

Charter Commission - [Possible SPAM] Fwd: Tax Hike on Farm Homes

From: Al Rabold <arabold@hawaii.rr.com>
To: Maui County Charter Commission <charter.commission@co.maui.hi.us>
Date: 11/16/2011 3:55 PM
Subject: [Possible SPAM] Fwd: Tax Hike on Farm Homes

This went to all of the local newspapers, the mayor and all of the council members today. It might be something you want to include in your charter proposals. - Al Rabold

----- Original Message -----

Subject: Tax Hike on Farm Homes

Date: Wed, 16 Nov 2011 15:44:35 -1000

From: Al Rabold <arabold@hawaii.rr.com>

To: The Maui News <letters@mauinews.com>

CC: Maui Time Weekly <letters@mauitime.com>, Debra Lordan <editor@mauiweekly.com>, Alan Arakawa <mayors.office@mauicounty.gov>, Gladys Baisa <gladys.baisa@mauicounty.us>, Robert Carroll <robert.carroll@mauicounty.us>, Elle Cochran <elle.cochran@mauicounty.us>, Donald Couch <don.couch@mauicounty.us>, Riki Hokama <riki.hokama@mauicounty.us>, Danny Mateo <danny.mateo@mauicounty.us>, Joseph Pontanilla <joseph.pontanilla@mauicounty.us>, Michael Victorino <michael.victorino@mauicounty.us>, mike.white@mauicounty.us

Once again the Maui County Council has shown themselves to be unclear on the concept.

The people support the reduced agricultural property tax rates as is for REAL FUNCTIONAL FULL TIME FARMS! What we object to are reduced taxes for "gentlemen farmers" - those people who have their million dollar homes on formerly zoned AG land and, at best, sell the avocados or whatever from a couple of trees to a veggie stand and claim AG tax rates! And no, a couple of riding horses is not agriculture either. We also object to former farm land that lays fallow for many years yet still receives the tax break. It should be taxed as unimproved residential/business property.

Don't make rocket science out of AG zoning Council Persons. It's very simple. Pass an ordinance that requires individuals claiming AG property tax rates to file a copy of their Federal Income Tax Schedule F (farm income for individuals) or the corporate equivalent federal tax form once a year and demand that it reflects a real effort to make a living from agriculture.

Do what's right for real farmers not what's "right" for your bucks up campaign contributors!

Al Rabold
 Kula, HI 96790
 878-8525

112811 - Item No. II.A. pg 1-1

November 16, 2011

Joshua A. Stone, Chair

Maui County Charter Commission

Department of the Corporation Counsel

Wailuku, HI 96793

Dear Chair Stone and Members of the Committee:

**SUBJECT: PRIORITY BASED UPDATED AND RESTATED PROPOSED
CHARTER LANGUAGE PERTAINING TO: NOVEMBER 14, 2011
TESTIMONY; ACTIVE OR DEFERRED MATRIX # 8.7.5 AND # 8.7.7;
REFORM OF ARTICLE 8, CHAPTER 7, OF THE COUNTY OF MAUI
CHARTER: ANALYSIS REPORT-AUGUST 2011**

The purpose of this communication is to provide the charter commission with priority based updated and restated proposed draft charter language pertaining to: my November 14, 2011 testimony; Matrix # 8.7.5 and 8.7.7; REFORM OF ARTICLE 8, CHAPTER 7, OF THE COUNTY OF MAUI CHARTER: ANALYSIS REPORT-AUGUST 2011. Please consider the following draft language and reference information:

Matrix: #8.7.5:

(Notes: It is requested that the proposed "Statement" or "Declaration" of Policy be located directly after existing charter section 8-7.1 Organization, and the remainder of

112811 - Item No. II.B. pgs 1-7

charter language succeed after the policy. This way, the policy covers, like an umbrella, the commission, fire chief, and necessary staff. In other words, it is requested that the policy NOT be enumerated under or as part of the powers, duties, and functions of the commission or fire chief. In contrast, the policy is intended to be an independent all encompassing section located around the beginning of Article 8, Chapter 7. In the Maui County Charter, the term “Declaration of Policy” is used instead of the term “Statement of Policy.” Therefore, the term “Declaration of Policy” is proposed, to maintain consistency with Maui Charter language, and serve as a replacement term updating previous proposal submittals.)

DRAFT LANGUAGE:

Section 8-7._. Declaration of Policy. It is hereby declared to be the purpose of this chapter of the charter to establish in the county a system of fire protection and prevention, emergency rescue, and emergency services which shall be based on qualified and professional leadership and personnel. In order to achieve this purpose, the County of Maui Fire Department shall be operated in accordance with the following:

1. Standards for recruitment shall be designed to attract into the department persons with high degrees of education, intelligence, and personal stability.
2. Promotions and other personnel actions shall be in accordance with all applicable laws and based upon fair and appropriate standards of merit, ability, and work performance.
3. Appropriate training shall be provided to the maximum extent possible and practicable.

Matrix #8.7.7:

(Notes: It is requested that the following proposed charter language be located or enumerated under or as part of the powers, duties, and functions of the fire commission in the form of an added subsection. The following language is a critical sub component of the proposed Declaration of Policy to effectually and practicably enable compliance with the policy. The fire chief has an existing power, duty, and function in Section 6-3.1 of the charter with no accountability at minimum in the form of review that routinely takes place AFTER that specific power is exercised. Thus, this is the reason for this language being proposed. The proposed power, duty, and function is in the form of review and recommend and NOT executive in nature. Therefore, it is not intended for the fire commission to recommend or approve personnel actions but rather ensure that after the fire chief executes personnel actions that they were compliant with the Declaration of Policy.)

DRAFT LANGUAGE:

__ Review personnel actions within the department for conformance with the policies under Section 8-7.__ (Declaration of Policy)

Reference Material:

**MAUI CHARTER
ARTICLE 8
CHAPTER 15
COST OF GOVERNMENT COMMISSION**

Section 8-15.1. Declaration of Policy. It is declared to be the policy of the county to promote economy, efficiency and improved service in the transaction of the public business in the legislative and executive branches of county by:

1. Limiting expenditures to the lowest amount consistent with the efficient performance of essential services, activities, and functions.
2. Eliminating duplication and overlapping of services, activities, and functions.
3. Consolidating services, activities, and functions of a similar nature.
4. Abolishing services, activities, and functions not necessary to the efficient conduct of government.

**MAUI CHARTER
ARTICLE 10
CODE OF ETHICS**

Section 10-1. Declaration of Policy. Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct to the end that the public may justifiably have trust and confidence in the integrity of government.

City and County of Honolulu

CHAPTER 10 - FIRE DEPARTMENT

Section 6-1001. Organization

Section 6-1002. Statement of Policy

Section 6-1003. Fire Chief, Qualifications

Section 6-1004. Powers, Duties and Functions

Section 6-1005. Fire Commission

Section 6-1006. Powers, Duties and Functions

Section 6-1007. Suspension; Removal; Appeals

(As of February 20, 2001)

Section 6-1002. Statement of Policy --

It is hereby declared to be the purpose of this chapter of the charter to establish in the city a system of fire protection and prevention and emergency rescue which shall be based on qualified and professional leadership and personnel. In order to achieve this purpose, the fire department shall be conducted in accordance with the following:

- (a) Standards for recruitment shall be designed to attract into the department persons with high degrees of education, intelligence, and personal stability.
- (b) Promotions and other personnel actions shall be based upon fair and appropriate standards of merit, ability, and work performance.
- (c) Appropriate training shall be provided to the maximum extent possible and practicable.

Section 6-1006. Powers, Duties and Functions --

The fire commission shall:

- (e) Review personnel actions within the department for conformance with the policies under Section 6-1002 of this charter.

CHAPTER 4 - HAWAI'I FIRE DEPARTMENT

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|--|----|
| Section 7-4.1. Organization. | 27 |
| Section 7-4.2. Statement of Policy..... | 27 |
| Section 7-4.3. Fire Chief..... | 28 |
| Section 7-4.4. Powers, Duties and Functions..... | 28 |
| Section 7-4.5. Fire Commission. | 28 |
| Section 7-4.6 Powers, Duties and Functions..... | 28 |

Section 7-4.2. Statement of Policy.

It is hereby declared to be the purpose of this chapter to establish in the county a system of fire protection and prevention and emergency services which shall be based on qualified and professional leadership and personnel. In order to achieve this purpose, the Hawai'i fire department shall be operated in accordance with the following:

- (a) Standards for recruitment shall be designed to attract into the department persons with high degrees of education, intelligence and personal stability.
- (b) Promotions and other personnel actions shall be based upon fair and appropriate standards of merit, ability and work performance.

(c) Appropriate training shall be provided to the maximum extent possible and practicable.

Section 7-4.6. Powers, Duties and Functions.

The fire commission shall:

(e) Review personnel actions within the department for conformance with the policies under Section 7-4.2 of this charter.

Thank you for your time and consideration of this important matter. Should you have any questions please contact me at 271-8722.

Respectfully,

A handwritten signature in black ink, appearing to read 'Gregory E. Jenkins', with a large, stylized flourish at the end.

GREGORY E. JENKINS

Molokai Resident and Firefighter

PO Box 1010

Kaunakakai, Hi 96748



OFFICE OF THE COUNTY CLERK

COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/county/clerk

November 17, 2011

Mr. Joshua A. Stone, Chair
Charter Commission
County of Maui
c/o Department of the Corporation Counsel
200 South High Street
Wailuku, Hawaii 96793

Dear Chair Stone:

SUBJECT: Response to Questions from the Charter Commission

This letter responds to questions posed in your letter dated November 17, 2011.

I. How do you define "lived" in determining residency?

Response: I have taken the liberty of rephrasing your question to read as follows:
What factors does the Clerk consider when determining whether a person meets the "residency" requirements to run for County elective office?¹

¹ The qualifications to run for the office of council member are found in Section 3-3 of the Charter of the County of Maui (1983), as amended, which provides as follows:

"Section 3-3. Qualifications. To be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days next preceding the filing of nomination papers and at the time of filing of nomination papers a resident in the area from which the person seeks to be elected. If a council member ceases to be a resident of the county, or ceases to be a resident of the council member's residency area during the council member's term of office, or if a council member is adjudicated guilty of a felony, the council member shall immediately forfeit office and the seat shall thereupon become vacant."

The qualifications to run for the office of mayor are found in Section 7-3 of the Charter of the County of Maui (1983), as amended, which provides as follows:

"Section 7-3. Qualifications. Any citizen of the United States who is a voter of the county and a resident of the county for a period of at least ninety (90) days next preceding the filing of nomination papers shall be eligible to be mayor. Upon removal of the mayor's residence from the county, the mayor shall by that fact be deemed to have vacated the office of mayor. If the mayor ceases to be a voter of the county or is adjudicated guilty of a felony, the mayor shall immediately forfeit the office of mayor."

11/24/11 - Item No. II.C

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RECEIVED
CORPORATION COUNSEL
2011 NOV 17 PM 2:50

The rules for determining residency are prescribed in HRS § 11-13.²

Recently, the Hawaii Supreme Court addressed the issue of residency in its opinion entitled Michael P. Dupree v. Roy T. Hiraga et al., 121 Hawaii 297, 219 P.3d 1084 (2009) (hereinafter “Dupree case” or “Dupree opinion”). A copy of the Dupree opinion is enclosed for your reference.

In the Dupree case, the Hawaii Supreme Court addressed the question of whether a person’s state of mind, i.e., intent, was sufficient to establish residency for the purposes of voter registration. The Hawaii Supreme Court confirmed that mere intent was insufficient to establish residency. The Court concluded that the language of HRS § 11-13(4) “requires an analysis of both intent *and* the existence of physical presence which corroborates that intent.” Dupree opinion p. 1110.

Below is a list of some of the factual circumstances that tend to corroborate a person’s residency that were mentioned in the Dupree opinion, together with citations to the page or pages of the Court’s opinion on which each particular fact or circumstance was discussed:

- Ownership or rental of a house (Dupree op. p. 1106)
- Where a car is kept (Dupree op. pp. 1106-1107)
- Where personal items are kept (Dupree op. p. 1107)

² HRS § 11-13 provides as follows:

“§ 11-13. **Rules for determining residency.** For the purpose of this title, there can be only one residence for an individual, but in determining residency, a person may treat oneself separate from the person’s spouse. The following rules shall determine residency for election purposes only:

- (1) The residence of a person is that place in which the persons habitation is fixed, and to which, whenever the person is absent, the person has the intention to return;
- (2) A person does not gain residence in any precinct into which the person comes without the present intention of establishing the persons permanent dwelling place within such precinct;
- (3) If a person resides with the persons family in one place, and does business in another, the former is the persons place of residence; but any person having a family, who establishes the persons dwelling place other than with the persons family, with the intention of remaining there shall be considered a resident where the person has established such dwelling place;
- (4) The mere intention to acquire a new residence without physical presence at such place, does not establish residency, neither does mere physical presence without the concurrent present intention to establish such place as the persons residence;
- (5) A person does not gain or lose a residence solely by reason of the persons presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;
- (6) No member of the armed forces of the United States, the members spouse or the members dependent is a resident of this State solely by reason of being stationed in the State;
- (7) A person loses the persons residence in this State if the person votes in an election held in another state by absentee ballot or in person. In case of question, final determination of residence shall be made by the clerk, subject to appeal to the board of registration under part III of this chapter.

- Payment of utility bills (Dupree op. p. 1107)
- Address listed on
 - (a) driver's license
 - (b) vehicle registration
 - (c) tax returns
 - (d) bank accounts(Dupree op. p. 1108)
- Purchase of groceries (Dupree op. p. 1109)
- Address where any homeowner's property tax exemption is claimed (Dupree op. pp. 1110-1111; HAR § 2-51-25 (a) (2) (A))³
- Address where any renter's tax credit is claimed (Dupree op. p. 1111; HAR § 2-51-25 (a) (2) (B))⁴
- Evidence of the abandonment of a previous residence (Dupree op. pp. 1105, 1106, and 1007)
- Evidence of actual residence (Dupree op. p. 1107)

II. How does the County Clerk define "area residency" for candidates running for Maui County Council seats, and do you have any suggestions to improve the criteria?

Response: I do not understand the question posed. I have taken the liberty of rephrasing your question as a request for information: **Please provide a description of the current Council residency areas.**

Currently, there are nine council residency areas. The residency areas are described in Section 3-1 of the Charter of the County of Maui (1983), as amended. A copy of Section 3-1 is enclosed for your reference.

III. Is it possible for the County Clerk's Office to determine if a person voted in the last election?

Response: Yes. As required by Federal law, the State of Hawaii has a state voter registration system (hereafter referred to as "SVRS"). Every election year, all SVRS voter registration files are updated to reflect whether a registered voter voted or failed to vote.

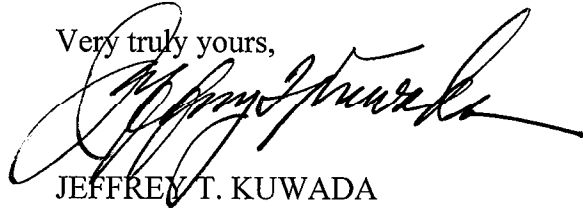
³ Note: The Dupree opinion is dated October 20, 2009. Effective January 9, 2010, HAR Chapters 2-50, 2-51, 2-52, 2-53, and 2-54 were repealed. See HAR § 3-172-25 (a) (2) (A), the current applicable HAR provision.

⁴ Note: The Dupree opinion is dated October 20, 2009. Effective January 9, 2010, HAR Chapters 2-50, 2-51, 2-52, 2-53, and 2-54 were repealed. See HAR § 3-172-25 (a) (2) (B), the current applicable HAR provision.

Mr. Joshua A. Stone, Chair
Charter Commission
County of Maui
November 17, 2011
Page 4

Please contact me should you have additional questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffrey T. Kuwada", written in a cursive style.

JEFFREY T. KUWADA
County Clerk

Enclosures

121 Hawai'i 297

Michael P. DUPREE,
Petitioner/Appellant-
Appellee,

v.

Roy T. HIRAGA, Clerk of the County of
Maui, and Solomon P. Kaho'ohalahala,
Respondents/Appellees-Appellants.

No. 29464.

Supreme Court of Hawai'i.

Oct. 20, 2009.

Background: Registered voter from island of Lāna'i appealed decision of county clerk that putative Lāna'i resident met voter registration requirements for upcoming election. County board of registration (BOR) determined that putative resident actually resided in Lahaina, Maui. Putative resident and county clerk appealed to the Intermediate Court of Appeals. The Supreme Court transferred appeal.

Holdings: The Supreme Court, Recktenwald, J., held that:

- (1) county clerk acted within scope of his authority in construing letter from registered voter as a challenge to putative resident's right to vote as Lāna'i resident, and in initiating an investigation on that basis, such that BOR had jurisdiction to hear appeal;
- (2) BOR did not exceed its jurisdiction in its decision on appeal;
- (3) putative resident lost prior residency on Lāna'i by changing his voter registration to Lahaina, Maui, even though he was working on Maui as a state employee; and
- (4) evidence did not establish a "habitation fixed" or a sufficient physical presence on Lāna'i under rules for determining a voter's residency.

Decision of BOR affirmed.

1. Administrative Law and Procedure ⊕486

An agency's findings must be sufficient to allow the reviewing court to track the

steps by which the agency reached its decision.

2. Administrative Law and Procedure ⊕486

The agency is the fact finder for purposes of an appeal from agency's decision, and the undigested transcript of agency proceeding is not a substitute for a set of findings of fact, nor should a court be put in a position wherein it is forced to ferret out the facts.

3. Administrative Law and Procedure ⊕485

It is important for administrative agencies to be complete in their factual findings to encourage confidence in reasoned decision making by the agency.

4. Elections ⊕112

Determination by county board of registration (BOR) that putative resident of the island of Lāna'i was actually a resident of Lahaina, Maui, for voter registration purposes would be reviewed under the clearly erroneous standard; issue presented mixed questions of fact and law and was dependent on the facts and circumstances in that particular case. HRS § 11-13.

5. Appeal and Error ⊕893(1)

The existence of jurisdiction is a question of law that the Supreme Court reviews de novo under the right/wrong standard.

6. Appeal and Error ⊕893(1)

Interpretation of a statute is a question of law that the Supreme Court reviews de novo.

7. Elections ⊕106

County clerk acted within scope of his authority in construing letter by registered voter from island of Lāna'i as a challenge to putative resident's right to vote as Lāna'i resident, and in initiating an investigation on that basis, such that county board of registration (BOR) had jurisdiction to hear appeal from clerk's decision in that regard, even though letter focused on residency in context of challenging putative resident's eligibility to

be a candidate for Lānaʻi seat on county council. HRS §§ 11-25, 11-26.

8. Pleading ⇌66

Failure to expressly plead a particular claim for relief is not dispositive, where the complaint alleges the underlying facts relating to that claim and there is no prejudice to the opposing party.

9. Pleading ⇌34(3.5)

Pleadings prepared by pro se litigants should be interpreted liberally.

10. Elections ⇌106

Letter of appeal by registered voter on island of Lānaʻi from decision of county clerk sufficiently challenged another individual's voter registration status for county board of registration to have jurisdiction to hear appeal, where letter alleged that the other individual had misrepresented himself on his voter registration, his nomination papers as candidate for Lānaʻi seat on county council, and his sworn affidavit in response to registered Lānaʻi voter's complaint to county clerk. HRS §§ 11-25, 11-26.

11. Elections ⇌112

Supreme Court was obligated, on appeal from decision of county board of registration (BOR), to determine BOR's jurisdiction over appeal from decision of county clerk.

12. Elections ⇌106

County board of registration (BOR) did not exceed its jurisdiction, on appeal from determination of county clerk that a particular individual was a resident of island of Lānaʻi for voter registration purposes, by including in its decision the undisputed fact that the individual was a candidate for the Lānaʻi seat on county council; that fact provided background and context for the appeal. HRS §§ 11-25, 11-26.

13. Elections ⇌112

Any error by county board of registration (BOR), in including in its conclusions of law extraneous information concerning county charter and the residency requirement for running for a council seat, was harmless in decision in which BOR determined that putative Lānaʻi resident was not properly regis-

tered to vote there; the information was not material to BOR's holding and did not purport to address putative resident's candidacy for Lānaʻi seat on county council. HRS §§ 11-12, 11-13.

14. Elections ⇌106

County board of registration (BOR) did not exceed its jurisdiction, on an appeal from determination by county clerk that a particular individual was properly registered to vote as a resident of island of Lānaʻi, by stating that it was ruling on the individual's residency "for election purposes"; it was apparent from the BOR's decision that it was not purporting to rule on whether the individual was properly a candidate for Lānaʻi seat on county council, but only on whether he was properly registered to vote. HRS §§ 11-25(a), 11-26(b).

15. Elections ⇌73

Resident of the island of Lānaʻi lost that residency for voting purposes by changing his voter registration to Lahaina, Maui, even though he was working in Maui as a state employee. HRS § 11-13.

16. Elections ⇌72

While not dispositive of residency issue, evidence that putative resident did not own or work for a business on island of Lānaʻi, and did not own or rent a house or keep a car on the island, was relevant to whether putative resident, who two years earlier had registered to vote in Lahaina, Maui, had established necessary physical presence on Lānaʻi under voter registration statute. HRS § 11-13(4).

17. Elections ⇌72

While not dispositive of residency issue, evidence that registered voter from island of Lānaʻi challenging putative resident's eligibility to vote in Lānaʻi had not seen putative resident at post office, banks, store, gas station, or any restaurant on Lānaʻi was relevant to whether putative resident had established sufficient physical presence on Lānaʻi for voter registration purposes. HRS § 11-13(4).

18. Elections ⇐73

Although a person may have a separate residence from that of the person's spouse, in context of determining residency for voter registration purposes, the location of one's spouse and children can nevertheless be relevant to determining whether a person actually relocated his or her residence. HRS § 11-13.

19. Elections ⇐72

Evidence that putative resident of Lānaʻi, who two years earlier had registered to vote in Lahaina, Maui, attended rally on Lānaʻi prior to primary election in which he sought Lānaʻi seat on county council, attended Lānaʻi's "Aloha Festival," and was seen being picked up on dock by his brother and driven around island on a number of instances did not establish a "habitation fixed" on Lānaʻi or a sufficient physical presence there under rules for determining a voter's residency. HRS § 11-13(1, 4).

20. Courts ⇐89

Attorney General's opinions are highly instructive but are not binding upon the Supreme Court.

Kenneth Kupchak, Robert Thomas and Christi-Anne Kudo Chock (of Damon Key Leong Kupchak Hastert), Honolulu, for petitioner/appellant-appellee.

Brian T. Moto, Corporation Counsel, and Jane Lovell, Deputy Corporation Counsel, County of Maui, for respondent/appellee-appellant Roy T. Hiraga.

Benjamin E. Lowenthal, Wailuku, for respondent/appellee-appellant Solomon Kaho'ohalahala.

MOON, C.J., NAKAYAMA, ACOPA, DUFFY, and RECKTENWALD, JJ.

Opinion of the Court by RECKTENWALD, J.

Roy T. Hiraga and Solomon P. Kaho'ohalahala appeal from the November 1, 2008 decision of the Board of Registration for Maui County (Board) which determined that Kaho'ohalahala was not a resident of Lānaʻi

"[f]or purposes of [the November 2008] election[.]"

The case began in September 2008, when appellee Michael P. Dupree and eleven other registered voters from Lānaʻi sent letters to Hiraga, the Clerk of the County of Maui, which alleged that Kaho'ohalahala was not a Lānaʻi resident. Hiraga subsequently found, inter alia, that Kaho'ohalahala was a Lānaʻi resident when he registered to vote there in July 2008. Dupree appealed that determination to the Board, which concluded that Kaho'ohalahala was in fact a resident of Lahaina rather than Lānaʻi.

The questions on appeal include whether: (1) the Board lacked jurisdiction because Dupree's complaint was an untimely challenge to Kaho'ohalahala's eligibility to be a candidate for the Lānaʻi seat on the Maui County Council, rather than to his voter registration, (2) the Board exceeded its jurisdiction by addressing issues beyond Kaho'ohalahala's voter registration, and (3) the Board erred in concluding that Kaho'ohalahala was not a Lānaʻi resident.

For the reasons set forth below, we conclude that the Board had jurisdiction to hear the appeal, the Board did not exceed its jurisdiction by addressing issues beyond Kaho'ohalahala's voter registration status, and the Board did not err in concluding that Kaho'ohalahala did not have the right to remain a registered voter of Lānaʻi. Accordingly, we affirm the Board's November 1, 2008 decision.

I. BACKGROUND

A. Dupree and other Lānaʻi residents submit complaints to Hiraga concerning Kaho'ohalahala's residency

Kaho'ohalahala was originally from the island of Lānaʻi. He was registered to vote on Lānaʻi from June of 1982 until July of 2006, when he registered to vote as a resident of Lahaina, Maui. In July of 2008, he registered to vote as a resident of Lānaʻi City, with an address on Fraser Avenue, and also filed nomination papers to run for the Lānaʻi seat

DUPREE v. HIRAGA

Cite as 219 P.3d 1084 (Hawai'i 2009)

Haw. 1087

on the Maui County Council.¹ Two of the qualifications for election to the Maui County Council are that the candidate must be a voter in Maui County and must be, at the time of filing nomination papers, a resident in the area from which the person seeks to be elected.² Kaho'ohalahala's nomination papers included a certification by Kaho'ohalahala that he met those qualifications.³ Hiraga did not receive any challenges to Kaho'ohalahala's nomination papers prior to the September 20, 2008 primary.⁴ Kaho'ohalahala voted in the primary as a Lāna'i resident, and finished first among the five candidates who ran for the Lāna'i seat. He and the candidate receiving the second highest number of votes, John Ornellas, advanced to the November 4, 2008 general election.

On September 23, 2008, Hiraga received two letters from Lāna'i City residents. The letters were identical in form, and stated as follows:

It is my understanding that you are responsible for investigating complaints made regarding elections in Maui County, Hawaii. In the 2008 primary election for

the Maui County Council[,] Sol P. Kaho'ohalahala represented himself as a resident of Lāna'i. Although his father resides here and he established a Post Office Box in order to receive mail, it is widely believed that he actually resides with his wife on Maui.

Would you please investigate his claim to residency here? Many residents of this island would like to know what the criteria [are] for establishing residency. I would like to know how to proceed to file a claim that Mr. Kaho'ohalahala falsified documents filed with his signature to run for the office of Maui County Council, Lāna'i Seat.

One of the writers added a handwritten note at the bottom which stated, "In the nine yrs. I've lived here I have never seen Sol at the gas station, stores, Bank or Post Office! This is a small island; Where is he?"

On September 24, 2008, Hiraga wrote to Kaho'ohalahala as follows:

The Office of the County Clerk, County of Maui, has received two written chal-

the candidate's behalf and in the name by which the candidate is commonly known. The nomination paper shall be in a form prescribed and provided by the chief election officer containing substantially the following information:

....
(3) The residence address and county in which the candidate resides;

....
(6) A sworn certification by self-subscribing oath by the candidate that the candidate qualifies under the law for the office the candidate is seeking and that the candidate has determined that, except for the information provided by the registered voters signing the nomination papers, all of the information on the nomination papers is true and correct[.]

4. **HRS § 12-8 (Supp.1999) Nomination papers; challenge; evidentiary hearings and decisions.** (a) All nomination papers filed in conformity with section 12-3 shall be deemed valid unless objection is made thereto by a registered voter, an officer of a political party whose name is on file with the chief election officer, the chief election officer, or the county clerk in the case of a county office. All objections shall be filed in writing not later than 4:30 p.m. on the thirtieth day or the next earliest working day prior to the primary or special election.

1. Maui County Charter, Section 3-1, provides for a County Council composed of nine members, one from each of the following areas: Lāna'i, Moloka'i, East Maui, West Maui, South Maui, Kahului, Makawao-Ha'ikū-Pā'ia, Pukalani-Kula-Ulupalakua, and Wailuku-Waihe'e-Waikapū. Maui County Charter § 3-1 (2003), available at <http://www.co.maui.hi.us/index.aspx?nid=162>.

2. The qualifications for County Council members are set forth in Maui County Charter, § 3-3: **Section 3-3 Qualifications.** To be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days next preceding the filing of nomination papers and at the time of filing of nomination papers a resident in the area from which the person seeks to be elected. If a council member ceases to be a resident of the county, or ceases to be a resident of the council member's residency area during the council member's term of office, or if a council member is adjudicated guilty of a felony, the council member shall immediately forfeit office and the seat shall thereupon become vacant.

3. **HRS § 12-3 (Supp.2005) Nomination paper; format; limitations.** (a) No candidate's name shall be printed upon any official ballot to be used at any primary, special primary, or special election unless a nomination paper was filed in

lenges to your voter registration, pursuant to Section 11-25 [1993], Hawaii Revised Statutes.^[5] The challenge alleges that you do not reside on the Island of Lanai.

You are hereby informed that our Office will conduct an investigation as soon as possible and will subsequently issue a ruling on the challenge. As part of our investigation, we request that you respond to the challenge allegation, i.e., that you do not reside at [] Fraser Avenue.^[6] Please send your response to our Office no later than October 3, 2008.

Kaho'ohalahala responded on October 3, 2008. He submitted an affidavit dated October 2, 2008, in which he stated that "I am a resident of Lana'i City," that "[m]y residence is fixed at [] Fraser Avenue, Lana'i City and whenever I am absent from the island of Lana'i, I intend to return[.]" and that at the time of "fixing my residence in Lana'i City, it was with the intention of making it my permanent dwelling place." Kaho'ohalahala also stated that his family has continuously lived on Lana'i throughout his life, that he had "filed an affidavit of voter registration with the belief and understanding that [he is] a legal resident of Lana'i because of [his] permanent residence at [] Fraser Avenue[.]" and that he had filed nomination papers and

voted in the primary "with the belief and understanding" that he was a legal resident of Lana'i.

Kaho'ohalahala also submitted an affidavit by his brother, Gaylien Kaho'ohalahala, in which Gaylien stated that Gaylien was a resident of Lana'i City and "[i]n the beginning of July, 2008, [Kaho'ohalahala] telephoned me and discussed with the family his intention of returning to Lana'i to live." Gaylien further stated that "[w]e welcomed [Kaho'ohalahala's] return home and he presently resides at [] Fraser Avenue and resided there since the beginning of July, 2008."

Kaho'ohalahala also submitted a response arguing that the letters were not challenges to his voter registration status under HRS § 11-25, but were challenges to his nomination papers under HRS § 12-8. Kaho'ohalahala noted that HRS § 12-8 required objections to have been made to his nomination papers, which included a sworn statement declaring his residency, no later than thirty days prior to the September 20, 2008 primary election, that no timely objections were made, and that his nomination papers were therefore presumptively valid. Kaho'ohalahala argued that the complaints were "underhanded attempt[s] to circumvent the legal requirements for proper objections to nomi-

5. HRS § 11-25 Challenge by voters; grounds; procedure. (a) Challenging prior to election day. Any registered voter may challenge the right of a person to be or to remain registered as a voter in any precinct for any cause not previously decided by the board of registration or the supreme court in respect to the same person; provided that in an election of members of the board of trustees of the office of Hawaiian affairs the voter making the challenge must be registered to vote in that election. The challenge shall be in writing, setting forth the grounds upon which it is based, and be signed by the person making the challenge. "The challenge shall be delivered to the clerk who shall forthwith serve notice thereof on the person challenged. The clerk shall, as soon as possible, investigate and rule on the challenge.

(b) Challenging on election day. Any voter rightfully in the polling place may challenge the right to vote of any person who comes to the precinct officials for voting purposes. The challenge shall be on the grounds that the voter is not the person the voter alleges to be, or that the voter is not entitled to vote in that precinct; provided that only in an election of members of

the board of trustees of the office of Hawaiian affairs, a person registered to vote in that election may also challenge on the grounds that the voter is not Hawaiian. No other or further challenge shall be allowed. Any person thus challenged shall first be given the opportunity to make the relevant correction pursuant to section 11-21. The challenge shall be considered and decided immediately by the precinct officials and the ruling shall be announced.

(c) If neither the challenger nor the challenged voter shall appeal the ruling of the clerk or the precinct officials, then the voter shall either be allowed to vote or be prevented from voting in accordance with the ruling. If an appeal is taken to the board of registration, the challenged voter shall be allowed to vote; provided that ballot is placed in a sealed envelope to be later counted or rejected in accordance with the ruling on appeal. The chief election officer shall adopt rules in accordance with chapter 91 to safeguard the secrecy of the challenged voter's ballot.

6. We have deleted residential street numbers for purposes of this opinion.

nation papers and challenges to election results." Additionally, Kaho'ohalahala argued that the complaints constituted a challenge to an election pursuant to HRS § 11-172 (1993),⁷ and that the Office of the County Clerk of Maui did not have jurisdiction to hear such a challenge. He requested that Hiraga dismiss the September 23, 2008 complaint letters as untimely challenges to his nomination papers and for lack of jurisdiction to decide election contest complaints.

Meanwhile, between September 24, 2008 and October 3, 2008, Hiraga received ten additional letters from Lāna'i residents. Six letters were identical to the September 23, 2008 letters. The content of the other letters varied. One resident submitted a letter alleging that Kaho'ohalahala falsified his residence on his filing papers, that Kaho'ohalahala's siblings resided at [] Fraser Avenue in Lāna'i, and that Kaho'ohalahala actually resided in Lahaina, Maui. This resident requested that Hiraga disqualify "Kaho'ohalahala[s] results from the [September 20, 2008 primary][,]" "exclude him from the General Election[,]" and "restore Alberta de Jetley's eligibility in the General Election."

Alberta de Jetley, an unsuccessful candidate in the primary election, submitted a complaint letter alleging that Kaho'ohalahala's "statement to the Maui News about maintaining his residency on Lanai while working for the Kahoolawe Commission is false." De Jetley requested that Hiraga "investigate this matter so [that] we, the registered voters of Lanai, can move on and elect someone who is truly a resident of this island to represent us."

Dupree submitted a complaint letter alleging that although Kaho'ohalahala was from Lāna'i, he did not own a home, manage a business, work on, or farm on, Lāna'i, that he had not campaigned or held rallies there, and that he had not been seen by local residents on the island. Dupree stated that Kaho'oha-

lahala won the primary based on "off island voting patterns[,]" but that residents of Lāna'i preferred several other candidates for the Lāna'i seat, as they "are all local residents, and they are in touch with the pulse of Lanai[.]" Dupree requested "that off-islanders give [Lāna'i residents] the right and opportunity to govern [them]selves[.]" Dupree stated that although Kaho'ohalahala was a "fine candidate," he should "run in the district that he currently resides in and give a current Lanai resident the opportunity to represent their home island[.]"

Another resident submitted a letter "challenging [Kaho'ohalahala's] running for County Council on behalf of the island of Lanai, or being voted into that office in the general election on November 4, 2008, based on the question of [his] permanent/legal residency on Lanai." This resident cited to the Maui County Charter and statements Kaho'ohalahala made to the Maui News. This resident asked if Kaho'ohalahala paid mortgage, rent, utility bills or property taxes in Lāna'i, and further inquired as follows:

- (1) What address did [Kaho'ohalahala] use on his Voter's Registration form; and, where is his polling address?
- (2) Where did [Kaho'ohalahala] vote on September 20, 2008 in the primary? Lahaina or Lanai?

This resident requested that Hiraga "investigate Mr. Kaho'ohalahala's right to file nomination papers to run for County Council to represent the island of Lanai, based on his questionable residency in Lanai," and further requested that if Kaho'ohalahala was found in violation of the residency requirement of the Maui County Charter, that Hiraga "remove Mr. Kaho'ohalahala's name from the November 4, 2008 general election ballot; or, if the ballots have already been printed, then any votes he may receive NOT be allowed to be counted."

7. HRS § 11-172 Contests for cause; generally. With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court. The complaint shall set forth any cause or causes, such as but not limited to, provable fraud, overages, or underages, that could cause a difference in the

election results. The complaint shall also set forth any reasons for reversing, correcting, or changing the decisions of the precinct officials or the officials at a counting center in an election using the electronic voting system. A copy of the complaint shall be delivered to the chief election officer or the clerk in the case of county elections.

B. Hiraga's ruling on complaints

On October 10, 2008, Hiraga issued a ruling on the twelve complaint letters. Hiraga treated the complaints collectively, stating that "[g]enerally, the writers of the Complaint Letters allege that [Kaho'ohalahala] does not reside in the Lanai residency area." The ruling stated in relevant part as follows:

The Complaint Letters challenge Mr. Kaho'ohalahala's residency based upon two separate statutory grounds, namely, [HRS § 12-8] and [HRS § 11-25].

To the extent that the Complaint Letters constitute a challenge to Mr. Kaho'ohalahala's candidacy pursuant to the provisions of [HRS § 12-8], the challenge is untimely. Section 12-8 clearly provides that "All objections shall be filed in writing not later than 4:30 p.m. on the thirtieth day or the next earliest working day prior to the primary or special election." The earliest date of receipt of a Challenge Letter by the Clerk's Office was Monday [sic], September 23, 2008, two days after the Primary Election was conducted on Saturday, September 20, 2008.

The ruling went on to quote HRS § 11-13 (1993),⁸ and then concluded as follows:

8. HRS § 11-13 Rules for determining residency. For the purpose of this title, there can be only one residence for an individual, but in determining residency, a person may treat oneself separate from the person's spouse. The following rules shall determine residency for election purposes only:

- (1) The residence of a person is that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has the intention to return;
- (2) A person does not gain residence in any precinct into which the person comes without the present intention of establishing the person's permanent dwelling place within such precinct;
- (3) If a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than with the person's family, with the intention of remaining there shall be considered a resident where the person has established such dwelling place;

Eight of the twelve Complaint Letters state, "... it is widely believed that [Mr. Kaho'ohalahala] actually resides with his wife on Maui." Assuming, for the purpose of argument, that this widely held belief is true, [HRS § 11-13] contemplates that a person may have a residence separate and apart from his or her spouse when it states as follows: "For the purpose of this title, there can be only one residence for an individual, but in determining residency, a person may treat oneself separate from the person's spouse."

Mr. Kaho'ohalahala admits that he resided on Maui when he was director of the Kahoolawe Island Reserve Commission. However, [HRS § 11-13(5)] states as follows: "(5) A person does not gain or lose a residency solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in prison[.]" Therefore, Mr. Kaho'ohalahala did not lose his residency due to his absence from Lanai while he was employed in service of the State.

One Complaint Letter alleges that "The [] Fraser Ave. address is the home of his father. His siblings, I believe, are listed on the deed of the home. His residence

- (4) The mere intention to acquire a new residence without physical presence at such place, does not establish residency, neither does mere physical presence without the concurrent present intention to establish such place as the person's residence;
- (5) A person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;
- (6) No member of the armed forces of the United States, the member's spouse or the member's dependent is a resident of this State solely by reason of being stationed in the State;
- (7) A person loses the person's residence in this State if the person votes in an election held in another state by absentee ballot or in person.

In case of question, final determination of residence shall be made by the clerk, subject to appeal to the board of registration under part III of this chapter.

for approximately the last 10 years has been [] Fleming Road, Lahaina, HI."

The language of [HRS § 11-13(1), (2) & (4)] makes it abundantly clear that physical presence or absence from a particular place is not the deciding factor in determining the residence of an individual. "Under section 11-13, one's *state of mind* determines one's place of residence." Atty. Gen. Op. 86-10. (Emphasis added.)

The key to deciphering Mr. Kaho'ohalahala's state of mind is found in his sworn affidavit. In it, he states:

... [.]

2. My residence is fixed at [] Fraser Avenue, Lana'i City, and whenever I am absent from the island of Lana'i, I intend to return.

3. I was born and raised on the island of Lana'i and retained my residence on Lana'i except for a brief period in which I was in the service of the State of Hawai'i with the Kaho'olawe Island Reserve Commission.

4. At the time of fixing my residence in Lana'i City, it was with the intention of making it my permanent dwelling place.

... [.]

(Emphasis added.)

It is clear from the quoted portions of his sworn affidavit that Mr. Kaho'ohalahala intends to reside on the island of Lana'i.

The Office of the County Clerk, County of Maui, has conducted an examination of Mr. Kaho'ohalahala's voter registration history and confirms that, with the exception of the period from July 2006 to July 2008, Mr. Kaho'ohalahala's residence address of record has always been on Lanai.

Pursuant to [HRS §§ 11-13 & -25], and based upon the foregoing discussion, to the extent that the Complaint Letters constitute a challenge to Mr. Kaho'ohalahala's right to remain a registered voter in (Lanai) District/Precinct 13/07, the challenge is not sustained.

(Emphases in original; footnotes omitted).

Hiraga notified all of the complainants of his decision, and of their right to appeal his

decision to the Board of Registration pursuant to HRS § 11-26 (1993).

C. Dupree appeals to the Board of Registration and the Board overrules Hiraga's decision

Dupree, proceeding pro se, sent an appeal letter dated October 16, 2008 to the Board of Registration. Dupree stated that he was challenging Hiraga's decision "not to sustain the challenge as to the true residency of [Kaho'ohalahala][.]" and argued in relevant part as follows:

While I would agree that according to Hawaii Revised Statutes that the challenges were received on an untimely basis, it doesn't change the truth and validity of this challenge. It doesn't change the fact that Sol Kaho'ohalahala and his brother Gaylien, may both have given false statements in their sworn affidavits. I would argue that in this specific situation an exception should be granted and further consideration be given to this challenge.

I live at [] Lama Street, a few blocks from [] Frasier [sic] Avenue, where Sol claims that he lives. I have passed by that house almost one thousand times since July 2008, ten times a day for over one hundred days, ... when Sol supposedly returned here according to he and his brother's sworn affidavit. I have not seen him once. Not once in a hundred days or a thousand passes. I'm not surprised that Sol would distort the truth but Gaylien too? I haven't seen Sol on Lanai once this year, although I am not saying he hasn't visited, I'm saying he doesn't live here. I haven't seen him once at the post office, either bank, not at any Lanai store, nor the gas station, nor any restaurant. I haven't seen him walking, driving a car, riding a bike, surfing or paddling a canoe. He certainly is not commuting to Maui. Four times a week I take the only road down to Expeditions Ferry Service at Manele Harbor and pass everyone who is going to Maui. I see all the Lanai faces commuting on the first boat to Maui at 8:00 AM, and again I have not seen his

face once in the last three months since he moved here as he swore before a notary public. He does not commute from Lanai to Lahaina and then to Kahului; that would be impractical. The Harbor Master of Lanai, Sheri Menze, also sent a letter challenging Sol's residency because she doesn't see him either. Is he invisible, are we blind, or are he and his brother not telling the truth?

....
I ask that you please uphold the challenge to Sol Kaho'ohalahala[s] true residency and help the residents of Lanai to take a step forward and not allow this dishonest man to represent our island on the Maui County Council. He misrepresent[ed] himself on his voter registration, his nomination papers and his sworn affidavit. Please remove him from the ballot and replace him with a true Lanai resident.

Kaho'ohalahala then filed a Motion to Dismiss for Lack of Jurisdiction. He argued that because there were no timely objections to his nomination papers, which included a declaration of his legal residency and registered voter status, his nomination papers were presumptively valid. Kaho'ohalahala argued that this was an election contest within the meaning of HRS § 11-172, which is within the exclusive jurisdiction of the Hawai'i Supreme Court.

On October 21, 2008, Kaho'ohalahala also filed a Petition for Writ of Mandamus (petition) with this court, which named Hiraga as the respondent. In his petition, Kaho'ohalahala similarly argued that none of the complaints challenged his voter registration, that his nomination papers were presumptively valid as there had been no timely objections, and that the complaint was an election contest within the meaning of HRS § 11-172. Kaho'ohalahala requested that this court vacate Hiraga's October 10, 2008 ruling and dismiss the underlying action because it constituted an election contest, which Hiraga did not have the jurisdiction to decide.

Kaho'ohalahala also filed with the Board a Motion for Stay of Proceedings pending disposition of his petition, and a Motion in Limine to Exclude Accepting Testimony from

Witnesses by Telephone or Video. A hearing on Kaho'ohalahala's motions was held on October 27, 2008. At the hearing, Dupree argued at one point that "the fundamental reason that we are here is because one clause ... in the Maui County charter ... says that one of the members of the Maui County Council must be a resident of Lanai,]" but later argued that "although in my original challenge I didn't list the word voter registration I didn't list the word nomination paper either but the thrust of the argument was that [Kaho'ohalahala] is not a resident[.]" After the hearing, the Board denied Kaho'ohalahala's motion to stay, motion to dismiss, and motion in limine to exclude testimony given by telephone or video. The Board issued an order dated October 28, 2008, denying the three motions, concluding in relevant part as follows:

FINDINGS OF FACT

....
2. The County Clerk's October 10, 2008 ruling from which Mr. Dupree has appealed to this Board determined that the County Clerk does not have jurisdiction to determine Mr. Kaho'ohalahala's candidacy pursuant to [HRS] § 12-8.

3. The County Clerk's October 10, 2008 ruling construed Mr. Dupree's challenge to be a challenge by a registered voter under HRS § 11-25, challenging the right of Mr. Kaho'ohalahala to be a registered voter in the precinct that includes Lanai.

4. Mr. Dupree's appeal of the County Clerk's ruling was filed on October 16, 2008 and challenged the application of the rules for determining residency that were applied by the County Clerk.

CONCLUSIONS OF LAW

....
2. The Board of Registration for the County of Maui has jurisdiction over the parties herein, and has primary jurisdiction of the subject matter of this appeal, which is a challenge by a registered voter under HRS § 11-25, challenging the right

of Mr. Kaho'ohalahala to be a registered voter in the precinct that includes Lanai.

3. Mr. Dupree has standing to bring this appeal of the County Clerk Roy Hiraga's determination regarding the voter registration status of Solomon P. Kaho'ohalahala.

On October 30, 2008, this court denied Kaho'ohalahala's petition for writ of mandamus, holding in relevant part as follows:

Upon consideration of the petition for a writ of mandamus filed by petitioner Solomon P. Kaho'ohalahala and the papers in support, it appears that respondent's October 10, 2008 ruling did not decide whether petitioner was nominated or elected as a candidate in the September 20, 2008 primary election, but decided only that the challenges to petitioner's nomination papers were untimely and that petitioner is a registered voter on Lanai. The October 10, 2008 ruling was not tantamount to a judgment in a primary election contest given pursuant to HRS § 11-173.5(b) (1993), but was a ruling only on a challenge to nomination papers and on a person's voter registration status. Jurisdiction to render such ruling was with respondent pursuant to HRS §§ 12-8(b) (1993) and 11-25(a) (1993).

Kaho'ohalahala v. Hiraga, No. 29415, 2008 WL 4769470, at *1 (Haw. Oct. 30, 2008).

A hearing was held on Dupree's appeal on October 31, 2008. Board chair John Henry characterized Dupree's appeal as a "challenge to [] Kaho'ohalahala's right to remain a registered voter on Lanai" pursuant to HRS §§ 11-13 and 11-25.⁹ Dupree initially presented his appeal as a "challenge of voter registration[.]" but also argued that Kaho'ohalahala registered to vote on Lānaʻi so that he could "file his nomination papers for candidacy." Counsel for Kaho'ohalahala objected that the Board "has already deter-

mined that it's not hearing questions related to candidacy[.]" and that any evidence "along those lines [] is irrelevant and immaterial[.]" The Board sustained the objection. Counsel for Hiraga joined in the objection, additionally noting that "this Board does not have jurisdiction to consider such matters." The Board agreed, and asked Dupree to "keep it to his voter registration."

Dupree argued that Kaho'ohalahala's residence was fixed in Lahaina, and that Lahaina is where Kaho'ohalahala intends to return to whenever he is away. Dupree argued that although Kaho'ohalahala registered to vote in Lānaʻi in July of 2008, he lacked the present intention and corresponding physical presence necessary to be a Lānaʻi resident.

When asked if he had any personal knowledge about where Kaho'ohalahala sleeps at night or resides, Dupree testified that he "kn[e]w [that Kaho'ohalahala] was on the island [of Lānaʻi] last weekend because ... he showed up at the Aloha Festival and stayed overnight a couple of nights[.]" Dupree also testified that he had heard that Kaho'ohalahala was at a political rally just before the primary.

Dupree then called Ron McComber to testify.¹⁰ McComber testified in part as follows:

[McComber]: I've lived on Lanai for thirty nine years, I've known [Kaho'ohalahala] for those thirty nine years, sometimes he lived down there and sometimes ah he doesn't. What I'm saying is now for the, the past probably ten years he has not physically lived on Lanai, that's, that's addressing the, the problem of him living on Lanai, he has not lived there.

[Dupree]: And ah as of July [2008] has he returned to the island to live on the island.

[McComber]: For ____.

[Dupree]: As far as your understanding.

9. Written transcripts of the October 27 and 31, 2008 hearings are part of the record on appeal. The record does not indicate who prepared the transcripts. Although Hiraga identifies two passages that he asserts were inaccurately transcribed, all parties cite to the transcripts in their briefs, and do not otherwise dispute their accuracy or authenticity.

10. Ron McComber's name is spelled in several different ways in the transcript and the briefs. For the purposes of this opinion, we adopt the spelling used by the Board in its November 1, 2008 decision.

[McComber]: As far as I know, he's come back one time since that time and it was for that rally, and he has not lived on Lanai.

[Dupree]: Um, and so, you're [sic] detection is that he's not an actual resident of the island?

[McComber]: That is my understanding, I live there, and it's a very small island, not very many things go on Lanai that people don't know, and the population of the island is very rare [sic] of who comes and who goes, who lives, who isn't. It's kind of a, a melting pot and there is no indication that I can find anywhere from anybody that [Kaho'ohalahala] has moved back there and lived there for the last, at least, ten years.

A Board member then asked McComber if, since July of 2008 when Kaho'ohalahala registered to vote on Lāna'i, McComber had seen "any signs that [] he had established ... any material goods there, a car, or moving van, anything along that line[.]" McComber testified that he had "not seen [Kaho'ohalahala] come back over there, and move in, move clothes in, bring a car over there. His brother picks him up at the dock and, and drives him around, he does not have a car that I know of over there."

Counsel for Kaho'ohalahala then moved for a directed order or decision that Dupree "has not by preponderance of evidence presented sufficient [] evidence to support [the] overturning of Mr. Hiraga's [decision][.]" and deputy corporation counsel joined in that motion. The Board denied the motion, and corporation counsel called Hiraga to testify.

Hiraga testified that subsequent to receiving the complaint letters alleging that Kaho'ohalahala was not a Lāna'i resident, he conducted an investigation which included researching Kaho'ohalahala's voter registration history. Hiraga testified that Kaho'ohalahala's voter registration records dated back to 1982, and that Kaho'ohalahala had been continuously registered to vote on Lāna'i with the exception of the period from July 2006 to July 2008. He also testified that it was his

understanding that during those two years, Kaho'ohalahala was employed by the State of Hawai'i.

Ellen Pelesaro¹¹ then testified for Kaho'ohalahala. She testified that she had known Kaho'ohalahala since 1991, and that Kaho'ohalahala's family had been on Lāna'i for seven generations. Pelesaro testified that Kaho'ohalahala had an "immense love affair with [the island of Lāna'i]," and that "he came right back from college and went to work there and began to do community service on that island that led ultimately to his running for office." She testified that Kaho'ohalahala had held a number of elective offices requiring Lāna'i residency. He had previously held the Lāna'i seat on the Maui County Council, was on a citizen's advisory committee, was a state representative, and was the Lāna'i representative to the Hawaiian Sovereignty Commission. Pelesaro stated that when Kaho'ohalahala previously represented Lāna'i on the Maui County Council, he commuted to and from work on Maui because he received an allowance for that purpose.

Pelesaro testified that Kaho'ohalahala had recently served as Executive Director of the Kaho'olawe Island Reserve Commission, and that he was currently employed by the state as an instructor at Maui Community College (MCC). She testified that he resided with his wife at an address on Fleming Road in Lahaina while employed at the Commission and MCC because "they've got no appointment for him to commute." During a break between his employment with the Commission and MCC, Kaho'ohalahala was on Lāna'i "for awhile" as well, helping to care for family members. Pelesaro testified that Kaho'ohalahala's wife was the Vice Principal at Lahainaluna School, and Pelesaro did not know if she joined him on Lāna'i during that period.

Pelesaro stated that "[Kaho'ohalahala] and his wife had talked as long as [she had] known them, about remaining on Lanai for the rest of their lives, their children are

adopt the spelling used by the Board.

11. There are different spellings of her name in the record. For purposes of this opinion, we

there, their grandchildren are there, ... it was work related why he had to physically not be there all the time." She also testified that she knew Kaho'ohalahala to be truthful, and that she did not believe he would lie under oath.

The Board asked for the opportunity to ask Kaho'ohalahala some "questions for clarification," but his counsel objected and the Board responded that it would "not yield to ask him questions[.]"

[1-3] The Board entered the following decision dated November 1, 2008, sustaining Dupree's appeal and overruling Hiraga's October 10, 2008 decision:¹²

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION**

FINDINGS OF FACT

***Mr. Dupree's Complaint to
the County Clerk***

2. Mr. Kaho'ohalahala is a candidate for the Maui County Council for the seat designated for the resident of the Island of Lana'i for the 2008 general election.

3. By letter received September 29, 2008, Mr. Phoenix Dupree, also known as Michael Phoenix Dupree, also known as Phoenix, a registered voter of the State of Hawai'i, filed a challenge to Mr. Kaho'ohalahala's right to be or to remain registered as a voter of the Lanai District/Precinct 13/07.

4. Mr. Dupree contends that while Mr. Kaho'ohalahala is from Lana'i and has family on Lana'i, he is in fact not a resident of Lana'i.

5. Based primarily on Mr. Kaho'ohalahala's stated intention of establishing his residence in Lana'i City, with the intention of making it his permanent dwelling place, the County Clerk concluded that "with the exception of the period from July 2006 to July 2008, Mr. Kaho'ohalahala's residence

address of record has always been on Lana'i." Accordingly, the County Clerk determined that Mr. Dupree's challenge was not sustained.

***Mr. Dupree's Appeal to the
Board of Registration***

6. By letter dated October 16, 2008, ... Mr. Dupree appeals the County Clerk's decision that Solomon P. Kaho'ohalahala is a registered voter in (Lana'i) District/Precinct 13/07.

7. Up until July 10, 2006, Mr. Kaho'ohalahala resided at [] Akolu Place, Lana'i City, Lana'i, Hawai'i 96763.

8. On or about July 10, 2006, Mr. Kaho'ohalahala changed his residence from Lana'i to [] Fleming Road, Lahaina, Maui[.]

9. On or about July 15, 2008, Mr. Kaho'ohalahala changed his residence to [] Fraser Avenue, Lana'i City, ... where his brother and his brother's family reside.

10. Mr. Kaho'ohalahala is employed by the Research Corporation of the University of Hawai'i as an instructor/facilitator at Maui Community College, at its campus in Wailuku, Maui[.]

11. Mr. Kaho'ohalahala is married to Lynn Kaho'ohalahala, who is a vice principal at Lahainaluna High School, in Lahaina, Maui[.]

12. While originally from Lana'i, and while his brother continues to live on Lana'i, Mr. Kaho'ohalahala does not own or work for a business on Lana'i, nor does he own or rent a house or keep a car on Lana'i.

13. Mr. Dupree has lived on Lana'i since 1991 and is currently employed as the general manager of the Blue Ginger Café. He presented Ron McComber, a resident of Lana'i, as a witness who testified that he has not seen Mr. Kaho'ohalahala on Lana'i.

14. Since July 2008 (when Mr. Kaho'ohalahala claims that he moved back to Lana'i), Mr. Dupree has not seen Mr.

12. The decision is dated November 1, 2008, but there is no indication in the record of when it was served. However, Hiraga states in his open-

ing brief, and the other parties do not dispute, that they were served on November 12, 2008.

Kaho'ohalahala at the post office, either bank, the Lana'i store, the gas station, or any restaurant on Lana'i.

15. The County Clerk received letters from eleven other residents of Lana'i disputing Mr. Kaho'ohalahala's Lana'i residency.

16. In support of his claim of residency on the island of Lana'i, Mr. Kaho'ohalahala submitted an affidavit in which he states that he "was born and raised on the island of Lana'i and retained [his] residence on Lana'i except for a brief period in which [he] was in the service of the State of Hawai'i with the Kaho'olawe Island Reserve Commission."^{1 (13)}

17. Mr. Kaho'ohalahala further states that his family has continuously lived on the island of Lana'i throughout his life and that it is his understanding that he is a legal resident of Lana'i because [] his permanent residence is, and was at the time he filed his nomination papers, [] Fraser Avenue, Lana'i City.

18. Mr. Kaho'ohalahala's brother, Gaylien, also submitted an affidavit in which he states that Mr. Kaho'ohalahala talked with

him about returning to Lana'i to live and that Mr. Kaho'ohalahala has resided at [] Frazer [sic] Avenue since [the] beginning of July, 2008.

19. Other than Mr. Kaho'ohalahala's self-proclaimed intention, which was corroborated by his brother, and a witness testifying as to his veracity, no evidence was presented regarding his abandonment of his residency in Lahaina and his permanent relocation to Lana'i.¹⁴

CONCLUSIONS OF LAW

3. Appellant Michael P. Dupree has standing to bring this appeal of County Clerk Roy T. Hiraga's decision regarding Mr. Dupree's challenge to Solomon P. Kaho'ohalahala's residency for election purposes. [HRS] § 11-25 ("Any registered voter may challenge the right of a person to be or to remain registered as a voter in any precinct for any cause not previously decided by the board of registration or the supreme court in respect to the same person[.]")

13. The Board's decision included a footnote at this point, which stated the following:

The County Clerk concluded that Mr. Kaho'ohalahala "did not lose his residency due to his absence from Lanai while he was employed in the service of the State", however, Mr. Kaho'ohalahala legally changed his residency from Lana'i to Lahaina on July 10, 2006.

14. It must be noted that the Board's findings made only a passing reference to Pelesaro, who was Kaho'ohalahala's only witness at the October 31, 2008 Board hearing. Also, although FOF 5 summarized Hiraga's October 10, 2008 ruling, the Board did not discuss the details of Hiraga's testimony in its findings. See *Application of Hawaii Elec. Light Co., Inc.*, 60 Haw. 625, 641-42, 594 P.2d 612, 623 (1979). ("The requirement that the [agency] set out findings of fact and conclusions of law is no mere technical or perfunctory matter. The purpose of the statutory requirement that the agency set forth separately its findings of fact and conclusions of law is to assure reasoned decision making by the agency and enable judicial review of agency decisions.") (citations omitted). In that regard, "[a]n agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision." *Nakamura v. State*, 98 Hawai'i 263, 276, 47 P.3d 730, 743 (2002) (Acoba, J., joined by Ramil, J., concurring

in part and dissenting in part) (quoting *Kilauea Neighborhood Ass'n v. Land Use Comm'n*, 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (1994)) (brackets omitted). As this court has stated:

The circumstance that the evidence is in the transcript and that the court, by weighing it, can determine for itself 'the facts' does not suffice. The agency is the fact finder, and the undigested transcript is not a substitute for a set of findings of fact. Nor should a court be put in a position wherein it is forced to ferret out the facts[.]

Hawaii Elec. Light Co., 60 Haw. at 642, 594 P.2d at 623-24 (citation and ellipsis omitted).

Thus, although the Board's ultimate decision was not clearly erroneous for the reasons set forth in section IV.B *infra*, it is important for administrative agencies to be complete in their factual findings to encourage confidence in "reasoned decision making by the agency." *Nakamura*, 98 Hawai'i at 276, 47 P.3d at 743 (Acoba, J., joined by Ramil, J., concurring in part and dissenting in part) (citation omitted); cf. *Igawa v. Koa House Restaurant*, 97 Hawai'i 402, 412, 38 P.3d 570, 580 (2001) (Acoba, J., concurring in part and dissenting in part) ("Findings and conclusions by an administrative agency in a contested case must be reasonably clear to enable the parties and the court to ascertain the basis of the agency's decision.").

4. Pursuant to the Maui County Charter Section 3-1, the Council shall be composed of nine members elected at large, and as it pertains to this case, one of whom shall be a resident of the island of Lana'i.

5. Pursuant to Maui County Charter Section 3-3, to be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days next preceding the filing of nomination papers and at the time of the filing of nomination papers, a resident in the area from which the person seeks to be elected.

6. Pursuant to [HRS] § 11-13(1), for election purposes, Mr. Kaho'ohalahala's residence is that place in which his habitation is fixed, and to which, whenever he is absent, he intends to return.

7. Pursuant to [HRS] § 11-13(2), "[a] person does not gain residency in any precinct into which the person comes without the present intention of establishing the person's permanent dwelling place within such precinct."

8. Pursuant to [HRS] § 11-13(3), "[i]f a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than with the person's family, with the intention of remaining there shall be considered a resident where the person has established such dwelling place."

9. Pursuant to [HRS] § 11-13(4), "[t]he mere intention to acquire a new residence without physical presence at such place, does not establish residency, neither does mere physical presence without the concurrent present intention to establish such place as the person's residence."

10. Pursuant to [HRS] § 11-13(5), "[a] person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison."

11. A rational, sensible, and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable, inasmuch as the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality. *Morgan v. Planning Department, County of Kauai*, 104 Hawai'i 173, 86 P.3d 982 (2004).

12. In order to relinquish one's domicile or residence there must be an intent to remain permanently at the new place where one is physically present and to simultaneously abandon the previously permanent place of abode. Acquisition of the new domicile must have been completed and the *animus* to remain in the new location fixed, before the former domicile can be considered lost. See *Akata v. Brownell*, 125 F.Supp. 6 (D.Hawai'i 1954); *Powell v. Powell*, 40 Haw. 625 (1954); *Anderson v. Anderson*, 38 Haw. 261 (1948); *Zumwalt v. Zumwalt*, 23 Haw. 376 (1916). Residence is not lost by a temporary absence nor by maintaining a temporary home elsewhere. *Hurley v. Knudsen*, 30 Haw. 887 (1929).

13. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion by a preponderance of the evidence. [HRS] § 91-10(5); [Hawai'i Administrative Rules (HAR)] § 2-51-43(h).

14. Mr. Dupree, as the person initiating the proceeding, presented sufficient credible evidence to prove by a preponderance that Mr. Kaho'ohalahala did not abandon his residence in Lahaina, Maui, ... and did not relocate his permanent residence to Lana'i City, Lana'i[.]

DECISION

Based upon the foregoing findings of fact and conclusions of law, the Board sustains Mr. Dupree's appeal of the County Clerk's October 10, 2008, determination and the County Clerk's decision is hereby overruled. For purposes of this 2008 election, Mr. Kaho'ohalahala is a resident of Lahaina, Maui[.]

In the event of an appeal of this decision, Mr. Kaho'ohalahala shall be allowed to vote "provided that the ballot is placed in a sealed envelope to be later counted or rejected in accordance with the ruling on appeal." See [HRS] § 11-25(c).

Three days after the issuance of the Board's decision, Kaho'ohalahala won the general election for the Lāna'i seat on the Maui County Council.

Hiraga and Kaho'ohalahala both appealed to the Intermediate Court of Appeals from the Board's November 1, 2008 decision. On June 10, 2009, Dupree applied for mandatory and discretionary transfer of the appeal to this court. On July 1, 2009, this court granted the transfer on both grounds.

II. ISSUES ON APPEAL

Kaho'ohalahala raises the following issues on appeal:

- 1) "The Board lacked jurisdiction to hear and resolve Dupree's appeal because Dupree never challenged Kaho'ohalahala's voter-registration status." Specifically, Kaho'ohalahala challenges Findings of Fact (FsOF) No. 3 and 4 and Conclusions of Law (CsOL) No. 2 and 3 of the order denying his motion to dismiss, and FOF No. 3 and CsOL No. 2-5 of the Board's November 1, 2008 decision.
- 2) "The Board erred in reversing the clerk's ruling because Dupree failed to adequately prove that Kaho'ohalahala[s] residence was Lahaina, Maui." Specifically, Kaho'ohalahala challenges FsOF No. 5, 7, 8, 13, 14, 16 and 19 and CsOL No. 4-6, 12, and 14 of the Board's November 1, 2008 decision.

Hiraga raises the following issues:

- 1) "The [Board] exceeded its statutory authority and jurisdiction[.]" Hiraga argues that although the Board has jurisdiction to determine voter registration eligibility, "the [Board's] decision improperly expanded the Board's jurisdiction to rule on whether Kaho'ohalahala's candidacy for County office met the criteria set out in the County Charter" and it lacked jurisdiction to determine residency "for election purposes." Specifically, Hiraga challenges FsOF No. 2 and CsOL Nos. 3, 4, 5, and 6, and the "Decision" section of the Board's November 1, 2008 decision.
- 2) "The [Board] erred in considering and relying on immaterial and irrelevant criteria for residency[.]" including the letters of citizen complainants who did not appeal Hiraga's opinion or testify at the hearing on appeal,¹⁵ as well as whether Kaho'ohalahala worked on Lāna'i, owned a house or business there, kept a car there, or had been seen by Dupree there. Specifically, Hiraga challenges FsOF 12, 13, 14, and 15.
- 3) CsOL No. 3, 4, 5, and 6 are erroneous because "the [Board] lacked statutory authority and jurisdiction to draw these legal conclusions." In addition, CsOL No. 14 "does not accurately state the law and is not supported by the evidence."
- 4) "The [Board] erred in concluding that Dupree had met his burden of proof[.]"

15. However, Hiraga failed to provide any argument in his brief with regard to whether it was appropriate for the Board to rely on the letters from the other complainants, and accordingly this point is waived. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived."). In any event, although the Board referred to the letters in FOF

No. 15, there is no indication that the Board relied on the letters in reaching its decision. Moreover, HAR § 2-51-43(h) provides that "rules of evidence in HRS § 91-10 shall be applicable" to appeals to the Boards of Registration, and HRS § 91-10(1) provides, with some limitations, that "any oral or documentary evidence may be received."

III. STANDARDS OF REVIEW

A. Administrative Agency Conclusions of Law and Findings of Fact

[4] While the parties agree that findings of fact should be reviewed for clear error and conclusions of law should be reviewed under the right/wrong standard, they disagree on the standard applicable to the Board's ultimate determination that Kaho'ohalahala was

No. 15, there is no indication that the Board relied on the letters in reaching its decision. Moreover, HAR § 2-51-43(h) provides that "rules of evidence in HRS § 91-10 shall be applicable" to appeals to the Boards of Registration, and HRS § 91-10(1) provides, with some limitations, that "any oral or documentary evidence may be received."

a resident of Lahaina rather than Lāna'i. Kaho'ohalahala states that findings of fact and conclusions of law that present mixed questions of law and fact are reviewed under the clearly erroneous standard. Hiraga states that the principle issue in this case is whether he correctly interpreted HRS § 11-13 that Kaho'ohalahala was a Lāna'i resident, which is a conclusion of law reviewable under the right/wrong standard. Dupree states that the Board's determination that Kaho'ohalahala was not a Lāna'i resident is entitled to "a presumption of validity[,"] citing *Kelipuleole v. Wilson*, 85 Hawai'i 217, 226, 941 P.2d 300, 309 (1997).

In *Del Monte Fresh Produce (Hawaii), Inc. v. Int'l Longshore & Warehouse Union*, 112 Hawai'i 489, 146 P.3d 1066 (2006), this court identified the applicable standard of review as follows:

An agency's conclusions of law are reviewed de novo, while an agency's factual findings are reviewed for clear error. A conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case.

As a general matter, a finding of fact or a mixed determination of law and fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Id. at 499, 146 P.3d at 1076 (emphasis added) (internal quotation marks, citations, and brackets omitted); see *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 167 P.3d 292 (2007) (holding that in general, an agency's conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard, but questions concerning whether an agency has followed proper procedures or considered the appropriate factors in making its determination

are questions of law which are reviewed de novo); *Peroutka v. Cronin*, 117 Hawai'i 323, 326, 329-30, 179 P.3d 1050, 1053, 1056-57 (2008) (holding that "[w]here both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency[,"] and that the Chief Election Officer did not clearly err in rejecting signatures on a petition for inclusion on the presidential ballot (citation omitted)).

B. Jurisdiction

[5] "The existence of jurisdiction is a question of law that we review de novo under the right/wrong standard." *Captain Andy's Sailing, Inc. v. Dep't of Land and Natural Resources, State of Hawai'i*, 113 Hawai'i 184, 192, 150 P.3d 833, 841 (2006) (internal quotation marks, brackets, and citation omitted).

C. Interpretation of a Statute

[6] "Interpretation of a statute is a question of law which we review de novo." *Kikuchi v. Brown*, 110 Hawai'i 204, 207, 130 P.3d 1069, 1072 (App.2006) (internal quotation marks and citation omitted).

IV. DISCUSSION

A. The Board had jurisdiction to consider Dupree's appeal

1. Hiraga had the authority to initiate an investigation based on Dupree's letter to him

[7] Kaho'ohalahala argues that the Board did not have jurisdiction to hear Dupree's appeal because "[Dupree's] initial complaint to [Hiraga] did not challenge Kaho'ohalahala's voter registration[,"] but instead sought to "declare Kaho'ohalahala an ineligible candidate." However, for the following reasons, we conclude that Hiraga acted within the scope of his authority in construing Dupree's letter as a challenge to Kaho'ohalahala's right to vote as a Lāna'i resident.

HRS §§ 11-25 and 12-8 impose two distinct responsibilities on county clerks. First, under HRS § 12-8(a), a voter may challenge a candidate's nomination papers based on the

candidate's assertion of residency. See HRS § 12-8 (a voter may file an objection to a candidate's nomination papers up to 30 days prior to the primary or special election day); HRS § 12-3 ("Nomination paper: format; limitations[]") (a candidate's nomination papers must include the "residence address and county in which the candidate resides"). Upon receipt of an objection to nomination papers, the clerk has the authority to issue a preliminary decision, and to file a complaint in the circuit court if the clerk determines that disqualification may be warranted.¹⁶ HRS § 12-8(d) & (e).

Second, under HRS § 11-25, a registered voter may also challenge another person's right to be or remain a registered voter based on that person's assertion of residency. See HRS § 11-25(a) (noting that prior to election day, a voter may challenge another person's right to be or remain a registered voter "for any cause"); HRS § 11-15 (1993 & Supp.1998) ("Application to register") (requiring a person seeking to register to vote to submit an affidavit which includes a declaration of that person's residence). Upon receiving a written challenge signed by the registered voter and "setting forth the grounds upon which it is based," the clerk is required to notify the person challenged and to "investigate and rule on the challenge" as soon as possible. HRS § 11-25(a).

Dupree's letter to Hiraga alleged that although Kaho'ohalahala was from Lāna'i and had family there, he did not live there. Dupree alleged that Kaho'ohalahala did not own a home, own or manage a business, or work on Lāna'i. Dupree stated that Kaho'ohalahala had not campaigned on Lāna'i, and that he had not been seen around the island shopping, going to the post office, filling up his

tank at the gas station, or driving on his way to catch the commuter boat to Maui. In sum, Dupree's letter set forth a detailed factual basis in support of his contention that Kaho'ohalahala was not a resident of Lāna'i.

As Kaho'ohalahala observes, Dupree's letter focused on Kaho'ohalahala's residency for the purpose of challenging his eligibility as a candidate from Lāna'i, rather than his right to vote on Lāna'i. However, that does not mean that Hiraga was required to ignore Dupree's factual allegations insofar as they cast doubt on the legitimacy of Kaho'ohalahala's voter registration on Lāna'i. To the contrary, Hiraga acted within the scope of his authority when he construed the letter as a challenge to Kaho'ohalahala's right to vote as a Lāna'i resident, and initiated an investigation on that basis. See *Am. Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 800 (7th Cir.1951) (in unfair labor practice proceeding under the Labor Management Relations Act, court observes that when a complaint "clearly describes an action which is alleged to constitute an unfair labor practice but fails to allege which subsection of the Act has been violated or alleges the wrong subsection, such failure or mistake, if it does not mislead the parties charged, does not prevent the [National Labor Relations Board] from considering and deciding the charge so presented"); *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135-136 (2d Cir. 1990) (NLRB order finding that employer violated a section of the National Labor Relations Act not charged in the complaint was enforceable, where the employer had notice of the allegedly unlawful acts and the issue had been fully litigated); cf. *Maha'ulepu v. Land Use Com'n*, 71 Haw. 332, 335, 790 P.2d 906, 908 (1990) ("Ordinarily, deference will be given to decisions of administrative agencies

16. HRS § 12-8(d) & (e) provide:

(d) Except for objections by an officer of a political party filed directly with the circuit court, the chief election officer or the clerk in the case of county offices shall have the necessary powers and authority to reach a preliminary decision on the merits of the objection; provided that nothing in this subsection shall be construed to extend to the candidate a right to an administrative contested case hearing as defined in section 91-1(5). The chief election officer or the clerk in the case of county offices shall render a preliminary decision not later

than five working days after the objection is filed.

(e) If the chief election officer or clerk in the case of county offices determines that the objection may warrant the disqualification of the candidate, the chief election officer or clerk shall file a complaint in the circuit court for a determination of the objection; provided that such complaint shall be filed with the clerk of the circuit court not later than 4:30 p.m. on the seventh working day after the objection was filed.

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acting within the realm of their expertise.”); see also *Haole v. State*, 111 Hawai'i 144, 152, 140 P.3d 377, 385 (2006) (“it is well established that an administrative agency’s authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted. The reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency.”) (2006) (emphasis added).

Hiraga’s decision to investigate in these circumstances did not cause unfair surprise or undue prejudice to Kaho’ohalahala. In *Perry v. Planning Commission*, 62 Haw. 666, 685–86, 619 P.2d 95, 108 (1980), this court held that pleadings in administrative proceedings are to be construed liberally rather than technically. In *Perry*, the appellants sought a special permit from the County of Hawaii Planning Commission and the State Land Use Commission to use land within an agricultural district for “quarrying” purposes. *Id.* at 669, 619 P.2d at 99. After the permit was granted, several owners of property adjoining the proposed quarry site appealed, arguing that the permit exceeded the scope of the application by including permission for a screening and crushing operation. *Id.* at 673, 619 P.2d at 101. The circuit court agreed, and invalidated the permit. *Id.* at 685, 619 P.2d at 107. This court reversed, holding that although the appellants originally sought permission only for “quarrying operations,” the full extent of the proposed operations was fully disclosed in additional documents, the notice of the public hearing, and during the public hearing, and that communications between the adjacent land owners and the commissions “reveal[ed] an awareness that the proposed use extended beyond” quarrying. *Id.* at 685, 619 P.2d at 107. In finding that the “circuit court’s holding is contrary to prevailing principles of administrative law that regard such formalism with disfavor[.]” *id.* at 686, 619 P.2d at 108, this court stated:

Modern judicial pleading has been characterized as simplified notice pleading. Its function is to give opposing parties fair notice of what the claim is and the grounds upon which it rests. That the same, if not

more lenient standard, also governs administrative pleadings is indisputable.

Id. at 685, 619 P.2d at 108 (citation, internal quotation marks and ellipsis omitted).

This court went on to cite *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250 (D.C.Cir.1979) as follows:

Pleadings in administrative proceedings are not judged by the standards applied to an indictment at common law. It is sufficient if the respondent understood the issue and was afforded full opportunity to justify its conduct during the course of the litigation. Thus, the question on review is not the adequacy of the pleading but is the fairness of the whole procedure.

Perry, 62 Haw. at 686, 619 P.2d at 108 (quoting *Aloha Airlines, Inc.*, 598 F.2d at 262 (internal quotation marks and ellipsis omitted)).

[8] The analysis of *Perry* is instructive here, since there were multiple forms of relief possible (loss of voter registration in a particular precinct under HRS §§ 11–25 and 11–26, disqualification as a candidate under HRS § 12–8) based on the same underlying factual allegation concerning Kaho’ohalahala’s residency. Even in the context of civil pleadings, the failure to expressly plead a particular claim for relief is not dispositive, where the complaint alleges the underlying facts relating to that claim and there is no prejudice to the opposing party. *Suzuki v. State*, 119 Hawai'i 288, 296, 196 P.3d 290, 298 (App.2008) (plaintiff’s complaint construed as including a claim for race discrimination).

[9] Moreover, Dupree was proceeding pro se when he submitted his letter to Hiraga. Pleadings prepared by pro se litigants should be interpreted liberally. See *Giuliani v. Chuck*, 1 Haw.App. 379, 385–86, 620 P.2d 733, 737–38 (1980) (“The rules [of civil procedure] do not require technical exactness or draw refined inferences against the pleader; rather, they require a determined effort to understand what the pleader is attempting to set forth and to construe the pleading in his favor. This is particularly true when a court is dealing with a complaint drawn by a layman unskilled in the law.”).

Kaho'ohalahala does not allege that because Hiraga construed Dupree's letter as a challenge to his residency for voter registration purposes, Kaho'ohalahala was denied full opportunity to be heard in opposition. On the contrary, Kaho'ohalahala acknowledges that Hiraga contacted him the day after receiving the first two complaint letters, informed Kaho'ohalahala that he was construing the complaints as challenges to his voter registration status pursuant to HRS § 11-25, stated that he would conduct an investigation on the matter, and asked Kaho'ohalahala to respond to the allegation. Kaho'ohalahala responded both by alleging that he was a resident of Lāna'i, and by arguing that the complaint letters were untimely challenges to his nomination papers. Kaho'ohalahala continued to argue this point in his motion to dismiss, his petition for writ of mandamus, and at the October 31, 2008 hearing on the merits. From the start, he was notified of the allegations and took full advantage of the opportunity to respond. Although Kaho'ohalahala disagrees with the outcomes of the various rulings, he was not denied a fair opportunity to respond.

[10, 11] In sum, Hiraga acted within the scope of his authority in construing the complaint letters as a challenge to Kaho'ohalahala's residency under HRS § 11-25, and investigating on that basis. The Board therefore did not err in denying Kaho'ohalahala's motion to dismiss, and had jurisdiction to hear Dupree's appeal from that aspect of Hiraga's decision.¹⁷ Therefore, the Board did not clearly err in entering FsOF Nos. 3 and 4 in the order to dismiss and FsOF Nos. 2 and 3 in its November 1, 2008 decision. Nor was the Board wrong in entering CsOL Nos. 2 and 3 in the order denying his motion to

17. It is unclear whether Kaho'ohalahala also challenges the sufficiency of Dupree's October 20, 2008 letter of appeal to the Board. However, since we are obligated to ensure the existence of jurisdiction, see *Chun v. Employees' Ret. Sys. of the State of Hawai'i*, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992); *Hawaii Mgmt. Alliance Assoc. v. Ins. Comm'r*, 106 Hawai'i 21, 27, 100 P.3d 952, 958 (2004), we have reviewed that letter and conclude that it sufficiently challenged Kaho'ohalahala's voter registration status for the Board to have jurisdiction to hear the appeal.

HRS § 11-26(a) provides that in instances where the clerk rules on a challenge to voter

dismiss, or CsOL Nos. 2-6 in the Board's November 1, 2008 decision.

2. The Board did not exceed its jurisdiction by referring to Kaho'ohalahala's candidacy and the residency requirement of the Maui County Charter

[12, 13] Hiraga concedes that the Board had jurisdiction to hear Dupree's appeal insofar as it challenged Kaho'ohalahala's voter registration status. However, Hiraga argues that the Board exceeded its jurisdiction in parts of its November 1 Decision by addressing matters related to Kaho'ohalahala's candidacy. Specifically, Hiraga challenges FOF No. 2, which states that Kaho'ohalahala "is a candidate for the Maui County Council for the seat designated for the resident of the Island of Lāna'i[.]" Hiraga next challenges CsOL Nos. 4 and 5, which summarize Maui County Charter §§ 3-1 and 3-3 and state that the council shall be composed of nine members, including one who is a resident of Lāna'i, and that to be eligible to run for the seat, the candidate must be a resident for 90 days next preceding the filing of nomination papers. Kaho'ohalahala also argues that the "Maui County Charter references indicate that the Board's decision went beyond its statutory authorization" in that they "suggest that Kaho'ohalahala did not truthfully certify in his nomination papers that he qualified to run for the Maui County Council." Hiraga also challenges CsOL Nos. 3 and 6, which discuss the challenge to Kaho'ohalahala's residency "for election purposes," as well as the portion of the decision holding that Kaho'ohalahala is a resident of Lahaina "[f]or purposes of the 2008 election[.]" Hiraga ar-

registration prior to election day, "the person ruled against may appeal from the ruling to the board of registration[.]" In his October 20, 2008 letter to the Board, Dupree alleged that Kaho'ohalahala "misrepresent[ed] himself on his voter registration, his nomination papers and his sworn affidavit." Dupree's appeal thus sufficiently notified Kaho'ohalahala that Dupree was challenging his residency for voter registration purposes, and Kaho'ohalahala was given a full opportunity to respond. *Perry*, 62 Haw. at 685-86, 619 P.2d at 108.

gues that by including these passages, the Board not only ruled on Kaho'ohalahala's voter registration, but also exceeded its jurisdiction and ruled on his qualifications as a candidate as well. For the following reasons, we disagree with this interpretation of the Board's ruling.

FOF No. 2, which states that Kaho'ohalahala is a candidate for the Lāna'i seat, is an undisputed fact and the Board did not exceed its jurisdiction by including it because it provided background and context for the appeal. CsOL Nos. 4 and 5 contain extraneous information on the Maui County Charter and the residency requirement for running for a council seat, and it is not clear from the record why the Board included them in its ruling. However, any error in including them is harmless because they were not material to the Board's holding and do not purport to address Kaho'ohalahala's candidacy.

[14] Finally, although the Board stated in several instances that it was ruling on residency "for election purposes," it is apparent from the Board's decision that it was not purporting to rule on whether Kaho'ohalahala was properly a candidate, but only on whether he was properly registered to vote. First, the phrase "for election purposes" appears in HRS § 11-13, which sets forth the rules for determining residency for voting purposes. HRS § 11-13 ("The following rules shall determine residency for election purposes only[.]"). Thus, the Board's reference to that phrase does not imply that it was making any determination with regard to his candidacy. Second, the limited scope of the Board's holding is also apparent when the challenged phrase is examined in the context of the relief granted by the Board. Cf. *Taylor-Rice v. State*, 91 Hawai'i 60, 75, 979 P.2d 1086, 1101 (1999) (clarifying the scope of a challenged conclusion of law by viewing it in context with the trial court's other findings and conclusions). In the "Decision" section of its November 1, 2008 decision, the Board stated that, pursuant to HRS § 11-25(c), if Kaho'ohalahala chose to appeal, he would be allowed to vote "provided that the ballot is placed in a sealed envelope to be later counted or rejected in accordance with

the ruling on appeal." The decision did not mention any possible consequences for Kaho'ohalahala's candidacy under the provisions applicable to a candidate whose nomination papers have been successfully challenged. See HRS § 12-8. Accordingly, the Board ruled only on Kaho'ohalahala's right to be or remain a registered voter, which was within the scope of its jurisdiction. HRS §§ 11-25(a) and 11-26(b) (1993). Thus, the Board did not exceed its jurisdiction in entering FOF No. 2, CsOL Nos. 4 and 5, and by stating that it was determining Kaho'ohalahala's residency for purposes of the 2008 election.

B. The Board did not clearly err in finding that Kaho'ohalahala was not a resident of Lāna'i for the purpose of voting in the 2008 election

The starting point for our analysis is HRS chapter 11, which is entitled "Elections." HRS § 11-12 (1993) provides that a person may not register to vote in a precinct other than that in which he or she resides. HRS § 11-13 provides in relevant part as follows:

Rules for determining residency. For the purpose of this title, there can be only one residence for an individual, but in determining residency, a person may treat oneself separate from the person's spouse. The following rules shall determine residency for election purposes only:

(1) The residence of a person is that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has the intention to return;

(2) A person does not gain residence in any precinct into which the person comes without the present intention of establishing the person's permanent dwelling place within such precinct;

(3) If a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than with the person's family, with the intention of remaining there shall be considered a resi-

dent where the person has established such dwelling place;

(4) The mere intention to acquire a new residence without physical presence at such place, does not establish residency, neither does mere physical presence without the concurrent present intention to establish such place as the person's residence;

(5) A person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;

(7) A person loses the person's residence in this State if the person votes in an election held in another state by absentee ballot or in person.

In case of question, final determination of residence shall be made by the clerk, subject to appeal to the board of registration under part III of this chapter.

18. Although it has been amended several times since then, those amendments are not relevant to the substance of this appeal. For example, in 1975, the introductory paragraph of HRS § 11-13 was amended to eliminate a requirement that if "a husband is a resident of this State, ... then the residency of the husband shall determine the residency of the wife." Compare 1970 Haw. Sess. Laws Act 26, § 2 at 19-20 with 1975 Haw. Sess. Laws Act 36, § 1 at 49-50. In 1977, the Legislature, inter alia, eliminated a provision for computing the length of residence. 1977 Haw. Sess. Laws Act 189, § 1 at 403-04. No substantive changes have been made to HRS § 11-13 since then.

Since its adoption in 1970, there have been no published Hawai'i cases interpreting HRS § 11-13.

19. HRS § 11-2 (1968) stated as follows:

Age, place of registering and voting. Every person who has reached the age of twenty years, or who will have reached the age of twenty years on or before the date of the next election, and is otherwise qualified to register may do so in the precinct in which he resides. No person shall register or vote in any other precinct than that in which he resides; provided, that where there is a mistake in placing the name of the elector on the list of electors of a precinct in which he does not actually reside,

HRS § 11-13 was enacted in 1970 as part of a comprehensive revision of the State's election law.¹⁸ The House Judiciary Committee stated that "[t]he purpose of the bill is to consolidate, streamline, and update all the material relating to elections presently scattered throughout the statutes." H. Stand. Comm. Rep. No. 1178, in 1969 House Journal, at 852.

Prior to the 1970 recodification, the Hawai'i Revised Statutes provided that "[n]o person shall register or vote in any other precinct than that in which he resides," but provided no guidance on determining residency other than noting that "[i]f any person resides in more than one precinct he may elect in which precinct he will register, but he shall register in one precinct only." HRS § 11-2 (1968).¹⁹ Similar provisions were included in Hawai'i's election laws since at least 1897.²⁰

In enacting HRS § 11-13, the Legislature noted that "[r]esidency has been clarified" to address various issues, including the "many instances of voters residing in one area of the State and claiming residency in another." H. Stand. Comm. Rep. No. 1178, in 1969 House

the elector shall nevertheless be allowed to vote therein, if otherwise qualified; and the chairman of the inspectors of election of the precinct where the elector has voted shall notify the county clerk of the error in order that the name of the elector may be placed on the next succeeding list of electors of the precinct where he actually resides.

If any person resides in more than one precinct he may elect in which precinct he will register, but he shall register in one precinct only.

20. Civil Laws of the Hawaiian Island 1897, Appendix at § 28, stated as follows:

Place of registering and voting. Every person qualified to register may do so in the [p]recinct in which he resides; and no person shall register or vote in any other [p]recinct than that in which he resides.

If any person resides in more than one [p]recinct, he may elect which [p]recinct he will register in; but he shall register in one [p]recinct only.

Provided, however, that at any special election, any person who has previously registered, and since registering has moved his residence to another precinct without having had an opportunity to register therein, may vote in the precinct in which he was last registered.

Journal, at 852;²¹ S. Stand. Comm. Rep. No. 830-70, in 1969 Senate Journal, at 1374-75.²²

In substance, HRS § 11-13 sets forth general requirements for establishing residency in subsection (1), and then provides additional rules in subsections (2)-(7) that address specific situations that may arise. The definition in subsection (1) requires the voter to both have a "habitation . . . fixed" in the place where the voter registers, and to have the intention to return to that place whenever absent. That formulation adopts a commonly stated test for determining domicile, which has been used by many other states to evaluate residency for voter registration purposes, see Note, *College Student Voting: A New Prescription for an Old Ailment*, 56 Syracuse L.Rev. 145, 151 (2005) (noting that "state election laws uniformly equate 'residence' to 'domicile'"), as well as by this court in cases decided prior to the 1970 recodification, see *In re Hurley*, 30 Haw. 887, 896-97 (1929). Additionally, this court has used similar formulations of the test to evaluate domicile in other contexts. *Yamane v. Piper*, 51 Haw. 339, 340, 461 P.2d 131, 132 (1969) (defining "resident" in terms of "domicile" when determining whether a person is a resident of Hawai'i for income tax purposes); *Blackburn v. Blackburn*, 41 Haw. 37, 40-41 (1955) (construing "resided" to mean "domiciled" in the divorce context); *Powell v. Powell*, 40 Haw. 625, 628-30 (1954) (applying domicile principles to evaluating whether husband was a resident of the Territory of Hawai'i for the purposes of a separate maintenance suit).

HRS § 11-13(4) addresses changes in residency, and provides that "[t]he mere intention to acquire a new residence without physical presence at such place" is not sufficient to establish a new residence. Thus, consistent with HRS § 11-13(1), this section re-

quires both action and intent on the part of the voter before a new residence is established. The requisite intent is to "acquire a new residence." HRS § 11-13(4). This necessarily implies a concurrent intent to abandon his or her prior residence, since a person can have only one residence under the statute. HRS § 11-13 ("there can be only one residence for an individual").

In the instant case, the Board found that Kaho'ohalahala was a Lāna'i resident up to the 2006 election. There is substantial evidence to support that finding. The record establishes that he was born and raised on Lāna'i, had family there, returned periodically over the years, was registered to vote there from 1982 up until 2006, and although he lived and was employed elsewhere at various times, his stated intent was always to return.

However, in 2006, Kaho'ohalahala changed his voter registration to Lahaina, where he was living and working at the time. The Board found that by so doing, he lost his residency on Lāna'i. The Board did not clearly err in reaching that conclusion. By registering to vote in Lahaina, Kaho'ohalahala represented that it was his place of residence. See HRS § 11-13 ("there can be only one residence for an individual"); HRS § 11-15 (a citizen seeking to register to vote must submit an affidavit including a declaration of his residence). That statement of intent, together with his habitation on Maui, established Maui as his residence. HRS §§ 11-13(1) & (4).

Courts from other jurisdictions that apply a domicile test have concluded that the act of registering to vote or voting in a new district results in the loss of residence in a district where the voter previously resided. - See

are also many instances of a male resident of this State marrying a female resident of another state, who under the present law may not vote in this State until she has physically located here for one year. Under the present law the voting residence of the above people is vague.

....

22. The relevant portion of the Senate Judiciary Committee report was identical to the House Judiciary Committee report.

21. Specifically, the House Judiciary Committee report provided:

[2]a. Residency has been clarified by establishing that a person may only reside in one place and may only register to vote from that place.

There are many instances of voters residing in one area of the State and claiming residency in another. There are also instances of out-of-state residents declaring the intent of becoming Hawaii state residents prior to the time they are physically located in the State. There

Klunker v. Van Allred, 112 N.M. 42, 811 P.2d 75, 78-79 (1991) (finding that three brothers were not residents of the county where their family ranch was located because, although they visited the ranch regularly and kept personal items there, they had moved outside the county and voted at those locations); *Kauzlarich v. Bd. of Trs.*, 78 Ariz. 267, 278 P.2d 888, 891 (1955) (husband and wife were not residents of a county for voting purposes even though they purchased property there, moved a house and some personal property onto the premises, and went there each weekend to work on the property with the intention of moving there because they were still living outside the county, where they had registered to vote and voted); see also *Del Rio Indep. Sch. Dist. v. Aldrete*, 398 S.W.2d 597, 603 (Tex.Civ.App.1966) (noting that the place where a person votes is evidence of whether that person's actions corroborate his stated intention to change his residence for voting purposes).

[15] Kaho'ohalahala and Hiraga both argue that because Kaho'ohalahala was working for the State of Hawai'i when he was on Maui, HRS § 11-13(5) provided that he would not lose his Lāna'i residency. However, that statute provides that "[a] person does not lose a residence *solely* by reason of the person's presence or absence while employed in the service of . . . this State[.]" (emphasis added). HRS § 11-13(5). In the instant case, Kaho'ohalahala did not lose his Lāna'i residence solely by reason of being employed on Maui. Rather, he lost it because he registered to vote in Lahaina. While HRS § 11-13(5) protects the preexisting residency of a state employee who retains the intent to return to his original residence in the future and acts consistently with that intent, it does not protect someone who, like

Kaho'ohalahala, renounces that preexisting residency by registering to vote elsewhere.

Thus, when Kaho'ohalahala registered to vote on Lāna'i for the 2008 election, he did so not as someone seeking to vote there after a long, unbroken period of residency on the island. Rather, it was as someone who was seeking to change his residency to Lāna'i after having become a resident elsewhere, in this case Maui. In addition to satisfying the basic residency test of HRS § 11-13(1), i.e., that he had a "habitation . . . fixed" on Lāna'i and that he intended to return there when absent, he also needed to have a sufficient "physical presence" on Lāna'i under HRS § 11-13(4) to corroborate his intent to abandon his Maui residence.

[16] The Board concluded in COL No. 14 that Dupree established that Kaho'ohalahala did not abandon his residence in Lahaina and relocate his permanent residence to Lāna'i.²³ The Board did not clearly err in reaching that conclusion. The Board found, and there is substantial evidence in the record to establish, that Kaho'ohalahala did not own or work for a business on Lāna'i, and did not own or rent a house or keep a car on the island. Hiraga and Kaho'ohalahala argue that those findings are immaterial or not dispositive. While they are certainly not dispositive, they are relevant because they support an inference that Kaho'ohalahala had not established the necessary physical presence on Lāna'i.²⁴ Cf. *Yamane*, 51 Haw. at 340-41, 461 P.2d at 132-33 (concluding that "the pulling of stakes was complete" and appellee was no longer a Hawai'i resident for income tax purposes when he had moved to Wake Island with his wife and children, sold his car, TV, and household furnishings, and did not leave real or personal property or an open bank account in Hawai'i).

23. In his points of error on appeal, Hiraga contended that COL No. 14 was an inaccurate statement of the law. However, Hiraga failed to offer any argument in support of this contention, and accordingly it is deemed waived. HRAP 28(b)(7) ("Points not argued may be deemed waived.") In any event, although this conclusion does not directly track the provisions of HRS § 11-13, we believe that it fairly summarizes the showing required under HRS § 11-13(1) & (4) in the circumstances of this case.

24. Kaho'ohalahala notes that the letters submitted by eight of the citizen complaints stated that he had a P.O. Box on Lāna'i. However, the Board did not enter a finding on that issue; in any event, even if Kaho'ohalahala had a P.O. Box on Lāna'i, there is still insufficient evidence to establish the necessary physical presence on Lāna'i.

[17] The Board further found that Dupree had not seen Kaho'ohalahala at "the post office, either bank, the Lana'i store, the gas station or any restaurant on Lana'i." There was substantial evidence to support that conclusion as well. Once again, while none of those observations are dispositive, they are relevant. The record establishes that Lāna'i is a small, close knit community where residents would likely see each other at such locations. Thus, the observations support the inference that Kaho'ohalahala had not established a sufficient physical presence on Lāna'i.

Although Kaho'ohalahala and his brother's affidavit established that Kaho'ohalahala had been "welcomed" back to his brother's home in July 2008, there was nothing in the record to establish that Kaho'ohalahala actually lived there or anywhere else on Lāna'i in any commonly-understood meaning of the term. Kaho'ohalahala's affidavit states that his "residence is fixed at [] Fraser Avenue in Lana'i City." Similarly, his brother's affidavit states that Kaho'ohalahala "presently resides at [] Fraser Avenue [and has] resided there since the beginning of July, 2008." However, neither affidavit states that Kaho'ohalahala actually lives at that address, or that he has stayed there for any particular number of nights, keeps personal items there, shares in paying the utility bills, or provides any other details consistent with actual residence at a particular location.

[18] Moreover, there is no evidence in the record establishing that Kaho'ohalahala

had abandoned his established residence on Maui.²⁵ To the contrary, the record shows that he continued to work there, as did his wife,²⁶ and they continued to stay at their home in Lahaina.²⁷ Cf. *Arakaki v. Arakaki*, 54 Haw. 60, 62, 502 P.2d 380, 382 (1972) (party in a divorce proceeding "had a job, home, family and financial obligations in this state" and accordingly was a Hawai'i resident before becoming an "employee of the Federal Government working in Japan"; this court rejected his claim that he no longer was a Hawai'i resident since "[t]here is insufficient evidence in the record to rebut the presumption that appellant's domicile in Hawai'i continued while he resided in Japan").

[19] There was evidence that Kaho'ohalahala visited Lāna'i after registering to vote there in July 2008. Dupree testified that he had heard that Kaho'ohalahala was on Lāna'i for a rally just before the primary, and that he had observed Kaho'ohalahala on Lāna'i at the Aloha Festival in October 2008, when Kaho'ohalahala stayed on the island for several days. McComber also testified that Kaho'ohalahala returned to Lāna'i for the rally, and that he had seen Kaho'ohalahala's brother "pick[] him up at the dock and ... drive[] him around" on an unidentified number of instances.²⁸

These visits do not constitute a sufficient physical presence on Lāna'i to establish that Kaho'ohalahala had changed his residence from Maui to Lāna'i within the meaning of 11-13(4), nor are they sufficient to establish a "habitation ... fixed" on Lāna'i for the pur-

25. Kaho'ohalahala contends in his brief that the Board erroneously put the burden of proof on Kaho'ohalahala with regard to the question of whether he had abandoned his Lahaina residence after registering to vote there in 2006. However, the Board explicitly acknowledged in COL No. 13 that Dupree had both the burden of proof and the burden of persuasion in the proceeding, HRS § 91-10(5), and HAR § 2-51-43(h), and there is nothing in the record to indicate that the Board misapprehended that burden.

26. Although under HRS § 11-13 a person may have a separate residence from that of the person's spouse, the location of one's spouse and children can nevertheless be relevant to determining whether a person actually relocated his or her residence. Cf. *Yamane*, 51 Haw. at 340-

41, 461 P.2d at 132-33 (the fact that appellee had moved to Wake Island with his wife and children, sold their personal belongings, and did not leave real or personal property or an open bank account in Hawai'i, was evidence that he was no longer a resident of Hawai'i).

27. It is unclear whether Kaho'ohalahala and his wife owned or rented their home in Lahaina.

28. FOF No. 13, which states that McComber testified that he "ha[d] not seen Mr. Kaho'ohalahala on Lana'i," is therefore clearly erroneous. However, we find the error was harmless since McComber's testimony was similar to that of Dupree. The brief visits by Kaho'ohalahala to Lāna'i were insufficient to establish that Kaho'ohalahala's "habitation [wa]s fixed" there. HRS § 11-13(1).

poses of HRS § 11-13(1) in these circumstances, i.e., where a previous resident has lost his or her residence by virtue of registering to vote elsewhere, and now seeks to reestablish it.

Although there are no Hawai'i cases directly on point, several cases from other jurisdictions have considered challenges to the registration of voters who sought to return to their original residence after registering to vote elsewhere. Although the voters in those cases had a more significant physical presence in their original areas of residence than Kaho'ohalahala had on Lāna'i in July 2008, the courts nevertheless found that they were not properly registered in those areas.

In *Klumker*, the New Mexico Supreme Court considered a challenge to the voter registration of three brothers in Catron County, Arizona. The brothers were born and raised in Catron County, had extended family there, and had a family homestead which they visited several times a month. 811 P.2d at 76. They kept clothing and other personal effects at the homestead, and stated that they intended to return to the homestead whenever they were absent. *Id.* However, prior to the election in question, the brothers had all moved outside of the county with their immediate family members, had been employed and voted in their new locations, and listed the new location as their residence on their driver's licenses, vehicle registration, tax returns, and bank accounts. *Id.* at 76-77. The district court found that because of a scarcity of employment in Catron County, the brothers were required to maintain a second residence in other locations, but that their habitation remained fixed at Catron County. *Id.* at 77.

Applying New Mexico's elections statute,²⁹ the New Mexico Supreme Court concluded that the district court erred in finding that the Allred brothers' habitation was fixed in Catron County, since "there was no substan-

tial evidence that they had ... the requisite physical presence in Catron County." *Id.* at 78. Although the brothers were present in the county when they registered to vote, returned to their home in the county as often as once a week and maintained personal property there, "[w]hat is required is not momentary, or occasional or sporadic physical presence; it is *significant* physical presence consistent with the ordinary conception of *living* (or abiding, or residing, or dwelling, or maintaining a habitation) in a place." *Id.* at 78 (emphasis in original). After noting that the brothers had lost their original residency in Catron County because they had registered to vote and had voted elsewhere, the court went on to hold "none of the Allred brothers had a sufficient physical presence in Catron County at the time each registered to vote there in 1988 so as to effect a change in his residence for voting purposes." *Id.* at 79.

In *Kauzlarich*, the Arizona Supreme Court considered an election contest alleging that the Oak Creek School District wrongfully denied a married couple their right to vote in an election. 278 P.2d at 890. The couple purchased property in the Oak Creek district, moved a house and some personal property to the premises, and worked on the house every weekend with the intention of making it their future home. *Id.* at 891. The couple also stated that their residence had always been with the husband's parents, who had moved from Beaver Creek to the Oak Creek district. *Id.* However, the husband had been employed in Beaver Creek for the three years preceding the election, and continued to vote in Beaver Creek after his parents had moved to Oak Creek. *Id.* at 890. The trial court found that the husband and wife were not residents of Oak Creek for the purpose of voting in the election. *Id.*

Applying Arizona's statute for determining

with the intent to remain in another place.") and (H) ("[A] person loses his residence in this state if he votes in another state in an election requiring residence in that state, and has not upon his return regained his residence in this state under the provisions of the constitution of New Mexico.").

29. New Mexico's elections statute contained the same basic definition of residency as HRS § 11-13(1), N.M. Stat. Ann. § 1-1-7(A) (West 1978), as well as a list of additional principles which is similar in structure to HRS § 11-13, but with some variations in individual provisions, see, e.g., N.M. Stat. Ann. § 1-1-7(C) ("[A] change of residence is made only by the act of removal joined

wai'i, flies to Honolulu and moves in with family members with the intent of making Hawai'i their permanent home, they could be considered residents from the day they arrived. At the other extreme, consider a person who has a home in Los Angeles, flies to Honolulu and registers to vote, and then returns to Los Angeles on the same day, all with the stated intent of making Honolulu his or her permanent residence. Recognizing such a person as a Honolulu resident would render the physical presence requirement in HRS § 11-13(4) an absurdity. See *State v. Haugen*, 104 Hawai'i 71, 76-77, 85 P.3d 178, 183-84 (2004) ("the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality") (citation omitted). Rather, the voter in such a case would need to have a more significant physical presence in Hawai'i, consistent with the intent to abandon his or her California residence, before he or she could be considered a Hawai'i resident.

Kaho'ohalahala suggests that his absences from Lāna'i were not relevant, since temporary absence from a residence does not result in the loss of that residence absent an intent to leave it. See HRS § 11-13(2). Similarly, Hiraga cites *In re Hurley* for the proposition that a county council member or supervisor need not reside exclusively in his district, and may maintain temporary homes in other places. 30 Haw. at 896-97. However, those arguments presuppose that

Kaho'ohalahala had established residency on Lāna'i when he left after registering to vote there in July 2008. Since we conclude that he had not done so, the provisions of HRS § 11-13(2) do not apply to his subsequent absences, and *In re Hurley* is therefore distinguishable.³¹

[20] Hiraga contends that "[t]he key to determining residency is the person's state of mind[,] and suggests that the Board failed to provide proper weight to evidence regarding Kaho'ohalahala's intent.³² However, that argument is contrary to the plain language of HRS § 11-13(4), which requires an analysis of both intent *and* the existence of a physical presence which corroborates that intent. Cf. *Blackburn*, 41 Haw. at 42, 44 (in rejecting a claim by a party to a divorce proceeding that he had changed his domicile from California to Hawai'i, this court noted that "[i]ntention has always been given large consideration, but claimed intention without acts to support it is not controlling" and "since actions speak louder than words the conduct of a person is the most important evidence of his intention to acquire a domicil[e] in a place") (citations omitted).

Finally, we note that there are provisions in the Hawai'i Administrative Rules that relate to voter registration, HAR §§ 2-51-20 to -31 (2000), including a provision that addresses the determination of residency, HAR § 2-51-25.³³ Hiraga did not refer to any of those provisions in his October 10, 2008 ruling, and the Board's November 1, 2008 deci-

31. *In re Hurley* concerned a challenge to the residency of a Kauai county supervisor, Eric Knudsen, in 1927. Knudsen had homes and substantial business interests in both Waimea and Koloa, and split his time between the two locations. 30 Haw. at 890-91. This court concluded that Knudsen was a resident of Waimea. Knudsen had a far more established physical presence in Waimea than Kaho'ohalahala did on Lāna'i. Also, although Knudsen had been registered to vote in Koloa for several months in 1923, he had transferred his registration to Waimea before the 1923 election and remained registered there for the 1925 and 1927 elections. *Id.* at 891-92.

32. In support of this argument, Hiraga cites to a 1986 opinion by the state Attorney General, which concluded that a legislator who temporarily lived outside of his district while his house inside the district was being renovated did not lose his residency in the district. Op. Attn'y Gen. 86-10 (1986), 1986 WL 80018. In reaching that

conclusion, the opinion stated that "[u]nder section 11-13, one's state of mind determines one's place of residence." *Id.*, at *2. However, there was nothing in the opinion to indicate that the legislator had registered to vote in the temporary district or had otherwise acted inconsistent with maintaining his residency in his original district during his temporary absence from it. Thus, the opinion addresses a factual situation distinct from that here, and the opinion's comment about the importance of intent must be considered in light of that factual context. In any event, "Attorney General's opinions are highly instructive but are not binding upon this court." *Taniguchi v. Ass'n of Apartment Owners of King Manor, Inc.*, 114 Hawai'i 37, 46 n. 12, 155 P.3d 1138, 1147 n. 12 (2007) (emphasis in original; citations omitted).

33. HAR § 2-51-25 provides in relevant part:

(a) In addition to the rules for determining residency provided in HRS § 11-13, the fol-

sion contains only a brief reference in COL No. 13 to HAR § 2-51-43(h) ("Rules of evidence as specified in HRS § 91-10 shall be applicable..." to a hearing before the Board challenging voter registration prior to election day). Neither Hiraga nor Kaho'ohalahala contend here that the Board erred by failing to consider HAR § 2-51-25. While this court has the discretion to notice plain error, HRAP Rule 28(b)(4), we decline to do so here since it does not appear that the outcome would be any different under HAR § 2-51-25.

In sum, the Board did not clearly err in concluding that Kaho'ohalahala was a resident of Lahaina rather than Lāna'i for purpose of voting in the 2008 general election, and that Dupree's appeal should be sustained as a result. In light of this analysis, Kaho'ohalahala's and Hiraga's challenges to FsoF Nos. 5, 7-8, 12, 14-16, 19 and CsOL Nos. 3-6, 12-14 in the November 1, 2008 decision are without merit.

V. CONCLUSION

We affirm the November 1, 2008 Findings of Fact, Conclusions of Law, and Decision of the Board of Registration, County of Maui.



lowing shall also be applicable in determining the residence of a person for election purposes:

(1) The residence of a person is that place in which the person's habitation is fixed, where the person intends to remain, and when absent intends to return;

(2) When a person has more than one residence:

(A) If a person maintains a homeowner's property tax exemption on the dwelling of one of the residences, there shall be a rebuttable presumption that the residence subject to the homeowner's property tax exemption is that person's residence;

(B) If a person claims a renter's tax credit for one of the residences, there shall be a rebuttable presumption that the residence subject to the renter's tax credit is that person's residence; and

(C) If a person has not physically resided at any one residence within the year immediately preceding the election, there shall be a rebuttable presumption that the residence in which the person has not resided is not the person's residence.

....

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Rowena Akana, Haunani Apoliona,
Dante Carpenter, Donald Cataluna, Lin-
da Dela Cruz, Colette Machado, Boyd P.
Mossman, Oswald Stender, And John
Waihe'e, IV, in their official capacities
as members of the Board of Trustees of
the Office of Hawaiian Affairs, Pia
Thomas Aluli, Jonathan Kamakawi-
wo'ole Osorio, Charles Ka'ai'ai, and
Keoki Maka Kamaka Ki'ili, Plaintiffs-
Appellants,

v.

HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII (HCDCH), Robert J. Hall, in his capacity as Acting Executive Director of HCDCH, Charles Sted, Chair, Stephanie Aveiro, Francis L. Jung, Charles King, Lillian B. Koller, Betty Lou Larson,

(4) When a person of this State is employed in the service of the United States, is a student of an institution of learning, or is in an institution, asylum, or prison:

(A) A person does not gain or lose residence in a precinct or this State solely by reason on being present in or absent from a precinct or this State; and

(B) A person once having established residency in a precinct shall be allowed to register and vote and to continue to vote from the address at which the person is registered even though, while residing outside of the precinct or the State, the person no longer has a place of abode in the precinct and the person's intent to return to the precinct may be uncertain.

(b) Should a person's status change and the person takes up residency in another precinct or state, there shall be a rebuttable presumption that the new place of residence is that person's residence.

(c) For purposes of this section, a rebuttable presumption is a presumption considered true unless prove false by evidence to the contrary.

residency,³⁰ the Arizona Supreme Court affirmed the trial court's determination that the husband and wife were not residents of Oak Creek. *Id.* at 892. Although the couple stated that their residence had always been with the husband's parents, the court found that the "fact that [the husband] voted in Beaver Creek precinct . . . long after his parents had moved to [the] Oak Creek district, completely refutes so far as establishing his right to vote in Oak Creek precinct is concerned, the statement that he was residing with them [at that time]." *Id.* at 891. The court also found that the couple's claim that they resided with the husband's parents was not supported by the evidence because they did not purchase groceries for the parents' home or pay the parents rent or board, and the home was too small to accommodate the couple and their two small children in addition to the husband's parents and grandparents, who lived there as well. *Id.* at 892.

While there are some differences in the underlying statutory schemes, the rationale of these cases is instructive in applying HRS § 11-13 to the circumstances of this case. Although someone who has established residency in a place can maintain that residency despite being physically absent as long as he or she intends to return and acts consistently with that intent, *see, e.g., Holton v. Hollingsworth*, 270 Ga. 591, 514 S.E.2d 6, 9-10 (1999) (although voter left his hometown to serve in the military and then lived in a house in another community, voter was properly registered in hometown when he maintained significant ties there and intended to return), different considerations apply once a person has established a new residence elsewhere. HRS § 11-13(4) recognizes that principle by explicitly requiring that the person have a "physical presence" which corroborates the person's intent to abandon his or her prior place of residence.

The requirement of a "physical presence" in HRS § 11-13(4) must be read in *pari*

materia with the other provisions of HRS § 11-13. HRS § 1-16 (1993) ("Laws in *pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."). HRS § 11-13(1) requires the voter to have a "habitation [that] is fixed" in order to establish residency, while HRS § 11-13(2) provides that "[a] person does not gain residence in any precinct into which the person comes without the present intention of establishing the person's *permanent dwelling place*." (emphasis added). Both habitation and dwelling place imply that the person is living at the location. Thus, the statute requires that the person seeking to relocate his residence to a new district must establish a dwelling or otherwise live in the district, in the commonly understood meaning of those terms. HRS § 1-14 ("The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.").

In arguing that Kaho'ohalahala had a sufficient physical presence on Lāna'i, Hiraga and Kaho'ohalahala both invoke the principle that a person need not live in an area for any particular time in order to establish residence there. *See Anderson v. Anderson*, 38 Haw. 261, 263 (1948) ("[T]he length of actual residence is immaterial to the acquisition of a domicile. A day or an hour will suffice.") (citations omitted); *Powell*, 40 Haw. at 630 ("Length of residence is not a factor where the act and intention to acquire a domicile concur No definite period of time is necessary to create a domicile and one day is sufficient provided the *animus manendi* exists.") (citation omitted). As a general proposition, that principle is correct. If a person who has been living on the mainland packs up their belongings and ships them to Ha-

30. Arizona's elections statute also contains the same basic definition of residency as HRS § 11-13(1), A.C.A. § 55-512(1) (1939), as well as a list of additional principles which is similar in structure to HRS § 11-13, but with some variations in individual provisions, *see, e.g.,* A.C.A. § 55-512(7) ("The place where a man's family perma-

nently resides is his residence unless he be separated therefrom, but if it be a place of temporary establishment for his family, or for transient objects, it is otherwise.") and (9) ("The mere intention to acquire a new residence without act of removal avails nothing; neither does the act of removal without the intention[.]").

ARTICLE 3 COUNTY COUNCIL

Section 3-1. Composition. There shall be a council composed of nine members who shall be elected-at large. Of the nine members elected to the council, one shall be a resident of the Island of Lānaʻi, one a resident of the Island of Molokaʻi, one a resident of the residency area of East Maui, one a resident of the residency area of West Maui, one a resident of the residency area of Makawao-Haʻikū-Pāʻia, one a resident of the residency area of "Upcountry" comprising Pukalani-Kula-ʻUlupalakua, one a resident of the residency area of South Maui, one a resident of the residency area of Kahului, and one a resident of the residency area of Wailuku-Waiheʻe-Waikapū. The county clerk shall prepare the nomination papers in such a manner that candidates desiring to file for the office of council member shall specify the residency area from which they are seeking a seat. The ballots shall, nevertheless, be prepared to give every voter in the county the right to vote for each and every council seat.

1. The East Maui (Hana-Keanae-Kailua) residency area shall be described as follows:

Beginning at shoreline and Kakipi Gulch
Proceed to Kepuni Gulch
North along Kepuni Gulch to Kahikinui Forest Reserve boundary
Easterly along Kahikinui Forest Reserve boundary to Haleakalā National Park boundary
Northwest, west, northerly, then southeast along Haleakalā National Park boundary to Waikamoi Stream
North along Waikamoi Stream and continuing due west to Kaʻiliʻili Road
West on Kaʻiliʻili Road to Opana Gulch
North along Opana Gulch to jeep trail
Easterly on jeep trail to Pālama Gulch then northeasterly to Halehaku Gulch
North along Halehaku Gulch to Kakipi Gulch
North along Kakipi Gulch to point of beginning

2. The West Maui residency area shall be described as follows:

Beginning at shoreline and Lahaina-Wailuku District boundary at Poʻelua Bay
~~Proceed south along boundary to shoreline (Manawainui Gulch)~~
Northwest, north, then northeast along shoreline to point of beginning
(includes the islands of Molokini and Kahoʻolawe)

3. The Wailuku-Waiheʻe-Waikapū residency area shall be described as follows:

Beginning at shoreline and Lahaina-Wailuku District boundary
Proceed southeast along shoreline to Kanaloa Avenue extension
Southwest on Kanaloa Avenue extension to Kahului Beach Road
Southeast on Kahului Beach Road to Kaʻahumanu Avenue

- West on Ka`ahumanu Avenue to Mahalani Street
 Southwest on Mahalani Street to Pu`umele Street
 Southwest on Pu`umele Street to Wai`inu Road
 West on Wai`inu Road to Wai`ale Road
 South on Wai`ale Road to East Waikō Road
 East on East Waikō Road to Kū`ihēlani Highway
 Southwest on Kū`ihēlani Highway to Honoapi`ilani Highway
 South on Honoapi`ilani Highway to Pohākea Gulch
 West, then northwest along Pohākea Gulch to point of beginning
4. The Kahului residency district area shall be described as follows:
 Beginning at shoreline and Kanaloa Avenue extension
 Proceed east along shoreline to Kanahā Beach Park boundary
 Southeast along Kanahā Beach Park boundary to Kalialinui Gulch
 Southeast along Kalialinui Gulch to Haleakalā Highway
 Southeast on Haleakalā Highway to Lowrie Ditch
 Southwest along Lowrie Ditch to Spanish Road
 West, then northwest on Spanish Road to East Waikō Road
 West on East Waikō Road to Wai`ale Road
 North on Wai`ale Road to Wai`inu Road
 East on Wai`inu Road to Pu`umele Street
 North on Pu`umele Street to Mahalani Street
 East, then north on Mahalani Street to Ka`ahumanu Avenue
 East on Ka`ahumanu Avenue to Kahului Beach Road
 Northwest on Kahului Beach Road to Kanaloa Avenue extension
 Northeast on Kanaloa Avenue extension to point of beginning
5. The South Maui residency area shall be described as follows:
 Beginning at Lahaina-Wailuku District boundary and Pohākea Gulch
 Proceed southeast, then east along Pohākea Gulch to Honoapi`ilani Highway
 North on Honoapi`ilani Highway to Kū`ihēlani Highway
 Northeast on Kū`ihēlani Highway to East Waikō Road
 East on East Waikō Road to Spanish Road
 Southeast, then east on Spanish Road to Lowrie Ditch
 South along Lowrie Ditch to Pūlehu Gulch
 Southeast along Pūlehu Gulch to Waiakoa Road
South on Waiakoa Road to Kīhei CDP boundary
 South along Kīhei CDP boundary to unnamed road
 Southwest, then south on unnamed road to unnamed stream (west of Keonekai Road)
 East on unnamed stream to Kula Highway
 Southwest on Kula Highway to jeep trail (abutting Tiger 2000 line 85098642)
 West, then south on jeep trail to Kanaio-Kalama Park Road (Ulupalakua Road)
 Southeast along Kanaio-Kalama Park Road to Pi`ilani Highway

Southeast, then east on Pi'ilani Highway to Kepuni Gulch
Southeast along Kepuni Gulch to shoreline
Southwest, west, north, northwest, southwest then northwest along
shoreline to Lahaina-Wailuku District boundary (Manawainui
Gulch)
North along boundary to point of beginning

6. The Makawao-Ha'ikū-Pā'ia residency area shall be described as follows:

Beginning at shoreline and Kanahā Beach Park boundary
Proceed east along shoreline to Kakipi Gulch
South along Kakipi Gulch to Halehaku Gulch
South along Halehaku Gulch to Pālama Gulch
Southeast along Pālama Gulch to unnamed jeep trail
Northwest, then southwest along jeep trail to Opana Gulch
South along Opana Gulch to Ka'ili'ili Road
East on Ka'ili'ili Road to Waikamoi Stream
South along Waikamoi Stream to Haleakalā National Park
boundary
Northwest, then southwest along Haleakalā National Park boundary
to Kailua Gulch
Northwest along Kailua Gulch to Lowrie Ditch
Southwest along Lowrie Ditch to Haleakalā Highway
Northwest along Haleakalā Highway to Kalialinui Gulch
Northwest along Kalialinui Gulch to 'Āmala Place
Northwest along Kanahā Beach Park boundary to point of
beginning

7. The Upcountry (Pukalani-Kula-'Ulupalakua) residency area shall be described as follows:

Beginning at Lowrie Ditch and Kailua Gulch
Proceed southeast along Kailua Gulch to Haleakalā National Park
boundary
Southwest, southeast, east, then southwest along Haleakalā
National Park boundary to Kahikinui Forest Reserve
boundary
Southwest along Kahikinui Forest Reserve boundary to Kepuni
Gulch
South along Kepuni Gulch to Pi'ilani Highway
West on Pi'ilani Highway to Kanaio-Kalama Park Road
('Ulupalakua Road)
Northwest along Kanaio-Kalama Park Road to jeep trail
Northeast on jeep trail to Kula Highway (abutting Tiger 2000 line
85098642)
Northeast along Kula Highway to unnamed stream
Northwest, then west along unnamed stream to unnamed jeep trail
North on unnamed jeep trail to unnamed road
North on unnamed road to Kīhei CDP boundary

North on Kīhei CDP boundary to Waiakoa Road
North on Waiakoa Road to Pūlehu Gulch
Northwest along Pūlehu Gulch to Lowrie Ditch
North, then northeast along Lowrie Ditch to point of beginning
(Amended 2002, 1998, 1992, 1990)

Section 3-2. Election of Council and Term of Office.

1. Council members shall be elected by nonpartisan special elections. Such special elections shall be held in conjunction with the primary and general elections every two (2) years commencing in 2000. The special election held in conjunction with the primary election every two (2) years shall be known as the first special election. The special election held in conjunction with the general election every two (2) years shall be known as the second special election.

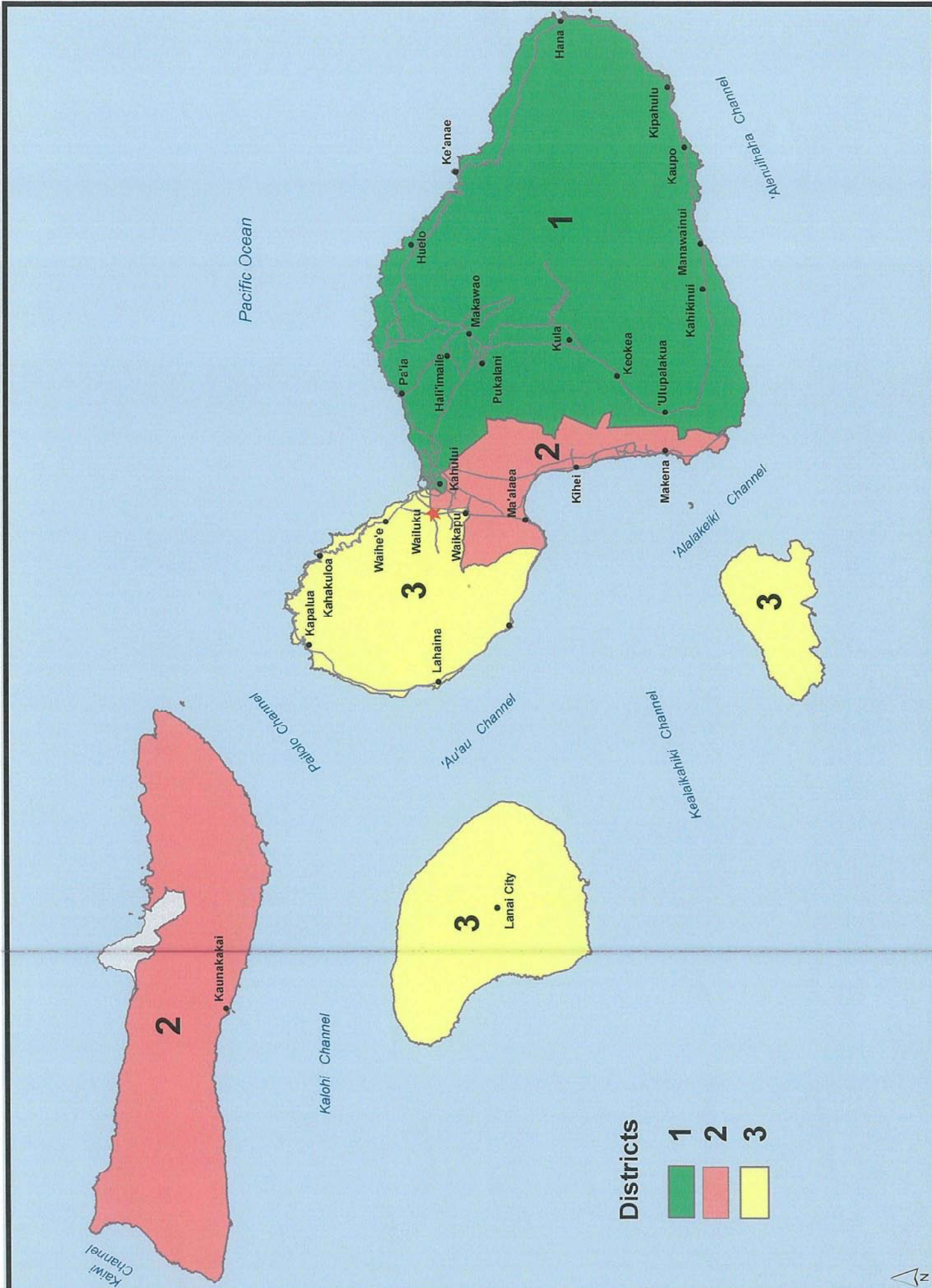
2. The names of all candidates for each council seat shall be placed on the ballot for the first special election; provided, that for any council seat with two or fewer candidates, the names of the candidates shall appear only on the ballot for the second special election.

3. For any council seat with three or more candidates, the names of the two candidates receiving the highest number of votes for each council seat in the first special election shall be placed on the ballot for the second special election; provided, that if two or more candidates tie for the highest number of votes received in the first special election, the names of the candidates tied for the highest number of votes shall be placed on the ballot for the second special election; and further provided, that if a single candidate receives the highest number of votes in the first special election and two or more candidates tie for the second-highest number of votes received, the names of the candidate receiving the highest number of votes and the candidates tied for the second-highest number of votes shall be placed on the ballot for the second special election.

4. At the second special election, the candidates receiving the highest number of votes for each council seat shall be deemed elected. If there is no more than one candidate for a council seat, such person shall be deemed elected regardless of the number of votes received.

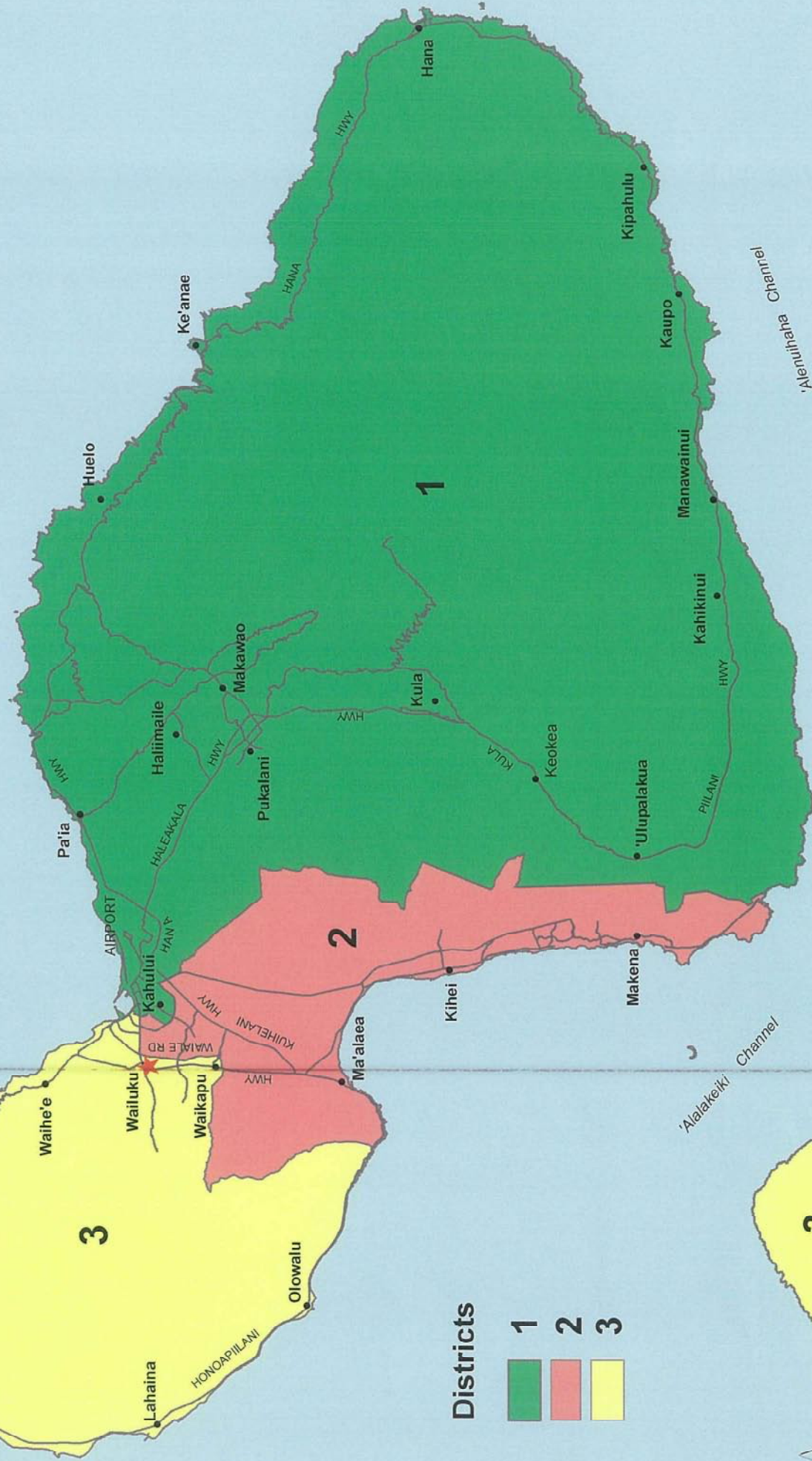
5. The term of office of council members shall be for two (2) years, beginning at twelve o'clock meridian on the second day of January following their election. No member of the county council shall serve more than five consecutive full terms of office. (Amended 1998, 1992)

Section 3-3. Qualifications. To be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days next preceding the filing of nomination papers and at the time of filing of nomination papers a resident in the area from which the person seeks to be elected. If a council member ceases to be a resident of the county, or ceases to be a resident of the council member's residency area during the council member's term of office, or if a council member is adjudicated guilty of a felony, the council member shall immediately forfeit office and the seat shall thereupon become vacant. (Amended 1992)

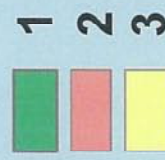


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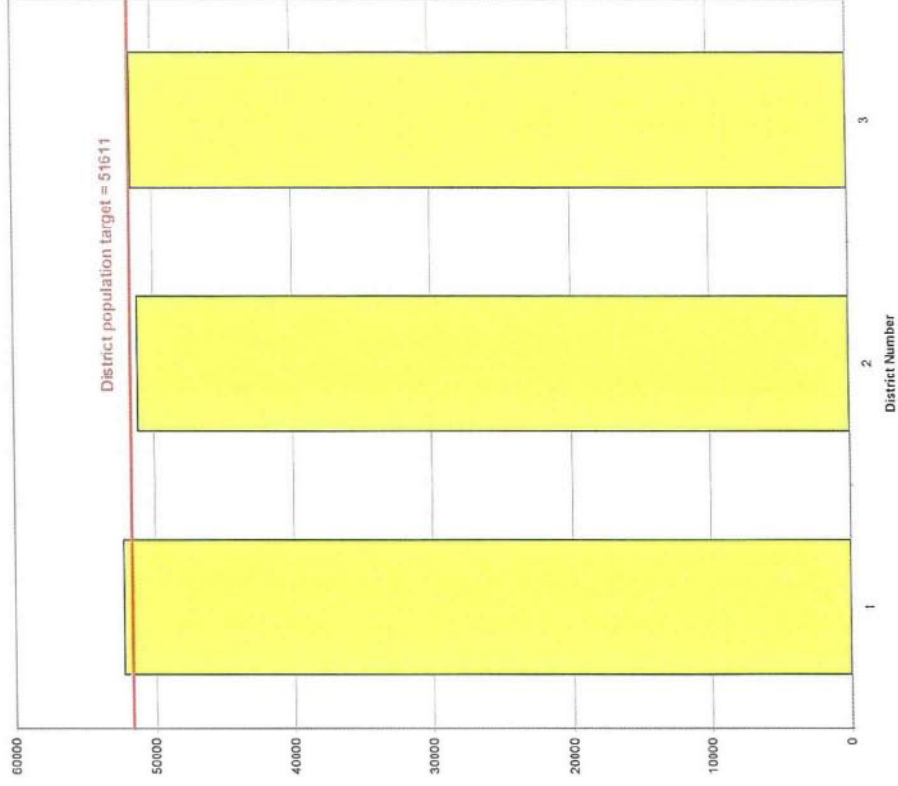
Detail of Maui Island



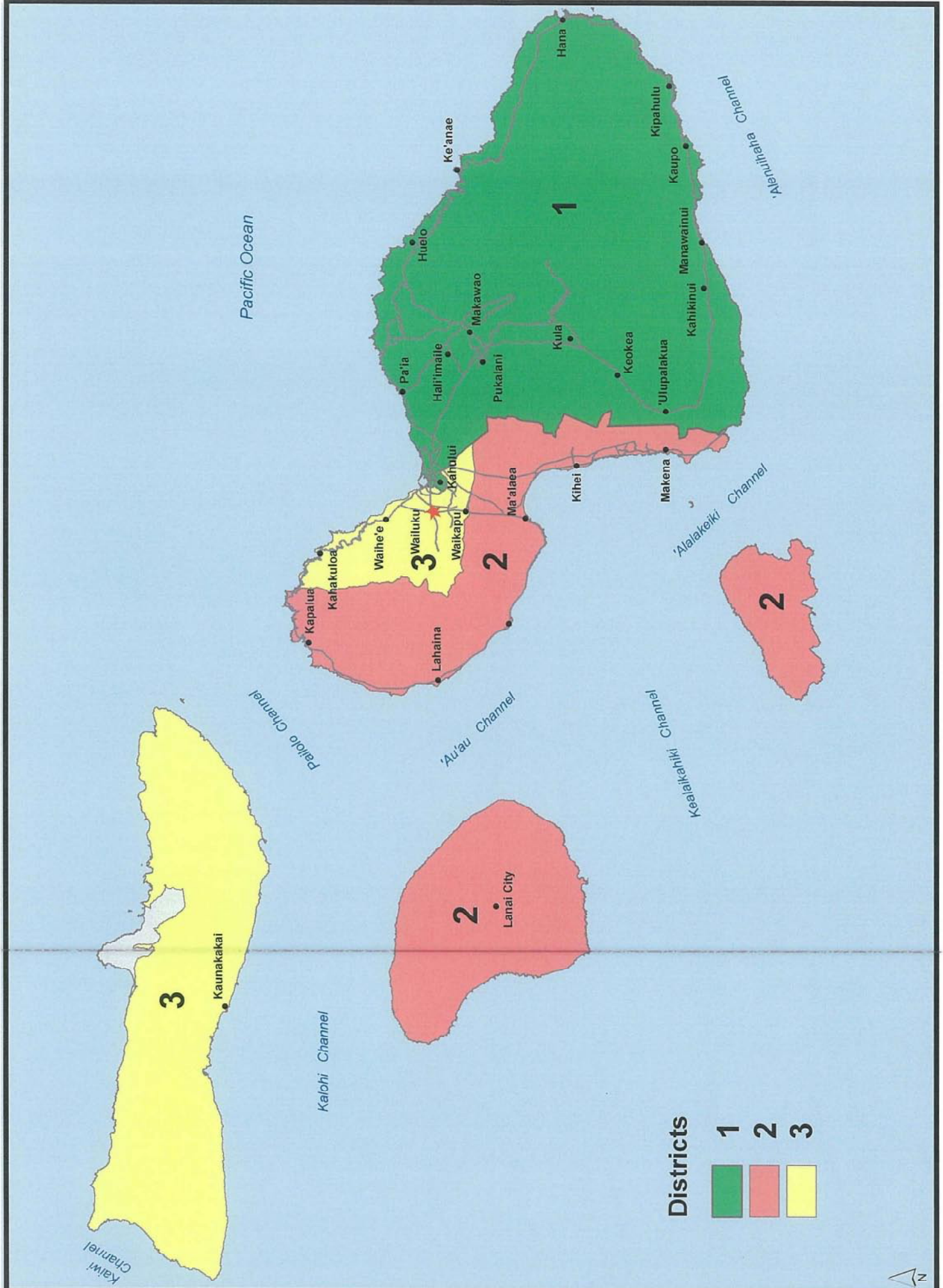
Districts



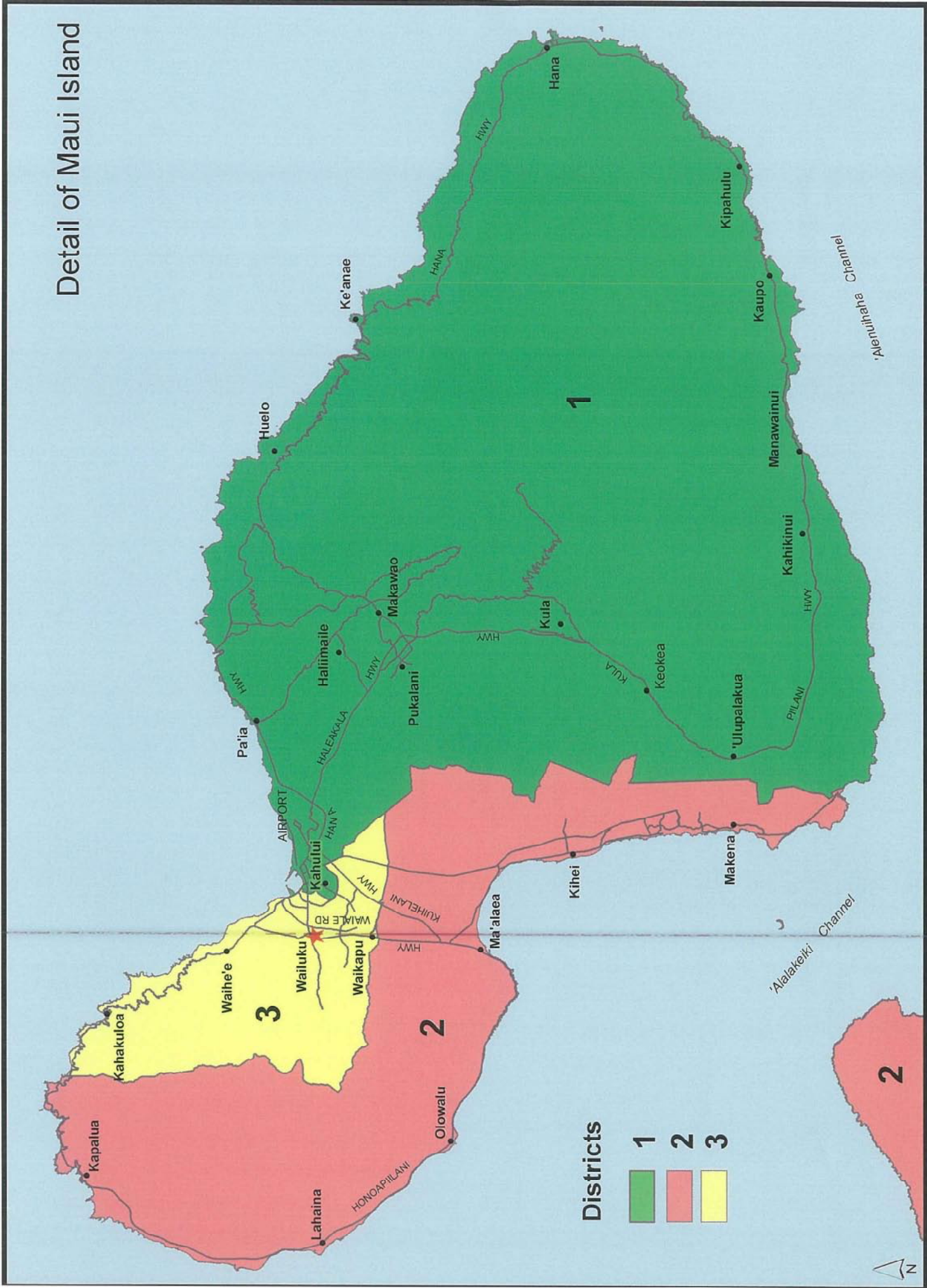
**Maui County Charter Commission
Districting Scenario 5**



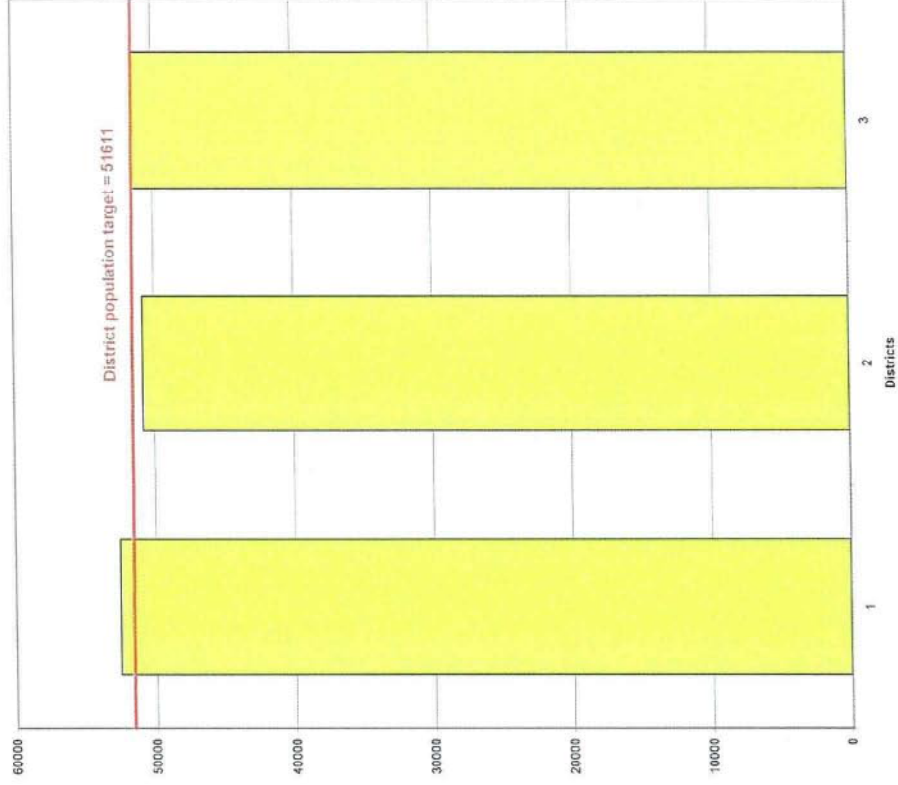
| Maui County Charter Commission Districting Scenario 5 | | | | |
|--|--|------------|-------|-------|
| (3 districts, T. Ramil, relatively equal) | | | | |
| District | Region | Population | Dev ± | Dev % |
| 1 | Lanai, West Maui, South Maui | 52218 | 607 | 1.12 |
| 2 | Molokai, Wailuku Kahului, | 51117 | -494 | -0.96 |
| 3 | East Maui, Paia, Makawao, Upcountry | 51495 | -116 | -0.22 |



Detail of Maui Island



Maui County Charter Commission
Districting Scenario 6



| Maui County Charter Commission Districting Scenario 6 | | | | |
|--|--|------------|-------|-------|
| (3 districts, Lanai with leeward, relatively equal) | | | | |
| District | Region | Population | Dev ± | Dev % |
| 1 | Lanai, West Maui, South Maui | 52535 | 924 | 1.79 |
| 2 | Molokai, Wailuku Kahului, | 50800 | -811 | -1.57 |
| 3 | East Maui, Paia, Makawao, Upcountry | 51495 | -116 | -0.22 |

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November 21, 2011

Chair Joshua A. Stone and Charter Commission Members
Maui County Charter Commission
200 High Street, 3rd Floor
Wailuku, HI 96793

Dear Chair Stone and Charter Commission Members:

This memorandum responds to several questions that were raised at the November 14 meeting of the Charter Commission:

1. **Legality to be able to require residency requirements on smaller portions of a district.**

Federal courts have upheld at-large election systems for legislative bodies, so long as they are not designed to discriminate against identifiable protected groups or deny effective participation in the political process. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55 (1980). Courts have also upheld schemes that require certain members who are elected at large to live in designated districts. *See, e.g., Dusch v. Davis*, 387 U.S. 112 (1967) (upholding the city council of Virginia Beach, Virginia, which consisted of 11 representatives elected at large by the voters, with seven members required to reside in one of each of these seven boroughs, which had populations ranging from 733 to 29,048, plus four at-large seats without residency requirements); *Dallas County, Alabama v. Reese*, 421 U.S. 477 (1975) (upholding a system with at-large voting for four commission members, with the requirement that each member be elected from a different residency district, even though the population of the four districts varied from a low of 6,209 to a high of 27,379, so long as the plan did not dilute the voting strength of an identifiable element of the voting population); *La Porte County Republican Cent. Committee v. Board of Com'rs of County of La Porte*, 43 F.3d 1126, 1128 (7th Cir. 1994) (upholding a system with three representatives elected at-large with the requirement that each must live in a different district and explaining that "[b]ecause voters may cast ballots for each position, the residence districts need not have identical (or even similar) populations.").

These plans have been upheld because they serve the purpose of ensuring that councilmembers are familiar with the particular problems of the different geographical areas served by a legislative body. It would appear, therefore, that substantial variations in

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populations of residency districts will be upheld for at-large election systems, so long as the scheme is not designed to discriminate against any identifiable group and so long as it serves some logical purpose, such as recognizing unique geographical configurations and maintaining traditional voting arrangements.

2. For Scenario One, what is the legality of the overall scheme?

It has been long established that any apportionment plan with disparities larger than 10% “creates a prima facie case of discrimination and therefore must be justified by the State.” *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983). Sometimes such disparities can be justified to preserve political subdivision or because of unique geographical configurations.

It seems unlikely, however, that the -20.43% and +16.13% disparities for District 3 in Scenario One could be justified, because it would be relatively easy to reduce those disparities by moving some residents from District 2 into District 3. Although it could be argued that the line between District 2 and 3 reflects the unique geography of Maui Island, that argument is not likely to be successful in light of the generally-shared interests and easy mobility of Maui Island residents.

3. What is the difference between initiatives and referendum re: 11.1 - 11.2?

A referendum or initiative measure generally is an exercise of the reserved power of the people of the state to legislate or a means through which the public has the final say with regard to the laws which shall be enacted.

An initiative generally is a direct voter action to enact a new law within a particular jurisdiction whereas the right of referendum generally permits voters to reject legislation that already has been adopted. The right of initiative may also be used to amend or repeal existing statutes. Referendum is the right of the people to have submitted for their approval or rejection any act passed by the legislature; the right of referendum is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies.

In the current Maui County Charter, Article 11 sets out a procedure whereby an initiative can be put onto the ballot. The Maui County Charter contains no formal description of a procedure for referendums: but in fact the voters have the power to reject an ordinance and it is described as an initiative power. See Section 11-1 par. 2.

The Kauai County Charter provides that “The power of voters to propose ordinances . . . shall be the initiative power.” See Section 22.01 (A). And that “The power of the voters to approve or reject ordinances that have been passed by the county council (except as provided in Section 22.02) shall be the referendum power.” See Section 22.01 (B).

The Charter of the County of Hawaii provides that: “Section 11-1. Powers of Initiative and Referendum. (a) The power of voters to propose ordinances or to amend existing ordinances shall be the initiative power. (b) The power of voters to approve or reject ordinances by election shall be the referendum power.”

The Charter of the County of Honolulu provides that “Section 3-401. Declaration -- 1. Power. The power of electors to propose and adopt ordinances shall be the initiative power.

2. Limitation. The initiative power shall not extend to any ordinance authorizing or repealing the levy of taxes, the appropriation of money, the issuance of bonds, the salaries of county employees or officers, or any matter governed by collective bargaining contracts.

4. What has happened in prior Maui County elections when initiative and recall charter amendments were placed on the ballot?

In 1992, the Charter Commission posed question 13 on initiative and question 14 on recall. The details of the 2 questions are in the attached document entitled Tentative Final Proposed Amendments To the Charter of the County of Maui by the Charter review Commission 1991-1992 from the Department of Corporation Counsel. We were not able to locate any other documents relating to the details of these amendments.

In 1992, both were defeated by the voters. The vote on question 13 on initiative was 13,825 yes, 15,623 no, 8,810 blank votes and 8 over votes. The vote on questions 14 on recall was yes 14,592, No 14,963, blank votes 8,704, and over votes 7.

In 2002, the Charter Commission posed question 17 on initiative. The ballot question stated “Should the process for proposing an ordinance by initiative be changed by: (A) increasing the time allowed to gather necessary signatures from 30 days to 180 days: (B) reducing the number of necessary signatures from 20% of registered voters to 20% of the total number of votes who cast ballots in the prior mayoral general election: and (C) submitting a proposed ordinance to the voters at a general election (instead of at a special election).”

In 2002, question 17 was adopted by the voters. The changes proposed were adopted by the voters. The vote on question 17 was Yes 22,681, No 11,847, Blank Votes 6,807, Over Votes 13.

In 1992, no ballot question to change the provisions of recall was proposed.

In the current Maui Charter, the number of voters who must sign a petition to be on the ballot differs between initiative and recall. Initiative Section 11-3 par.2 requires not less than twenty percent of the total number of voters who cast ballots in the last mayoral general election. Recall section 12-3 par.2 requires not less than twenty percent of the voters registered in the last general election.

In the current Maui Charter, the number of votes required to enact an ordinance proposed by initiative or to recall an elective officer or member of a board or commission is as follows:

For initiative, section 11-7 provides that “[i]f a majority of the qualified electors voting on a proposed ordinance vote in its favor, it shall be considered enacted upon certification of the election results.”

For recall, section 12-7 provides that “[a] majority vote shall be sufficient to recall such officer.” However, section 12-6 further provides that “[i]f less than fifty percent (50%) of the voters registered in the last general election shall vote at such recall election, the officer sought to be recalled shall not be deemed recalled regardless of the outcome of the election.”

5. What are the percentages for initiative, referendum, charter amendments, and recall in California and other counties of Hawaii?

County of Kauai

Charter Amendment - By petition presented to the council, signed by not less than five percent (5%) of the voters registered in the last general election,

Each initiative or each referendum petition must be signed by not less than twenty percent (20%) of the number of eligible voters in the last preceding general election.

Recall petitions shall be signed by currently registered voters numbering not less than twenty percent (20%) of the voters registered in the last general election.

County of Hawai'i

Section 11-15 (c)

For purposes of certification, any petition [relating to **initiative or referendum**] shall be found insufficient that:

- (1) Is signed by registered voters of the county equal in number to less than fifteen percent of the number of persons who voted for the office of Mayor in the last Mayoral election.
- (2) Proposes, or requests appeal of, an ordinance not subject to the powers of initiative or referendum.

Section 15-1. Initiation of Amendments or Revisions [to the Charter].

Amendments or revisions of this charter may be initiated only in the following manner: (b) By petition presented to the council, signed by qualified electors equal in number to at least twenty percent of the total ballots cast in the last preceding general election, setting forth the proposed amendments or revisions.

Section 12-1.1. Recall Procedure.

In addition to impeachment procedures, any elective officer may be removed from office by the voters of the county. The procedure to effect such removal shall be in accordance with this article. A petition demanding that the question of removing such official be submitted to the voters shall be addressed to the council and filed with the county clerk.

(a) A petition demanding recall of an official elected at-large, or by voters of the entire county, as the case may be, shall be signed by qualified voters equal to or greater than twenty-five percent of the total valid votes cast for the office subject to the recall petition in the last election.

(b) A petition demanding recall of a district council member shall be signed by qualified voters equal to or greater than twenty-five percent of the total valid votes cast for the district office subject to the recall petition in the last election.

(c) The term "qualified voter" means a person who is registered to vote in the county on the day that the clerk begins the examination to determine the sufficiency of the signatures on the petition.

County of Honolulu

Ordinances by Initiative Power

Section 3-402. Procedure for Enactment and Adoption -- 1. Petition. An ordinance may be proposed by petition, signed by duly registered voters equal in number to at least ten percent of the total voters registered in the last regular mayoral election.

Section 15-101. Initiation of Amendments or Revisions to Charter

(b) By petition presented to the council, signed by duly registered voters equal in number to at least ten percent of the total voters registered in the last regular mayoral election, setting forth the proposed amendments or revisions.

Section 12-101. Recall of the Mayor

The mayor may be removed by recall which shall be initiated upon petition signed by duly registered voters equal in number to at least ten percent of the total voters registered at the last regular mayoral election. Signatures from any one council district, as provided by this charter for the election of councilmembers, in excess of forty percent of the total number required on the petition shall not be counted.

Section 12-102. Recall of a District Councilmember

A district councilmember may be removed by recall which shall be initiated upon petition signed by duly registered voters of the council district equal in number to at least ten percent of the total voters registered in such councilmember's district in the last regular council election held in the district.

Section 12-104. Recall of the Prosecuting Attorney

The prosecuting attorney may be removed by recall which shall be initiated upon petition signed by registered voters equal in number to at least ten percent of the total voters registered in the last regular election of the prosecuting attorney. Signatures from any one council district, as provided by this charter for the election of councilmembers, in excess of forty percent of the total number required on the petition shall not be counted.

California

The number of signatures needed to qualify a measure for the ballot is based on the number of votes cast for the office of Governor of California in the most recent gubernatorial

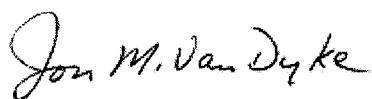
election. Article II, Section 8 of the California Constitution states that to place a constitutional amendment on the ballot, signatures equaling 8% of this vote are required. To place a statute or veto referendum on the ballot, signatures equaling 5% of this vote are required.

Below is the calculation in California of the number of votes required to place a measure on the ballot.

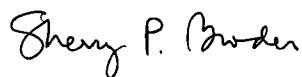
| Year | Amendment | Statute | Veto referendum |
|---------------|-----------|---------|-----------------|
| 2011-2014[6] | 807,615 | 504,760 | 504,760 |
| 2007-2010[7] | 694,354 | 433,971 | 433,971 |
| 2003-2006[8] | 598,105 | 373,816 | 373,816 |
| 1999-2002[9] | 670,816 | 419,260 | 419,260 |
| 1995-1998[10] | 693,230 | 433,269 | 433,269 |
| 1991-1994[11] | 615,958 | 384,974 | 384,974 |

Please do not hesitate to contact us should you have any questions, and please let us know whenever we can provide further assistance.

Sincerely yours,



Jon M. Van Dyke, Esq.



Sherry P. Broder, Esq.

cc: Lisa Kahuhu, Supervising Law Technician

Edward S. Kushi, Jr., Deputy Corporation Counsel

**ACTIVE PROPOSALS FOR SUBSTANTIVE CHANGES TO THE
MAUI COUNTY CHARTER**

October 17, 2011

November 7, 2011

November 21, 2011

Sherry P. Broder, Esq. and Jon M. Van Dyke, Esq.

Article 3, County Council

Subject Matter – District Elections

Discussed at prior meetings and additional information requested

#3.2 - Amended Proposal to have a general discussion on proposals of Single Member Districts

#3.3 – Amended Proposal to have as part of a general discussion on Single Member Districts – Single Member District Proposal with Lanai and Molokai in Separate Districts

Amend Section 3-1, Composition, to change the composition of the Maui County Council to Nine Single Member Districts but without placing Lanai and Molokai in the same council district

#3.4 - Amended Proposal to have as part of a general discussion on Single Member Districts - Single Member Districts Proposal with Self-Rule for Lanai and Molokai

Amend Section 3-1, Composition, to change the composition of the Maui County Council to Nine Single Member Districts and grant Lanai and Molokai self-rule

#3.5 - Amended Proposal to have as part of a general discussion on Single Member Districts - Proposal to Create Three Single Member Districts and Three Geographic Districts for Lanai, Molokai and Maui

#3.6 - Amended Proposal to have as part of a general discussion on Single Member Districts - Proposal to create Island Boards for the Islands of Lanai and Molokai.

These would be elected bodies of five (Lanai) to seven (Molokai) members who would (1) replace and would take on the responsibilities of the appointed planning commissions and (2) in addition have authority over all other land use approvals on the island, including zoning and variances. These bodies would also (3) be the official voice of their communities, at the County, State and national levels.

#3.7 - Amended Proposal to have as part of a general discussion on Single Member Districts Proposal with Lanai, Moloka'i, and Hana in one district together

Amend Section 3-1, Composition, to change the composition of the Maui County Council to Nine Single Member Districts and grant Lanai and Molokai self-rule

#3.8 - Amended Proposal to have as part of a general discussion on Proposal to Retain At-large Districts with Geographic Residency

Do not amend Article 3, County Council, Section 3-1, Composition

#3.9 - Amended Proposal to have as part of a general discussion on Proposal to Expand the Number of Council Members to 13

#3.10 - Amended Proposal to have as part of a general discussion on Proposal to have three Council members in each of three districts

#3.11 - Amended Proposal to have as part of a general discussion on Proposal to have six Council districts with equal population plus three at-large Council districts

Subject Matter -- Nonpartisan elections

Possible amendment language to be drafted by staff

#3.13 - Proposal to Return to a Closed Primary System

#3.14 - Proposal to Abolish Nonpartisan Elections for County Council

Amend Article 3, County Council, Section 3-2, Election of Council and Term of Office, to delete nonpartisan elections and implement a system of partisan elections in the primary and general elections

Subject Matter – Residency Requirements

Possible amendment language to be drafted by staff

#3.15 - Proposal for Residency Requirements for County Council Members

Amend Section 3-3, Qualifications, to require that candidates have lived in and voted in the district in the previous election for which they are currently running

Amend Section 3-3, Qualifications, to require that candidates have lived in the district for one year

#3.16 - Proposal to adopt a Five-Year Residency Requirement for County Council Members

Amend Section 3-3, Qualifications, to require that candidates have lived in the district for which they are running for at least five years.

Subject Matter – Term Limits

Possible amendment - language to be drafted by staff

#3.17 - Proposal for Eight-Year Term Limits

Amend Section 3-2 (5), Election of Council and Term of Office, to limit a council member to two terms of four years or four terms of two years for a total of eight years altogether and, after the eight years have been exhausted, to prohibit the individual from ever serving on the Council again

#3.18 - Three-Term Four-Year Term Limits Proposal

Amend Section 3-2 (5), Election of Council and Term of Office, to limit a council member to 3 terms of 4 years

#3.19 - Two-Term Four-Year Term Limits Proposal

#3.20 - One-Term Four-Year Term Limit Proposal

#3.21 - Proposal to change the present system of five two-year terms of Council members to three full four-year terms, whether consecutive or not, and to require that terms of Council members to be staggered.

#3.22 - Proposal to Amend Term of Office for Council Members from a Two-Year Term to a Four-Year Term, to Stagger the Terms, and to Limit the Number of Terms

Amend Section 3-2, Election of Council and Term of Office, from a two-year term to a four-year term, stagger the terms by implementing for the first election the highest four vote getters who will serve four-year terms and the next highest five vote getters will serve two year terms, limit the terms to two consecutive terms and a total of 12 years or three full terms.

#3.23 - Proposal to Retain Article 3, Section 3-2 (5), Term of Office for Council Members, for a two-year term

Subject Matter – Council Power

Removed from active list

~~#3.33—Proposal to Amend Section 3-6, Powers of the Council, to require that the Council approve the appointments of all department heads~~

~~In the alternative, require that the Council approve the appointments of the Planning Director and the Director of the Department of Finance~~

Subject Matter – Structure of Office of the Executive

Removed from active list

~~#7.2—Proposal to Make the Office of the Mayor Ceremonial and Implement an Appointed County Manager as Chief Executive Officer~~

~~Amend Section 7-5, Powers, Duties and Functions, to change the powers of the Mayor to be ceremonial, to include accepting service of process and to be recognized by the Governor for civil defense and military purposes and to allow the County Council to appoint an interim mayor in the event of a vacancy~~

~~Amend Article 8, County Departments, Chapter 1, Department of the Management, Section 8-1.1 Organization, [1] to change the title of this section to Office of the County Manager, [2] to provide that the County Manager will be selected by the County Council, [3] to require that the County Manager have proven administrative qualifications, [4] to require residency in Maui only after selection, [5] to set forth a procedure for removal from office that includes the conduct of a hearing, [6] to provide the County Council with final authority for removal and [7] to Amend Section 8-1.3, Powers, Duties and Functions, to enumerate the duties of the County Manager and make other conforming changes in Article 8~~

Article 8, County Departments

Chapter 1, Department of Management

Removed from active list

~~#8.1.1—Proposal to Amend Section 8-1.1, Organization, to specify that there shall be a deputy managing director~~

Chapter 3, Department of Prosecuting Attorney

Possible amendment - language to be drafted by staff

#8.3.1 - Proposal to Section 8-3.3 Powers, Duties and Functions, to clarify that the investigators in the prosecuting attorney's office have all the powers and privileges of a police officer of the county

#8.3.2 - Proposal to Section 8-3.3 Powers, Duties and Functions, to clarify that the County Prosecuting Attorney prosecutes offenses against the law of the State of Hawaii under the authority of the Attorney General of the State of Hawaii.

Chapter 7, Department of Fire and Public Safety

Defer remaining items to November 14, 2011 meeting

~~#8.7.1 - Proposal to Abolish the Department of Fire and Public Safety, to Require the Fire Chief to Report to the Mayor, and to Set Minimum Qualifications for Fire Chief and Other High-Ranking Fire Officials~~

~~Delete Section 8-7.2 Fire and Public Safety Commission, and amend Section 8-7.3, Fire Chief, to give the Mayor the authority rather than the Fire and Public Safety Commission to appoint the Fire Chief, and require the Fire Chief and Assistant Chief to have a four-year college degree and the Battalion Chief to have a two-year college degree as one of the minimum requirements~~

~~#8.7.2 - Proposal to give the Mayor the authority to in the selection and removal of the Fire Chief.~~

~~Amend Section 8-7.3 to require approval by the Mayor of the Commission's recommendation to remove the Fire Chief~~

~~Amend Section 8-7.3 to require that the Mayor initiate and the Commission approve the request to remove the Fire Chief by a majority vote~~

Possible amendment – language to be drafted by staff

#8.7.3 - Proposal to Amend Chapter 7, Department of Fire and Public Safety, to change the name of the Department of Fire and Public Safety and delete the term Public Safety in order to more accurately reflect the duties of the Fire Department, and to conform other provisions of the Charter to reflect the new name

Suggested new name - Fire Protection and Prevention and Rescue

Defer to November 14, 2011 meeting: Commissioner Crivello to report

#8.7.5 - Proposal to Amend Chapter 7, Department of Fire and Public Safety, Section 8-7.2, Fire and Public Safety Commission, to delete the current language and to add new language on a Statement of Policy as follows:¹

It is hereby declared to be the purpose of this chapter of the charter to establish in the county a system of fire protection and prevention, emergency rescue, and emergency services which shall be based on qualified and professional leadership and personnel In order to achieve this purpose, the Maui County INSERT NEW NAME OF DEPARTMENT shall be operated in accordance with the following:

The goal of the county shall be to have qualified and professional leadership and personnel in this department

Standards for recruitment shall be designed to attract into the department persons with high degrees of education, intelligence, and personal stability

Promotions and other personnel actions shall be in accordance with all applicable laws and based upon fair and appropriate standards of merit, ability and work performance

Appropriate training shall be provided to the maximum extent possible and practicable

#8.7.5 *Corrected* - Proposal to Amend Chapter 7, Department of Fire and Public Safety, Section 8-7.2, Fire and Public Safety Commission, ²to add new language on a Statement of Policy as follows:

It is hereby declared to be the purpose of this chapter of the charter to establish in the county a system of fire protection and prevention, emergency rescue, and emergency services which shall be based on qualified and professional leadership and personnel In order to achieve this purpose, the Maui County INSERT NEW NAME OF DEPARTMENT shall be operated in accordance with the following:³

¹ For the working purposes of the Commission, corrections to this proposal have been made and are as follows in the next #8.7.5 corrected proposal.

² The exiting charter language was just being moved to a different section and not completely deleted.

³ This language was removed as being duplicative: The goal of the county shall be to have qualified and professional leadership and personnel in this department

Standards for recruitment shall be designed to attract into the department persons with high degrees of education, intelligence, and personal stability

Promotions and other personnel actions shall be in accordance with all applicable laws and based upon fair and appropriate standards of merit, ability and work performance

Appropriate training shall be provided to the maximum extent possible and practicable

Move to Boards and commissions section, for discussion, Article 13, General Provisions

#8.7.6 - Proposal to Amend Section 8-7.2, Fire and Public Safety Commission, to have one member from each council district, to expand the powers of the Commission to appoint such staff as it needs and to engage consultants as necessary for the performance of its duties and to add that the Commission members be appointed by the Mayor and confirmed by the Council in the manner prescribed in Section 13-2.

Defer to November 14, 2011 Meeting

#8.7.7 - Proposal to Amend Section 8-7.2, Fire and Public Safety Commission, to expand and clarify the powers, duties and functions of the Commission to do one or more of the following:

Expand the authority of the Commission to review rules for the administration of the Department.

Add to subsection 4 - publish a summary of the charges filed against members⁴ and officers and the disposition of each charge to be included in the annual report of the Commission.

Review personnel actions within the Department for conformance with the policies under the statement of policy.

Review and recommend on the strategic plan for the Fire Department or other similar type of plans

⁴ Added the term "members" to reflect intent to include all employees of the department

Add to subsection 5 regarding the annual evaluation of the fire chief that the Commission shall at least annually compare the actual achievements in the strategic or other similar types of plans or latest update submitted by the fire chief

Submit an annual report to the mayor and the council on its activities.

Defer to November 14, 2011 Meeting

#8.7.8 - Proposal to Amend Section 8-7.2, Powers, Duties and Functions of the Commission, to require that a summary of the charges filed and their disposition shall be included in the annual report of the Commission.

Defer to November 14, 2011 Meeting

#8.7.9 - Proposal to Amend Section 8-7.4, Fire Chief, Powers, Duties and Functions to add the following:

Prepare and, when deemed necessary, update a strategic or other similar type of plan of goals and objectives for the Maui County [NEW NAME OF FIRE DEPARTMENT]. The chief shall submit the plan and each update to the Commission for review and recommendations.

Possible amendment – language to be drafted by staff

#8.7.10 - Proposal to Amend Section 8-7.4 (4), Powers, Duties, and Functions, to add and assign ocean safety and rescue to the Department of Fire and Public Safety

~~#8.7.11 - Proposal to Amend Section 8-7.4 (4), Powers, Duties, and Functions, to clarify that reserve fire fighters and emergency rescue personnel can be trained and utilized, when needed.~~

~~#8.7.12 - Proposal to Delete Section 8-7.2 to eliminate the Fire and Public Safety Commission~~

Subject Matter – Housekeeping: Chapter 9, Department of Personnel Services

Possible amendment - language to be drafted by staff

#8.9.1 - Proposal to Amend Article 8, County Departments, Chapter 9, Department of Personnel Services, Section 9.4, Civil Service Commission, with a housekeeping measure to align the Maui County Charter with the Hawaii Revised Statutes regarding recent changes to the civil service law.

Subject Matter – Water Supply Department and Board

Chapter 11, Department of Water Supply

Removed from active list

~~#8.11.1 – Proposal to Eliminate the Board of Water Supply~~

~~Delete Section 8-11.3, Board of Water Supply and Section 8-11.4 Powers Duties and Functions, in order to eliminate the Board of Water Supply.~~

~~#8.11.2 – Proposal to Amend Article 8, County Departments, Chapter 11, Department of Water Supply, Section 8-11.3 Board of Water Supply and Section 8-11.4 Powers Duties and Functions, to strengthen the independence of the Board of Water Supply and to establish it as a semi-autonomous entity and to have some or all of the following powers:~~

~~* issue revenue bonds~~

~~* hire its own legal counsel, so that it does not need to the Corporation Counsel~~

~~* set rates~~

~~* promulgate rules and regulations~~

~~* set its own budget~~

~~* appoint the Director of the Department of Water Supply~~

~~* use as a model the provisions in the Charter of the City and County of Honolulu~~

~~* use as a model the provision proposed by the 2001 Maui County Charter Commission~~

~~* complete an independent authority for rules, budget, fees, and rates~~

~~#8.11.3 – Proposal to amend Section 8-11.5, Powers Duties and Functions [of Director of Water Supply], to increase his or her powers~~

~~report to either the Council or the Board of Water Supply on all issues to eliminate piecemeal authority~~

~~#8.11.4 Proposal to delete the requirement in Sec. 8-11-5 that the Director of the Department of Water Supply be confirmed by the County Council~~

Chapter 12, Department of Police

Removed from active list

~~#8.12.4 – Proposal to amend Section 8-12.2, Police Commission, to add a new subsection to require that the Police Commission hold public meetings in truly public venues in different parts of the County four times a year.~~

Chapter 15 – Department of Environmental Management [current section was in the 2006 Charter Amendment]

Defer to October 24, 2011 meeting and additional information requested

#8.15.1 - Proposal to Amend Article 8, County Departments, Chapter 15, Department of Environmental Management, to add the function of sustainability to the Department of Environmental Management and change the name of the department to Department of Sustainability and Environmental Management, and thus to create a new department entitled the Department of Sustainability and Environmental Management :

Add specific language to include the function of sustainability as follows:

Guide efforts to maximize opportunities for natural resource protection, conservation, and restoration.

Coordinate and develop policies and initiatives that integrate sustainable resource development, support local food and energy production, and establish partnerships with agencies and organizations to implement programs, policies, and projects that promote sustainability

Chapter 16 –Cost of Government Commission [formerly section 15 in 2003 edition of the Charter]

#8.16.1 - Proposal to Amend Article 8-16.2, Cost of Government Commission, to require that its annual appropriation not be less than the year before, and that the Commission decide the compensation of elected officials, appointed directors, and deputy directors of all departments, consulting with the boards and commissions which have appointing authority for department heads.

#8.16.2 - Proposal to Amend Article 8-16.3, Term of Commission, from a two-year term to a four-year term and to limit the number of terms

#8.16.3 – Proposal to Amend Article 8-16.3, Term of Commission, from a two-year term to a five-year term and to limit the terms to two consecutive terms for a total of ten years

#8.16.4 – Proposal to Amend Article 8-16.3, Term of Commission, from a two-year to a six-year term and to require that members must have been a resident of Maui for at

least one year preceding the filing of nomination papers and have voted in the last election, and must continue to reside on Maui for his or her elected term. Vacancy in office shall be filled at the next special election, unless it is more than six months before, and then the Mayor shall make the appointment to serve until the next special election

#8.16.5 – Proposal to Amend Article 8-16.3, Term of Commission, to have three members, elected for six years, whose terms shall be staggered every two years. The longest serving commissioner shall serve as temporary chair until the Commission elects a permanent chair

#8.16.6 – Proposal to Amend Article 8-16.3, Term of Commission, to have Commission members elected in a nonpartisan special election, with a second special election where necessary

#8.16.7 - Proposal to Amend Article 8, Section 16.3, Term of Commission, to conform the term of the Cost of Government Commissioners to be the same as the terms and the timetables of other commissions as provided in the Charter in Article 13, General Provisions, Section 13.2, Boards and Commissions.

Subject Matter - Independent Counsel for Boards and Commissions [new section]

~~#8.New.3—Amended Proposal to Create an Office of Independent Counsel for Boards and Commissions—General Discussion of Independent Counsel for Boards and Commissions~~

~~Amend Article 8, County Departments, to add a new section to create an Office of Independent Counsel separate from the Department of Corporation Counsel to provide independent legal advice to County boards and commissions~~

Subject Matter - Article 9, Financial Procedures

Possible amendment – language to be drafted by staff

#9.1 - Proposal to Amend Article 9, Financial Procedures, Section 9-2, Preparation and Submission of Budget and Capital Program to change from an annual budget to a biennial budget to commence in a non-election year.

Possible amendment – language to be drafted by staff

#9.2 - Proposal to Amend Article 9, Financial Procedures, Section 9-2, Preparation and Submission of Budget and Capital Program, to change from an annual budget in odd years for the operating budget and even years for the CIP budget.

Subject Matter – Discussion on Voter-Initiated Ballot Measures

Staff to provide additional information for Initiative, Recall and Charter Amendment Petitions 11/14/11

Article 11, Initiative

#11.1 - Proposal to Reduce Number of Signatures Required for Initiative Petition

Amend Section 11-3(2), Petitions, to reduce the percentage of signatures required from 20% to 10% of voters, and to amend the definition of "voters" from those who were registered to those who voted

#11.2 - Proposal to Require Explanation of the Effect of Blank Votes on Ballot Initiative

Amend Article 11-6(2), Action on Petitions, to add a new section to require an explanation on the ballot itself of the consequence of leaving the vote blank

Staff to provide additional information for Initiative, Recall and Charter Amendment Petitions 11/14/11

Article 12, Recall

#12.1– Proposal to Reduce Number of Signatures Required for Recall Petition

Amend Section 12-3(2), Petitions, to reduce the percentage of signatures required from 20% to 10% of voters, and to amend the definition of voters from those who were registered to those who voted

#12.2 - Proposal to Extend Time to File Papers for Recall Petition

Amend Section 12-4, Filing and Certification, to extend the date for filing all papers comprising a recall petition from 30 days to 180 days after the filing of the affidavit (to conform to the initiative requirements).

#12.3 - Proposal to Reduce Number of Votes Required to Recall

Amend Section 12-6, Recall Election, to change the definition of voters from those who were registered to those who voted

#12.4 – Proposal to Require Explanation of Blank Vote on Ballot for Recall

Amend Section 12.7, Ballots, to add a new section to require an explanation on the ballot itself of the consequence of leaving the vote blank

Staff to provide additional information for Initiative, Recall and Charter Amendment Petitions 11/14/11

#14.5 - Proposal to Reduce the Number of Votes Required for Charter Amendment Petition

Amend Section 14-2(3), Initiation of Amendments, to reduce from 20% to 10% the percentage of voters required to sign a petition to change the County Charter, and amend the definition of voters from those who were registered to those who voted

Subject Matter – General Discussion on Boards and Commissions

Article 13 – General Provisions

Possible amendment – language to be drafted by staff

#13.1 - Proposal to Amend Section 13-2 (16), Subsection 17, to clarify that the 30 days for the Mayor to submit to the Council the name of the Mayor's nominee to fill the vacancy commences upon the date of informing the Council of a vacancy.

~~#13.2 – Proposal to Remove the Council's power to nominate and approve Board and Commission Members under Sections 13.2-16 and 13.2-17~~

Possible amendment – language to be drafted by staff

#13.3 - Proposal to Require Interactive Communications Access for the Public to All County Public Meetings and to County Departments

Amend Article 13, General Provisions, to add a new section to require interactive communications access for the public to all County Public Meetings and to County Departments

~~#13.4 – Proposal to Add a New Paragraph to require that all county boards and commissions post on the county website [1] the minutes of any public meeting or hearing within a certain number of days after the meeting and [2] any and all internal policies of all departments~~

Possible amendment – language to be drafted by staff and to be combined with #13.3

#13.5 - Proposal to Amend Article 13, General Provisions, to create a new section to require telecommunications access for Hana, Lānaʻi, and Molokai residents to all County Public Hearings with the capability for Hana, Lānaʻi, and Molokai residents to testify remotely at all County Public Hearings

~~#13.6 - Proposal to Amend Article 13, General Provisions, to create a new section to establish a blue ribbon committee to make recommendations to the Mayor for appointments to boards and commissions~~

~~Amend Article 13, General Provisions, to add a new section to require the creation of a blue ribbon committee to make recommendations to the Mayor for appointments to Boards and Commissions, with three members to be appointed by the Mayor and three to be appointed by the Council, to serve for two-year terms that can be renewed one time. Recommendations shall be revealed to the Mayor only and the Mayor shall make every effort to utilize the Committee's recommendations.~~

Additional information about the current situation requested 11/14/11

#13.7 - Proposal to Amend Article 13, General Provisions, to add a new section entitled reports to make available all reports required by Charter, Code or Ordinance to be posted and available to the public at no cost.

Possible amendment – language to be drafted by staff

#13.8 - Proposal to delete Section 13.2, Boards and Commissions, Subsection 2, which requires that no more than a majority of the members of a board or commission can belong to the same political party

~~#13.9 - Proposal to Amend Section 13-2 (3) Boards and Commissions to require that each board or commission include a qualified resident of Lanai and Molokai~~

Article 14, Charter Amendments

Possible amendment – language to be drafted by staff

#14.3 - Proposal to Amend Article 14, Charter Amendment, Sections 14-1, Initiation of Amendments, Subsections (1) and (2), to delete the power of County Council to amend the Maui Charter during the time that a Charter Commission is constituted

Possible amendment – language to be drafted by staff

#14.4 - Proposal to Amend the Charter Commission Appointment Process, Sec. 14.3, so that it follows the time requirements for regular Maui County boards and commissions in Sec. 13.2-16.

~~#14.9 — Proposal to Extend the Term of Charter Commissioners to 18 months~~

Possible amendment – language to be drafted by staff

#14.10 – Proposal to require that the Charter be republished each time it is amended, with a significant amendment

New Article – Office of County Auditor

Included with other possible amendment/proposal on county auditor

A. Proposal to Establish an Office of County Auditor to include one or more of the following:

- * be independent of both the Mayor and Council/complete autonomy
- * perform all financial and operational audit functions
- * coordinate with the COG or otherwise work with COG
- * complete discretion to prioritize assignments
- * administrative assigned to the Council
- * possible appointment by the Judiciary
- * possible appointment by a committee
- * county auditor could be removed only by a 2/3rds vote of the council [as in Honolulu Charter]
- * model powers and duties after the Auditor for the City and County of Honolulu

PROPOSALS ADDED TO THE ACTIVE LIST AT OCTOBER 10, 2011 MEETING

Discussed with other district amendment proposals

#3.40 – Proposal to Amend Section 3-1, Composition, to have three districts and three Council persons from each district, and have the districts organized as follows: (1) Lanai, Lahaina, and part of South Maui; (2) Molokai, Kahului, and maybe Paia, and (3) part of South Maui, Upcountry, and Hana.

#8.7.13 – Proposal to add to #8.7.2 to include the following language: Four out of the nine members of the fire and public safety commission shall be nominated to the mayor by the fire fighters labor union. The fire fighters labor union shall submit names of nominees for up to four out of the nine fire and public safety commissioners that shall be appointed by the mayor and confirmed by the council in the matter prescribed in Section 13-2.

#8.7.14 – Proposal to change the names to Fire Department and Fire Commission and to amend section 8-7.1 to provide that the Fire Department shall consist of the Fire Chief, Fire Commission and the necessary staff.

#8.7.15 – Proposal to amend Sections 8-9.4, 8-12.2, 8-13.2, and 8-13.4 to create consistency in the powers and duties of the Fire and Public Safety, Police, Liquor, and the Civil Service Commissions and the due process afforded directors of these departments in the event of dismissal.

Possible amendment – language to be drafted by staff

#8.16.8 – Proposal to establish an Independent Office of County Auditor, to have the Commission on Government be attached to the Office of County Auditor, and to have the Commission on Government have the power to hire and fire the County Auditor.

Possible amendment – language to be drafted by staff

#13.10 – Proposal to amend Article 13, General Provisions, Section 2, Boards and Commissions, to add provisions requiring the county to indemnify and fund the legal representation of members of Boards and Commissions in the event of civil action as a result of the lawful performance of their duties.

PROPOSALS ADDED TO THE ACTIVE LIST AT OCTOBER 24, 2011 MEETING

~~#8.8.15 – Proposal to Amend Article 8-8.4(3) regarding the requirement that the appropriate planning commission must transmit its findings and recommendations on proposed land use ordinances and amendments that are unrelated to the general plan to the council within 120 days after the final public hearing but rather after receipt of the referral and make other changes to time frames in the Department of Planning to eliminate any inconsistencies.⁵~~

⁵See also #8.8.9 – Proposal to Provide Adequate Time for Planning Commissions to Act and #8.8.10 – Proposal to Provide Adequate Time for Planning Commissions to Act also addressed the issue of timing for the Planning Commission to transmit findings and recommendations to the Council but neither proposal was specifically moved to the Active Matrix. However, a general discussion of Boards and Commissions and a number of proposals relating to Article 13 were moved to the Active Matrix under Article 13, General Provisions, Section 2, Boards and Commissions.

Maui County Charter

Article 3

County Council Term Limits

Proposed Charter Amendment

[added material is underlined, deleted material is bracketed.]

Amend Section 3-2. Election of Council and Term of Office, Paragraph 5. as follows:

The term of office of council members shall be for [two (2) years] four (4) years, beginning at twelve o'clock meridian on the second day of January following their election. No member of the county council shall serve more than [five consecutive] three full terms of office, whether consecutive or not consecutive. The terms shall be staggered.

The staggering of the terms of councilmembers shall commence on January 2, 2015 and be implemented in accordance with this section.

The five councilmembers who have received the highest number of votes shall be elected to four year terms. The remaining four council members shall be elected to two-year regular terms commencing on the same date.

Questions on details

How many years at the time of implementing this staggered system can a person who is elected to the two year term serve? Should it be two or three additional terms – ten or fourteen years?

How many additional terms currently elected council members should have in this staggered system? Should these council members have the time served count toward the twelve year limit? Under the current system, council members do not have to count time already served, so long as it is not consecutive. Should that same rule apply if these proposed new limits are submitted to and adopted by the voters? In other words, should a break in time allow the candidate to start all over again?

102411 - Item No. IV. B. pg 1-1 Deferred
111411 - Deferred
11/28/11 - Item No. IV. D. pg 1-1

Maui County Charter

Article 8

County Departments

Chapter 9

Department of the Personnel Services

Proposed Charter Amendment

[added material is underlined, deleted material is bracketed.]

Amend Section 8-9.3. Powers, Duties, and Functions. The director of personnel services shall:

Add a new paragraph as follows:

4. Adopt rules having the force and effect of law to carry out the provisions of the civil service laws of the state.

Amend Section 8-9.4. Civil Service Commission. The civil service commission shall consist of five members appointed by the mayor with the approval of the council.

The civil service commission shall:

1. Adopt rules having the force and effect of law to carry out [the] applicable provisions of the civil service laws [of the state] as prescribed by the Hawaii Revised Statutes.

102411 - Item No. IV.C. pg 1-1
111411 - Deferred
11/28/11 - Item No. IV.E. pg 1-1

Maui County Charter

Article 3

County Departments

Chapter 8

Department of the Prosecuting Attorney

Proposed Charter Amendment

Amend Section 8-3.3. Powers, Duties and Functions as follows [added material is underlined, deleted material is bracketed.]

The prosecuting attorney shall:

1. Appoint such deputy prosecuting attorneys and necessary staff, including investigators who shall have all the powers and privileges of a police officer of the county, as shall be authorized by the council. Deputy prosecuting attorneys shall be exempt from civil service and shall serve at the pleasure of the prosecuting attorney.

and

Add a new paragraph 8.

8. Prosecute offenses again the laws of the State under the authority of the attorney general of the State.

102411 - Item No. IV. D. pg 1-1
111411 - Deferred
112811 - Item No. IV. F. pg 1-1

MAUI COUNTY CHARTER

ARTICLE 3 ELECTION OF COUNCIL AND TERM OF OFFICE

ARTICLE 7 ELECTION OF MAYOR AND TERM OF OFFICE

Proposed Charter Amendments

[added material is underlined, deleted material is bracketed]

Amend Section 3-2. Election of Council and Term of Office, Paragraphs 1 through 4, as follows:

1. Council members shall be elected by [nonpartisan special elections. Such special elections shall be held in conjunction with the primary and general elections every two (2) years commencing in 2000. The special election held in conjunction with the primary election every two (2) years shall be known as the first special election. The special election held in conjunction with the general election every two (2) years shall be known as the second special election] partisan elections in accordance with the election laws of the state, insofar as applicable.

[2. The names of all candidates for each council seat shall be placed on the ballot for the first special election; provided, that for any council seat with two or fewer candidates, the names of the candidates shall appear only on the ballot for the second special election.

3. For any council seat with three or more candidates, the names of the two candidates receiving the highest number of votes for each council seat in the first special election shall be placed on the ballot for the second special election; provided, that if two or more candidates tie for the highest number of votes received in the first special election, the names of the candidates tied for the highest number of votes shall be placed on the ballot for the second special election; and further provided, that if a single candidate receives the highest number of votes in the first special election and two or more candidates tie for the second-highest number of votes received, the names of the candidate receiving the highest number of votes and the candidates tied for the second-highest number of votes shall be placed on the ballot for the second special election.

4. ~~At the second special election, the candidates receiving the highest number of votes for each council seat shall be deemed elected. If there is no more than one candidate for a council seat, such person shall be deemed elected regardless of the number of votes received.]~~

102411 - Deferred
111411 - Deferred
112811 - Item No. IV. G. pgs 1-2

Amend Section 7-2. Election of Mayor and Term of Office, Paragraphs 1 through 4, as follows:

1. The mayor shall be elected by [nonpartisan special elections. Such special elections shall be held in conjunction with the primary and general elections every four (4) years commencing in 2002. The special election held in conjunction with the primary election every four (4) years shall be known as the first special election. The special election held in conjunction with the general election every four (4) years shall be known as the second special election.] a partisan election in accordance with the election laws of the state, insofar as applicable.

[2. The names of all candidates for mayor shall be placed on the ballot for the first special election; provided, that if there are two or fewer candidates, the names of the candidates shall appear only on the ballot for the second special election.

3. If there are three or more candidates, the names of the two candidates receiving the highest number of votes in the first special election shall be placed on the ballot for the second special election; provided, that if two or more candidates tie for the highest number of votes received in the first special election, the names of the candidates tied for the highest number of votes shall be placed on the ballot for the second special election; and further provided, that if a single candidate receives the highest number of votes in the first special election and two or more candidates tie for the second-highest number of votes received, the names of the candidate receiving the highest number of votes and the candidates tied for the second-highest number of votes shall be placed on the ballot for the second special election.

4. At the second special election, the candidate receiving the highest number of votes shall be deemed elected. If there is no more than one candidate for mayor, such person shall be deemed elected regardless of the number of votes received.]

PROPOSED BALLOT QUESTION

Shall Sections 3-2 and 7-2 of the Revised Charter of the County of Maui (1983) be amended to delete the reference to nonpartisan elections, and provide that Council members and the Mayor shall be elected by partisan elections in accordance with the election laws of the State of Hawaii ?

Maui County Charter

Article 8, County Departments, Section 7, Fire Department and Public Safety

Adopt New Name for Department of Fire and Public Safety Department and Commission

Proposed Charter Amendment

Shall Section 8-7 of the Charter of the County of Maui be amended to provide that the name of Department of Fire and Public Safety and Fire and Public Safety Commission be amended to be the Maui County Fire Department and the Maui County Fire Commission?

[added material is underlined, deleted material is bracketed.]

CHAPTER 7

MAUI COUNTY FIRE DEPARTMENT [OF FIRE AND PUBLIC SAFETY]

Section 8-7.1. Organization. There shall be a Maui County Fire Department [department of fire and public safety] consisting of a Maui County Fire Commission [fire and public safety commission], a fire chief, and the necessary staff.

Section 8-7.2. Maui County Fire Commission [Fire and Public Safety Commission]. The Maui County Fire Commission [fire and public safety commission] shall consist of nine members appointed by the mayor with the approval of the council.

The Maui County Fire Commission [fire and public safety commission] shall:

1. Adopt such rules as it may consider necessary for the conduct of its business and regulation of the matters committed to its charge by law.
2. Review and submit to the mayor the department's request for an annual appropriation for the operation of the department.
3. Review the operations of the Maui County Fire Department [department of fire and public safety] and the civil defense agency and make recommendations for changes that may be desirable to improve the performance of emergency functions and the provision of public safety services.
4. Receive, review, and investigate any charges brought forth by the public against the conduct of the Maui County Fire Department [department of fire and public safety] or any of its members and submit a written report of its findings and recommendations to the fire chief for disposition.
5. Evaluate at least annually the performance of the fire chief and submit a report to the mayor and the council.
6. Submit an annual report to the mayor and the council on its activities.
7. Have such other powers and duties as may be provided by law.

111411 - Deferred
112811 - Item No. IV.H. pgs 1-2

Except for purposes of inquiry or as otherwise provided in this charter, neither the commission nor its members shall interfere in any way with the administrative affairs of the department.

Section 8-7.3. Fire Chief. The fire chief shall be appointed and may be removed by the Maui County Fire Commission [fire and public safety commission]. The fire chief may be removed by the Maui County Fire Commission [fire and public safety commission] only after being informed in writing of the charges that are resulting in the fire chief's dismissal, and after being given a hearing before the commission. The fire chief shall have had a minimum of five years of experience in fire control, at least three years of which shall have been in an administrative capacity.

Article 15

Transitional Provisions

Add a new section.

Upon adoption of the proposed 2012 amendment to Section 8-7, the Maui County Fire Department shall provide the timetable for the transition to its new name.

Maui County Charter

Article 8, County Departments, Section 7, Department of Fire and Public Safety

Assign Ocean Safety and Rescue to Department of Fire and Public Safety

Proposed Charter Amendment

Shall Section 8-7.4 (4) of the Charter of the County of Maui be amended to assign ocean safety and rescue to the Department of Fire and Public Safety?

[added material is underlined, deleted material is bracketed.]

CHAPTER 7

DEPARTMENT OF FIRE AND PUBLIC SAFETY

Section 8-7.4. Powers, Duties, and Functions. The fire chief shall:

1. Be the administrative head of the department.
2. Provide and perform fire fighting, rescue, ocean rescue and safety, and first-responder emergency services in order to save lives and property from fires and other emergencies arising on land, sea, and hazardous terrain, including the mitigation and stabilization of hazardous materials and incidents relating to the same.
3. Provide public education programs related to fire prevention, ocean rescue and safety and public safety.
4. Train, equip, maintain, and supervise the force of fire fighting, ocean rescue and safety and emergency rescue personnel.
5. Investigate the cause, origin and circumstances of fires.
6. Adopt rules relating to the protection of persons and property against fires.
7. Monitor the standards for construction and occupancy of buildings for the purposes of fire prevention and life safety and approve building plans as provided by law.
8. Exercise such other powers and duties as may be assigned by the ~~commission or as may be provided by law.~~

Add a new section.

Upon adoption of the proposed 2012 amendment to Section 8-7, the Maui County Fire Department shall provide the timetable for the transition to include the functions of ocean rescue and safety.

111411 - Deferred
112811 - Item No. IV. I. pg 1-1

Maui County Charter

Article 9, Financial Procedures

Adopt Biennial Budget and Capital Program in Non-election Years

Proposed Charter Amendment

Shall Section 9.2 of the Charter of the County of Maui be amended to provide that the Budget and Capital Program be prepared on a biennial basis and in non-election years?

[added material is underlined, deleted material is bracketed.]

Section 9-1. Fiscal Year. The fiscal year shall begin on the first day of July and end on the thirtieth day of June of the succeeding year. All fiscal affairs of the county during any fiscal year shall be controlled by a budget ordinance and a capital program ordinance adopted on a biennial basis for that fiscal year.

Section 9-2. Preparation and Submission of Budget and Capital Program.

1. On or before the fifteenth day of March before the ensuing fiscal year begins, in non-election years, the mayor shall submit to the council (a) an operating budget for the ensuing two fiscal year[s], including an executive operating budget and a legislative operating budget, (b) a capital program, and (c) an accompanying message.

2. Upon submission, the budget, the capital program and the message shall be a public record in the office of the county clerk and shall be open to public inspection. The mayor shall at the same time make available copies of the budget, the capital program and the message for distribution to interested persons.

Section 9-3. Scope of Budget and Message.

1. The budget shall present a complete financial plan for the operations of the county and its departments for the ensuing two fiscal year[s], showing all county funds on hand whether encumbered or unencumbered and estimated reserves and revenues. It shall be set up as provided by the council after consultation with the mayor.

2. The estimated revenues, proposed expenditures and total appropriations for the ensuing two fiscal year[s] ~~shall be equal in amount.~~

3. The mayor's message shall explain the budget both in fiscal terms and in terms of work to be done. It shall outline the proposed financial policies of the county for the ensuing two fiscal year[s] and describe the most important features of the budget plan. It shall indicate any major changes in financial policies and in expenditures, appropriations and revenues as compared with the two fiscal year[s] currently ending, and shall set forth the reasons for the changes. The message shall include a list of pending and proposed capital improvements together with the mayor's comments on such list. The message shall also include such other supporting or explanatory material as the mayor deems desirable.

111411 - Deferred
112811 - Item No. IV.J. pgs 1-2

Section 9-5. Budget: Council Action.

1. After the public hearing, the council may pass the budget with or without amendment. In amending, it may add new items or increase items in the budget. It may decrease or delete items, except appropriations required by law and appropriations to pay any indebtedness. In all cases the estimated revenues, proposed expenditures and total appropriations for the ensuing fiscal year shall be equal in amount.

2. The council shall pass the budget on or before the thirty-first day of May of the fiscal year currently ending in a non-election year. If it fails to do so, the budget submitted by the mayor shall be deemed enacted as the budget for the ensuing two fiscal year[s].

3. The enacted budget shall be in effect on and after the first day of the two fiscal year[s] to which it applies. By virtue of the adoption of the budget, the several amounts listed in the budget column entitled "Appropriations" shall be appropriated to the specified departments and programs.

Section 9-6. Capital Program: Scope; Council Action.

1. The capital program shall contain at least the following:

a. A simple, clear general summary of the detailed contents of the program.

b. The capital improvements pending or proposed to be undertaken within the ensuing two fiscal year[s], together with the estimated cost of each improvement and the pending or proposed method of financing it.

c. The capital improvements proposed for the five (5) years next succeeding the ensuing fiscal year, together with the estimated cost of each improvement and the proposed method of financing it.

2. Capital expenditures to be financed from current revenues in the ensuing two fiscal year[s] shall be included in the budget as well as in the capital program. Appropriations for such expenditures shall be included in the budget.

3. After the public hearing on the capital program, the council may pass the program with or without amendment.

4. The council shall pass the capital program on or before the thirty-first day of May of the fiscal year currently ending in a non-election year. If it fails to do so, the program submitted by the mayor shall be deemed enacted as the program for the ensuing two fiscal year[s]. The enacted program shall be in effect on and after the first day of that fiscal year in a non-election year.

5. At any time during a fiscal year the capital program may be amended by ordinance.

Maui County Charter

Establish an Independent Office of the County Auditor and Define its Duties and Provide that the County Auditor be Appointed and Removed by the Cost of Government Commission

Proposed Charter Amendment**

"Shall the Charter be amended to establish an independent Office of the County Auditor, to provide for the appointment and removal of an Independent County Auditor by the Cost of Government Commission, to define the County Auditor's duties and powers in order to increase accountability and efficiency of County operations, to be appointed by and removed by the Cost of Government Commission and to make other clarifying, conforming, transitional, and related amendments?"

**** STAFF COMMENTS** - The commission's current proposal would greatly increase the power/authority of the COG from the current charter-created, advisory commission whose task is to complete and submit a report to the council to a board/commission similar in power/authority to the Police or Fire commissions, which directly appoint its "CEO", i.e., the Fire and Police chiefs. Accordingly, Section 8, Chapter 16, would probably need to be amended further to reflect the creation of such authority.

**** STAFF COMMENTS** - It might make sense for the Charter Commission to consider moving the independent office of the county auditor from Article 8, County Departments, Section 16, Cost of Government Commission to create a separate department. The motion that passed seemed to continue its existence in Article 8, Chapter 16, Cost of Government Commission. See Active Proposal #8.16.8

****STAFF COMMENTS** -- In addition to its appointing authority, the Cost of Government Commission would also be making budget/funding requests to the council for the new department as well as other matters.

111410 - Item No. IV.M. pgs 1-6 - Deferred
112811 - Item No. IV.K. pgs 1-6

[added material is underlined, deleted material is bracketed.]

1. Amend Article 8, County Departments, Section 16, Cost of Government Commission, as follows:

Chapter 16

[Cost of Government Commission]

Office of the County Auditor

Section 8-16-4. Office of the County Auditor Established.

1. There is established an office of the county auditor, to be headed by a county auditor who shall be appointed by the cost of government commission, by a majority vote of its membership, and shall serve for a term of six years. The county auditor may be re-appointed, or a successor appointed, by the Commission for subsequent terms of six years. The county auditor may hold over until a successor is appointed. The salary of the county auditor shall be determined by the salary commission. The cost of government commission, by a two-thirds vote of its membership, may remove the county auditor from office at any time for cause. The county auditor shall be exempt from the civil service.
2. The county auditor shall possess adequate professional proficiency for the office, demonstrated by relevant certification as a certified internal auditor or certified public accountant, and have at least five years of experience in the field of auditing, evaluation, or analysis. The county auditor shall have a bachelor's degree in accounting, business administration, or public administration or related field.
3. Except for exercising the right to vote, neither the county auditor nor any staff member of the office of the county auditor shall support, advocate, or aid in the election or defeat of any candidate for county public office.

4. The county auditor shall appoint the necessary staff as shall be authorized by the commission. Persons appointed to such positions shall be exempt from the civil service and shall serve at the pleasure of the county auditor.

Section 8-16-5. Office of the County Auditor; Powers, Duties and Functions.

1. It shall be the duty of the county auditor to conduct or cause to be conducted:

a. The independent annual financial audit of the county, as authorized by Section 9-13;

b. Other program, financial, or performance audits or evaluations regarding county organizations, operations, and regulations; and

c. Performance or financial audits of the funds, programs, or activities of any agency or function of the county, as the county auditor deems warranted; provided that, before each fiscal year, the auditor shall transmit a plan of the audits proposed to be conducted during the fiscal year to the mayor and the council, for review and comment, but not approval.

2. Audit findings and recommendations shall be set forth in written reports of the county auditor, a copy of which shall be transmitted to the mayor and to the council, which shall be public records, except as provided by law.

3. For the purposes of carrying out any audit, the county auditor shall have full, free, and unrestricted access to any county officer or employee and shall be authorized to examine and inspect any record of any agency or operation of the county, to administer oaths and subpoena witnesses, and compel the production of records pertinent thereto. If any person subpoenaed as a witness or compelled to produce records shall fail or refuse to respond thereto, the proper court, upon request of the county auditor, shall have the power to compel obedience to any process of the county auditor and to punish, as a contempt of the court, any refusal to comply therewith

approval, retain special counsel to represent the county auditor in implementing these powers.

4. For the purpose of this section, the following definitions shall apply:

“Agency or operation of the county” includes any executive agency, semi-autonomous agency, council office, and other establishment of county government supported, in whole or in part, by county or public funds.

“Council office” includes the council itself, the office of a council member and the council member’s immediate staff, the office of the county clerk, and the office of council services. This definition shall not be construed as excluding the office of the county auditor from the legislative branch.

“Record” includes any account, book, paper, and document, and any financial affair, notwithstanding whether any of the preceding is stored on paper or electronically.”

2. Amend Section 9-13 of the Charter, pertaining to Audit of Accounts, as follows:

Section 9-13. Audit of Accounts. Within six (6) months after the beginning of each fiscal year, [the county council shall provide for] the county auditor shall conduct or cause to be conducted an independent financial audit of the funds, accounts and other evidences of financial transactions of the county and of all operations for which the county is responsible[.] for the audited fiscal year. The audit shall be [made] conducted by a certified public accountant or firm of certified public accountants[, designated by the council,] who have no personal interest, direct or indirect, in the fiscal affairs of the county or any of its operations. The audit shall include both financial accountability and adequacy of the financial and accounting system. If the State makes such an audit, the [council] county auditor may accept it as satisfying the requirements of

this section. The scope of the audit shall be in accordance with the terms of a written contract [to be] recommended by the county auditor and signed by the council chair[,] as the contracting officer for the legislative branch, which contract shall encourage recommendations for better financial controls and procedures and shall provide for the completion of the audit within a reasonable time after the close of the previous fiscal year. A copy of the audit reports shall be filed with the county clerk and shall be a public record[.], unless otherwise provided by law.

In case of the death, resignation or removal of the director of finance, the council shall cause an independent audit to be made of the finance director's accounts.

3. Amend Article 15 of the Charter, pertaining to Transitional Provisions, to add a new section to read as follows:

"Section 15-4. Transfer of Audit Functions to the Office of the County Auditor.

1. All lawful obligations and liabilities owed by or to the office of council services relating to financial and performance audits on June 30, 2013 shall remain in effect on July 1, 2013. The obligations and liabilities shall be assumed by the office of the county auditor.

All contracts held by the office of council services relating to financial and performance audits which are to remain effective after June 30, 2013 shall be assumed by the office of the county auditor. The contracts shall continue in effect until fulfilled or lawfully terminated.

All financial and performance audit activities administered by the office of council services on June 30, 2013 shall be assumed by the office of the county auditor on July 1, 2013.

2. On July 1, 2013, all records, data, and information held by the office of council services relating to financial and performance audits which have not been completed as of June 30, 2013 shall be transferred to the office of the county auditor."

Maui County Charter

Article 13, General Provisions, Section 13-2, Boards and Commissions, Subsection 2

Non Partisan Board and Commissions

Proposed Charter Amendment

Shall the Maui County Charter be amended to provide that all County of Maui boards and commissions be nonpartisan?

[added material is underlined, deleted material is bracketed.]

Amend Section 13.2, Boards and Commissions, Subsection 2 as follows:

2. [Not more than a bare majority of the members of any board or commission shall belong to the same political party.] Members of boards and commissions shall be appointed on a nonpartisan basis.

112811 - Item No. IV.L - pg 1-1

Maui County Charter

Article 13, General Provisions, Section 13-2, Boards and Commissions, Subsection 17

Require Interactive Communications Access for the Public to

All County Council and County Council Committee Meetings

Proposed Charter Amendment

Shall Article 13, General Provisions, of the Charter of the County of Maui be amended to require Interactive Communications Access to All County Council and County Council Committee Meetings for the Residents of Hana, Lanai and Molokai and residents of other geographic areas as the Council deems appropriate and reasonable.

[added material is underlined, deleted material is bracketed.]

Amend Article 13, General Provisions, to add a new section:

Section _____. The County Council shall hold provide interactive communications access for the residents of Hana, Lānaʻi, and Molokai and residents of other geographic areas as the Council shall deem appropriate and reasonable to all County Council Meetings and and County Council Committee Meetings. Said access shall include but not be limited to the ability of the public to testify, of council members to ask questions, and of the public to respond to questions.

** Should the Charter Commissioners identify other locations from which the public should have the interactive facilities or should that matter be addressed by an ordinance to implement the details of this provision? Any requirements should be able to accommodate the changes in technology that might increase the locations from which access can be available at a reasonable cost.

112811 - Item No. IV. M. Pg 1-1

Maui County Charter

Article 13, General Provisions, Section 13-2, Boards and Commissions, Subsection 17

Proposed Charter Amendment

Shall Article 13, General Provisions, Section 13-2, Boards and Commissions, Subsection 17 of the Charter of the County of Maui be amended to provide that the Mayor shall have 45 days from the receipt of notice of a vacancy to submit to the Council the name of the Mayor's nominee to fill the vacancy

[added material is underlined, deleted material is bracketed.]

Article 13, General Provisions, Section 13-2, Boards and Commissions

17. A vacancy on a commission or board due to death, resignation or removal shall be filled as follows:

Within [thirty (30) days of the occurrence] forty five days of the notification of a vacancy the mayor shall submit to the council the name of the mayor's nominee to fill the vacancy. Within sixty (60) days thereafter the council shall act to approve or disapprove the nominee. If the council disapproves the nominee it shall immediately so notify the mayor of its action. The mayor shall then submit the name of a second nominee to the council within ten (10) days and the council shall act thereon within sixty (60) days. This process shall continue until the vacancy is filled. In the event that the council fails to approve or disapprove a nominee within the time periods provided for herein, that nominee shall be deemed appointed to fill the vacancy upon its occurrence. If the mayor fails to submit the name of a nominee within the times provided for herein, the council may within sixty (60) days nominate and approve the appointment of an individual to fill the vacancy.

112811 - Item No. IV. N. Pg 1-1

Maui County Charter

Article 14, Charter Amendments, Section 14-1, Initiation of Amendments

Remove Authority of County Council to Propose Charter Amendments During the General or Special Election Cycle that the Charter Commission Is Conducting Its Mandatory Review

Proposed Charter Amendment

Shall Article 14, Charter Amendments, Section 14-1, Initiation of Amendments, be amended to remove the authority of the County Council to propose charter amendments during the general or special election cycle that the Charter Commission is conducting its mandatory review?

[added material is underlined, deleted material is bracketed.]

Amend Article, Article 14, Charter Amendments, Section 14-1, Initiation of Amendments, as follows:

Section 14-1. Initiation of Amendments. Amendments to this charter may be initiated only in the following manner:

1. By resolution of the council adopted after two readings on separate days and passed by a vote of six or more members of the council[.] provided that the council shall not propose amendments to the charter during the general and special election cycle that the Charter Commission is conducting its mandatory review pursuant to Section 14-3.

2. By petition presented to the council, signed by not less than ten percent (10%) of the voters registered in the last general election, setting forth the proposed amendments[.] provided that a petition signed by not less than ten percent (10%) of the voters registered in the last general election shall not be available to propose amendments to the charter during the general and special election cycle that the Charter Commission is conducting its mandatory review pursuant to Section 14-3. Such petitions shall designate and authorize not less than three nor more than five of the signers thereto to approve any alteration or change in the form or language or any restatement of the text of the proposed amendments which may be made by the corporation counsel.

Upon filing of such petition with the council, the county clerk shall examine it to see whether it contains a sufficient number of apparently genuine signature of voters. The clerk shall complete the examination of the petition within fifteen (15) days.

The council shall then hold a public hearing and shall determine whether the amendments proposed shall be submitted to the voters for approval. The determination by the council to submit such proposed amendments to the voters shall be by resolution adopted by a

vote of five or more members of the council within forty-five (45) days after the receipt of the petition.

** Section 14-3 provides that charter amendments may be submitted to the voters “by petition presented to the county clerk, signed by not less than twenty percent (20%) of the voters registered in the last general election, setting forth the proposed amendments.” In that case, where there are twenty percent (20%) of the voters signing the petition, the proposed amendment is automatically on the ballot, assuming that it meets all the technical and other criteria, and the council is not involved in deciding whether the amendment shall be on the ballot.

The present wording of this draft includes changes to the voters’ petition only when the council is involved in making a decision about submitting the proposed amendment to the voters.

Maui County Charter

Article 14, Charter Amendments

Amend Article 14, Charter Amendments, to Add a New Section to Require that the Charter be Revised and Published to Include All New Significant Amendments Adopted

Proposed Charter Amendment

Shall Article 14, Charter Amendments, be amended to add a new section to require that the Maui County Charter be Revised and Published to Include All New Significant Amendments Adopted?

{added material is underlined, deleted material is bracketed.]

Amend Article, Article 14, Charter Amendments, to add a new section as follows:

Section 14-___. Publication of Maui County Charter. The Maui County Charter shall be revised and published following any special or general election on any proposed charter, or revision or amendment thereto to include all new significant amendments adopted.

112811- Item No. IV. P. pg 1-1

Maui County Charter

Article 14, Charter Amendments, Section 14-3, Mandatory Review

Amend the Charter Commission Appointment Process, Sec. 14.3, Mandatory Review, to Conform the Term of Appointment of Charter Commissioners to the Terms of Other Maui County Boards and Commissions

Proposed Charter Amendment

Shall Article 14, Charter Amendments, Section 14-3, Mandatory Review, be amended to conform the term of appointment of Charter Commissioners to the terms of other Maui County Boards and Commissions?

{added material is underlined, deleted material is bracketed.]

Amend Article, Article 14, Charter Amendments, Section 14-3, Initiation of Amendments, as follows:

Section 14-3. Mandatory Review. [Not later than the first day of March, 2001,] Not later than the first day of December 1, 2017, the mayor, with the approval of the council, shall appoint a charter commission composed of eleven members who shall serve for 5 years to study and review the operation of the government of the county [under this charter.] under such amendments or new charter and to propose amendments or to draft a new charter in the manner hereinafter set forth. Thereafter, the mayor with the approval of the council shall appoint a charter commission at ten year intervals.

The commission may propose amendments to the charter or draft a new charter which shall be submitted to the county clerk within sixteen (16) months after such commission has been appointed. Upon receipt of the amendments or new charter, the county clerk shall provide for the submission of such amendments or new charter to the voters of the county at any general or special election as may be deemed by the commission. Any special election shall be held not less than forty-five (45) days and no more than seventy-five (75) days after the receipt of the amendments or the new charter by the county clerk.

The commission shall publish not less than forty-five (45) days before any election, at least once in the newspaper of general circulation within the county, a brief digest of the amendments or new charter and notice to the voters that copies of the amendments or new charter are available at the office of the county clerk.

[Following any special or general election on any proposed charter, or revision or amendment thereto, at intervals of ten (10) years, the mayor, with the approval of the council, shall appoint a charter commission composed of eleven members to study and review the

112811- Item No. ¹IV.Q. pgs 1-2

operation of the government of the county under such amendments or new charter and to propose amendments or to draft a new charter in the manner hereinabove set forth.]

**Section 13-2, Boards and Commissions, provides for 5 year appointments. However it also provides for staggered terms. Thus other than the length of term, it did not seem applicable to the tenure of Charter Commissioners.

Starting the five year term on December 1, 2017 provides for the Charter Commissioners to hold their positions through the election cycle of 2022.