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May 22, 1990

COPY

Honorable Stephen K. Yamashiro
Councilman, County of Hawaii
25 Aupuni Street
Hilo, HI 96720

Dear Councilman Yamashiro:

Re: Resignation to Seek an Elective Office

You have asked for a written opinion on when you must resign to seek the office of mayor in the election to be held in 1990 to fill the vacancy created by the death of Mayor Akana. We reply that you must resign at or before the time of filing nomination papers for the mayor's office.

Section 7, Article II of the Hawaii State Constitution provides that:

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.

Generally this constitutional provision would not apply in the case of a councilmember running for the office of mayor since the terms of office of councilmember and mayor are coterminous. See Hawaii County Charter §§3-2 and 5-1.1. We have so advised in a prior opinion to Helene Hale (see attached opinion dated December 29, 1982).

However as this election for mayor is a midterm election wherein the term of office for mayor will begin in 1990 which is prior to the term of your office ending, it is our opinion that this constitutional provision applies and you must resign your council seat in order to be able to run for the office of mayor.

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The term of office of the current council began at 12 noon on the first Monday in December after the council elections, i.e., on December 5, 1988. The term continues for 4 years until 1992. Section 3-2, Hawaii County Charter. Therefore if you seek the mayor's office in the election to be held in 1990, you must resign "before being eligible as a candidate for another public office," since your term as councilmember runs until 1992 and the term of the mayor's office run for in 1990 will begin prior to 1992.

The term "being eligible as a candidate" has been interpreted in Attorney General Opinion 86-4 as requiring the public officer seeking another office to resign no later than when nomination papers for the office sought are filed. This is based upon § 12-3(a)(8) of the Hawaii Revised Statutes which requires that a nomination paper for a candidate must be filed which contains "a certification, where applicable, by the candidate that the candidate has complied with the provisions of Article II, Section 7, of the Constitution of the State of Hawaii."

In addition to the State constitutional provision, the County Charter should be considered. Section 13-1(f)(9) provides that there is a vacancy in office "[u]pon filing nomination papers for another elective office during his own term of office." Both the State Constitution and the County Charter would apply, therefore, a current councilmember must leave office when filing for another office in the election to be held in 1990.

The prior opinions and interpretations of these relevant provisions have been attached for your information: Corporation Counsel opinion dated May 27, 1988, and Attorney General Opinions 86-4 and 86-17.

To add complexity to this issue, Act 35 of the 1990 legislature impacts directly upon the question under consideration in that it sets the time for filing nomination papers for special elections. The act provides in section 8 that the nomination papers shall be filed "not later than 4:30 p.m. on the fiftieth day prior to the special primary or special election..." (emphasis added), i.e., the Act allows 10 additional days to file the nomination papers than heretofore permitted.

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The definition of "special election" in §11-1, HRS, does not apply in this context but the words "special primary election" and "special general election" in the said section are construed as follows:

"Special primary election" and "special general election," elections held only (a) whenever any vacancy occurs in the offices of United States senator, United States representative, state senator, or state representative because of failure to elect a person at an uncontested general election or (b) as specified in county charters. (emphasis added.)

The Hawaii County Charter does not provide for a special election as such where a vacancy occurs, however, it provides in §5-1.5 that the "successor [be] duly elected at the state or state and county election and seated."

The question posed here is whether the election contemplated in §5-1.5 of the Hawaii County Charter is a "special" election. In Kenfield v. Irwin, 52 Cal. 164, 165, the court concluded that a "special election" is an election held to supply a vacancy in office occurring before the expiration of the full term for which the incumbent was elected. See also, State ex rel. Fish v. Howell, 110 P. 386, 388, 59 Wash. 492, in which the court held that it was not necessarily the time or manner of holding an election to fill a vacancy that makes it a 'special election,' but the fact that it is held at a time other than that fixed by law to elect an officer for the regular or defined term. Based on these and other authorities on the subject of special elections, we hold that the elections contemplated in §5-1.5 of the County Charter are "special" elections.

Thus, it is possible under Act 35 for a candidate to resign and file his nomination papers "not later than" the 50th day prior to the primary election.

Very truly yours,

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PKO:de
Enclosures
cc: Mayor
Managing Director