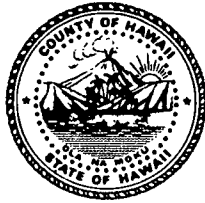


Harry Kim
Mayor



Lincoln S.T. Ashida
Corporation Counsel

Gerald Takase
Assistant Corporation
Counsel

**COUNTY OF HAWAI'I
OFFICE OF THE CORPORATION COUNSEL**

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • Fax (808) 961-8622

**PRIVILEGED AND CONFIDENTIAL COMMUNICATION
ATTORNEY-CLIENT COMMUNICATION
NOT A PUBLIC RECORD**

July 14, 2006

Sent via email; no hard copy will follow

Honorable Constance Kiriū ckiriū@co.hawaii.hi.us
County Clerk, County of Hawai'i
25 Aupuni St.
Hilo, HI 96720

Dear Ms. Kiriū:

**RE: Hawai'i's "Resign to Run" Law and Charter Provisions
Pertaining to Vacancies in County Elected Offices
Our Entry No.: WRK 05-10274**

This communication responds to your inquiry concerning the proper procedure for filling vacancies in County elected office, in the event present elected officials vacate their offices prior to the expiration of their term.

To provide proper context for this discussion, it has been asked what will happen in the event Hawai'i County Mayor Harry Kim chooses to run for Governor in the 2006 election, with respect to the vacancy in the Office of the Mayor, as well as Council Members who may choose to seek the mayoral seat.

We also address in the latter portion of this communication questions raised by some Council members with respect to the filling of vacancies on the Council in the event a majority of members are successfully impeached and removed from office.

Hawai'i's "Resign to Run" law is found in Article II, Section 7 of the Hawai'i State Constitution. This section was created by the voters in 1978. That section provides in its entirety as follows:

Resignation from Public Office

Section 7. Any elected public officer shall resign from that office before being eligible as a candidate for another public office, if the term of the office sought begins before the end of the term of the office held.

As this issue involves the offices of both the Mayor and Council, we present to you our analysis and recommendations based upon the following possible likely (and even unlikely) scenarios.

- 1. *If the Mayor, whose term does not expire until December 2008, desires to run for the Office of the Governor, must he resign his mayoral position before filing his gubernatorial nomination papers?***

Yes. Hawai'i's "resign to run" provision in the State Constitution is triggered by a candidate filing nomination papers for the sought elected office. Simply pulling nomination papers, or filing a gubernatorial campaign spending organizational report, in and of itself, is insufficient to trigger this requirement. *Blair v. Harris*, 98 Hawai'i 176, 45 P.3d 798 (2002).

- 2. *If the Mayor resigns his office prior to July 25, 2006, the State deadline for filing nomination papers for elected office for the primary election, what happens?***

The Managing Director shall succeed to the Office of the Mayor. The County Clerk will then file an election proclamation, and the following requirements found in Article V, Section 5-1.4 of the Hawai'i County Charter (2000) (hereinafter "Charter") are engaged:

...The Council shall, through its clerk, immediately issue an election proclamation, announcing that a successor will be elected as prescribed in section 13-27.¹ The proclamation shall also announce the date for the close of filing of

¹ Section 13-27 of the Charter provides as follows:

County Election.

- No person shall be a candidate for more than one elective office in the same election. If no person is elected to a county office, the county council shall appoint a person to fill such office. County elections shall be conducted in accordance with the election laws of the state insofar as applicable.
- All county elective officers--mayor, council members and prosecuting attorney--shall be elected in nonpartisan special elections. Such special elections shall be held with the primary and general elections of the applicable year.
- First special election.** The first special election shall be held with the regularly scheduled primary election. Any candidate for mayor, prosecuting attorney or council receiving a majority of all votes validly cast for candidates for that office, excluding blank and spoiled ballots, shall be deemed elected. If there is only one candidate for the office, that candidate shall be deemed elected regardless of the number of votes received.

nomination papers for the office, which shall be ten days after the issuance of the election proclamation, or the filing deadline for the primary election, whichever comes later. The election shall be held in accordance with the election laws of the state insofar as otherwise applicable.

3. What happens if the Mayor resigns his office on July 25, 2006, the very same day he files his nomination papers for the Office of the Governor?

The Managing Director shall succeed to the Office of the Mayor. The County Clerk will file an election proclamation, again following the requirements of the above-cited Charter provision. It makes no legal difference that the Mayor resign from office on the filing deadline date.

4. If the Mayor resigns to run for the Office of the Governor prior to completing his second term of mayoral office, may he run again for the Office of the Mayor in the next regular mayoral election?

No. We conclude it is the intent of the Charter to require a mayor who has been elected to a second consecutive term of office to "sit out" the subsequent term of mayoral office.

Article V, Chapter 1, Section 5-1.2 of the Charter provides as follows (emphasis supplied):

Any citizen of the United States of America who has been a duly qualified elector of the county for at least one year immediately preceding the election as mayor shall be eligible for the office of mayor. *The mayor may serve for more than two terms of office but shall not serve for more than two consecutive full terms of office.*

Although some may argue the phrase "two consecutive full terms of office" means the mayor must serve eight consecutive and complete years in order for this section to preclude him from running in a subsequent election, we opine such a result to be repugnant to the term limit restriction found in our Charter.

(d) Second special election. The second special election shall be held with the regularly scheduled general election. Unless a candidate has been elected in the first special election, the two candidates receiving the highest number of votes for the office in question in the first special election shall be placed on the ballot for the second special election. At the second special election the candidate receiving the highest number of votes for each respective office shall be deemed elected. (Subsection (a) amended; subsections (b),(c) and (d) added 2000 Charter Amend. 1)

Further, our research reveals this section essentially provides that a mayor is prohibited from a third consecutive term of mayoral office so long as he *has been elected to two consecutive full terms of office*. In other words, it matters not how many of the eight consecutive years he actually serves in office. So long as he was elected to both consecutive terms, he is "term limited" from running in the subsequent mayoral election.

This result is consistent with our research that instructs us there is a fundamental difference between the "term" of office, and the "tenure" in office.

Tenure in an office means "the right to perform its duties and to receive its emoluments." *Casamasino v. City of Jersey City*, 158 N.J. 333, 730 A.2d 287 (1999). It is also frequently used to mean "the right to occupation of the office or position for some extended or indefinite period of time, dependent upon efficient performance of duties, good behavior, age or other such requisites." *Greenfield v. Passaic Valley Sewerage Com'rs*, 126 N.J.L. 171, 17 A.2d 489 (1941).

"Tenure" in an office is *not* synonymous, and is distinguished from "term of office," which means "the fixed legal period during which the incumbent may legally hold the office." *Sueppel v. City Council of Iowa City*, 257 Iowa 1071, 136 N.W.2d 523 (1965).

Applying these definitions to our Charter provision, and there being no express provision in our Charter or laws to the contrary, it is our considered opinion the "two consecutive full terms of office" referenced in Section 5-1.2 of the Charter means 8 years, irrespective of how many years the mayor actually serves in the office (his tenure).

The length of a "break" in between terms is not specified in our laws. In the present scenario involving our County, we conclude that the "term" of office at issue is 4 years (2004-2008). The fact is the Mayor (assuming he vacates his office) and his successor share a single term of office (a 4-year term from 2004-2008). For purposes of our laws, they do not constitute two separate two-year terms.

This result is consistent with the authority of *Sueppel v. City Council of Iowa City*, *supra*, and prevents manipulation of our laws to achieve a result inconsistent with the term limit legislation found in our Charter.

5. If presently seated Council Members wish to run for the Office of the Mayor, must they also "resign to run" for the vacant Mayor's seat?

No. Generally, the constitutional "resign to run" provision applies to

members of the Council. However, under the facts of the present scenario, since the office they seek (the Mayor's Office) begins after the expiration of their present Council term, there is no resignation requirement, as the Constitutional "resign to run" provision is not applicable.

6. ***Assume one or more Council Members wish to run for Mayor, and they file for nomination to the Mayor's Office after the July 25, 2006, deadline. They will have 10 days to do, pursuant to the Clerk's election proclamation. Is there a similar "10-day window" for citizens to file nomination papers to run for the Council seat that will be vacated in December, 2006?***

No. Our laws do not provide for the Clerk to issue an election proclamation in such a case. Only candidates who have filed for election by the September 25, 2006, deadline will appear on the ballot.

If there are no candidates who have filed to run for the Council seat in the district, the vacancy on the Council will be filled pursuant to Section 3-4 of the Charter (see discussion below, *infra*).

7. ***If there is a mayor's race this year (2006), when will it take place?***

The first special election (primary election) will take place on the second to the last Saturday in September (September 23, 2006). Section 12-2, Hawai'i Revised Statutes, as amended.

The second special election (general election), if necessary, will take place on the first Tuesday after the first Monday in November (November 7, 2006). Article II, Section 8, Hawai'i State Constitution.

8. ***Is the person elected as a successor to the Mayor allowed to run again for the Mayor's Office? How many times may he/she run for this office?***

The successor to the Office of the Mayor in the 2006 election will be eligible to run for this office twice more, in 2008 and 2012.

As noted above, our Charter provides that "the mayor may serve for more than two terms of office but shall not serve for more than ***two consecutive full terms of office.***" Section 5-1.2 (Emphasis supplied).

"Terms of office," as the case law instructs us, means "the fixed legal period during which the incumbent may legally hold the office." *Sueppel v. City Council of Iowa City, supra.*

Thus, "two consecutive full terms of office" means 8 years. As discussed in Question 4, *infra*, the successor to the Mayor's Office in the 2006 election shares the 4-year term with the previous Mayor. The successor Mayor was not afforded a "full term of office" of four years, as is contemplated in our Charter. Based on this plain reading of our laws, the successor to the Mayor's Office in the 2006 election would be eligible for re-election in 2008 and 2012 without violating Section 5-1.2 of our Charter.

9. *In the event an impeachment or recall of a Council Member(s) is successful, how do we go about filling their vacant seats on the Council?*

Replacement Council Members will be selected pursuant to Article III, Section 3-4 of the Charter, which provides as follows:

When any vacancy occurs in the county council, the remaining members of the council shall appoint as a successor a person with the requisite qualifications to fill the vacancy. Within thirty days after the occurrence of any vacancy, the council chairperson shall notify all remaining members of the council by registered mail that on a specified regular meeting date, formal action shall be taken to fill the vacancy. Should the council fail to fill any vacancy within sixty days after its occurrence, the chairperson of the council shall appoint a successor to fill the vacancy for the unexpired term. The person appointed shall serve until a successor is duly elected and seated.

10. *What if five or more presently seated Council Members are impeached or recalled, or otherwise leave their positions on the Council? How would replacement Council members be selected or elected?*

As noted in Article III, Section 3-4 of the Charter, "formal action" is required for appointing a successor to any vacancy on the Council. Article III, Section 3-7 of the Charter provides in pertinent part that, "The affirmative vote of a majority of the entire membership shall be necessary for council action." In sum, this means a minimum of five (5) votes are necessary for any formal action by the Council. If there are less than five seated members, the Council may not take any formal action.

This conclusion is supported by the supplemental language found in Article III, Section 3-7 of the Charter, which provides in pertinent part as follows:

A majority of the entire membership of the council shall constitute a quorum, but a smaller number may adjourn from time to time and may compel the attendance of absent members. Whenever the term "entire membership" appears in this

charter pertaining to council voting, it means the entire membership of nine members, even if there (sic) vacancies.

In the United States, there is a general split of authority with respect to the legal ability of remaining council members to fill vacancies, when there is less than a quorum of members left in office. For illustration purposes, we discuss one case that allowed less than a full majority of members to which the council was entitled to proceed to fill a vacant position.

In *Schisler v. Clausing*, Not Reported in N.E.2d, 1980 WL 351087 (Ohio App. 4 Dist. 1980),² at issue was the following provision from the Portsmouth (Ohio) City Charter:

If a vacancy occurs in the Council, except as the result of a recall election, some eligible person shall be chosen within thirty (30) days by a majority vote of the remaining members of Council to fill the unexpired term.

At the time, the Portsmouth City Council was comprised of a full membership of six members. There were only five active members, as the sixth member had recently resigned. At issue were three meetings where only three of the remaining five members appeared. At these meetings, over the objection and protestation of the Council's attorney,³ the three present members by unanimous vote proceeded to select Marceline Shepherd to the single Council vacancy.

The Court of Appeals of Ohio, Fourth District, held that the appointment was proper, and "a majority vote of the remaining members" meant that only three votes were necessary, as three members represented a majority of the remaining members (five).

It is important to note here *Schisler* may be distinguished from the circumstances presented in our present hypothetical, since Hawai'i County's Charter provision specifically requires (and is unambiguously clear) that a majority of the entire membership (nine members) is necessary for official action, even if there are vacancies. Thus, five votes remain necessary for our Hawai'i County Council to take any official action.

Our Hawai'i State Constitution, Hawai'i Revised Statutes, Hawai'i Administrative Rules, and County Charter provide little guidance on the specific

² We recognize unpublished opinions should not be cited to a court for the purpose of arguing precedent. In the present matter, we cite this case to the County Clerk for the purpose of legal analysis only.

³ Not wise to ignore your attorney (most of the time).

Honorable Constance Kiriu

July 14, 2006

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question presented here. In other words, there is no legal mechanism in existence that would provide for this specific dilemma.

Assuming this unlikely event occurs, it is our considered recommendation that a petition be filed with the Third Circuit Court, asking the Court to act as special administrator for the filling of the vacancies. The Court may develop a process that provides for the filling of the positions pursuant to its general jurisdictional powers.

We thank you for raising this very stimulating issue with our office, and utilizing our services. Please contact me if further discussion or assistance is desired.

Very truly yours,



LINCOLN S. T. ASHIDA
Corporation Counsel