

**COMPLIANCE
OF COUNTY
AGENCIES WITH
THE HAWAII
ADMINISTRATIVE
PROCEDURE ACT**

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LEGISLATIVE REFERENCE BUREAU

UNIVERSITY OF HAWAII
Honolulu, Hawaii 96822

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FOREWORD

This study of county compliance with the Hawaii Administrative Procedure Act has been made in response to House Resolution 273 which was adopted during the General Session of 1967.

The Resolution expressed concern that "serious questions have arisen concerning the possible lack of conformity of some agencies with the requirements of the Hawaii Administrative Procedure Act. . . ." This report reveals the patterns of compliance with the Administrative Procedure Act found in the counties and attempts to present insights into reasons for lack of conformity where it exists. Some of these reasons are complex and are not easy of solution; this report attempts to present these problems and to make suggestions for solutions.

To a great extent this report could not have been completed without the cooperation and assistance of the county officials. It is hoped that this report, in addition to meeting its major objective of providing information to the Legislature, will aid the counties in carrying out their responsibilities under the Administrative Procedure Act.

Herman S. Doi
Director

February 1968

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SUMMARY

It has been found in this study of county compliance with the Administrative Procedure Act that while most of the counties are substantially in compliance with the Administrative Procedure Act, particularly concerning agencies which might be considered "most important", there is some nonconformity which is in part due to confusion as to the applicability of the Administrative Procedure Act and in part due, perhaps, to oversight.

One must appreciate the following facts in evaluating county compliance.

1. The counties have had considerable difficulty in determining, in some instances, what entities the Administrative Procedure Act applies to.
2. Some laws delegating administrative powers are relatively obscure.
3. There may be a feeling, in some cases, that the Administrative Procedure Act imposes a formalistic superstructure on administration which may be inimical to a certain attitude of informality and disproportionate to the amount of administrative power delegated.

It should also be appreciated that county agency compliance was studied because Resolution 273 referred only to counties. It may be that the Administrative Procedure Act poses problems for state agencies too.

Chapter I

INTRODUCTION

The Hawaii Administrative Procedure Act (hereinafter APA) was adopted by the Legislature of Hawaii in 1961. The APA was, with certain modifications, based on "the first tentative draft of the revision of the Model State Administrative Procedure Act which was drawn up at the meeting of the National Conference of Commissioners on August 17-22, 1959. . . ."¹

The purposes of the model administrative procedure acts have been set forth as follows in the 1946 Handbook of the National Conference of Commissioners on Uniform State Laws at page 200:

- (1) Requirement that each agency shall adopt essential procedural rules and, so far as practicable, that all rule-making, both procedural and substantive, shall be accompanied by notice of hearing to interested persons;
- (2) Assurance of proper publicity for administrative rules that affect the public;
- (3) Provision for advance determination of (or "declaratory judgments" on) the validity of administrative rules, and provision for "declaratory rulings," affording advance determination of the application of administrative rules to particular cases;
- (4) Assurance of fundamental fairness in administrative hearings, particularly in regard to rules of evidence, the taking of official notice in quasi-judicial proceedings, and the exclusion of factual material not properly presented and made a part of the record;
- (5) Provision assuring personal familiarity on the part of the responsible deciding officers and agency heads with the evidence in quasi-judicial cases decided by them;
- (6) Assurance of proper scope of judicial review of administrative orders to guarantee correction of administrative errors.

The Hawaii APA embodies provisions which satisfy these principles. A somewhat unique feature of the Hawaii APA is that it applies to county agencies as well as to state agencies.²

The word agency is a key one in any discussion of the APA, for the APA only applies to state or county instrumentalities which fall within the definition of the term agency in section 6C-1(a).³ For an instrumentality to be an agency, it must possess, under law, rule-making or adjudicatory functions.

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It may perhaps be argued that every single county instrumentality is by the mere fact of its establishment under law empowered to make rules and is thus an agency. Support for this proposition might rely on the notion that all entities have inherent power to make what are called interpretive, nonregulatory rules. A leading authority has said:

It is equally clear that an agency may, without specific authority, make known its interpretation of the provisions of the statute it administers. . . .⁴ (Emphasis added)

The main thrust of this argument would be that an instrumentality need not be specifically authorized to make rules by written law such as statutes or ordinances or a constitution; because it possesses inherent power to make rules of an interpretive nature and because interpretive rules are rules under the APA definition of "rule", the instrumentality, the argument would proceed, is an agency subject to the APA.

The trouble with this argument is that it fails to give any meaning to the words "authorized by law" in the APA definition of "agency" but renders them redundant and meaningless. While we recognize that the word "law" has various broad meanings and is not necessarily restricted to mean statutory or constitutional law we believe that in the case of the APA, the subject term must be restricted to mean written law.

As further support for our conclusion, we note that the official comment to the model draft which was used as a basis for Hawaii's APA clearly shows that the term "agency" was not meant to be all-inclusive respecting every government instrumentality. The following appears in the First Tentative Draft of the Revised Model State Administrative Procedure Act:

SECTION 1. [Definitions.]

For the purpose of this Act:

(1) "Agency" means each state [board, commission, department, or officer] authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.

Comment

The present definition of "agency" is retained. Careful consideration was given to the suggestion that the definition should be broadened

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to include, as does the Federal Act, each and every "authority." This offered alluring possibilities of requiring every little autocratic bureaucrat (of whom there are unquestionably many in State Governments) to adopt rules and publish information. But when attention was given to practical difficulties involved if the statutory provisions were made applicable to every bean board and cider commission and citizens advisory council, it was concluded with some reluctance that the scope of operation of the act should not be enlarged.

This study will proceed on the assumption that the words "authorized by law" mean authorized by statute or ordinance.

Thus, given the above assumption, it follows that some county instrumentalities are agencies under the APA while others are not (Cf. SR 67-23 of the Corporation Counsel of the City and County of Honolulu found in the Appendix). In order to measure county compliance with the APA it then becomes necessary as a first step to determine which county instrumentalities are APA agencies. At first blush, this would seem to be a simple task involving a run through of all relevant statutes and ordinances to find instances where rule making or adjudicatory functions are conferred upon county instrumentalities. Clear and easy cases would be those in which the relevant law, for example, states: "the department shall make rules and regulations to carry out the purposes of this Act". There probably would be no question but what the APA would apply to such a situation. A complicating factor intruded itself upon this study, however, when the search of the laws revealed delegations of power to county instrumentalities or officers to perform certain acts which arguably involved rule making but which failed to make it clear that rule making was intended.

We will present two examples to illustrate this situation which has caused considerable confusion. It should be borne in mind throughout this discussion that at the time this report was being written, the situations described below were not regarded by the county involved as coming under the APA and the rules, if they are that, made by the officials involved were not promulgated in accord with the APA. It should also be kept in mind that none of the laws delegating the powers discussed in these examples specifically state that the affected officials are to make rules.

The Traffic Code of the City and County of Honolulu provides at section 15-3.2:

(2) The Traffic Engineer may establish, place and maintain such signs, signals, pavement markings and other traffic control devices as he may deem necessary when special occasions or emergencies warrant such

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action, but when there is in his opinion an apparent need for such traffic control devices to remain in use for a period of time exceeding one month, application must be made to the City Council for approval of said traffic control devices.

This provision allows the traffic engineer without other prior action of the City Council to erect traffic control devices for a period of one month when justified by emergencies or special occasions. When the traffic engineer exercises his discretionary powers under this section he does not do so in conformity with the APA. The APA makes special provision for the filing and immediate effectiveness of emergency rules in cases when an agency finds that "adoption of the rule is necessary because of imminent peril to the public health, safety or morals" (section 6C-4, RLH 1955). Thus, it would be possible for the traffic engineer to utilize the APA machinery to file his regulations under the above quoted provision of the Traffic Code without experiencing delays which would interfere with the effectiveness of his actions. There are, we recognize, practical objections to applying the APA to this situation. The action of the traffic engineer remains effective for only one month after which it appears to become the action of the City Council which would seem to insulate it then from APA applicability. Would it be desirable to clutter up the registers of rules with such ephemera? Aren't these actions, anyway, likely to receive wide publicity from other sources such as the news media if they are taken in cases of emergency? These are some of the practical considerations which would be faced in applying the APA to this situation. Does the APA apply? The APA would apply if the action of the traffic engineer involved a "contested case" as defined in section 6C-1(e)⁵ or "rule" making as defined in section 6C-1(d).

While it might depend upon the facts of a particular situation as to whether a contested case is involved, it is difficult to believe that in most instances the traffic engineer would be determining "the legal rights, duties, or privileges of specific parties" in situations where agency hearings are "required by law" when he acts respecting traffic control under the subject provision. At best, the chance seems remote that the actions of the traffic engineer call into play the contested case hearing provisions of the APA.

Is the traffic engineer making a rule when he acts under this Traffic Code provision? A rule is defined as follows in the APA:

(d) "Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not

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affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 6C-8, nor intra-agency memoranda.

Let us examine what typically might happen under this delegation of power to the traffic engineer. Assume that some unusual circumstance has made traffic on a particular street extremely heavy and consequently dangerous. Further assume that the traffic engineer, in his discretion, determines that the situation constitutes an emergency of proportions sufficient to warrant his banning parking on the street even before the City Council is able to act by ordinance on the matter. He prohibits parking on the street. Has he made a rule?

The relevant elements of the definition of rule are as follows:

1. statement
2. of general or particular applicability
3. and future effect
4. that implements, interprets or prescribes law or policy.

It appears that elements 2 through 4, supra, are involved and satisfied in the traffic engineer's action. But, has he done element number 1? Has he made a statement? In fact, the traffic engineer has probably not made a statement; he has taken action. But his action could be put in the form of a statement. He could say, "For a period of one month, parking will be prohibited on both sides of Dole Street between University Avenue and St. Louis Drive". So, it is arguable that the traffic engineer has made a statement and thus a rule.

It remains to consider whether the exceptions to the definition of the term rule apply to the action of the traffic engineer. A regulation is not a rule if it is one:

1. concerning only the internal management of an agency
2. and not affecting private rights
3. or procedures available to the public.

The use of the conjunction and in the above elements of the exception creates confusion. We recognize that under the rules of statutory construction set forth in the Revised Laws of Hawaii 1955

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and can be read or (section 1-23, RLH 1955). Yet is or intended? If or is intended it would be enough to except a statement from the definition or rule to say that the statement merely does not affect private rights. We have found no authority which casts any light on a solution to this question. If and is clearly intended then a regulation would have to satisfy element 1 as well as 2 of the exception, in order to enjoy the exception. Perhaps some clarification of the APA should be considered here.

(In the instant situation, of course, for violating a traffic control order made by the traffic engineer under the subject section, a person could be penalized. At this point, the regulation would seem to affect his private rights so the public rights-private rights dichotomy attempted to be suggested above as a dividing line between when a regulation is a "rule" and when it is not one in the preceding paragraph would appear to be inapposite here.)

Thus, it is that an ordinance gives the traffic engineer limited authority to "make law" for a one-month period. He does not, when he now acts under the subject section, file his actions under APA procedures. Arguably he should.

For our second troublesome example we look to section 5-505(d) of the Charter of the City and County of Honolulu which empowers the Planning Commission to "adopt regulations having the force and effect of law pursuant to the subdivision ordinance". Rule 11B of these rules provides:

B. STREETS AND HIGHWAY IMPROVEMENTS IN SUBDIVISIONS WITHIN THE CITY OF HONOLULU. All streets in subdivisions within the City of Honolulu shall be on a grade which permits proper drainage of the street to or from adjoining streets, and shall have sidewalks, street lights, gutters and curbing, in conformity with the standards of the City and County of Honolulu; provided, however, that the Commission may authorize unimproved sidewalks in subdivisions where the streets constructed therein are not through streets which require no coordination with existing or planned streets, or where, on account of topographical conditions, such as hillside subdivisions or for any other reasons the inclusion of improved sidewalks would cause practical difficulty or unnecessary hardships or are not needed. All such streets shall have a pavement designed for the particular soil condition as determined by field and laboratory testing of the soil samples, and shall contain water mains, sewers where practicable, storm drainage facilities and street survey monuments as elsewhere herein stipulated.

The specifications for pavements, curbs, gutters, sidewalks, street lights, etc., outlined herein shall be in accordance with the specifications now on file in the Bureau of Plans of the Department of Public

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Works of the City and County of Honolulu (except the specifications as to the water system which shall conform to the rules and regulations and standards of the Board of Water Supply) and are subject to such changes and improvements in highway design as may be recommended by the Chief Engineer; provided, however, that rolled curbs may be constructed where in the opinion of the Commission and the Chief Engineer said type of curb construction will not be detrimental to the safety of the people within the area and where standard vertical curbs are not necessary for control of flood waters or traffic. (Sec. 1(d), Am. CPC Res. No. 786) (Emphasis added)

Pursuant to the above Planning Commission rule, the chief engineer of the City and County of Honolulu has promulgated a booklet of specifications. These specifications have not been promulgated under the APA. Yet, the specifications appear to constitute rules.

A striking feature of the treatment of these specifications is that but for filing with the proper authorities and the giving of public notice prior to hearings, the development and publication of the specifications are handled much as they would be under the APA. Informal hearings are held prior to the promulgation of the specifications; copies of the specifications are printed and available to the public. There would appear to be little reason why these specifications could not be promulgated under the APA. (The chief objection would seem to be the loss of flexibility to make changes without holding public hearings.) It is submitted that the specifications of the chief engineer may well be subject to the APA although they are not presently so regarded. Other counties in the Islands use the specification device and may face the same likelihood of APA applicability thereto. It must be pointed out that the Corporation Counsel disagrees with the above analysis and feels that a rule making function has not been conferred on the chief engineer.⁶

The presentation of the above two examples was intended to demonstrate some of the difficulties the counties face in attempting to determine what the APA applies to.

In each of the counties, under section 5-42, Revised Laws of Hawaii 1955, the mayor or county chairmen are required to make rules respecting vacations and sick leaves. It has been decided not to include these officers in the following listings on the grounds that the subject rules concern "internal" matters and thus are exempt from the APA.

When this study was conducted, it was too soon after Act 118, SLH 1967, dealing with value engineering, had been passed to expect

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the counties to have drawn up the requisite rules. Accordingly, this Act is left out of the tables which follow.

The drawing up of a list of county agencies which should comply with the APA presents a number of difficulties. These include the fact that all statutes and ordinances must be combed through to find instances of delegation of administrative authority to agencies. In a search of such large proportions it is likely that some instances of delegation may be missed. Secondly, judgments must be made as to whether the delegations found constitute rule making or adjudicatory functions or neither. It has been of considerable help in the conduct of this study that county officials, particularly the attorneys, have in certain instances supplied us with lists giving their opinions as to what instrumentalities are subject to the APA. Unfortunately, the list from Honolulu was still in the process of being drawn up when this report was being written, but lists were available from the other counties. These lists will be used as the core of discussion for each county but if corrections or additions are indicated they will be made herein.

When in the discussion which follows, it is asserted that a county agency is in compliance with the APA, it will mean that rule-making agencies have adopted rules after requisite notice and public hearing with executive approval (except in the case of boards of water supply) and filed them with the clerk and lieutenant governor. It will mean, in the case of adjudicatory agencies, that spot checks of their files revealed compliance with the APA requirements in contested cases concerning notice to parties, statements of the case, opportunity to present evidence, and the making of findings of fact and conclusions of law. In the case of both types of agencies, it will mean that they have made the procedural rules called for by section 6C-2 and have published their rules in accord with section 6C-5. Where compliance is substantial but not complete, an indication will be made for the affected agency indicating the respects in which compliance is incomplete.

Chapter II

COUNTY AGENCY COMPLIANCE WITH APA

City and County of Honolulu

The following instrumentalities of the City and County of Honolulu are believed to be agencies subject to the APA. The citations to statutes or ordinances indicate laws conferring rule making or adjudicatory authority. Those agencies marked with the letter "C" are, at least, in substantial compliance with the APA while those which are not so marked are not in compliance.

- C 1. Liquor Commission - Secs. 159-16 (rules, hearings), 159-58 (public hearing prior to licensing), 159-90 (hearing on revocation or suspension of license), RLH 1955.
- C 2. Motor Vehicle Dealers' and Salesmen's Licensing Board - Secs. 160-163 (rules, hearings), 160-174 (hearing on suspension or revocation of license), RLH 1955.
- C 3. Board of Water Supply - Charter Sec. 5-513 (rules re subdivisions), 8-105 (rules), 8-109 (rates), 8-110 (rates), 8-118 (appeals from action of manager), also see discussion, supra, re specifications.
- C 4. Urban Redevelopment Agency - Sec. 143-6(b) (rules), RLH 1955.
- 5. Examiner of Chauffeurs - Sec. ____-128, Act 214, SLH 1967 (hearing on suspension or revocation of driver's license) (rules are being adopted).
- C 6. Board of Trustees of Pensions for Policemen, Firemen and Bandsmen - Sec. 6-151 (hearings on actions concerning pensions), RLH 1955.
- C 7. Police Commission - Charter Secs, 7-103, 7-108.
- 8. Chief of Police - Sec. 160-81, RLH 1955; Taxi Control Ordinance. (While the chief of police has filed procedural rules, he has not filed rules relating to the motor vehicle safety act (sec. 160-81). Additionally, under a number of ordinances the chief

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of police has power to revoke or suspend licenses without a hearing. The counties should be sensitive to the possibility that constitutional principles may nevertheless require hearings to be held in which case the APA would be applicable. In this connection, see sec. 13-6.8, R.O. 1961 (summary suspension of dance hall permits), ord. 2896, 2955. Respecting sec. 15-13.11 of the Traffic Code (disposal of unclaimed vehicles), the chief of police has made rules complying with the APA.)

- C 9. Civil Service Commission - Charter Secs. 5-607 (appeals from action of civil service director), 5-609 (appeals).
- 10. Director of Civil Service - Sec. 5-72 (hours of work), RLH 1955.
- C 11. Director of Finance - Sec. 130-7, RLH 1955, as amended by Act 49, SLH 1966 (fees for motor vehicle number plates and emblems). (Arguably no discretion is conferred on the director but see Corporation Counsel Op. 66-46.) Secs. 7B-2 and 9-24, RLH 1955.
- C 12. Planning Commission - Charter Sec. 5-505 (subdivision rules).
- C 13. Zoning Board of Appeals - Charter Sec. 5-507 (hearings on zoning matters).
- 14. Director of Planning - Sec. 21-11.2, R.O. 1961 (hearing for permit to carry on temporarily industrial uses under zoning ordinance).
- 15. Electrical Advisory Board - Ord. 2541 (hearing appeals under Electrical Code). (Rules are being drafted.)
- 16. Board of Electrical Examiners - Sec. 17-3.2, R.O. 1961 (hearings under Electrical Code).
- C 17. Building Board of Appeals - Ord. 2867 (hearings under Building Code). (Compliance is substantial, but published copies are not available for the public.)

COUNTY AGENCY COMPLIANCE

18. Board of Plumbing Examiners - Uniform Plumbing Code Sec. 2.5.
19. Fire Chief - Sec. 13-9.3, R.O. 1961 (hearing on suitability of fire extinguishers).
20. Traffic Engineer - See discussion, supra, on emergency rules and ord. 2946 (creating "no passing" zones).
21. Chief Engineer - See discussion, supra, of specifications and sec. 11-2.4, R.O. 1961 (sewer ordinance). (Additionally, although it is doubtful at this time whether they contemplate compliance with the APA, certain ordinances give the chief engineer broad regulatory powers. For example, see ord. 2734 (grading), 2733 (quarrying). It is possible that constitutional principles may require a hearing under these ordinances in case of permit denials or suspension in which case the APA would apply. However, it is not clear at this time that the APA does apply.)

County of Hawaii

As stated earlier, the counties other than Honolulu submitted opinions as to which agencies are subject to the Act and which agencies are in compliance therewith. The following is an excerpt from the opinion of the Hawaii county attorney:

Mr. Herman S. Doi, Director
Legislative Reference Bureau
University of Hawaii
2425 Campus Road
Honolulu, Hawaii 96822

Attention: Miss Sonia Faust

Dear Mr. Doi:

County Chairman Shunichi Kimura has referred to this office your letter dated June 5, 1967, relative to House Resolution No. 273.

* * *

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Agencies, Departments, Boards and Commissions that are
required to adopt rules: Dates Rules Filed

Planning Commission - July 16, 1962

Liquor Commission - August 19, 1964

Police Commission - January 8, 1964

Hawaii Redevelopment Agency - (rules not submitted)

Board of Electrical Examiners - December 28, 1965

Board of Plumbing Examiners - December 28, 1965

Board of Water Supply - (rules not submitted)

Motor Vehicle Dealers' Licensing Board - July 5, 1963

Pension Board of Trustees, Policemen, Firemen and
Bandsmen - (rules not submitted)

* * *

Civil Service Commission - March 17, 1964

Board of Appeals, Building Code - February 16, 1966

The following boards are under study to determine whether
compliance to the Administrative Procedure Act is required:

Board of Trustees, Honokaa Lyceum Association

Board of Hawaii County Hospital System
(Created by Resolution No. 80, April 5, 1967)

Board of Ethics
(Created by County of Hawaii Ordinance No. 68, April 5, 1967)

Enclosed is our letter to the listed agencies of their need to
comply with the Administrative Procedure Act.

If there are any further questions, please do not hesitate to
inquire.

* * *

Very truly yours,

/s/ Robert T. Ito

ROBERT T. ITO
Deputy County Attorney

RTI:ds:jo

Enclosures

cc: County Chairman Shunichi Kimura

COUNTY AGENCY COMPLIANCE

On the basis of the foregoing letter and our own study, we find that the following agencies are subject to the APA and that those marked with a "C" are at least in substantial compliance.

- C 1. The Liquor Commission - Secs. 159-16, 159-58, 159-90, RLH 1955.
- C 2. The Motor Vehicle Dealers' and Salesmen's Licensing Board - Secs. 160-163, 160-174, RLH 1955.
- C 3. Board of Water Supply - Sec. 146-112, RLH 1955.
(Rules being drafted.)
- C 4. Urban Redevelopment Agency - Sec. 143-6(b), RLH 1955.
- 5. Examiner of Chauffeurs - Sec. ____-128, Act 214, SLH 1967.
- 6. Board of Trustees of Pensions for Policemen, Firemen and Bandsmen - Sec. 6-151, RLH 1955. (This agency is defunct on Hawaii.)
- 7. Police Commission - Secs. 145-4, 145-10, RLH 1955.
(Actually, rules called Police Commission Rules in foregoing letter are mislabeled police chief rules.)
- C 8. Police Chief - Sec. 160-81, RLH 1955; Ord. 39.
- C 9. Civil Service Commission - Sec. 3-21, 3-25, 3-26, RLH 1955.
- C 10. Director of Civil Service - Sec. 5-72, RLH 1955.
- 11. Treasurer - Ord. 27 (dance hall ordinance; there are no dance halls in the county).
- 12. County Engineer - Ord. 53 (driveway construction - specifications), 70 (traffic code - establishing no-passing zones).
- 13. Executive Committee of the Parks and Recreation Commission - Ord. 11. (Arguably this is an advisory group only.)
- C 14. Board of Appeals - Building Code.

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- C 15. Board of Electrical Examiners - Ord. 59 (hearing appeals under Electric Code).
- C 16. Board of Plumbing Examiners - Ord. 60 (Plumbing Code).
- C 17. Planning Commission - Ord. 58 (mobile home parks and homes, licensing; arguably no discretion is involved here), 63 (zoning).

It is rather interesting that Planning Commission hearings in the County of Hawaii are not adjudications of "contested cases" under the APA because in most instances there is an appeal to the Board of Supervisors. Under the APA a "contested case" is dependent upon the definition of "agency hearing" and the APA defines "agency hearing" as follows:

"Agency hearing" refers only to such hearing held by an agency immediately prior to a judicial review of a contested case. . . .

Since hearings held by the Planning Commission are not held immediately prior to judicial review but instead are subject to appeal to the legislative body which is exempted from the APA, Planning Commission hearings are thus insulated from the APA.

Section 6C-5 of the APA provides:

[Sec. 6C-5.] Publication of rules.

(a) Each agency shall, as soon as practicable after January 2, 1962, compile, index and publish all rules adopted by such agency and remaining in effect. Compilations shall be supplemented as often as necessary and shall be revised at least once every ten years.

(b) Compilations and supplements shall be made available free of charge upon request by the state officers in the case of a state agency and by the county officers in the case of a county agency. As to other persons each agency may fix a price to cover mailing and publication costs.

In Hawaii County only the Liquor Commission and the Civil Service Commission are in compliance with this section. None of the other agencies interviewed make available copies of their rules for distribution to or purchase by the public.

Although rules have been drafted for the Hawaii County Planning Commission and the Motor Vehicle Dealers' Licensing Board, these rules

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have not been filed with the Lieutenant Governor's office.⁷ Thus, there is a violation of APA section 6C-4.

County of Maui

The following letters and information from Maui County show:

1. A listing of county instrumentalities.
2. By asterisk, an opinion from the Chairman's Office that ten of these instrumentalities are APA agencies.
3. That five agencies have made rules as indicated by the county attorney's letter of June 27, 1967, i.e.:

Miss Sonia Faust
Legislative Reference Bureau
University of Hawaii
2425 Campus Road
Honolulu, Hawaii 96822

Dear Miss Faust:

We inadvertently failed to forward a listing of agencies, departments, and commissions to you as requested by Mr. Herman S. Doi, Director of your Bureau.

Enclosed you will find such a listing.

Sincerely yours,

/s/ Goro Hokama

GORO HOKAMA
ACTING CHAIRMAN AND EXECUTIVE
OFFICER

Enc.

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DEPARTMENTS, AGENCIES AND COMMISSIONS UNDER THE EXECUTIVE BRANCH OF MAUI COUNTY GOVERNMENT

1. Office of the Chairman and Executive Officer
2. Office of the County Attorney
3. Office of the County Auditor
4. Office of the County Clerk
5. Office of the County Treasurer
6. Civil Defense Agency
7. Department of Civil Service (Civil Service Commission)*
8. Office of Economic Development (Economic Research and Development Commission)
9. Department of Public Works
10. Board of Electrical Examiners* [Appeal to Board of Supervisors]
11. Board of Plumbing Examiners* [Appeal to Board of Supervisors]
12. Department of Parks, Playgrounds and Recreation*
13. Police Department (Police Commission)*
14. Fire Department
15. County of Maui Planning Commission*
16. Liquor Commission*
17. County of Maui Historic Commission*
18. Board of Water Supply*
19. Motor Vehicle Dealers' Licensing Board [*]
20. County of Maui Redevelopment Agency*

*Empowered to issue rules and regulations or to hold hearings.

Mr. Herman S. Doi
Director
Legislative Reference Bureau
University of Hawaii
2425 Campus Road
Honolulu, Hawaii 96822

Dear Mr. Doi:

Your letter addressed to Acting Chairman Goro Hokama, dated June 5, 1967, relative to House Resolution No. 273, was referred to this office.

In accordance with your request, we enclose herewith the following:

* * *

2. Rules and Regulations of the Liquor Commission of the County of Maui.

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3. Rules of Administrative Practice and Procedure, Motor Vehicle Dealers Licensing Board of the County of Maui.

4. Rules on Public Information: Petition for Revision of Rules and Declaratory Rulings of the Civil Service Commission of the County of Maui.

5. Rules and Regulations of the Board of Water Supply of the County of Maui.

6. Rules of Practice and Procedure of the Planning and Traffic Commission of the County of Maui.

We also enclose herewith a volume of the Permanent Ordinances of the County of Maui 1966. The Permanent Ordinances contain rules and regulations of the Department of Parks, Playgrounds and Recreation of the County of Maui.

We also enclose herewith a copy of an opinion dated October 3, 1962, written by Deputy County Attorney Richard R. Komo relative to the applicability of the Hawaii Administrative Procedure Act to the Board of Trustees of the Maui Community Hospitals.

Referring back to the list of boards, committees and commissions of the County of Maui, it should be mentioned that many of said boards and commissions do not have rules and regulations for various reasons. For example, the activities of the Board of Electrical Examiners and the Board of Plumbing Examiners are controlled by ordinance. (See Permanent Ordinances of the County of Maui 1966.) Many of the advisory boards and commissions do not have rules and regulations for the reason that they are merely advisory. These include the Street Naming Commission, the Maui County Street Lighting Committee, etc.

We hope this will give you a preliminary idea as to how the Administrative Procedure Act is being effectuated in the County of Maui.

Please let us know if there is any other material or information that you desire.

Yours very truly,

/s/ Kase Higa

KASE HIGA
COUNTY ATTORNEY

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HAWAII ADMINISTRATIVE PROCEDURE ACT

On the basis of the foregoing letter and our own study, we find that the following agencies are subject to the APA and that those marked with a "C" are at least in substantial compliance with it.

- C 1. The Liquor Commission - Secs. 159-16, 159-58, 159-90, RLH 1955.
- C 2. The Motor Vehicle Dealers' and Salesmen's Licensing Board - Secs. 160-163, 160-174, RLH 1955.
- C 3. Board of Water Supply - Secs. 145A-16, 145A-23, RLH 1955.
- 4. Urban Redevelopment Agency - Sec. 143-6(b), RLH 1955.
- 5. Examiner of Chauffeurs - Sec. ____-128, Act 214, SLH 1967.
- 6. Board of Trustees of Pensions for Policemen, Firemen and Bandsmen - Sec. 6-151, RLH 1955.
- 7. Police Commission - Secs. 145-4, 145-10, RLH 1955.
- 8. Police Chief - Sec. 160-81, RLH 1955.
- C 9. Civil Service Commission - Secs. 3-21, 3-25, 3-26, RLH 1955.
- 10. Director of Civil Service - Sec. 5-72, RLH 1955.
- 11. County of Maui Historic Commission - Sec. 8-1.23, P.O., 1967. (This commission may be regarded as merely advisory.)
- C 12. Planning Commission - Secs. 7-1.1, 8-1.22, 8-1.23, P.O. 1967.
- 13. Department of Public Works - Sec. 11-1.9, P.O. 1967, see discussion, supra, re specifications of Honolulu's chief engineer.

In the case of the Maui County Board of Electrical Examiners and Plumbing Examiners, an appeal lies to the Board of Supervisors. Thus, it would seem that the APA is inapplicable to hearings held by these bodies and so they have not been included.

COUNTY AGENCY COMPLIANCE

In Maui County, the Liquor Commission and Board of Water Supply rules are available for purchase by the public in compliance with section 6C-5 of the APA. Civil Service rules are xeroxed for persons wishing copies of them as are Planning Commission rules.

The Maui County Planning Commission's rules have not been filed with the Lieutenant Governor's office.

County of Kauai

The following information was received from the County of Kauai. Contrary to the statement contained in Chairman Vidinha's letter, below, the Kauai Liquor Commission was found to be in compliance with the APA.

Miss Sonia Faust
Assistant Researcher
Legislative Reference Bureau
University of Hawaii
2425 Campus Road
Honolulu, Hawaii 96822

Dear Miss Faust:

Thank you for your letter of July 28, 1967, with regard to the State's Administrative Procedure Act.

Forwarded herewith is a list of agencies, boards, commissions, etc. The agencies denoted with an asterisk are agencies subject to the Administrative Procedure Act. None of these agencies have published rules with the Clerk or Lieutenant Governor.

As to the use of our ordinances, I would be happy to send it to you on a loan basis or should you not require it immediately, I'll have it ready for you to hand carry when you meet with us on September 5th.

Thanking you kindly for your patience on this matter and the many past favors rendered this County, I remain

Very truly yours,

/s/ Antone Vidinha, Jr.

ANTONE VIDINHA, JR.
Chairman & Executive Officer

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encl.

HAWAII ADMINISTRATIVE PROCEDURE ACT

CHAIRMAN & EXECUTIVE OFFICER
COUNTY ATTORNEY
COUNTY AUDITOR
COUNTY CLERK
COUNTY TREASURER
CIVIL SERVICE DEPARTMENT
KAUAI FIRE DEPARTMENT
KAUAI POLICE DEPARTMENT
* BOARD OF WATER SUPPLY
* KAUAI LIQUOR COMMISSION
SAMUEL MAHELONA MEMORIAL HOSPITAL
KAUAI VETERANS MEMORIAL HOSPITAL
DEPARTMENT OF ECONOMIC DEVELOPMENT
DEPARTMENT OF PUBLIC WORKS
CIVIL DEFENSE
PURCHASING DEPARTMENT
PLANNING & TRAFFIC DEPARTMENT
COUNTY PENSION BOARD
* CIVIL SERVICE COMMISSION
* PLANNING & TRAFFIC COMMISSION
* POLICE COMMISSION
* SAMUEL MAHELONA MEMORIAL HOSPITAL BOARD OF TRUSTEES
[see Act 203, SLH 1967]
KAUAI COUNTY COMMITTEE ON AGING
* KAUAI VETERANS MEMORIAL HOSPITAL MANAGING COMMITTEE
[see Act 203, SLH 1967]
* MOTOR VEHICLE DEALERS LICENSING BOARD
PENSION BOARD FOR POLICEMEN AND FIREMEN
ADVISORY COMMITTEE ON ECONOMIC DEVELOPMENT
WAIMEA WAR MEMORIAL SWIMMING POOL ADVISORY COMMITTEE
KAUAI LIQUOR COMMISSION
KAUAI VETERANS CEMETERY ADVISORY COMMITTEE
COUNTY ADVISORY HEALTH COMMITTEE
WAILUA GOLF COURSE ADVISORY COMMITTEE
KAUAI WAR MEMORIAL CONVENTION HALL ADVISORY COMMITTEE
ADVISORY COMMITTEE ON TOURISM
KAPAA BEACH NATATORIUM COMMITTEE
KAUAI CHARTER COMMISSION
KAUAI COMMITTEE ON CHILDREN & YOUTH
CITIZENS PLANNING ADVISORY COMMITTEE

On the basis of the foregoing letter and our own study, we find that the following agencies are subject to the APA and that those marked with a "C" are at least in substantial compliance.

1. The Liquor Commission - Secs. 159-16, 159-58, 159-90, RLH 1955.
2. The Motor Vehicle Dealers' and Salesmen's Licensing Board - Secs. 160-163, 160-174, RLH 1955.

COUNTY AGENCY COMPLIANCE

3. Board of Water Supply - Secs. 145A-16, 145A-23, RLH 1955.
4. Urban Redevelopment Agency - Sec. 143-6(b), RLH 1955.
5. Examiner of Chauffeurs - Secs. 160-42, 160-51, RLH 1955.
6. Board of Trustees of Pensions for Policemen, Firemen and Bandsmen - Sec. 6-151, RLH 1955.
7. Police Commission - Secs. 145-4, 145-10, RLH 1955.
8. Police Chief - Sec. 160-81, RLH 1955; Ord. 74.
9. Civil Service Commission - Secs. 3-21, 3-25, 3-26, RLH 1955.
10. Director of Civil Service - Sec. 5-72, RLH 1955.
11. County Engineer - Ord. 33.
12. Building Board of Appeals - Ord. 95.

It is significant that in a number of instances where a hearing is contemplated by a county official or instrumentality on Kauai, an appeal lies to the Board of Supervisors thus taking the proceeding outside of the reach of the APA because the hearings held prior to those held before the Board of Supervisors are not held immediately prior to judicial review. This is the case with the revocation or suspension of plumbing permits by the county engineer, the granting or denial of zoning variances, and hearings by the Board of Appeals created by the Electric Code.

Chapter III

EVALUATION OF COMPLIANCE PATTERNS

The following generalizations may be made about county compliance with the APA:

1. The more powerful an agency is, the more identifiable its public is, the more active the agency is, and the more closely it resembles what is typically thought of as a regulatory board, the more likely it is that it will be in compliance with the APA.
2. The clearer the law delegating administrative authority is concerning the making of rules and holding hearings, the greater the likelihood is that there will be compliance with the APA.
3. In some areas, particularly, there may be a measure of indifference regarding compliance with the APA. No indication was found that noncompliance was due to a wilful disregard for the law. It may be that what was found tended to be an attitude that the APA imposed a weighty formalistic superstructure on administrative practices somewhat inimical to island informality and somewhat elaborate when measured against the administrative powers delegated. It is difficult to know whether this indifference springs from public indifference as well as official indifference. On Maui, it was learned that when the public hearing was held prior to the adoption of Planning Commission rules, no one came. Also, we were the first people in the history of the Maui County Clerk's office to ask to see the rules on file there. Some rules have failed to be filed simply because no one had ever gotten around to typing them in the prescribed form. This form was prescribed by the Governor's office during the Quinn administration. (It calls for typing the rules on legal sized paper to be filed in bound volumes.)
4. The APA uses very broad, general language which tends to be somewhat circuitous and this has the effect of making it unclear in some cases whether an instrumentality is subject to it.

One county attorney interviewed estimated that rule making under the APA took about two months; thus, he said, it was preferable, in many cases, for the county to act by ordinance rather than by rule.

Chapter IV

THE FINAL DRAFT OF THE REVISED STATE ADMINISTRATIVE PROCEDURE ACT

After the draft of the model act which Hawaii followed in drawing up its APA was made, the National Conference of Commissioners on Uniform State Laws went on to make a further revision of the model act. This revision is set forth in the Appendix along with Hawaii's APA and will be referred to herein as the final revision.

The final revision is different from the Hawaii APA in certain respects. Among them are the following:

1. The Hawaii APA exempts entities "in the legislative or judicial branches" from the definition of agencies subject to the Act. Sec. 6C-1. The final revision, on the other hand, exempts "the legislature or the courts". Sec. 1. The reason this can have significance in Hawaii is demonstrated by the fact that the county clerk in the case of the City and County of Honolulu is in the legislative branch of the city and county although he is an administrative official. The final revision's definition of agencies subject to the Act would exclude legislative bodies, but not ministerial entities existing in the legislative branch.
2. The definitions of "contested case" and "rule" in the Hawaii APA do not make it clear whether ratemaking and licensing are adjudicatory or rule-making functions. Sec. 6C-1. In fact, under Hawaii's APA it is completely unclear if licensing per se is included at all. The final revision includes these activities in the "contested case" provisions. Sec. 1(2).

It would be premature at this time to advocate the adoption of the final revision. While it may have certain good points to it, it does not appear to solve the uncertainties that arose during the course of this study as to what entities are agencies subject to the Act. Several alternatives are available. They include:

1. Leaving the APA as it is and encouraging all subject agencies to comply therewith. Counsel might take the position that in case of doubt the entity should comply.
2. Modifying the APA. This approach would require study and the study should involve the attorney general, county

HAWAII ADMINISTRATIVE PROCEDURE ACT

attorneys and representatives of affected agencies.
Types of modification available include:

- a. Listing agencies which the APA applies to (this is done in California, Maine, New Mexico, New Hampshire and Ohio), or
 - b. Listing those which it does not apply to (this is done in Georgia, Massachusetts, Michigan, Indiana, Maryland, Oregon and Virginia).⁸
 - c. Improvement of definitions.
3. Revising, where necessary, all laws delegating administrative powers to make it clear whether the APA is intended to apply.

Chapter V

PROPOSALS BY THE COUNTY ATTORNEYS AND THE HARVARD STUDENT LEGISLATIVE RESEARCH BUREAU

The county attorneys held a meeting on January 5, 1968 to discuss the mutual problems they encountered under the APA. We were invited to attend. The attorneys for all four counties were present.

At the meeting, the following points emerged:

1. There was basic disagreement as to whether the specifications of the chief engineer were rules. The county attorneys felt they were not; we felt there was a good argument to be made that they were and thus this report indicates as much.
2. There was uncertainty as to whether civil service rules, vacation and sick leave rules, and police commission rules were subject to the APA. It is obvious that some counties thought they were, or at least that the civil service and police rules were, for they complied with the APA respecting them. The argument that such rules are not subject to the APA proceeds upon the premise that the rules affect internal matters. The counter argument is that the rules meet the APA definition of rule and affect vested rights or, even, constitutional rights and not mere internal agency matters. In this connection see Article XIV, section 1 of the Hawaii State Constitution which gives constitutional status to the merit principle as it affects public employees. Arguably, this alone gives employees a vested right respecting the civil service rules or some of them.
3. The county attorneys felt that the best solution to the problems they had encountered respecting applicability of the APA was to amend the APA so that it would list the agencies which were to be subject to it. As an alternative to that, they felt that the key definitions in the APA should be amended. To that end they agreed to work out a proposal which would meet their objections and to submit it to us. The following is their proposal; the underlinings and parenthetical indications of new subsections are theirs:

HAWAII ADMINISTRATIVE PROCEDURE ACT

Sec. 6C-1(a). "Agency" means each state or county board, commission, department, or officer authorized by statute or ordinance to make substantive rules or to adjudicate contested cases, except those in the legislative or judicial branches.

Sec. 6C-1(d). "Substantive Rule" means each statement, having the force and effect of law, made by a state or county board, commission, department, or officer, pursuant to a discretionary grant of administrative power delegated by statute or ordinance, which is of general applicability and future effect that implements, interprets or prescribes the law or policy of the delegating statute or ordinance. The term does not include statements governing only the internal affairs of the state or county governments or governmental instrumentalities, nor declaratory rulings issued pursuant to Section 6C-8. (New)

Sec. 6C-1(e). "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by statute, ordinance or constitutional right to be determined after an opportunity for agency hearing.

Sec. 6C-2. Public information.

(a) In addition to other substantive rule making requirements imposed by law, each agency shall: . . .

Sec. 6C-3. Procedure for Adoption, Amendment or Repeal of Substantive Rules. Prior to the adoption of any substantive rule, or the amendment or repeal thereof, the adopting agency shall: . . .

Sec. 6C-4. Filing and taking effect of substantive rules.

(a) Each agency adopting, amending or repealing a substantive rule; . . .

(b) Each substantive rule . . .

Sec. 6C-6. Petition for Adoption, Amendment or Repeal of Substantive Rules.

Any interested person may petition an agency requesting the adoption, amendment, or repeal of any substantive rule stating reasons therefor . . .

The gist of the above proposal would be to restrict the definition of rule to something called a substantive rule. The changes proposed do not, in our opinion, necessarily help to clear up the confusion. For one thing, no mention is made of licensing and so it is difficult to know where this comes in, if at all. Additionally,

PROPOSALS BY THE COUNTY ATTORNEYS

just as much agony of thought would be involved in deciding whether a rule is a substantive rule as whether it is a rule. Moreover, the attorneys have, perhaps, retained interpretive rules though they sought to avoid them by leaving in the word "interpret" as one of the things a substantive rule is to do.

Mr. Kase Higa of Maui sent in his own proposed amendments to the APA. They follow:

PROPOSED AMENDMENTS TO CHAPTER 6C

(a) "Agency" means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except such board, commission, department or officer whose rules pertain mainly to the internal management and organization of such agency, although such rules may incidentally affect the public.

(e) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing; provided that "contested case" shall not include any case arising out of the civil service laws of the State or to any rule or regulation made pursuant to such laws.

It must be pointed out that changes to the APA suggested by the county attorneys and presented above are their second choices. Their first choice of alternatives would be for the APA to list agencies which the APA does or does not apply to. They are aware of the difficulty the potential for creating new agencies would pose for this approach.

As stated earlier, a number of states have administrative procedure acts for state agencies but not for municipal agencies. In an attempt to fill the void for municipalities, the Harvard Student Legislative Research Bureau has proposed a Municipal Administrative Procedure Act.⁹ This Act appears to contain definitions of "contested case" (Individualized actions) and "rule" which should be considered very seriously as an improvement to the definitions contained in the APA. The fact that these definitions are tailored for municipalities does not appear to make them inapposite for state agencies.

The definition of "individualized action" is:

(c) "Individualized action" is a proceeding before a board in which the legal rights, duties, or privileges of specific parties are to be determined. It includes, but is not limited to, license applications,

HAWAII ADMINISTRATIVE PROCEDURE ACT

renewals, and revocation. It does not include rule-making procedure except when the proposed rule will affect fewer than six known parties.

The term "rule" is defined as follows:

(f) "Rule" includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect adopted by a board to implement or interpret the law enforced or administered by it, but does not include:

- (1) advisory rulings issued under section 206 of this Act; or
- (2) rules concerning only the internal management or discipline of any board, and not directly affecting the rights of, or the procedures available to, the public or that portion of the public affected by the board's activities; or
- (3) decisions issued in individualized actions; or
- (4) interpretative statements and statements of general policy [;
- (5) rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals].

The above definitions have as their good points the fact that they take into account licensing which is a major county function and they would provide for the situation, for example, of the traffic engineer's emergency rules and "no passing" regulations by clearly exempting them. It is not clear how the specifications of the chief engineer would fare under these definitions. Also, the exclusion from the definition of "rule" of "interpretive statements and statements of general policy" introduces a large measure of ambiguity into the definition of "rule" and could be used to inhibit the legitimate reach of the act.

In our opinion, it is important for an administrative procedure act to deal with licensing and ratemaking. It is important to determine as the final revision of the model act does whether these are rules or contested cases. It is also important that thought be given to the situation in which someone does not obtain what may be thought of typically as a license but rather is given permission to do a certain act. Often, for example, members of the public are required to submit plans for approval by a government official as a condition precedent to taking some action. It is a matter of complete uncertainty whether the APA applies to such a situation although arguably it would constitute a "contested case".

PROPOSALS BY THE COUNTY ATTORNEYS

The presentation of all of the above proposals was made in the hope that it would bring into focus some of the reasons why the APA has been difficult to follow and to demonstrate the directions in which thought about the problem is going.

FOOTNOTES

1. Stand. Com. Rep. 8 on H.B. No. 5, 1961 House Journal, pp. 653, 654.
2. Rev. Laws of Hawaii, sec. 6C-1(a) (1955).
3. "[Sec. 6C-1.] Definitions. For the purpose of this chapter:
(a) 'Agency' means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches." (Emphasis added)
4. Frank E. Cooper, State Administrative Law (Indianapolis: Bobbs-Merrill, 1965), Vol. 1, p. 176.
5. "(e) 'Contested case' means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."
6. Conversation with Corporation Counsel Stanley Ling, January 5, 1968.
7. Letter from Lieutenant Governor Thomas P. Gill to Sonia Faust, August 21, 1967.
8. Cooper, Vol. 1, pp. 102-105.
9. "A State Municipal Administrative Procedure Act," Harvard Journal on Legislation, 3 (February, 1966), 323-344.

Appendix A

HAWAII ADMINISTRATIVE PROCEDURE ACT

general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 6C-8, nor intra-agency memoranda.

(e) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

(f) "Agency hearing" refers only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 6C-14. [L. 1961, c. 103, s. 1.]

[§ 6C-2.] Public information.

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) Adopt as a rule a description of the methods whereby the public may obtain information or make submittals or requests.

(2) Adopt rules of practice, setting forth the nature and requirements of all formal and informal procedures available, and including a description of all forms and instructions used by the agency.

(3) Make available for public inspection all rules and written statements of policy or interpretation formulated, adopted, or used by the agency in the discharge of its functions.

(4) Make available for public inspection all final opinions and orders.

(b) No agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required, except where a person has actual knowledge thereof.

(c) Nothing in this section shall affect the confidentiality of records as provided by statute. [L. 1961, c. 103, s. 2.]

[§ 6C-3.] Procedure for adoption, amendment or repeal of rules. Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

(a) Give at least twenty days' notice for a public hearing. Such notice shall include a statement of the substance of the proposed rule, and of the date, time and place where interested persons may be heard thereon. The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its rule-making proceedings, and published at least once in a newspaper of general circulation in the

[CHAPTER 6C]

[ADMINISTRATIVE PROCEDURE]

[§ 6C-1.] Definitions. For the purpose of this chapter:

(a) "Agency" means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.

(b) "Persons" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

(c) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.

(d) "Rule" means each agency statement of

State for state agencies and in the county for county agencies.

(b) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date as to when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency shall, if requested to do so by an interested person, issue a concise statement of the principal reasons for and against its determination.

(c) Notwithstanding the foregoing, if an agency finds that an imminent peril to the public health, safety, or morals requires adoption, amendment, or repeal of a rule upon less than twenty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

(d) The adoption, amendment or repeal of any rule by any state agency shall be subject to the approval of the governor. The adoption, amendment or repeal of any rule by any county agency shall be subject to the approval of the chairman of the board of supervisors or the mayor of the county. The provisions of this subsection shall not apply to the adoption, amendment and repeal of the rules and regulations of the county boards of water supply. [L. 1961, c. 103, s. 3; am. L. 1965, c. 96, s. 139a.]

L. 1965 added par. (d).

[§ 6C-4.] Filing and taking effect of rules. (a) Each agency adopting, amending or repealing a rule, upon approval thereof by the governor or chairman of the board of supervisors or the mayor of the county, shall file forthwith certified copies thereof with the lieutenant governor in the case of the State, or with the clerk of the county in the case of a county. In addition, the clerks of all of the counties shall file forthwith certified copies thereof with the lieutenant governor. A permanent register of such rules, open to public inspection, shall be kept by the lieutenant governor and the clerks of the counties.

(b) Each rule hereafter adopted, amended, or repealed shall become effective ten days after filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties.

(1) If a later effective date is required by statute or specified in the rule, such later date shall be the effective date, provided, that no rule shall specify an effective date in excess of thirty days after the filing of the rule as provided herein.

(2) An emergency rule shall become effective upon filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties, for a period of not longer than one hundred twenty days without renewal unless extended in compliance with the

provisions of subsections (a) and (b) of section 6C-3, if the agency finds that immediate adoption of the rule is necessary because of imminent peril to the public health, safety or morals. The agency's finding and brief statement of the reasons therefor shall be incorporated in the rule as filed. The agency shall make an emergency rule known to persons who will be affected by it by publication at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies within five days from the date of filing of such rule. [L. 1961, c. 103, s. 4; am. L. 1965, c. 96, s. 139b.]

L. 1965 amended par. (a).

[§ 6C-5.] Publication of rules.

(a) Each agency shall, as soon as practicable after January 2, 1962, compile, index and publish all rules adopted by such agency and remaining in effect. Compilations shall be supplemented as often as necessary and shall be revised at least once every ten years.

(b) Compilations and supplements shall be made available free of charge upon request by the state officers in the case of a state agency and by the county officers in the case of a county agency. As to other persons each agency may fix a price to cover mailing and publication costs. [L. 1961, c. 103, s. 5.]

"January 2, 1962" substituted for "the effective date of this Act".

[§ 6C-6.] Petition for adoption, amendment or repeal of rules. Any interested person may petition an agency requesting the adoption, amendment, or repeal of any rule stating reasons therefor. Each agency shall adopt rules prescribing the form for such petitions and the procedure for their submission, consideration and disposition. Upon submission of such petition, the agency shall within thirty days either deny the petition in writing, stating its reasons for such denial or initiate proceedings in accordance with section 6C-3. [L. 1961, c. 103, s. 6.]

[§ 6C-7.] Declaratory judgment on validity of rules.

(a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) herein by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business. Such action may be maintained whether or not petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures. [L. 1961, c. 103, s. 7.]

[§ 6C-8.] Declaratory rulings by agencies. Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the

agency. Each agency shall adopt rules prescribing the form of such petitions and the procedure for their submission, consideration and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders. [L. 1961, c. 103, s. 8.]

[§ 6C-9.] Contested cases; notice; hearing; records.

(a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

(1) The date, time, place and nature of hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided, that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;

(5) The fact that any party may retain counsel if he so desires.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decisions, the record shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings and exceptions;

(5) Report of the officer who presided at the hearing;

(6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein. [L. 1961, c. 103, s. 9.]

[§ 6C-10.] Rules of evidence; official notice. In contested cases:

(a) Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole

record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law.

(b) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original.

(c) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.

(d) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. [L. 1961, c. 103, s. 10.]

[§ 6C-11.] Examination of evidence by agency.

Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. [L. 1961, c. 103, s. 11.]

[§ 6C-12.] Decisions and orders. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. Parties to the proceeding shall be notified by delivery or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to his attorney of record. [L. 1961, c. 103, s. 12.]

[§ 6C-13.] Consultation by officials of agency.

No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law. [L. 1961, c. 103, s. 13.]

[§ 6C-14.] Judicial review of contested cases.

(a) Any person aggrieved by a final decision

and order in a contested case or by a preliminary ruling of such nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to the provisions of the Hawaii rules of civil procedure, except where a statute provides for a direct appeal to the supreme court and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court. The court in its discretion, may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions; but the agency or the reviewing court may order a stay upon such terms as it deems proper.

(d) Within fifteen days after the designation of the record on appeal, or within such further time as the court may allow, the agency shall transmit to the reviewing court the designated record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral argument and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order. [L. 1961, c. 103, s. 14.]

Review of decision of civil service commission is on the record. 48 H. 278, 398 P.2d 155.

Cost of record transmitted to the reviewing court is borne by the agency. Att. Gen. Op. 64-4.

[§ 6C-15.] Appeals. An aggrieved party may secure a review of any final judgment of the circuit court under this chapter by appeal to the supreme court. Such appeal shall be taken in the manner provided in the Hawaii rules of civil procedure. [L. 1961, c. 103, s. 15.]

[§ 6C-16.] Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. [L. 1961, c. 103, s. 16.]

[§ 6C-17.] Federal aid. The provisions of section 6C-14 shall not be applicable where such applicability would jeopardize federal aid or grants of assistance. [L. 1961, c. 103, s. 19.]

[§ 6C-18.] Short title. This chapter may be cited as the Hawaii Administrative Procedure Act. [L. 1961, c. 103, s. 20.]

Effective date of chapter, January 2, 1962. L. 1961, c. 103, s. 21.

L. 1961, c. 103, s. 17, reads:

"Section 17. **Repeal and Pending Proceedings.**

(a) Sections 7-28 through 7-41 inclusive of the Revised Laws of Hawaii 1955 are hereby repealed as of the time this Act shall take effect.

(b) Provisions of Act 261, Session Laws of Hawaii 1959 which are inconsistent with the provisions of this Act are hereby repealed as of the time this Act shall take effect.

(c) All rules and regulations adopted prior to the time of taking effect of this Act shall continue in full force and effect; however, all statutes including those provided in the aforesaid subsections (a) and (b), rules and regulations, or parts thereof, which are inconsistent with the provisions of this Act are hereby repealed, and such repeal shall not affect any rights or obligations enjoyed or arising prior to the time of taking effect of this Act. Any proceeding commenced prior to the time of taking effect of this Act shall conform to the procedure as much as possible under the provisions of this Act after the Act becomes effective if the proceeding is still pending. All petitions, hearings and other proceedings pending before any agency whose procedure has been changed by this Act, and all legal proceedings or investigations by or against any agency not completed at the time this Act shall take effect, shall continue and remain in full force and effect before such agency, its successor as to its powers and functions, or court where the matter may be or has been commenced or is then pending."

Appendix B

FINAL DRAFT

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

AN ACT Concerning Procedure of State Administrative Agencies
and Review of Their Determinations.

[Be it enacted.....]

1 SECTION 1. [Definitions.] As used in this Act:

2 (1) "agency" means each state [board, commission, department, or
3 officer], other than the legislature or the courts, authorized by law to
4 make rules or to determine contested cases;

5 (2) "contested case" means a proceeding, including but not restricted
6 to ratemaking, [price fixing], and licensing, in which the legal rights,
7 duties, or privileges of a specific party are required by law to be determined
8 by an agency after an opportunity for hearing;

9 (3) "license" includes the whole or part of any agency permit, certifi-
10 cate, approval, registration, charter, or similar form of permission required
11 by law, but it does not include a license required solely for revenue
12 purposes;

13 (4) "licensing" includes the agency process respecting the grant,
14 denial, renewal, revocation, suspension, annulment, withdrawal, or amendment
15 of a license;

16 (5) "party" means each person or agency named or admitted as a party,
17 or properly seeking and entitled as of right to be admitted as a party;

18 (6) "person" means any individual, partnership, corporation, associa-
19 tion, governmental subdivision, or public or private organization of any
20 character other than an agency;

21 (7) "rule" means each agency statement of general applicability that
22 implements, interprets, or prescribes law or policy, or describes the organiza-
23 tion, procedure, or practice requirements of any agency. The term includes
24 the amendment or repeal of a prior rule, but does not include (a) statements
25 concerning only the internal management of an agency and not affecting private
26 rights or procedures available to the public, or (b) declaratory rulings
27 issued pursuant to Section 8, or (c) intra-agency memoranda.

1 SECTION 2. [Public Information; Adoption of Rules; Availability
2 of Rules and Orders.]

3 (a) In addition to other rule making requirements imposed by law, each
4 agency shall:

5 (1) adopt as a rule a description of its organization, stating
6 the general course and method of its operations and the methods
7 whereby the public may obtain information or make submissions or
8 requests;

9 (2) adopt rules of practice, setting forth the nature and require-
10 ments of all formal and informal procedures available, and including a
11 description of all forms and instructions used by the agency;

12 (3) make available for public inspection all rules and all other
13 written statements of policy or interpretations formulated, adopted,
14 or used by the agency in the discharge of its functions;

15 (4) make available for public inspection all final orders,
16 decisions, and opinions.

17 (b) No agency rule, order, or decision is valid or effective against
18 any person or party, nor may it be invoked by the agency for any purpose,
19 until it has been made available for public inspection as herein required,
20 except that this provision is not applicable in favor of any person or party
21 who has actual knowledge thereof.

1 SECTION 3. [Procedure for Adoption of Rules.]

2 (a) Prior to the adoption, amendment, or repeal of any rule, the agency
3 shall:

4 (1) give at least 20 days' notice of its intended action. The
5 notice shall include a statement of either the terms or substance of
6 the intended action or a description of the subjects and issues
7 involved, and of the time when, the place where, and the manner in
8 which interested persons may present their views thereon. The notice
9 shall be mailed to all persons who have made timely request of the
10 agency for advance notice of its rule-making proceedings, and published
11 in [here insert the medium of publication appropriate for the adopting
12 state];

13 (2) afford all interested persons reasonable opportunity to sub-
14 mit data, views, or arguments, orally or in writing. In case of sub-
15 stantive rules, opportunity for oral hearing must be granted if requested
16 by 25 persons, or by a governmental subdivision or agency, or by an

17 association having not less than 25 members. The agency shall consider
18 fully all written and oral submissions respecting the proposed rule. Upon
19 adoption of a rule, the agency, if requested to do so by an interested
20 person, either prior to adoption or within 30 days thereafter, shall issue
21 a concise statement of the principal reasons for and against its adoption,
22 incorporating therein its reasons for overruling the considerations
23 urged against its adoption.

24 (b) If an agency finds that an imminent peril to the public health,
25 safety or welfare requires adoption of a rule upon less than 20 days'
26 notice, and states in writing its reasons for that finding, it may proceed
27 without prior notice or hearing, or upon any abbreviated notice and hear-
28 ing that it finds practicable, to adopt an emergency rule. The rule so
29 adopted may be effective for a period of not longer than 120 days [renew-
30 able once for a period not exceeding _____ days], but the adoption
31 of an identical rule under subsections (a)(1) and (a)(2) of this Section
32 is not precluded.

33 (c) No rule hereafter adopted is valid unless adopted in substantial
34 compliance with this Section, but no contest of any rule on the ground
35 of non-compliance with the procedural requirements of this Section may be
36 commenced after 2 years from its effective date.

1 SECTION 4. [Filing and Taking Effect of Rules.]

2 (a) Each agency shall file forthwith in the office of the [Secretary
3 of State] a certified copy of each rule adopted by it, including all rules
4 existing on the effective date of this Act. The [Secretary of State] shall
5 keep a permanent register of the rules open to public inspection.

6 (b) Each rule hereafter adopted is effective 20 days after filing,
7 except that:

8 (1) if a later date is required by statute or specified in
9 the rule, the later date is the effective date;

10 (2) subject to applicable constitutional or statutory pro-
11 visions, an emergency rule may become effective immediately upon
12 filing with the [Secretary of State], or at a stated date less
13 than 20 days thereafter, if the agency finds that this effective
14 date is necessary because of imminent peril to the public health,
15 safety, or welfare. The agency's finding and a brief statement
16 of the reasons therefor shall be filed with the rule in the office
17 of the [Secretary of State]. The agency shall take appropriate

measures to make emergency rules known to the persons who may be affected by them.

SECTION 5. [Publication of Rules.]

(a) The [Secretary of State] shall compile, index, and publish all rules adopted by each agency and remaining in effect. Compilations shall be supplemented or revised as often as necessary [and at least once every 2 years].

(b) The [Secretary of State] shall publish a [monthly] bulletin in which he shall set forth the text of all rules filed during the preceding [month] excluding rules in effect upon the adoption of this Act.

(c) The [Secretary of State] may omit from the bulletin or the compilation rules the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if such rules in printed or processed form are made available on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(d) Bulletins and compilations shall be made available upon request to [agencies and officials of this State] free of charge, and to other persons at prices fixed by the [Secretary of State] to cover mailing and publication costs.

SECTION 6. [Petition for Adoption of Rules.] Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Upon submission of a petition, the agency within 30 days shall either deny the petition in writing (stating its reasons for the denials) or initiate rule-making proceedings in accordance with Section 3.

SECTION 7. [Declaratory Judgment on Validity or Applicability of Rules.] The validity or applicability of any rule may be determined in an action for declaratory judgment in the [District Court of . . . County], when it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

1 SECTION 8. [Declaratory Rulings by Agencies.] Each agency shall pro-
2 vide by rule for the filing and prompt disposition of petitions for declaratory
3 rulings as to the applicability of any statutory provision or of any rule or
4 order of the agency. Rulings disposing of petitions have the same status as
5 agency decisions or orders in contested cases.

1 SECTION 9. [Contested Cases; Notice; Hearing; Records.]

2 (a) In any contested case, all parties shall be afforded an opportunity
3 for hearing after reasonable notice.

4 (b) The notice shall include:

5 (1) a statement of the time, place, and nature of the hearing;

6 (2) a statement of the legal authority and jurisdiction under
7 which the hearing is to be held;

8 (3) a reference to the particular sections of the statutes
9 and rules involved;

10 (4) a short and plain statement of the matters asserted.

11 If the agency or other party is unable to state the matters in
12 detail at the time the notice is served, the initial notice may
13 be limited to a statement of the issues involved, and thereafter
14 upon application a more definite and detailed statement shall be
15 furnished.

16 (c) Opportunity shall be afforded all parties to respond and present
17 evidence and argument on all issues involved.

18 (d) Unless precluded by law, informal disposition may be made of any
19 contested case by stipulation, agreed settlement, consent order, or default.

20 (e) The record in a contested case shall include:

21 (1) all pleadings, motions, intermediate rulings;

22 (2) evidence received or considered;

23 (3) a statement of matters officially noticed;

24 (4) questions and offers of proof and rulings thereon;

25 (5) proposed findings and exceptions;

26 (6) any decision, opinion, or report by the officer presiding
27 at the hearing;

28 (7) all staff memoranda or data submitted to the hearing
29 officer or members of the agency in connection with their consider-
30 ation of the case.

31 (f) Oral proceedings or any part thereof shall be transcribed on
32 request of any party.

33 (g) Findings of fact shall be based exclusively on the evidence and
34 matters officially notice.

1 SECTION 10. [Rules of Evidence; Official Notice.] In contested cases:

2 (1) irrelevant, immaterial, or unduly repetitious evidence shall be
3 excluded. The rules of evidence as applied in [non-jury] civil cases in the
4 [District Courts of this State] shall be followed; but, when necessary to
5 ascertain facts not reasonably susceptible of proof under those rules, evi-
6 dence not admissible under those rules may be submitted (except where pre-
7 cluded by statute) if it is of a type commonly relied upon by reasonably
8 prudent men in the conduct of their affairs. Agencies shall give effect to
9 the rules of privilege recognized by law. Objections to evidentiary offers
10 may be made and shall be noted in the record. Subject to these requirements,
11 when a hearing will be expedited and the interests of the parties will not
12 be prejudiced substantially, any part of the evidence may be received in
13 written form;

14 [(2) documentary evidence may be received in the form of copies or
15 excerpts, if the original is not readily available. Upon request, parties
16 shall be given an opportunity to compare the copy with the original;]

17 (3) a party may conduct cross examinations required for a full and
18 true disclosure of the facts;

19 (4) notice may be taken of judicially cognizable facts. In addition,
20 notice may be taken of generally recognized technical or scientific facts
21 within the agency's specialized knowledge; but parties shall be notified
22 either before or during the hearing, or by reference in preliminary reports
23 or otherwise, of the material noticed, including any staff memoranda or
24 data, and they shall be afforded an opportunity to contest the material so
25 noticed. The agency's experience, technical competence, and specialized
26 knowledge may be utilized in the evaluation of the evidence.

1 SECTION 11. [Examination of Evidence by Agency.] Whenever in a con-
2 tested case a majority of the officials of the agency who are to render the
3 final decision have not heard the case or read the record, the decision, if
4 adverse to a party to the proceeding other than the agency itself, shall not
5 be made until a proposal for decision is served upon the parties, and an
6 opportunity is afforded to each party adversely affected to file exceptions
7 and present briefs and oral argument to the officials who are to render the
8 decision. The proposal for decision shall contain a statement of reasons and
9 include the determination of each issue of fact or law necessary to the

10 proposed decision, prepared by the person who conducted the hearing or one
11 who has read the record. The parties by written stipulation may waive
12 compliance with this Section.

1 SECTION 12. [Decisions and Orders.] Any final decision or order adverse
2 to a party in a contested case shall be in writing or stated in the record.
3 Any final decision shall include findings of fact and conclusions of law,
4 separately stated. Findings of fact, if set forth in statutory language,
5 shall be accompanied by a concise and explicit statement of the underlying
6 facts supporting the findings. If a party, in accordance with agency rules,
7 submitted proposed findings of fact, the decision shall include a ruling upon
8 each proposed finding. Parties shall be notified either personally or by
9 mail of any decision or order. Upon request a copy of the decision or order
10 shall be delivered or mailed forthwith to each party and to his attorney
11 of record.

1 SECTION 13. [Ex Parte Consultations.] Unless required for the disposi-
2 tion of ex parte matters authorized by law, members or employees of an agency
3 assigned to render a decision or to make findings of fact and conclusions of
4 law in a contested case shall not, directly or indirectly, in connection with
5 any issue of fact, communicate with any person or party, nor, in connection
6 with any issue of law, with any party or his representative, except upon
7 notice and opportunity for all parties to participate; but any agency member

8 (1) may communicate with other members of the agency, and
9 (2) may have the aid and advice of one or more personal
10 assistants.

1 SECTION 14. [Licenses.]

2 (a) Whenever the grant, denial, or renewal of a license is required
3 to be preceded by notice and opportunity for hearing, the provisions of this
4 Act concerning contested cases apply.

5 (b) Whenever a licensee has made timely and sufficient application for
6 the renewal of a license or a new license with reference to any activity of
7 a continuing nature, the existing license does not expire until the applica-
8 tion has been finally determined by the agency, and, in case the application
9 is denied or the terms of the new license limited, until the last day for
10 seeking review of the agency order or a later date fixed by order of the
11 reviewing court.

12 (c) No revocation, suspension, annulment, or withdrawal of any license
13 is lawful unless, prior to the institution of agency proceedings, the agency

14 sent notice by mail to the licensee of facts or conduct which warrant the
15 intended action, and the licensee was given an opportunity to show compliance
16 with all lawful requirements for the retention of such license. If the
17 agency finds that public health, safety, or welfare imperatively requires
18 emergency action, and incorporates a finding to that effect in its order,
19 summary suspension of a license may be ordered pending proceedings for revo-
20 cation or other action. These proceedings shall be promptly instituted and
21 determined.

1 SECTION 15. [Judicial Review of Contested Cases.]

2 (a) Any person who has exhausted all administrative remedies available
3 to him within the agency, and who is aggrieved by a final decision in a con-
4 tested case is entitled to judicial review under this Act. This Section
5 does not limit utilization of or the scope of judicial review available
6 under other means of review, redress, relief, or trial de novo provided by
7 law. Any preliminary, procedural, or intermediate agency act or ruling is
8 immediately reviewable in any case in which review of the final agency
9 decision would not provide an adequate remedy.

10 (b) Proceedings for review are instituted by filing a petition in the
11 [District Court of the _____ County] within [30] days after [mailing
12 notice] of the final decision of the agency or, if a rehearing is requested,
13 within [30] days after the decision thereon. Copies of the petition shall be
14 served upon the agency and all other parties of record.

15 (c) The filing of the petition does not itself stay enforcement of the
16 agency decision. The agency may grant, or the reviewing court may order,
17 a stay upon appropriate terms.

18 (d) Within [30] days after the service of the petition, or within
19 further time allowed by the court, the agency shall transmit to the review-
20 ing court the original or a certified copy of the entire record of the pro-
21 ceeding under review. By stipulation of all parties to the review proceed-
22 ings, the record may be shortened. Any party unreasonably refusing to
23 stipulate to limit the record may be taxed by the court for the additional
24 costs. The court may require or permit subsequent corrections or additions
25 to the record.

26 (e) If, before the date set for hearing, application is made to the
27 court for leave to present additional evidence, and it is shown to the
28 satisfaction of the court that the additional evidence is material and that
29 there were good reasons for failure to present it in the proceeding before

30 the agency, the court may order that the additional evidence be taken before
31 the agency upon conditions determined by the court. The agency may modify
32 its findings and decision by reason of the additional evidence and shall file
33 that evidence and any modifications, new findings or decisions with the
34 reviewing court.

35 (f) The review shall be conducted by the court without a jury and shall
36 be confined to the record. In cases of alleged irregularities in procedure
37 before the agency, not shown in the record, proof thereon may be taken in
38 the court. The court, upon request, shall hear oral argument and receive
39 written briefs.

40 (g) The court shall not constitute its judgment for that of the agency
41 as to the weight of the evidence on questions of fact. The court may affirm
42 the decision of the agency or remand the case for further proceedings, or it
43 may reverse or modify the decision if substantial rights of the appellant
44 have been prejudiced because the administrative findings, inferences, con-
45 clusions, or decisions are:

- 46 (1) in violation of constitutional or statutory provisions;
47 (2) in excess of the statutory authority of the agency;
48 (3) made upon unlawful procedure;
49 (4) affected by other error of law;
50 (5) clearly erroneous in view of the reliable, probative, and
51 substantial evidence on the whole record; or
52 (6) arbitrary or capricious or characterized by abuse of discre-
53 tion.

1 [SECTION 16. [Appeals.] An aggrieved party may obtain a review of
2 any final judgment of the [District Court] under this Act by appeal to the
3 [Supreme Court]. The appeal shall be taken as in other civil cases.]

1 [SECTION 17. [Severability] If any provision of this Act or the
2 application thereof to any person or circumstance is held invalid, the in-
3 validity does not affect other provisions or applications of the Act which
4 can be given effect without the invalid provision or application, and to
5 this end the provisions of this Act are declared to be severable.]

1 SECTION 18. [Repeal.] The following acts and parts of acts are hereby
2 repealed:

- 3 (1)
4 (2)
5 (3)

1 SECTION 19. [Time of Taking Effect and Scope of Application.] This
2 Act takes effect and (except as to proceedings then pending) applies
3 to all agencies and agency proceedings not expressly exempted.

Appendix C

C
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Y

July 14, 1967

Honorable Kekoa D. Kaapu
Councilman, City Council
City and County of Honolulu
Honolulu, Hawaii

Dear Councilman Kaapu:

This is in reply to your letter of June 26, 1967 requesting our opinion on 14 questions relating to the Administrative Procedure Act.

The basic implication of your letter seems to be that most City agencies have not complied with the Administrative Procedure Act. Our subsequent conversation with you disclosed that you are now aware that the various boards and commissions have complied with the law.

You have further raised the question as to the necessity of line agencies, such as the Department of Public Works and the Traffic Department, to make and file rules as to matters within their jurisdiction. This latter question had not been raised heretofore and therefore no study has been made with reference thereto. However, we shall be happy to look into this aspect of the problem that you have posed.

Please note, however, that under the Administrative Procedure Act, not all governmental units are required to adopt rules. Only "agencies" as defined in the Act are required to have rules and "agency" is defined as:

"...each state or county board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches."¹

Pursuant thereto, we do not believe that, just because the performance of duties of a particular department affects members of the public, such a department must adopt "rules". There are many line agencies which simply administer the law as set forth in statutes and ordinances. These agencies would not be authorized to deviate from such statutes or ordinances nor to promulgate their own "rules". Assuming such statutes and ordinances are so broad that the adoption of "rules" are deemed necessary, it is very likely that such statutes and ordinances would be held invalid, unless reasonable standards are provided for the adoption of the rules.

As noted above an "agency" is a "board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases." (Emphasis added). Therefore, unless a board, commission, department or officer comes within that definition, the requirements of the Administrative Procedure Act would not be applicable.

1 See Section 6C-1, R.L.H. 1955.

Turning to the specific question you have raised, we find that certain questions require more research than others. These questions are 6, 9, 12 and 14 and they will be answered in a subsequent opinion. Questions 1, 2, 3, 4, 5, 7, 8, 10, 11 and 13 will be answered by this opinion.

- "1. Which agencies in the City and County have complied fully with Ref. I² above (Public Information)? Which have not? Of those which have not fully complied, to what extent have they complied?"

The agencies mentioned in Appendix A have substantially complied with Ref. I. If we find that there are agencies that have not complied or have only partially complied, these will be reported to you in the subsequent opinion.

- "2. With regard to Ref. I-B³ above, what is the validity of rules, policies and regulations now being used or invoked against parties with which any agency not in full compliance may deal or have dealt?"

The validity of such rules, policies and regulations will depend on whether or not the party has actual knowledge of them. If he has knowledge, then they will be valid as applied to him. If he is unaware of the rules, policies and regulations, then, as applied to him, they may be invalid, but this determination must ultimately be made by the courts.

2 Ref. I, in your letter states:

"I. Public Information (Sec. 6C-2, R.L.H.)

"A. In addition to rules each agency shall:

- "1. Adopt as a rule a description of the methods whereby the public may obtain information or make submittals or requests.
2. Adopt rules or practice setting forth the nature and requirements of all formal or informal procedures available, and including a description of all forms and instructions used by the agency.
3. Make available for public inspection all final opinions and orders."

3 Ref. I-B refers to Section 6C-2(b), R.L.H. 1955, which provides:

"No agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required, except where a person has actual knowledge thereof."

By this question, since it refers to Sec. 6C-2(b), we assume that you are referring to the situation where the agency has complied with the Act except for the rules not being 'published or made available to public inspection.' Otherwise, in substance, this question would be similar to Questions 5 and 8.

"3. Which agencies have held hearings and complied fully with Ref. II⁴ above? Which have not fully complied? Of those agencies which have not fully complied, to what extent have proper procedures been used? Has any agency adopted emergency rules under the procedures set forth by the Act?"

All agencies listed in Appendix A have held hearings and have fully complied with Ref. II. We are unaware of any agencies that have held hearings but have not fully complied with Ref. II.

Regarding emergency rules, we know of no agency that have adopted such a rule under the procedures set forth by the Act.

"4. Which agencies have filed rules and regulations with the office of the City Clerk and which have not? Have any such published rules been filed with the office of the Lieutenant Governor as prescribed by law? Is there a file of such rules and regulations in the Clerk's Office available for public inspection?"

The agencies listed in Appendix A have all filed their rules and regulations with the City Clerk. As to which agencies that have not filed with the Clerk's Office, we are still researching the problem and will report our findings to you in a subsequent opinion.

The rules of the agencies in Appendix A have also been filed with the Lt. Governor's Office, except for (1) the original Rules and Regulations of the Civil Service Commission and the original Rules on Compensation and (2) the original Rules and Regulations on Subdivisions. However, amendments to such rules are on file.

The administrative code does not mandate that the original rules and regulations in effect prior to the passage of the code be filed with the Clerk's Office or the Lt. Governor's Office. We will, however, instruct the agencies to file the originals with the aforementioned depositories.

4 Ref. II, as stated in your letter provides:

"II (Sec. 6C-3) Procedure for adoption, amendment or repeal of rules. Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

"A. Give at least twenty day's notice, etc., and publish a statement of the substance of the proposed rule, etc.

"B. Afford opportunity for submission of data, views and arguments. Consider all submissions and upon request issue a statement of principal reasons for and against its determination.

"C. Emergency rules may be adopted for a limited time only."

We have been informed by the City Clerk that the Rules and Regulations on file with their office are available to public inspection during regular business hours.

"5. Are any rules, regulations or policies being used by agencies valid if they have not been filed with the Clerk's Office?"

This question cannot be categorically answered. The answer will depend on whether or not the rules, regulations or policies of the agency involved must be adopted pursuant to the procedures outlined under the Administrative Procedure Act. For example, it may be that such rules, regulations or policies involve only the internal management of the agency and does not affect the private rights or procedures available to the public and therefore would not fall within the meaning of the Act (See Section 6C-1(d), R.L.H. 1955). But where such rule or regulation does fall within the Act, and it is not filed with the Clerk's Office, we feel that such rule or regulation may be invalid. However, since Section 6C-7, R.L.H. 1955, expressly provides for a declaratory ruling by the Circuit Court in such cases, the ultimate decision must be made by the courts.

"7. Which agencies have and which have not complied with Ref. V⁵ above relative to procedures and form for petitions asking repeal, adoption or amendment of rules and regulations?"

The agencies mentioned in Appendix A have complied with Ref. V. If we find that there are agencies that have not complied, they will be included in the subsequent opinion.

"8. Are rules, regulations, etc. valid if not adopted in compliance with the Act?"

Our answer to your question 5 is equally applicable here.

"10. Has the Department of Traffic in determining that subdivision plans which indicate the placement of street lights must be stamped by a registered electrical engineer complied with the Act? If so, how was this policy adopted, published and filed?"

In view of our conclusion reached in SR 67-22, dated July 7, 1967 . . . we feel this question is moot. In our communication SR 67-22, we advised that there is no requirement imposed by law that plans and specifications involving street lighting must be prepared by an electrical engineer before approval may be granted by the Traffic Engineer.

5 Ref. V refers to Section 6C-6, R.L.H. 1955: "Any interested person may petition an agency requesting the adoption, amendment, or repeal of any rule stating reasons therefor. Each agency shall adopt rules prescribing the form for such petitions and the procedure for their submission, consideration and disposition. Upon submission of such petition, the agency shall within thirty days either deny the petition in writing, stating its reasons for such denial or initiate procedures in accordance with Section 6C-3."

July 14, 1967

- "11. Has the Department of Public Works adopted and published a document prescribing the content and form of petitions for the initiation of improvement districts in compliance with the Act?"

The Administrative Procedure Act does not require the adoption and publication of such documents.

Procedures for the initiation of improvement districts are set forth in Chapter 24, R.O. 1961, as amended by Ordinance No. 2578. Section 24-3.1, relates to Council or City initiated improvement districts and Sections 24-3.3 and 24-3.4, respectively, relate to 60% and 100% property owner initiated improvement districts. These sections expressly provide for the items that should be included in a petition for an improvement district. Moreover, the City Council is the body which is empowered to approve or disapprove the initiation of an improvement district. (See Sections 24-3.1 and 24-3.3). Thus, impliedly, if not expressly, the Council is the proper body to determine the form of petitions that should be used in the initiation of an improvement district. The Public Works Department is merely directed by the improvement district ordinance to assist the Council in processing the improvement districts. The Department does not have the power to determine the contents and form of the petitions.

Accordingly, since Section 6C-1(a) of the Administrative Procedure Act expressly excludes the City Council from the operation of said Act, we believe that such a document, describing the contents and form of petitions for the initiation of an improvement district, need not be adopted and published in accordance with the procedures outlined under the Act. For your information, we have been informed by the Division of Engineering, Department of Public Works, that they have, as a matter of practice, given advice to everyone who desired information as to the form and contents of petitions which the Council has accepted in the past.

- "13. Has the Planning Commission which shall 'adopt rules and regulations having the force and effect of law pursuant to the subdivision ordinance' (Sec. 5-505) done so in conformance with the administrative procedure act? Has the Commission complied with the provisions of Ref. I (Sec. 6C-2) above? With Ref. V (Sec. 6C-6) above?"

We answer all three questions in the affirmative.

Very truly yours,

/s/ Henry N. Kitamura
HENRY N. KITAMURA
Deputy Corporation Counsel

APPROVED:

/s/ Stanley Ling
STANLEY LING
Corporation Counsel

HNK:si
Attach.

APPENDIX A

- (1) Building Department:
 - (a) Building Superintendent, Relating to the Housing Code
 - (b) Building Board of Appeals, Relating to the Building Code
- (2) Board of Water Supply
- (3) Department of Civil Service:
 - (a) Rules and Regulations Governing the Civil Service of the City and County of Honolulu
 - (b) Rules on Compensation Governing the City and County of Honolulu
 - (c) Rules and Regulations on Hours of Work, Overtime and Premium Pay of Officers and Employees of the City and County of Honolulu
 - (d) Rules Relating to Vacation and Sick Leave of Officers and Employees of the City and County of Honolulu
- (4) Department of Finance
- (5) Liquor Commission
- (6) Motor Vehicle Dealers Licensing Board
- (7) Planning Department:
 - (a) Planning Commission
 - (b) Zoning Board of Appeals
- (8) Police Department:
 - (a) Police Commission
 - (b) Chief of Police

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