

Approved

COUNTY OF KAUAI
Minutes of Meeting
OPEN SESSION

Approved as circulated on 3/25/19

Board/Commission:	CHARTER REVIEW COMMISSION	Meeting Date	February 25, 2019
Location	Mo'ikeha Building, Meeting Room 2 A/B	Start of Meeting: 3:03 p.m.	End of Meeting: 4:04 p.m.
Present	Chair Ricky Watanabe. Vice Chair Jan TenBruggencate. Members: Carol Suzawa, Marissa Sandblom, Patrick Stack Also: Deputy County Attorney Adam Roversi. Boards & Commissions Office Staff: Administrator Ellen Ching, Administrative Specialist Anela Segreti Ka'aina Hull, Planning Director; Jodi Higuchi Sayegusa, Deputy Planning Director		
Excused	Member Virginia Kapali.		
Absent			

SUBJECT	DISCUSSION	ACTION
Call To Order		Chair Watanabe called the meeting to order at 3:03 p.m. with five members present which constituted a quorum.
Communications	<p><u>CRC 2019-01 2018 General Election Results</u></p> <p>Ms. Ching went through the results of the General Election. After reading the Charter Amendment results for Article XIV, Planning Department, sections 14.01, 14.03, 14.12, 14.13, and 14.14 be amended by removing all references to the Zoning Board of Appeals, Ms. Ching stated that she invited Ka'aina Hull, Planning Director to be present to have more discussion on this. Recognized that Deputy Planning Director, Jodi Higuchi Sayegusa, was present and finished going through the results.</p> <p>Ka'aina Hull, Planning Director joined the meeting.</p> <p>Vice Chair TenBruggencate stated that he sensed that more people vote when they understand the question and the Charter Amendment with the most votes total was the Term Limits question, more than 23,000 votes, the one with the least was the Zoning Board of Appeals</p>	

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	<p>(ZBA), 18,000 votes. Suspects that people did not have a clue to what that was all about and that is something they should be aware of as a commission and put comprehensible amendments on the ballot.</p> <p>Ms. Ching relayed that at the County Council the Commission was complimented. Council Chair stated that the wording on the questions were done in a simpler fashion where it was easier to explain. If you want a change, vote yes, and if you don't want a change, vote no. Ms. Ching stated she thinks a lot of people in general don't understand the Charter Amendments and the questions and why it's coming up. The Challenge for Boards and Commissions is to do a better job on community education.</p> <p>Ms. Suzawa stated that because it did not pass what is in the Charter today stands, therefore the Administrator of Boards and Commissions has the duty of looking for these persons that want to serve. The Amendment did not come from this Commission, it came from outside because they found out it could not work and the message didn't get out and people don't like that change, because taking away a board appears to be like there is only one attorney in charge of making a decision. Ms. Suzawa feels that Boards and Commissions should pursue or at least document the process of trying to locate people and the difficulty in that and if there's any compelling reason that the Planning Commission feels that we should give it another shot, then we should. Personally she wants the County to adhere to this proposal (amendment) that is in the Charter.</p> <p>Mr. Hull appeared on behalf of the Planning Department joined by Jodi Higuchi Sayegusa. Mr. Hull stated that as far as the Zoning Board of Appeals concern, the Department was one of the primary supporters for providing an avenue whereby the massive overload of appeals to the planning commission would have a valve to another body that can perform the duties of reviewing the appeal. The concept went before the public and they voted to have that board. Discussions with County Attorneys' Office and how legal the proceedings can be and having a body of volunteers act as pseudo-judges, i.e. attorneys, that will have scrutiny of other courts. Having lay volunteers serve as judges in the appeal cases may not have been the appropriate</p>	

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	<p>avenue to vent off the appeals from the Planning Commission. In discussions with Ms. Ching, with the manner of which these appeals have been going on would be hesitant as the Planning Director to recommend to the Planning Commission to have any appeals of his decision referred to the Zoning Board of Appeals. It's the Planning Commissions discretion whether they want to send it to the Zoning Board of Appeals. This has been their read for the last few months. There is a conundrum as Ms. Ching has the prerogative to get the Board going, they may not get referrals.</p> <p>Ms. Sandblom asked if there is other options if the Planning Commission does not refer to the Zoning Board of Appeals.</p> <p>Mr. Hull replied that the option now is to hire a Hearings Officer to review the cases. Generally they are attorneys and act in that third party review manner to review appeal cases. The past year the ZBA wasn't working well, the Administration with Council approval put into the Boards and Commission budget, \$100,000 to hire a Hearings Officer to review all the cases. They anticipate having a similar if not larger budget moving into Council budget hearings for a Hearings Officer.</p> <p>Vice Chair TenBruggencate asked what are the kind of cases that are generating the appeals.</p> <p>Mr. Hull responded that roughly 90-95% are vacation rentals. Virtually all related to the vacation rental industry.</p> <p>Vice Chair TenBruggencate asked if the cost of litigation and the penalties are so outweighed by the profits that it is a sound business decision to run the appeals process as long as they can because they are making more money than they are paying in case.</p> <p>Mr. Hull responded that that is an honest assessment of some operators in that industry. The Planning Department has had for some years an enforcement team solely dedicated to vacation rental enforcement. Have an officer that is complaints based, he has a back log. Vacation</p>	

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	<p>Rental section is actively monitoring the web and trying to shut them down. Majority that they successfully identify and issue a compliance notice or ultimately a fine through a notice of violation, come into compliance. They then re-monitor websites and properties to make sure they don't come up again. Vast majority are running in the \$200-\$300 cost per night, when they are in that threshold they find that the cost of litigation is not commiserate to staying open. It's the ones that are in the \$550, \$600, \$1000, \$5000 where they are no, and appeal and continue operating. It has been the Department's practice that once it's been referred to the attorneys' office should we get an appeal, to move on and look for other operators that they can call out. So there is an argument that the \$10,000 fine is not commiserate and therefore will hit with litigation, much to a case where there was \$10,000 in fines and the attorney was able to point out that he is still operating, the Hearings Officer hit him with \$130,000 which hopefully sends a message, but that will probably be appealed to the court system. He and Ms. Higuchi Sayegusa are lobbying for different authoritative powers to the State Legislature, on is disgorgement.</p> <p>Ms. Higuchi Sayegusa explained that disgorgement is a technique that San Francisco currently has imbedded in their ordinance or rules. A remedy to allow the violators to turn over their ill-gotten gains. If they've been giving notice to shut down but choose to continue to operate and they have a certain amount of profits that would be a remedy that we would seek. It would have to be enforced in court. An additional mechanism aimed at discouraging continued illegal activity through the appeal process. Another remedy they will be asking for when the Bills are at the Judiciary and Senate Ways and Means Committees is to also ask for attorney's fees and costs, Hearing Officer cost and litigation team cost defending through the administrative appeal process in court. Should the violation be held up in court.</p> <p>Mr. Hull summarized that it is a fairly legal and scrutininess and judicious process that is very much like a court proceeding, and Hearings Officer must not only render a decision but must also oversee the entire proceedings in a manner that is un-bias and neutral in order to stand up under the scrutiny of the court system. Preliminarily if the County Attorney's Office says that they can do this in a manner with the Zoning Board of Appeals than okay, but as it has been</p>	

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	<p>proceeding he is very hesitant to send appeals of his decisions to the ZBA because he would be fearful that it might not hold up under the scrutiny of court.</p> <p>Vice Chair TenBruggencate asked if they are far enough into this vacation rentals prosecution process to know if we are winning these cases.</p> <p>Mr. Hull doesn't think that we have gone far enough, none have hit the Supreme Court yet and they anticipate that many of them will hit the Supreme Court.</p> <p>Vice Chair TenBruggencate stated that there are other Counties that have Zoning Board of Appeals, but he suspects that they have different kinds of materials before those Zoning Boards.</p> <p>Mr. Hull replied that he has not researched it thoroughly but the other Counties that have it are not pursuing the vacation rental business as robustly as they are. So they don't really have the vacation rental appeals before them and as much as it's tied to a lucrative business that is rooted in land rights and Constitution property rights. Maui County has quota systems, and they have not hit their quotas. Big Island just passed a law and are allowed \$200 fines on it. Oahu's City and County is still debating at Council whether to adopt an ordinance.</p> <p>Chair Watanabe asked if Mr. Hull could resend a new, revised for informational purposes.</p> <p>Vice Chair TenBruggencate stated that the argument for doing away with this section of the Charter is fairly compelling based on actual experience and he suspects that we would need to do a better job of explaining what's going on because it had the lowest number of total votes. Thinks it means that people didn't understand what they were voting on so they either voted no or didn't vote for it.</p> <p>Mr. Hull would agree with that. They are giving a briefing to County Council on Wednesday as well as to the Planning Commission at the beginning of March, this is also tied to the fact that they are spinning a vacation rental enforcement amendment and there are some digital services</p>	

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	<p>that they are procuring that allows them to root out more successfully those illegal TVRs that are operating in the dark. They expect that over the year that vacation rentals will be at the forefront of discussions of policy making. That will be a way for the Administration and Department to provide better awareness to the public as to why this section of the charter may not be as appropriate as originally conceived.</p> <p>Vice Chair TenBruggencate clarified that they are talking about vacation rental homes that don't have the owners living on board. Is that correct? Is it different from Bread and Breakfast?</p> <p>Mr. Hull replied the vast majority of appeals are transient vacation rentals which the owner does not reside. However homestays or bread and breakfast where the owner resides on property are also prohibited outside the visitor destination area, so they are restricted to the same areas as transient vacation rentals. The department has no problem with those in the visitor destination areas. Roughly 800-1200 illegal vacation rentals outside of these areas that they are focused on saying they are not operating in the appropriate zone and need to remove themselves from that area.</p> <p>Vice Chair TenBruggencate asked Mr. Hull if it was his recommendation that the Commission try again to get this out of the Charter.</p> <p>Mr. Hull replied that he would need to consult with Administration. He has no problem tentatively saying that they might want to look at that and providing better awareness around it, but needs to consult with the Administration.</p> <p>Ms. Suzawa stated because it wasn't clear that there was another place in the Charter that provides for that service. She is not comfortable serving on the Commission doing something that basically, if she has a problem, that if someone wants their case to the Zoning Board of Appeals and we say we don't have one, but the Charter says we're supposed to have one. Lack communication.</p>	

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	<p>Mr. Hull agreed that public was not aware, that information needs to be shared.</p> <p>Ms. Sandblom clarified that people may want to volunteer for the Board, but they need a wide ranging skill set because it's so litigious and for the common lay person in the community it could be over whelming to wade through all the documentation and legal language. So in trying to seat this Board there would be some kind of minimum qualification.</p> <p>Mr. Hull replied that there would.</p> <p>Mr. Roversi referred to the Allen case. The Hearings Officer in that case generated, he thinks, a 38 page finding of facts, conclusion of law decision and order. As the litigator he relies on the comprehensive document when he has to go to Civil Court. A strategy of the very profitable TVRs is to drag this out as long as possible, so they expect that virtually every one of them will be appealed, too much money is at stake. To be able to deal with those appeals proficiently and hopefully successfully in Circuit Court they rely on a very well drafted finding of facts, conclusion of law. He thinks that Mr. Hull is likely right that a group of untrained volunteers would not be capable of generating those. They would be reliant on a County Attorney assigned to them to draft those documents. It would be probably be inappropriate for the Attorney's Office to both be litigating the case and drafting those findings of fact, conclusion of law. In the current situation it seems that the Hearings Officer through the Office of Board and Commission seems to be providing a solution to the problem of Administratively litigating the TVR issue.</p> <p>Mr. Hull stated that in conversations with Ms. Ching he has talked with people that would want to volunteer for the Board and with their fervor and sentiment against TVRs, he had to say that he could use them in the fight, but he needs a neutral party to review these.</p> <p>Ms. Sandblom stated that they need to be aware of the perceptions and challenges involved.</p>	

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	<p>Ms. Ching stated that she stepped into 11 Contested Case Hearings and knows in that latest one the hearing was for an entire day and continued into a second day. She also has concerns that an attorney is needed because of the need to establish a legal record that will probably go to District Court. When she looks at the Zoning Board of Appeals and the types of people described in the Charter are not exactly on point that should be on this, they need to be an attorney and need to run the hearing as a quasi-judicial body.</p> <p>Ms. Suzawa thought it was the requirements for the Planning Commission.</p> <p>Ms. Ching stated that it was Zoning Board of Appeals.</p> <p>Ms. Suzawa stated that they are almost verbatim.</p> <p>Ms. Ching stated this is why, Boards and Commissions has the contract for the Hearings Officer, who is an attorney, who does convene over the Contested Case Hearings right now and it's all technical.</p> <p>Ms. Suzawa stated that she thinks for the community this one thing would be a fast track.</p> <p>Chair Watanabe asked if any more discussion.</p> <p>Ms. Suzawa stated that it should fall back to Planning as they know what the issues and the Commission does not. She can see that it needs to be eliminated, but if we do not adhere to it while it's there, some documentation should be done backing up and include that there is a process in place.</p>	<p>Vice Chair TenBruggencate moved to receive CRC-2019-01 with understanding that ball is in B&C court and at the point that when want to raise this issue again could bring it back up, but this Commission not proceed at this time. Ms. Suzawa seconded. Motion carried 5:0</p>

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<p>Approval of Minutes</p>	<p><u>Open Session Minutes of January 28, 2019</u></p> <p>Vice Chair TenBruggencate noted two typos, spelling of Mr. Roversi's name and on page 6 change Huffman's name to Walton.</p>	<p>Vice Chair TenBruggencate moved to approve the Open Session Minutes of January 28, 2019, with corrections. Mr. Patrick seconded the motion. Motion carried 5:0.</p>
<p>Business</p>	<p><u>CRC 2019-02 General Discussion on Charter Initiatives of Interest</u></p> <p>Vice Chair TenBruggencate stated that he put this on the agenda so if any member of the Commission that had any items they wanted to talk about they can.</p> <p>Mr. Patrick asked if that had to be in executive session.</p> <p>Chair Watanabe and Vice Chair TenBruggencate responded no.</p> <p>Ms. Suzawa stated that also #5 was also something that did not come from the Commission, but from somewhere else. Feels some communication should go there.</p> <p>Vice Chair TenBruggencate asked for clarification.</p> <p>Ms. Suzawa clarified that it was about eliminating, setting the standards, from the Salary Commission. She thinks the process was an improvement and maybe it should be sent back to them if they wish to pursue or make changes in anyway.</p>	

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	<p>Vice Chair TenBruggencate asked Ms. Ching if they have had it on their agenda.</p> <p>Ms. Ching stated that they have not. The Salary Commission is required to provide a resolution to the County Council by March 15th. The energies are focused on getting a resolution to the Council by the 15th. Their frustration is when the resolution hasn't been adopted and they've received testimony from Board of Water, Fire and Police Commission and Administration on the various appointed positions and how the salary or lack thereof have hampered placing people in those positions. It has hampered the Fire and Police Commission attempts at attracting and recruiting candidates internally as well as a good group of competitive candidates. For the Administration, in the last 25 years the County Engineers position has been vacant for 25% of the time which is significant and the impact to our County government, not just this Administration but many before have been challenged to fill the position because of the requirements in the Charter. Similarly with the Board of Water, it's finding engineers and filling the positions in the County has been a long standing issue.</p> <p>Ms. Suzawa stated that after March, if they have any issue with...</p> <p>Ms. Ching stated that the issue has been, there's been. One of the issues has been sending over a statement of fact with the resolution, which they did not do in the previous year, and that is going back to 2016 when a salary study and review was commissioned to give the Council an overview of what their recommendation is and why. They are being very conservative, but they do have plans for subsequent resolutions. Having a thorough explanation of why they came up with the resolution and why they are making the recommendation.</p> <p>Ms. Sandblom asked about the timing of things. If they have Charter Review Initiatives of interest for the next go around.</p> <p>Chair Watanabe stated a year and a half.</p> <p>Ms. Suzawa stated two years.</p>	

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	<p>Vice Chair TenBruggencate responded next year, next year April would be the deadline, they would have to be done. They have 14-15 months. Chair Watanabe would recommend writing down initiatives they would like to discuss so that it can be put on the agenda.</p> <p>Ms. Suzawa asked if a motion needed to be made to keep it on the agenda.</p> <p>Vice Chair TenBruggencate after discussing with Mr. Roversi recommended that deferring and leaving it on the agenda it could be discussed.</p> <p>Mr. Roversi stated that seemed appropriate as far as Sunshine law, with a notion that if a permanently open agenda item to allow for a free flowing discussion, that's fine as long as substantive decision making on some newly brought up issue doesn't occur without a subsequent public notice. For example if someone came up with an idea at today's meeting on districting a substantive vote could take place without it being placed on the agenda for a future meeting and then the vote could be (inaudible).</p> <p>Ms. Ching stated for future planning, she would like Commission to look at a time table, if a number of amendments are being looked at to go on the ballot she would want to make sure that we have adequate resources. She spoke of community education and need to step up to provide more explanation to the community, so resources need to be put in place and she needs to know about it so in January it is. For media campaign, a good budget would be about \$25,000.</p> <p>Vice Chair TenBruggencate stated that the last time they had no budget.</p> <p><u>CRC 2019-03 Discussion on County Auditor Position</u></p> <p>Vice Chair TenBruggencate stated that it's his understanding there is no County Auditor and there is no staff in the County Auditor's office. It is effectively vacant, but it is in the Charter</p>	<p>Ms. Suzawa moved to defer 2019-02 Vice Chair TenBruggencate seconded. Motion carried 5:0</p>

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	<p>and the Council could appoint an Auditor at this point. He also takes judicial notice that the Mayor has talked about doing his own audit of departments, so audits are going on without the presence of a County Auditor, but private individuals that are competent in the specific fields where they are in operation. As a reminder last year before the last election this Commission discussed a measure to ask the voters if they wanted to remove the County Auditor's position and the County Council asked not to at that time and said that might do that themselves and they did not. They also did not appoint an auditor which they had intended to try to do. As a result that conversation was not completed. It is on the agenda so they can continue the conversation if they choose to.</p> <p>Chair Watanabe recommends keeping it on the agenda till they can come up with a recommendation on how to proceed for the next election.</p> <p>Ms. Suzawa asked if they should have communication going out to our Administrator for more information.</p> <p>Chair Watanabe stated that the last time the Council said they would remove it, but they did not. They went through all the candidates, but did not find one.</p> <p>Ms. Suzawa stated that she doesn't know enough about it and that they should ask the people who need to use a County Auditor what is there position and then can go from there. Do they want to make a change or not or eliminate, then could start working on something.</p> <p>Vice Chair TenBruggencate stated that they need to decide who they want to hear from. They should hear from Ellen, an Administration representative, possibly the County Clerk or more likely someone that can more likely represent the Council. To see if there are compelling reasons to leave or remove it, or whether this issue is not right one way or another.</p> <p>Ms. Ching stated that she could communicate with the County Clerk and see if someone is willing to come to communicate to Commission and see who they would choose to send.</p>	

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	<p>Vice Chair TenBruggencate asked if there are any Auditors on island.</p> <p>Ms. Suzawa stated mostly from away.</p> <p>Chair Watanabe stated that they mostly get the from Oahu.</p> <p>Ms. Ching agreed and stated that there is good sense to getting them form O’ahu. You would want someone that doesn’t have a conflict. Also there is a difference between a fiscal audit and programmatic audit. She knows there are accountants on Kaua’i that do fiscal audits but no one that does programmatic audits.</p> <p>Vice Chair TenBruggencate suggested that it may be useful to reach out to a regulatory agency that could write to or invite someone to come and ask them if they are benefits to having a paid professional in the position as a County Auditor.</p> <p>Ms. Ching stated that in the past when the position was filled they were basically managing contracts and they contracted someone to conduct the audits. So is there a compelling reason to have an Office of County Auditor when Finance can procure an audit? This Administration from their inauguration speech talked specifically about conducting three audits over departments. They are intent on conducting audits. Cost Control Commission hasn’t met yet. They are waiting for the State of the County address and the Mayor to deliver his message regarding the budget, but they are also charged with looking at cost containment per the Charter.</p> <p>Mr. Roversi stated that for information the Charter also expressly empowers the Council to hire auditors for any project specific audit, they want to be done.</p> <p>Ms. Suzawa asked if from the Council and from Administration, can come from anywhere.</p>	

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	<p>Mr. Roversi stated that there's a specific section in the Charter, 3.12 section A by its term requires the County Council to conduct an audit at least every two years, a financial audit. Then under section B they have a more discretionary authority to hire outside auditors to do performance audits of any department or division in the County that they choose.</p> <p>Ms. Suzawa stated so that can take the place of our auditor. She stated she should ask her nephew who's the Acting County Auditor for O'ahu what it entails.</p>	<p>Ms. Sandblom moved to defer CRC 2019-03 Ms. Suzawa seconded. Motion carried 5:0</p>
Announcements	<p>Next Meeting: Monday, March 25, 2019, 3:00 p.m., in the Mo'ikeha Building, Meeting Room 2A/2B</p>	
Adjournment		<p>Vice Chair TanBruggencate moved to adjourn the meeting. Seconded by Ms. Suzawa Motion carried 5:0 Chair Watanabe adjourned the meeting at 4:04 p.m.</p>

Submitted by: _____
 Anela Segreti, Administrative Specialist

Reviewed and Approved by: _____
 Ricky Watanabe, Chair

- (X) Approved as circulated.
 () Approved with amendments. See minutes of _____ meeting.