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March 31, 2005

Duane W. H. Pang, Esq.
Deputy Corporation Counsel
Department of the Corporation Counsel
530 South King Street, Room 110
Honolulu, Hawaii 96813

Re: Public Testimony When Non-Sunshine Law Requirements Apply

Dear Mr. Pang:

You wrote to the Office of Information Practices ("OIP") on October 29, 1999, asking for an opinion on several issues after receiving a letter from OIP regarding the public's right to testify at a meeting subject to the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes ("HRS"). In a letter dated September 30, 1999, OIP Staff Attorney John Cole had advised the Department of the Corporation Counsel that when an agenda item was called at a meeting, the Sunshine Law[1] required the board to accept oral testimony on the item. See Haw. Rev. Stat. § 92-3 (1993).

ISSUE PRESENTED

I. Must a board allow public testimony at every meeting even when the agenda item is a contested case, given the Hawaii Supreme Court's holding in Town v. Land Use Commission, 55 Haw. 538 (1974), that a board hearing a contested case violated the Hawaii Administrative Procedure Act, chapter 91, HRS, by allowing an applicant to testify at a meeting subsequent to the public contested case hearing required by chapter 91, HRS? Similarly, must a board allow a member of the public

[1] In the September 30 letter, OIP assumed that the meeting was subject to the Sunshine Law: the letter did not consider or decide whether the liquor licensing process was an "adjudicatory function[] exercised by a board. . ." and thus exempt from the Sunshine Law under section 92-6(a), HRS. If the Liquor Commission believes that section 92-6(a) may apply to the liquor licensing process, it may raise that argument or seek an opinion from OIP on that issue in the future.

who is not a party or a witness to testify in a declaratory or contested case proceeding?

II. Must a board must allow public testimony at subsequent meetings when it has held a public hearing for adoption of agency rules as required by section 91-3, HRS, and has announced a date at which it intends to make its decision?

III. Must a board allow testimony on a properly noticed agenda item when the notice required for that item by another state law or county ordinance was not met?

BRIEF ANSWER

I. No. The Sunshine Law does not apply to "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes." Haw. Rev. Stat. § 92-6(a)(2) (1993). Thus, with the exception of the Land Use Commission, a board holding a contested case hearing will not be subject to the Sunshine Law's requirements while exercising its adjudicatory functions.

II. Yes. Section 91-3, HRS, does not prohibit an agency from accepting public testimony on the date the agency announces its decision as to proposed rule revisions. Thus, a board can follow the Sunshine Law without violating section 91-3, HRS.

III. No. If the board discovers that an agenda item it has noticed properly under the Sunshine Law has not been adequately noticed as required by another law or ordinance, then the board may either cancel the meeting or cancel that individual item without calling it up. However, the board must refrain from any discussion of the item beyond the announcement of its cancellation and, if appropriate, an announcement of when the item is expected to be rescheduled.

DISCUSSION

I. CONTESTED CASE HEARINGS AND THE SUNSHINE LAW

You first asked how the Sunshine Law's requirement to allow public testimony at every meeting could be reconciled with Town v. Land Use Commission, 55 Haw. 538 (1974), which held that the Land Use Commission violated the Hawaii Administrative Procedure Act, chapter 91, HRS, by allowing an applicant to testify at a meeting subsequent to the public hearing required by chapter 91, HRS.

The holding in Town applied specifically to contested cases, as defined in section 91-1(5), HRS. Id. at 548. The Sunshine Law does not apply to "adjudicatory

functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes." Haw. Rev. Stat. § 92-6(a)(2) (1993). Thus, a board holding a contested case hearing generally[2] will not be subject to the Sunshine Law's requirements – including the requirement to accept public testimony – while exercising its adjudicatory functions.

Similarly, you asked whether section 92-3, HRS, requires a board to allow a member of the public who is not a party or a witness to testify in a declaratory or contested case proceeding governed by sections 91-8 or 91-9, HRS. Again, section 92-6(a), HRS, takes such proceedings outside the application of the Sunshine Law. Thus, section 92-3, HRS, does not apply to a declaratory or contested case proceeding governed by sections 91-8 or 91-9, HRS.[3]

II. HEARINGS ON AGENCY RULES AND THE SUNSHINE LAW

You asked whether a board must allow public testimony at subsequent meetings when it has held a public hearing for adoption of agency rules as required by section 91-3, HRS, and has announced a date at which it intends to make its decision. You noted that section 91-3(a)(2), HRS, allows an agency to "make its decision at the public hearing or announce then the date as to when it intends to make its decision," and wrote that "this appears to conflict with HRS section 92-3." This question was answered in an earlier OIP Opinion Letter, which stated:

> There is no conflict between sections 91-3 and 92-3, Hawaii Revised Statutes. Section 91-3, Hawaii Revised Statutes, does not prohibit an agency from accepting public testimony on the date the agency announces its decision as to proposed rule revisions. Thus, it is possible for a board to follow both section 91-3, Hawaii Revised Statutes, and the Sunshine Law, without violating either. Further, a board subject to the Sunshine Law may make its decision on proposed rule revisions at a later date than the public hearing without accepting further public testimony during its decisionmaking, by continuing the decisionmaking portion of the public hearing/meeting to a reasonable day and time as provided by section 92-7(d), Hawaii Revised Statutes.

OIP Op. Ltr. No. 01-06 at 2 (Dec. 31, 2001).

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[2] The Land Use Commission is in the unique position of being subject to the Sunshine Law even for its contested case hearings. Haw. Rev. Stat. § 92-6(b). Because Town was decided in 1974, prior to the 1975 passage of the Sunshine Law, the court did not consider the interaction between the Sunshine Law's requirements and those of chapter 91, Hawaii Revised Statutes.

[3] Again, the Land Use Commission is the sole exception: it must comply with the Sunshine Law even for contested case hearings. Haw. Rev. Stat. § 92-6(b) (1993).

III. CANCELLATION OF AN AGENDA ITEM WHEN A NON-SUNSHINE NOTICE REQUIREMENT IS NOT MET

Finally, you asked whether a board must allow testimony on a properly noticed agenda item when the notice required for that item by another state law or county ordinance was not met. You expressed concern that in such a situation, taking public testimony as required by section 92-3, HRS, would violate the other state law or county ordinance.

When a matter before a board is subject to both the Sunshine Law and another law or ordinance requiring public notice, then the board must follow the requirements of both the Sunshine Law and the other law or ordinance. If the board discovers that an agenda item it has noticed properly under the Sunshine Law has not been adequately noticed as required by another law or ordinance, then the board may either cancel the meeting or cancel that individual item without calling it up.[4] Section 92-7(d), HRS, limits a board's ability to change its agenda "by adding items thereto," but does not restrict a board from changing its agenda by removing items. OIP therefore concludes that a board chair or other person charged with creating the agenda may cancel an individual item from the agenda. OIP would recommend that a board do so by noting the cancellation on any copy of the agenda posted outside the meeting room and announcing the cancellation of the item at the beginning of the meeting without opening the item for discussion. If the item is canceled from the board's agenda, the board must refrain from any discussion of the item beyond the announcement of its cancellation and, if appropriate, an announcement of when the item is expected to be rescheduled.

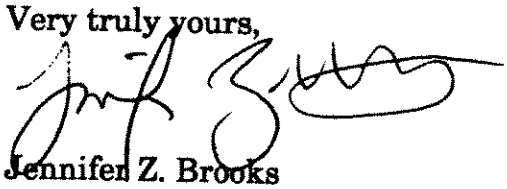
CONCLUSION

Boards other than the Land Use Commission are not subject to the Sunshine Law during the exercise of their adjudicatory functions. Haw. Rev. Stat. § 92-6 (1993). Thus, boards conducting contested case hearings or other adjudicatory processes need not follow the Sunshine Law's public testimony requirements while doing so. There is no Sunshine Law exception for boards holding public hearings on proposed rules under section 91-3, HRS, however. Boards must take care to follow the Sunshine Law's requirements as well as the requirements of 91-3 during the rulemaking process. Finally, if a board finds that it has failed to give adequate notice of an item as required by another law or ordinance, even though the notice was adequate under the Sunshine Law, the board can avoid violating the notice

[4] By contrast, OIP's advice in the September 30 letter was based on a situation where an agenda item had been called, and one interested party was permitted to ask for a continuation and to discuss that request with the board. The board continued the matter and would not permit members of the public to testify on the agenda item.

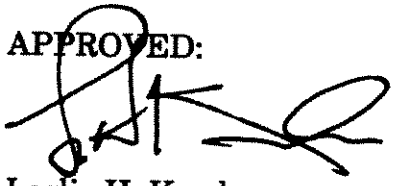
requirements of the other law by canceling the meeting or canceling the individual agenda item without discussion.

Very truly yours,



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

JZB:os