

October 30, 1998

Mr. Donald Ikeda
County Clerk
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

OPINION NO. 98-6

Dear Mr. Ikeda:

Re: Whether Blank, Spoiled, and Invalid Ballots Are Counted in Determining Whether a Charter Amendment or an Initiative Proposal Has Been Approved by the Voters of the County of Hawaii in an Election

By letter dated August 18, 1998, you requested an opinion concerning how “blank” and “over” ballots are to be counted with regard to the proposed County Charter amendments and initiative proposal which will be voted on in the 1998 General Election. This opinion is to confirm the oral advice given to you that the phrase “a majority of voters voting upon a proposed initiative ordinance” as used in Section 11-8, Hawaii County Charter, and the phrase “a majority of voters voting upon a charter amendment” as used in Section 15-3, Hawaii County Charter, does not include the counting of blank, spoiled, and invalid ballots.

In the absence of clear legislative language to the contrary, where the applicable statute provides for a vote to be decided by a majority of the electorate, all that is required is a majority of those actually voting on the question as long as the election is available to all qualified voters; absentees and abstainers are thus regarded as assenting to the will of the majority actually voting. Accordingly, to adopt or amend a charter by a “majority vote of the qualified voters of the city,” means a majority of the votes polled. 3 McQuillin, Mun. Corp., 3rd Ed., Section 12.18. (Emphasis supplied.)

In *Republican Party of Hawaii v. Waihee*, 68 Haw. 258, 709 P.2d 980 (1985), the Hawaii Supreme Court was asked to determine whether Plaintiff Rudy Pacarro was recalled as a member of the City Council of the City and County of Honolulu following a special recall election. In *Waihee*, the county charter provision at issue provided that “[i]f a majority of the registered electors who vote on the question at a recall election shall vote ‘Yes,’ the elected officer shall be deemed recalled and removed from office, otherwise he shall remain in office.” *Id.* at 259, 709 P.2d at 980. The court acknowledged

“[t]he general view that a qualified voter who succeeds in getting his name on the poll list and a ballot in the ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes.” *Id.* at 259-60, 709 P.2d at 981, citing 26 Am. Jur.2d, *Elections*, Section 314 (now Section 410). However, the court cautioned that “[w]hether that general view has any application in a particular case depends on the particular wording of the charter, statute or constitutional provision in question.” *Id.* at 260, 709 P.2d at 981.

To determine whether blank, spoiled, and invalid ballots are to be counted in determining whether a charter amendment or an initiative proposal has been approved by the voters of the County of Hawaii in an election requires us to examine the relevant provisions of the Hawaii County Charter, which in this case are Sections 11-8 and 15-3 and any relevant state statutes. Section 11-8, Hawaii County Charter, reads as follows:

Section 11-8. Results of Election. If a majority of the voters voting upon a proposed initiative ordinance shall vote in favor of it, the ordinance involved shall thereupon be an ordinance of the county. A referred ordinance which is not approved by a majority of the voters voting on it shall thereupon be repealed.

The relevant portion of Section 15-3, Hawaii County Charter, reads as follows:

If the majority of the voters voting upon a charter amendment votes in favor of it or a new charter, if a new charter is proposed, the amendment or new charter shall become effective at the time fixed in the amendment or charter.¹

¹ At this point we should mention that the reference to “charter amendment” in Section 15-3, Hawaii County Charter, includes charter amendments initiated by an ordinance adopted by the County Council pursuant to Section 15-1, Hawaii County Charter, hereinafter referred to as “council initiated charter amendments,” and charter amendments initiated by a charter commission pursuant to Section 15-3, Hawaii County Charter, hereinafter referred to as “commission initiated charter amendments.” You have stated that the County Clerk’s office has acted in accordance with then Corporation Counsel Stephen J. Menezes’s memorandum dated November 8, 1982, which, in response to a question concerning the effect of blank ballots on a council initiated charter amendment, concluded that “blank ballots should not be considered in determining the number of votes from which a majority is to be computed.” Mr. Menezes points out that the council initiated charter amendment he dealt with in his November 8, 1992 memorandum was initiated pursuant to Section 15-1, Hawaii County Charter, and

not Section 15-3, Hawaii County Charter, which is entitled “Mandatory Charter Reviews.” Apparently, Mr. Menezes concluded that because Section 15-3, Hawaii County Charter is entitled “Mandatory Charter Reviews” that everything contained in that section applies only to mandatory charter reviews and commission initiated charter amendments. However, Section 13-2, Hawaii County Charter provides that “[t]itles and subtitles shall not be used for the purposes of construing this charter.” Although we concur with Mr. Menezes’s conclusion that blank ballots should not be considered in determining the number of votes from which a majority is to be computed, we disagree with his statement that Section 15-3, Hawaii County Charter, applies only to commission initiated charter amendments and is not applicable to council initiated charter amendments. Based on the interpretive flexibility provided by Section 13-2, Hawaii County Charter, we are of the opinion that the last paragraph of Section 15-3, Hawaii County Charter, quoted above, is applicable to council initiated charter amendments initiated pursuant to Section 15-1, Hawaii County Charter, as well as commission initiated charter amendments initiated pursuant to Section 15-3, Hawaii County Charter. Mr. Menezes’s memorandum dated November 8, 1982 is hereafter superseded by this opinion.

Chapter 50 of the Hawaii Revised Statutes, enabled the counties initially to adopt charters and contains a section pertaining to charter amendments and revisions which reads as follows:

Section 50-11 Charter amendment and revision. Every charter established under this chapter shall provide means by which the charter may be amended or revised. The provisions for amendment and revision must provide for approval of all amendments and revisions by referendum to the electors of the county. The amendment or revision shall be considered ratified if a majority of the electors voting on the amendment or revision cast their ballots in favor of adoption. (Emphasis supplied.)

While Section 50-11, Hawaii Revised Statutes, does not specify whether blank, spoiled, and invalid ballots are counted, Section 50-10, Hawaii Revised Statutes, which pertains to the ratification of a proposed charter and for any proposed alternative, directly addresses this issue:

Each elector may vote for the proposed charter and any proposed alternative. Blank ballots and spoiled ballots shall not be counted in determining the majority of the votes. Any proposition receiving a majority of the votes cast at the charter election shall be considered approved by the electors. If the proposed charter and any of the proposed alternatives receive a majority of the votes cast at the election, the proposition receiving the larger majority shall supersede the proposition with the smaller majority. The laws and rules governing elections, so far as applicable and not inconsistent with this chapter, shall apply to elections held pursuant to this chapter. (Emphasis supplied.)

Chapter 11, Hawaii Revised Statutes, contains the state law governing elections. Part X, Section 11-151 (3), Hawaii Revised Statutes, reads as follows:

PART X. VOTE DISPOSITION

Section 11-151 Vote count. Each contest or question on a ballot shall be counted independently as follows:

* * *

- (3) If a contest or question requires a majority of the votes for passage, any blank, spoiled, or invalid ballot shall not be tallied for passage or as votes cast except

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that such ballots shall be counted as votes cast in ratification of a constitutional amendment. (Emphasis supplied.)

Therefore, pursuant to Section 11-151, Hawaii Revised Statutes, the phrase “a majority of voters voting upon a proposed initiative ordinance” as used in Section 11-8, Hawaii County Charter, and the phrase “a majority of voters voting upon a charter amendment” as used in Section 15-3, Hawaii County Charter, does not include the counting of blank, spoiled, and invalid ballots. Although this opinion is substantially in accord with our memorandum to the County Clerk dated November 14, 1990, it is our intent that this opinion hereafter supersede all previous opinions on this subject.

Please contact me if you have any questions. I apologize for the delay in responding in writing to your inquiry.

Sincerely,

RICHARD D. WURDEMAN
Corporation Counsel

By _____
GLENN H. SHIIGI
Deputy Corporation Counsel

GHS:pc
gs:blank vote count.wpd
cc: Al Konishi, Elections Office

APPROVED:

RICHARD D. WURDEMAN
Corporation Counsel