SUPREME COURT'S KANAHELE OPINION REGARDING MEETING CONTINUANCES AND SERIAL COMMUNICATIONS UNDER THE SUNSHINE LAW

In its first Sunshine Law ruling since 1993, the Hawaii Supreme Court issued a decision in *Kanahele v. Maui County Council*, 130 Haw. 228, 307 P.3d 1174 (2013). While the unanimous decision written by Justice Richard Pollack discusses the facts and rationale in great detail and length, the state Office of Information Practices (OIP) has briefly summarized it as follows.

In *Kanahele*, Maui County Council's Land Use Committee (MLUC) and the Maui County Council (MCC) posted meeting agendas for their initial meetings on October 18, 2007 and February 8, 2008, respectively, on matters concerning a 670-acre residential development. After taking public testimony at the initial meetings, the MLUC and MCC each continued the meetings multiple times, without posting any further written notices. During the continuance period, several MCC members transmitted written memorandums to all other members asking them to favorably consider various bill amendments being proposed in the memoranda. Although copies of the memoranda were given to the County Clerk, Director of Council Services, Planning Director, and Corporation Counsel, and the developer's representative was invited to provide comments on early proposals, no further public testimony was taken before the MCC passed two bills concerning the development on first reading at a February 14, 2008 meeting. Thereafter, the MCC posted an agenda for March 18, 2008, for the second and final reading of the bills, at which time additional public testimony was taken. At the March 18 meeting, the MCC passed, without any further changes, the two bills concerning the development.

In the meantime, on March 5, 2008, members of the public (petitioners) filed an action in the circuit court seeking to enjoin the bills from being implemented by the MCC. The circuit court ultimately ruled against them, and the Intermediate Court of Appeal (ICA) upheld the circuit court's decision, with a separate concurring decision by Judge Lisa Ginoza.

On appeal, the Supreme Court upheld the ICA's conclusion that the Sunshine Law does not limit a continuance of a public meeting to just one time and stated that "based on the OIP's construction of the Sunshine Law as well as the legislative history of the statute, we conclude that the MLUC and MCC did not violate the Sunshine Law by continuing and reconvening the October 18, 2007 meeting and February 8, 2008 meeting beyond a single continuance." *Kanahele*, 130 Haw. at 248, 307 P.3d at 1194. Nevertheless, the Court emphasized that "boards are constrained at all times by the spirit and purpose of the Sunshine Law," *id.*, and the Court went on to provide the following examples of various procedural devices that

could be used to ensure that meetings are continued in a manner that complies with this spirit and purpose.

> *For example, if a board is cognizant that a single meeting will be insufficient for the consideration of an agenda items and anticipates continuances, a board may include the dates of continuances in the agenda posted pursuant to HRS § 92-7(a). . . . A board is also not required to serially recess meetings on an agenda item of reasonably major importance. Rather, a board may decide to hold separate meetings, with separate agendas, on different aspects of the same bill.*
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> *A board may also consider permitting periodic oral testimony by members of the public, as issues develop during the deliberation process.*

Id. The Court further noted that while the Sunshine Law does not require the posting of a new agenda and acceptance of oral testimony at each continuance and reconvening of a meeting beyond the first continuance, it implied that oral notices alone were inadequate and stated that "the means chosen to notify the public of the continued meeting must be sufficient to ensure that meetings are conducted 'as openly as possible' and in a manner that 'protect[s] the people's right to know.'" *Id.* at 251, 307 P.2d at 1198.

With respect to the second issue on appeal, the Court held that the challenged memoranda sent by MCC members to all other members did not fall within any of the Sunshine Law's permitted interactions, and thus the ICA majority opinion had erred in characterizing them as "one-way communication[s]" or "informational memoranda" that did not solicit a vote or commitment to vote. Instead, the Court determined that the memoranda improperly advocated for the adoption of proposals by detailing their rationale and justifications, and solicited votes by asking for "favorable consideration" of the proposal contained within them. *Id.* at 253-54, 307 P.3d at 1199-1200.

Even if the memoranda could be considered to fall within a permitted interaction, the Court concluded that they would nevertheless violate HRS § 92-5(b)'s spirit or requirements to decide or deliberate matters in open meetings, citing the ICA's decision in *Right to Know Comm. v. City Council, City & Cnty. of Honolulu*, 117 Haw. 1, 4, 175 P.3d 111, 113 (Haw. App. 2007), as well as OIP's underlying opinion in that case, OIP Op. Ltr. No. 05-15. Although there was no evidence of telephone or in-person interaction by MCC members outside of a duly noticed meeting, the language of the memoranda encouraged and invited such improper interaction by stating "please contact me." *Id.* at 256-57, 307 P.3d at 1202-03.

Despite concluding that the distribution of the memoranda among board members did not fall within a permitted interaction and violated HRS § 92-5(b), the Court ultimately concluded that it need not determine whether such action also

"constitutes a violation of § 92-3, so as to trigger the voidability analysis under § 92-11." Instead, the Court adopted Judge Ginoza's concurring opinion analysis to hold that "the Petitioners did not appeal from a "final action" within the meaning of § 92-11 with respect to the challenged memoranda." *Id.* at 258, 307 P.3d at 1204. The Court went on to define "final action" to mean "the final vote required to carry out the board's authority on a matter." *Id.* at 259, 307 P.3d at 1205. The Court expressly limited this definition to determine when the 90-day period starts for the filing of a complaint seeking invalidation, and declined adopting it as a definition of when a violation of the Sunshine Law might warrant invalidation under HRS § 92-11. *Id.* at 260, 307 P.3d at 1206. As the *Kanahele* petitioners never challenged the second and final reading of bills on March 18, 2008, the Court ultimately held that the MCC members' improper distribution of the challenged memoranda did not require invalidation of their final action in voting to pass the two bills on March 18, 2008. *Id.*

Nevertheless, because the MCC violated the Sunshine Law by distributing the memoranda, the Court remanded the case to the circuit court for a consideration of an attorney's fee award under HRS § 92-12(c) (2012). *Id.*

Based on the Supreme Court's *Kanahele* decision, OIP has provided guidance in the form of a "Quick Review: Continuance of a Meeting Under the Sunshine Law," which is posted on the Training page at oip.hawaii.gov.