



LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

LESLIE H. KONDO
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.hawaii.gov/oiip

OPINION

Requesters: Mr. Tom Leonard
Council Member Bob Jacobson
Council Member Brenda Ford

Board: Hawaii County Council

Date: February 2, 2007

Subject: Sufficiency of Agenda Re: Motions to Reconsider
(S INVES-P 07-25) (S RFO-G 07-46) (S RFO-G 07-47)

REQUEST FOR OPINION

Requesters seek an investigation and/or advisory opinion from the Office of Information Practices (“OIP”) on whether, under part I of chapter 92, Hawaii Revised Statutes (“HRS”) (the “Sunshine Law”), the Hawaii County Council (the “Council”) properly considered and voted on motions to reconsider Bill 251, draft 2 (“Bill 251”), and Bill 309, draft 4 (“Bill 309”) (together the “Motions to Reconsider”) at its meeting held at 10:00 a.m. on December 4, 2006 (the “December 4 morning meeting”).

Unless otherwise indicated, this opinion is based upon the facts contained in Mr. Tom Leonard’s e-mail to OIP received on December 5, 2006; Council member Bob Jacobson’s letter to OIP received on December 7, 2006; Council member Brenda Ford’s letter to OIP dated December 11, 2006; the letter from the Office of the Corporation Counsel, County of Hawaii (“Corporation Counsel”), to OIP dated December 18, 2006; the agenda filed for the December 4 morning meeting (the “Agenda”); the record of the actions taken at the December 4 morning meeting; and the video recording of the December 4 morning meeting.¹

¹ A copy of the Corporation Counsel’s November 30, 2006, legal opinion to the Council was also provided to OIP for *in camera* review.

QUESTION PRESENTED

Whether broad language included in all of the Council's agendas that generally notices the possibility of reconsideration motions (the "Standard Language") provided sufficient notice under the Sunshine Law to allow the Council to consider and decide the Motions to Reconsider.

BRIEF ANSWER

No. The Standard Language did not provide sufficient notice to allow the Council's substantive discussion,² deliberation and decision on the Motions to Reconsider.

FACTS

At its November 29, 2006 meeting, the Council passed Bill 251, relating to the rezoning of certain property in Kona, and Bill 309, relating to amendments to the Hawaii County General Plan. The Council's next scheduled meeting, the last meeting of the Council's 2004 to 2006 session, was held five days later on the morning of December 4.

Council member Jacobson apparently anticipated bringing the Motions to Reconsider as part of the December 4 morning meeting. However, because that meeting occurred less than six days after the November 29 Council meeting, a new agenda could not have been filed within the Sunshine Law's requisite six day filing timeframe to specifically list the Motions to Reconsider.³ The Agenda did include the Standard Language, which appears under the heading "Other Business" and reads as follows:

OTHER BUSINESS

(Including but not limited to consideration of vetoed items, if any, or reconsideration of actions on agenda items.)⁴

² The Standard Language did provide notice sufficient to have allowed the motions to be brought for the purpose of placing the Motions to Reconsider on an agenda for a future meeting for which they could be properly noticed. See text below discussing the propriety of limited, non-substantive discussion of a motion to reconsider a bill for the sole purpose of placing the motion on a future agenda.

³ The Agenda was filed prior to the November 29 Council meeting.

⁴ The Council has historically and without challenge heard motions to reconsider without specifically listing the subject of the motions on its meeting agendas. Corporation Counsel submits that reconsideration actions need not be noticed on the agenda since they are non-substantive and not "final actions" voidable under the Sunshine Law. See Haw. Rev. Stat. § 92-11 (Supp. 2006).

Because the December 4 morning meeting constituted the next regular meeting after the November 29 Council meeting, Council member Jacobson believed and had been advised by Corporation Counsel that a motion to reconsider a bill passed at the November 29 Council meeting should, under Council rule 17.1, be brought no later than the December 4 morning meeting.⁵ Council member Jacobson thus moved to reconsider Bill 251 at the December 4 morning meeting, then moved to postpone discussion and voting on the motion until the Council's scheduled December 20 meeting. After some discussion, the Council voted against the motion to postpone consideration of Bill 251 and then discussed and voted against the motion to reconsider Bill 251. Council member Jacobson then moved to reconsider Bill 309 and then to postpone discussion and voting on the motion until the Council's scheduled December 20 meeting. The Council similarly voted against the motion to postpone and then voted against the motion to reconsider Bill 309.

These actions raised a number of issues for the Council regarding the interplay between the notice provisions of the Sunshine Law and the Council's rules and customary practices in hearing motions for reconsideration. Many of the issues raised are outside of OIP's jurisdiction.⁶ OIP's role is limited here to investigating and providing an advisory opinion on the issues raised only to the extent that they implicate the Sunshine Law. See Haw. Rev. Stat. § 92F-42(18) (Supp. 2006).

DISCUSSION

The Sunshine Law requires a board to file written public notice of any meeting at least six calendar days before the meeting. Haw. Rev. Stat. § 92-7(a) and (b) (Supp. 2006). The notice must include an agenda that lists all of the items that the board intends to consider at that meeting. Haw. Rev. Stat. § 92-7(a). The clear purpose of the Sunshine Law's notice provisions is to give the public the opportunity to exercise its right to know and to scrutinize and participate in the formation and conduct of public policy. See Haw. Rev. Stat. §§ 92-1 and 92-3 (1993); Kaapu v. Aloha Tower Development Corp., 74 Haw. 365, 384, 846 P.2d 882 (1993).

⁵ Council rule provides that when a motion is carried "any Council Member voting with the majority may move for a reconsideration of the vote on the motion **at the same meeting or at the next regular meeting.**" Rule No. 17.1, Rules of Procedure and Organization of the Council of the County of Hawaii (2004-2006 Term) (emphasis added). This opinion cites to and quotes Council rules for the 2004 to 2006 Council term, being the rules in effect when the Council's actions in question were taken. As of the date of this opinion, the rules referenced remain unchanged.

⁶ For example, OIP was also asked to opine or comment on, among other things, recourse regarding reconsideration of Bills 251 and 309 and revision of the Council's rules to clarify its procedures. These issues should be addressed by the Council's legal advisors.

Given this purpose, OIP interprets section 92-7(a) to require that an agenda list each item the board intends to consider with sufficient detail and specificity to allow a member of the public to understand what the board intends to consider at the meeting and to decide whether to attend and to participate through oral or written testimony. See OIP Op. Ltr. No. 03-22.

General descriptions, “catch-alls,” or items intended to preserve the board’s ability to consider a matter unknown at the time that the notice is filed are thus contrary to the intent and the spirit of the Sunshine Law and do not provide sufficient notice to allow a board to discuss, deliberate and decide the matter. See, eg., OIP Op. Ltr. No. 06-05 (generic executive session entries would not comply with Sunshine Law notice requirements); see also Op. Att’y Gen. No. 85-2 at 3 (1985) (because the Sunshine Law requires a board to list on its agendas all of the specific “items” or “matters” that will be discussed at any public meeting, listing broad categories of items on the agendas and general phases, such as “Unfinished Business” and “New Business,” will not comply with the Sunshine Law).⁷ For a matter not specifically listed on the agenda (and where a new notice may not be properly filed at least six calendar days prior to the meeting), a board cannot consider the matter unless the agenda may be amended at the meeting to include the item pursuant to section 92-7(d), HRS.⁸

The Standard Language under the heading “Other Business” did not provide the public with reasonably fair notice of the Council’s intent to consider the Motions to Reconsider. See Op. Att’y Gen. No. 85-2 at 4 (all matters to be considered under general categories of an agenda such as “New Business” should “be listed on the agendas and made a part of the written public notice of the . . . meeting, in order to give interested members of the public reasonably fair notice of what the [board] proposes to consider.”). OIP notes Corporation Counsel’s reasoning that, because Council rule allows for motions to reconsider that must be brought no later than the next regular meeting, “[a]nyone following bills of concern would find that reconsiderations would be possible regarding actions of the prior meeting.” However, an agenda must allow **any** member of the public to know what the Council will consider at the forthcoming meeting without being required to know

⁷ The Office of the Attorney General (the “Attorney General”) was charged with administration of the Sunshine Law from 1975 through 1998.

⁸ Section 92-7(d) of the Sunshine Law provides that a filed agenda may be amended to add an item by a two-thirds recorded vote of all members to which the board is entitled; “provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons.” Haw. Rev. Stat. § 92-7(d) (Supp. 2006). Determination of whether an item “is of reasonably major importance” and when board action thereon will “affect a significant number of persons” is fact-specific and must be made on a case-by-case basis.

the Council's procedural rules or to refer to another source, such as the minutes of the last meeting. See Haw. Rev. Stat. § 92-7(a); Haw. Rev. Stat. § 92-1 (1993); see also OIP Op. Ltr. No. 03-22. Accordingly, OIP concludes that in this instance the Sunshine Law required the Council to specifically list motions to reconsider Bills 251 and 309 in an agenda filed more than six calendar days prior to the meeting at which the Motions to Reconsider would be considered.

Although OIP agrees with Corporation Counsel that motions to reconsider are generally viewed as procedural, OIP cannot agree that such motions are **purely** procedural and therefore may be decided without specific notice of the underlying action so long as no substantive discussion occurs. A motion to reconsider, if successful, clearly affects the underlying action to be reconsidered because it has the effect of negating the final action taken on the underlying question: "The effect of the adoption of the motion to *Reconsider* is immediately to place before the assembly again the question on which the vote is to reconsidered – in the exact position it occupied the moment before it was voted on originally." Robert's Rules of Order Newly Revised § 37 at 313, l. 26-30 (10th ed. 2000).⁹ Thus, an affirmative decision on the motion to reconsider, even if done without substantive discussion, has substantive effect: It in essence "wipes the slate clean," opening up the underlying question for consideration as if no action had been taken.

Further, parliamentary procedure provides for substantive debate on the merits of the underlying action taken: a motion to reconsider is "debatable in all cases in which the motion proposed to be reconsidered is debatable, and when debatable, **opens to debate the merits of the question whose reconsideration is proposed.**" Id. at 309, l. 7-10 (emphasis added). Thus, substantive discussion is allowed on the underlying action taken, which includes discussion of the subject matter of that action. Based upon the foregoing and in light of the Sunshine Law's spirit and intent, OIP cannot view a motion to reconsider as a purely procedural motion that may be **decided** without specific notice, even where no substantive discussion of the underlying question occurs.

The Sunshine Law would have allowed the Motions to Reconsider to be brought **for the sole purpose of requesting their placement on a future agenda, with no substantive discussion.** Where a board's chair sets its agenda, placement of a matter on a future agenda is a purely administrative matter, not "board business," and its discussion is therefore not prohibited. See generally OIP

⁹ When Council rules are silent, applicable rules of parliamentary procedure contained in the current edition of Robert's Rules of Order Newly Revised govern the Council's action to the extent the rules are not inconsistent with the Hawaii County Charter, Council rules, constitutional provision or any law. Rule No. 28, Rules of Procedure and Organization of the Council of the County of Hawaii (2006-2008 Term).

Op. Ltr. No. 05-02 (Sunshine Law allows discussion limited to raising a matter for placement on a future agenda.) Accordingly, the Council could properly have allowed the Motions to Reconsider to be brought and seconded, and then without substantive discussion postponed consideration of the motions to a later meeting for which the Motions to Reconsider (with the underlying bills designated) would be specifically listed on the agenda. Although the Council arguably had no substantive discussions on the Motions to Reconsider,¹⁰ the Council clearly went beyond discussion when it considered and voted on the motions.

For guidance, OIP notes that, given the clear import and effect of these bills and their passage after second and final reading, the Agenda could not have been amended to list motions to reconsider Bills 251 and 309. See Haw. Rev. Stat. § 92-7(d). As a general rule, a proposed bill, being a legislative act through which the Council seeks to enact county law, must be viewed as an item of “reasonably major importance” that affects a “significant number of persons.” Where a bill has been acted upon after second and final reading, a motion to reconsider that action must be viewed likewise because the potential effect of that motion is to re-open for consideration and action a bill that has already received a “final” vote -- likely after considerable debate and public testimony. In such an instance, the Council’s deliberation and decision on the motion to reconsider is clearly of significant import to the parties involved as well as members of the public who were either proponents or opponents of the bill. Thus, an agenda generally may not be amended to add a motion to reconsider final action taken on a bill. See id.

In conclusion, OIP finds that the Sunshine Law required the Council to specifically list motions to reconsider Bills 251 and 309 in an agenda filed more than six calendar days prior to the meeting at which the Motions to Reconsider would be considered. The agenda for the December 4 morning meeting, at which the Council considered those motions, did not meet the Sunshine Law’s notice requirements.

However, OIP finds that the Council did not willfully violate the Sunshine Law’s notice provisions.¹¹ OIP finds that the Council reasonably believed, upon advice of counsel, that the Agenda’s standard language provided sufficient notice to act upon the Motions to Reconsider and that the procedural nature of the motions allowed action as long as no substantive discussion occurred. As further evidence that the Council acted in good faith, OIP notes the substance and tenor of

¹⁰ Discussion limited to Council procedure, parliamentary procedure or application of the Sunshine Law does not concern the substance of the underlying bill.

¹¹ A requester asked OIP to opine on whether the Council willfully violated the Sunshine Law. See Haw. Rev. Stat. § 92-13 (1993) (penalties imposed upon willful violation).

Corporation Counsel's discussions with OIP prior to the December 4 morning meeting, the lack of any specific OIP opinion providing guidance regarding motions to reconsider, the legal guidance provided to the Council in Corporation Counsel's November 30 legal opinion to the Council (which referenced and included a related 1997 Corporation Counsel opinion), and the lack of any substantive discussion on the Motions to Reconsider at the December 4 morning meeting.

OFFICE OF INFORMATION PRACTICES

Cathy L. Takase
Staff Attorney

APPROVED:

Leslie H. Kondo
Director