power and authority of the mayor to supervise all departments listed in Article 8, which includes the Department of the Corporation Counsel.

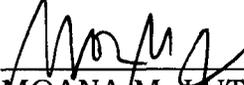
Lastly, such a proposed amendment would violate the well-established doctrine of separation of powers between the legislative and executive branches of government, which doctrine provides that each branch is coordinate with the other, and neither may exercise the power vested in the other.<sup>4</sup>

3. Conclusion.

Based on the foregoing, we herein return the proposed charter amendment, as initially drafted, unsigned.

In the alternative, we would request that a revised proposed amendment that only involves amending Charter Section 8-2.2, and deletes the legally indefensible amendment to Charter Section 3-8.2, be submitted to our office for review and approval.

APPROVED FOR TRANSMITTAL:

  
\_\_\_\_\_  
MOANA M. LUTEY  
Corporation Counsel  
LF2019-1988

<sup>4</sup> Harris v. DeSoto, 80 Hawai'i 425, at page 431 (1996)