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August 5, 2021

Chair Lance D. Collins and Commissioners  
County of Maui Charter Commission  
200 S. High Street  
Wailuku, Hawai`i 96793

RE: Interpretation of the Charter of the County of Maui  
and Hawai`i Revised Statutes, Chapter 50

Dear Chair Collins and Maui County Charter Commissioners,

This letter responds to several inquiries relating to authority of several seeming conflicts between the Charter of the County of Maui (2021) (“Maui Charter”) and the provisions of the Hawai`i Revised Statutes (“HRS”), Chapter 50.

The first Constitution of the State of Hawai`i (“Hawai`i Constitution”) established the constitutional right of home rule for the counties and subsequent amendments strengthened that right. It is clear that the powers enumerated in the Maui Charter generally are of superior authority to state law and the provisions of the Maui Charter take precedence over state law. Thus, the Charter Commissioners were validly appointed pursuant to Maui Charter Sec. 14.3.

After the 2020 ballot question was approved, the Maui Charter Sec. 14.3 was amended and refers to state law relating to the procedure of submission to the council of proposed amendments and a timeline for of the submission of the final ballot question to the county clerk. It is recommended that the charter commission submit its report and proposed charter draft to the council within one year of its appointment and follow the timeline set forth by the Corporation Counsel in the letter dated March 12, 2020.

HRS Sec. 50-5 and Charter Sec. 13.2 (15) do not conflict on the issue of the authority of the 2021-2022 Charter Commission to adopt its own internal rules governing its operations. The Charter Commission adopted its own rules which provided for the commission to select its own Chair. Maui Charter Sec. 13.2 (9) further provides that boards and commissions select their own chairs annually. HRS Sec. 50-3 is in conflict but has been superseded by the 2020 adoption of the new language in Maui Charter Sec. 14-3. The selection of the Charter Commission Chair is of no relevance nor concern statewide and the state statutory provisions have been superseded.

HRS Sec. 50-5 exempts charter commissions from HRS Chapter 91 formal rule making requirements. There is no section in the Maui Charter that conflicts. Moreover, the Charter Commission is not expected to engage in any formal rule making.

However, state laws involving “matters of statewide concern and interest” in certain areas are generally found to govern when there is a conflict. The Hawai`i Supreme Court has decided in several cases that compensation of county officials is a matter of statewide concern. Thus, Charter Commissioners are entitled to be compensated as set forth in HRS Sec. 50-13 even though there is a conflict with the Maui Charter.

**I. The “Hawai`i Constitution” establishes county home rule as a state constitutional right and empowers the counties to create a form and structure of governance of their own choosing in their charters, so long as a provision in the charter does not conflict with “matters of statewide concern and interest.”**

The Hawai`i Constitution was first created by the 1950 Constitutional Convention, ratified by voters of the Territory on November 7, 1950, and amended on June 27, 1959, at the time of the vote on the Statehood Bill relating to the admission of Hawai`i to the United States. Since 1950, there have been two more Constitutional Conventions, in 1968 and 1978.

The Delegates to the 1950 Constitutional Convention of Hawai`i made home rule for the counties a priority and emphasized its importance and status by making it a state constitutional provision. Section 2 of the Local Government article of the 1959 Hawai`i Constitution provided:

Section 2. Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be prescribed by law.

The Delegates explained the importance of home rule and political subdivision self-determination in Committee on Local Government, Stand. Comm. Rep. No. 74 in I Proceedings of the Constitutional Convention of Hawai`i of 1950, at 228-229 (1960):

The urge for self-government is inherent in every American. This country has been made great by an abiding faith in the principle that the people have the ability and have a right to manage their own affairs. It is the purpose of the Committee to give form and life to this urge in the Constitution. . . .

The Committee felt very strongly that **a local governmental unit should have strong powers of self-government with minimum interference from the legislature.** Thus, we find the provision that, once defined, a political subdivision of the state shall have full authority to provide for its form of government and management of its own affairs.

(emphasis added). The language in Section 2 was interpreted to be non-self-executing and requiring statutory implementation. The Supreme Court found that Act 73, 1963 Sess. Laws Haw., provided the necessary implementation language. *Fasi v. City and County of Honolulu*, 50

Haw. 277, 289, 439 P. 2d 206, 208 (1968).<sup>1</sup> Act 73 was intended to be “charter-enabling legislation,” Conf. Comm. Rept. No. 1, Haw. H.J. 901 (1963), “to implement the concept of ‘home-rule,’” S. Stand. Comm. Rept. 166, Haw. S.J. 727 (1963) and to establish “the machinery necessary for enabling the counties to frame and adopt charters for their self-government,” H. Stand. Comm. Rept. 41, Haw. .J. 593, 594 (1963).

The purpose clause of Act 73 (codified in HRS Chapter 50) declared that it was enacted to provide the counties with the means to create the form of local government the people desired:

The purpose of this Act is to provide the counties of this State with an increased measure of self-government and responsibility by permitting them to form charter commissions and select their own form of local government as provided by the procedures herein.

HRS Sec. 50-11 provides: “every charter established under this chapter shall provide means by which the charter may be amended or revised.” Since the Maui Charter was first adopted and effective on January 2, 1969, all subsequent charter commissions have been created pursuant to its Charter and not state law, including but not limited to HRS Chapter 50.<sup>2</sup>

The Delegates to the 1968 Constitutional Convention of Hawai`i strengthened and protected this constitutional provision providing for home rule. The new language added by the 1968 Delegates is underlined below:

Section 2. Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be prescribed by general law. The prescribed procedures, however, shall not require the approval of a charter by a legislative body.

Charter provisions with respect to a political subdivision’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.

A law may qualify as a general law even though it is inapplicable to one or more of the counties by reason of this section.

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<sup>1</sup> See also, Letter dated June 2, 2011, from Deputy Attorney General Charlene Aina to The Honorable Patrick Wong, Corporation Counsel, County of Maui (“2011 AG Letter”)(“...while state law authorizes and directs the counties to include provisions in their state charters with which to create charter commissions, once the counties adopted their initial charters pursuant to Act 73, as amended and currently codified in Haw. Rev. St. ch. 50, charter commissions have been created pursuant to provisions of the counties’ charters themselves, and not Act 73, c. 143A, Revised Laws of Haw. 1955, Haw. Rev. Stat. ch. 50, or any other state law.”), p. 7-8.

<sup>2</sup> All the counties have charter provisions creating successive charter commissions. Sec. 15-3, Charter of the County of Hawai`i; Sec. 15-5, Revised Charter of the City & County of Honolulu; Sec.24.03 Charter of the County of Kaua`i. The Legislature enacted Act 235, Sess. Laws Haw. 1965, to repeal HRS Sec. 143A-11 that required ratification of county charters by the legislature.

The 1968 Delegates were clear that the intent of the changes was to enable and empower the county governments to have the breadth of legal authority necessary to govern and manage their own local affairs. The Delegates explained: “The principal change in this section is the protection of certain charter provisions against amendment or repeal by the legislature.” See Committee on Local Government, Stand. Comm. Rep. No. 53 (majority), I Proceedings of the Constitutional Convention of Hawai`i of 1968, at 229. In fact, the Delegates were purposeful in adopting these changes in order to clarify and mandate “the area within which a charter shall be of superior authority to a statute.” *Id.* The Delegates took steps to give the charter provisions a higher status and overrule the holding in *Fasi v. City and County of Honolulu*, that a charter “is no more than a statutory charter which is subject to continuing legislative control.” The Delegates explained:

[T]he area which the proposal places beyond legislative control is limited to charter provisions as to the executive, legislative and administrative structure and organization of the political subdivision. . . . This means that the legislature could transfer a function from the county to the state level even if the result would be eliminate a department of the county government provided for in the charter.

*Id.* Moreover, HRS Chapter 50 was amended in Act 235, Sess. Laws Haw. 1967, Sec. 1(4) to ensure county home rule powers and to have these powers supersede all other laws: “Upon adoption, the charter shall become the organic law of the county and shall supersede any existing charter and all laws affecting the organization and government of the county which are in conflict therewith.”<sup>3</sup> HRS Sec. 50-10.

The Hawai`i Constitution, Article XVI, Sec. 16, provides: “The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit.” The Hawai`i Supreme Court has found that “The self-executing clause only means that the rights therein established or recognized do not depend upon further legislative action in order to become operative.” *Figueroa v. State*, 61 Haw. 369, 382, 604 P.2d 1198, 1206 (1979) (citations omitted). See also, *State v. Rodrigues*, 63 Haw. 412, 415, 629 P.2d 1111, 1114 (1981) (“The phrase ‘as provided by law’ in the context of other state constitutional provisions has been construed as a direction to the legislature to enact implementing legislation.”). The 1968 revisions and additions to the article on Local Government in the Hawai`i Constitution clarified and provided further powers to the basic principle of county self-government and the process of local democracy at the core of local autonomy. This new language approved in the 1968 Hawai`i

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<sup>3</sup> Act 73, Sess. Laws Haw. 1963, was clear that its purpose was to provide for home rule.

The purpose of this Act is to provide the counties of this State with an increased measure of self-government and responsibility by permitting them to form charter commissions and select their own form of local government as provided by the procedures herein. See Section 1, Purpose.

Constitution did not require the legislature to do anything further after the people of Maui adopted their first Charter.<sup>4</sup>

**II. The current Charter Commissioners were validly appointed. Maui Charter Sec. 14.3 governs the appointment of the members of the charter commission and the conflicting provisions in HRS Sec. 50-3 have been superseded by the 2020 Maui Charter ballot question approved by the Maui voters.**

The voters of the Maui expressed their will and specifically amended the Maui Charter Sec. 14.3 to change the method for appointment of charter commissioners and provide that nine members be appointed by the council, with each councilmember nominating one of the nine members, and two by the mayor. This conflicts with HRS Sec. 50-3 which provides that the Mayor appoint all eleven members and select the Chair.<sup>5</sup>

In the general election of November 3, 2020, the following question was approved by Maui voters: “Shall the Charter be amended, effective January 2, 2021, to authorize the Council to appoint nine members and the Mayor to appoint two members of the 11-member Charter Commission, which is required to study and review the operation of the County government?” By approval by the Maui County voters, this ballot question amended the Maui Charter Art. 14-3. YES 34,868 48.7% and NO 28,753 40.1%. See State of Hawaii, Office of Elections 2020, <https://elections.hawaii.gov/wp-content/results/com.pdf>.

The Hawai'i Constitution, Art. VIII, Sec. 2 clearly grants the counties powers of self-government and home rule. In *Hawaii Gov't Employees' Ass'n v. County of Mau'i*, 59 Haw. 65, 79, 576 P.2d 1029, 1038 (1978), the Hawai'i Supreme Court found that counties are authorized to enact any charter provision, even if it conflicts with statutory provisions, if the county is able to demonstrate, first, that the provision relates to the county's structure and organization, and

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<sup>4</sup> The 1978 Constitutional Convention of Hawai'i made only stylistic changes to Section 2, which are underlined and as follows:

Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body.

Charter provisions with respect to a political subdivision'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.

A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section.

<sup>5</sup> Honolulu and Kaua'i have established charter commissions with the number of charter commissioners different than HRS Sec. 50-3 (11 members). Sec. 15-5, Revised Charter of the City & County of Honolulu, Sec. 24.03 (13 members); Charter of the County of Kaua'i (seven members).

second, that it is a matter of local, as opposed to statewide, concern. The court explained the broad extent of county powers and authority as provided in the charters:

As presented ... the area which the proposal places beyond legislative control is limited to charter provisions as to the executive, legislative and administrative structure and organization of the political subdivision. **For example, the legislature could not change the composition of the legislative body of a county.**

*Id.* at 75, 576 P.2d at 1036 (quoting Stan. Comm. Rep. No. 53, Vol. 1 Proceedings of the Constitutional Convention of Hawaii of 1968, at 229 (1973) (emphasis added).<sup>6</sup>

The *HGEA* court reasoned that the revised charter provision changing the number of members appointed to the Maui police commission “is a matter of executive and administrative structure and organization and is superior to conflicting statute.” (footnote omitted.). The court explained:

Such a provision as contained in article VIII [sic], section 2 of our State Constitution allows a county in this state through its charter to redelegate to another appropriate local officer or body a power originally delegated by the legislature to another body,”(citation omitted).

59 Haw. at 82, 576 P.2d at 1039. Similarly, the new Maui Charter provision governing the appointment to members to the Charter Commission is a matter of executive, legislative, and administrative structure and organization uniquely applicable to Maui and consequently superior to conflicting statutory provisions.

The amendment to the Maui Charter Sec. 14-3 made the following additional changes relating to a procedure to send the proposals to the council for review, if required by state law:

The commission may propose amendments to the charter or draft a new charter which [shall] must be submitted to the county clerk within sixteen [16] months after [such] the commission has been appointed, after earlier review by the council, if required by state law.

(New language is underlined and deleted language is captioned.) These underlined additions were never discussed at the Governance, Ethics, and Transparency Committee nor at the two readings at the Maui County Council. The clause does not suggest in any way that the entire Chapter 50 should now be reincorporated to govern the Maui Charter No suggestion was ever

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<sup>6</sup> The civil service laws were found to be matters of statewide concern. However, the organization of a county water board, liquor control department, and police department were found to be within county authority. *HGEA, supra*. Other subjects of statewide concern include the State Tax Court’s jurisdiction, *Kalaeloa Ventures, LLC v. City and County of Honolulu*, 143 Hawai’i 103, 113, 424 P.3d 458, 468 (2018); long-range planning for land-use development, *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu*, 70 Hawai’i 480, 777 P.2d 244 (1989); compensation of county officials, *City and County of Honolulu v. Ariyoshi*, 67 Haw. 412, 689 P.2d 757 (1984), reconsideration denied, 67 Haw. 682, 744 P.2d 779 (1984).

made that “if required by law” reincorporated all of the provisions of HRS Chapter 50 to govern the Maui Charter. See Committee Report No. 20-76 and June 30, 2020 minutes, Governance, Ethics, and Transparency Committee; July 7, 2020 and July 24, 2020 minutes, Council of the County of Maui.

It is fair to assume that the language at most was considered merely a procedural matter and not any kind of general waiver of any rights of home rule. A plain reading of the paragraph substantiates that the clause with the new language, “after earlier review, if required by state law” specifically refers only to the new language stating “after earlier review by the council . . . .” In other words, including a review by the council of the proposed amendments was to be done so long as state law requires it. It would not be reasonable to expect the people of the County of Maui to give up any of their rights to home rule without a full airing of the issue . No explanation was provided to the electorate that a “yes” vote would result in the loss of any portion of home rule. Certainly, the ballot question as phrased does not include any language suggesting any waiver of any rights of home rule.

In interpreting constitutional provisions, the Hawai`i Supreme Court has consistently held that “[t]he general rule is that, if the words used in a constitutional provision ... are clear and unambiguous, they are to be construed as written.” *Kalaeloa*, at 110, 424 P. 3d at 465 (2018) (quoting *Everson v. State*, 122 Hawai`i 402, 407, 228 P.3d 282, 287 (2010) and *Watland v. Lingle*, 104 Hawai`i 128, 139, 85 P.3d 1079, 1090 (2004)). Moreover, the Supreme Court has “repeatedly held that the fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it.” *Everson*, 122 Hawai`i at 407, 228 P. 3d at 287 (citations omitted).

Maui County Council Vice-Chair Rawlins-Fernandez who introduced the Resolution explained the intent of the proposed ballot question was fairness in the appointment of the Maui Charter Commission:

This would definitely assist the intent of the proposal to ensure fairness and balanced membership on the Charter Commission, with the Mayor having a choice of two, and each Councilmember, in all likelihood, having one each. Hence, the nine. This proposal is meant to be a very fair and even-handed way to compile the composition of such an important Commission, tasked with amending our Maui County...oh...as Chair Lee called it, ‘our Maui County Constitution’, every ten years.”

See July 30, 2020, minutes, Governance, Ethics, and Transparency Committee, at 61.

**III. With the adoption of the 2020 Maui Charter ballot question, the issue of the lack of authority of the revisor of statutes to make substantive changes to language of HRS Sec. 50-3 is moot and not a “present live controversy” and there is no action to take.**

“A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law.” (citation omitted). *Civil Beat L. Ctr. for the Pub. Int., Inc. v. City & Cnty. of Honolulu*, 144 Hawai`i 466, 476, 445 P.3d 47, 57 (2019). The adoption of the 2020 ballot question changed the language of the Maui

Charter Sec. 14-3 and the changes made by the revisor of statutes are no longer a “present, live controversy” requiring any decision. However, this discussion is intended to complete understanding of HRS Sec. 50-3.

The language of HRS Sec. 50-3 enacted by the legislature before the revisor made changes had the “chairman” of the “board of supervisors” appoint a charter commission with the approval of the legislative body of the county. There was no reference to a mayor and no reference to a council. That county structure was changed when the first Maui Charter was adopted. Yet the revisor of statutes changed the wording of the statute to insert the Mayor as the nominating authority. The duties of the revisor of statutes are set forth in HRS Sec. 23G–12 which is clear that “in making the revision, the revisor shall not alter the sense, meaning, or effect of any act.” The revisor is allowed to make stylistic and consistency changes. The revisor may not, in making such revisions, alter the sense, meaning or effect of any act.<sup>7</sup>

The 1969 Maui County Charter changed the most fundamental allocation of powers within the county from having one branch of government, the board of supervisors with a Chairman, to having two separate and equal branches of county government, the mayor and council. The 1969 Charter necessarily had the effect of superseding this earlier language in HRS Sec. 50-3, a statute that preexisted the first Maui County Charter, rendering HRS Sec. 50-3 meaningless.

The revisor did not have the right to capriciously decide on the meaning of language in a statute that had been rendered incapable of implementation.

**IV. After the 2020 ballot question was approved, the Maui Charter Sec. 14.3 now incorporates HRS Sec. 50-8 relating to the procedure of submission to the council of proposed amendments and a timeline for of the submission of the final ballot question to the county clerk. The charter commission should submit its report and proposed charter draft to the council within one year of its appointment.**

After the 2020 ballot question was approved, the Maui Charter Sec. 14.3, as explained above in section II, now incorporates state law relating to the procedure of submission to the council of proposed amendments and a timeline for preparation of the submission of the final ballot

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<sup>7</sup> HRS Sec. 23G-12. Duties, In performing the function of statute revision and publication of session laws, and supplements, and replacement volumes, the duties of the revisor of statutes, in the order of priority shall be:

- (1) The publication of the session laws;
- (2) The publication of supplements to the revised statutes;
- (3) The publication of replacement volumes of the revised statutes;
- (4) The review of annotations to the revised statutes;
- (5) The continuous revision of the statutes of Hawaii;
- (6) The publication of the Hawaii administrative rules index and supplements thereto; and
- (7) The preparation of rules of format to be followed by all state agencies in the compilation and publication of their rules and the distribution of copies of the format rules to all state agencies.

question to the voters. (“The commission may propose amendments to the charter or draft a new charter which must be submitted to the county clerk within sixteen months after the commission has been appointed, after earlier review by the council, if required by state law.”). That reference to state law in the Maui Charter is referring to HRS Sec. 50-8 only (see discussion in Sec. II, supra) which provides the details:

Within one year of its appointment, the charter commission shall submit a report in writing on its activities, findings, and recommendations to the legislative body of the county together with a draft of the proposed charter. The legislative body of the county may in turn propose one or more sections as alternative, or alternatives to any section of the proposed charter; provided that there shall not be more than a single proposition under any alternative proposal. Within thirty days after the receipt of the proposed charter from the commission, the legislative body shall return the proposed charter with the alternatives to the commission for its study.

The Letter from the Corporation Counsel to the County of Maui Charter Commission dated March 12, 2021, sets forth the specific dates to follow that will enable the Maui Charter Commission and Maui County to meet these deadlines and it is recommended that this timeline be followed. See pages 8-9.

**V. The Charter Commission is authorized to adopt its own internal rules of procedure and has properly done so and selected its Chair pursuant to its internal rules.**

The Maui County Charter Sec. 13.2 (15) and HRS Sec. 50-5 do not conflict on the issue of the authority of the 2021-2022 Charter Commission to adopt its own internal rules governing its procedures and operations. The Charter Commission adopted its own rules and those include having the commission select its own chair. The Charter Sec. 13.2 (9) further provides that boards and commissions select their own chairs annually. HRS Sec. 50-3 is in conflict, but the selection of the Charter Commission Chair is absolutely of no relevance nor concern statewide and the Maui Charter and the internal rules of the Charter Commission govern.

HRS Sec. 50-5 specifically exempts charter commissions from the formal rule-making requirements of HRS Chapter 91. Clearly the legislature has the jurisdiction to exempt itself and charter commissions. This is a reasonable and common sense rule and usually governs the operations of boards and commissions when internal rules are developed. It is consistent with HRS Sec. 91-1 which excludes from its coverage "regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public." See, *Green Party of Hawai`i v. Nago*, 138 Hawai`i 228, 238, 378 P.3d 944, 954 (2016) (“The exception to the definition of “rule” applies to regulations that concern (a) only the internal management of the agency and (b) do not affect private rights or procedures available to the public. HRS Sec. 91–1(4).” (citations omitted.)). See also *Kawashima v. State*, 140 Hawai`i 139, 150, 398 P.3d 728, 739 (2017) (Department of Education regulation governing how its own teachers' salaries was determined to involve only internal management of the agency.).

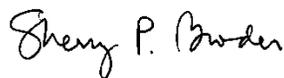
**VI. Compensation of county officials has been determined to be a matter of statewide concern and HRS Sec. 50-13 details the compensation for members of charter commissions**

HRS Sec. 50-13 provides that “Members of the charter commission shall receive as compensation for their services the sum of \$1,000 each, and shall be reimbursed by the county for their necessary expenses incurred in the performance of their duties.” In *Ariyoshi*, 67 Hawai‘i at 420-421, 689 P.2d at 764 (1984), the Supreme Court found the area of compensation of county officials to be part of the State compensation structure reasoning that it provides for “more efficient and effective government for the people of Hawai‘i.” The Supreme Court was very clear that personnel matters include both civil service and other personnel compensation matters “remain subject to legislative control.” Its interpretation of the word personnel was very expansive and comprehensive. “The definition of ‘personnel’ matters may include the paying of persons, because ‘personnel matters’ is given no particular limited meaning.” *Id.* at 420, 689 P. 2d at 763, at fn. 2. In other opinions, the Supreme Court has consistently found that personnel matters are not limited to civil service and are governed by state law. See also *Konno v. County of Hawai‘i*, 85 Hawai‘i 61, 76, 37 P.2d 397, 412 (1997); *HGEA*, 59 Haw. at 86, 576 P.2d at 1041 (“[f]rom an examination of the framers' Standing Committee Report No. 53 (majority), we think it is clear that they intended the final authority on all civil service and compensation matters to remain with the legislature.”).

**VII. Conclusion.**

The Maui Charter established home rule for the people of the County of Maui, and it governs the duties and functions of the Maui Charter Commission. Only when the charter conflicts with a few matters of statewide concern such as compensation of personnel would state law take precedence. The 2020 ballot question was validly adopted, and the appointment of the Charter Commissioners and selection of the Chair are matters unique to the county of Maui and do not involve the issues of concern to the state. Please do not hesitate to contact me should you have any questions.

Very truly yours,



SHERRY P. BRODER

cc: Moana Lutey, Corporation Counsel, Maui County  
Michael Victorino, Mayor, Maui County  
Alice L. Lee, Chair, Maui County Council  
Keani N.W. Rawlins-Fernandez, Vice-Chair, Maui County Council  
James Forrest, Legislative Attorney