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April 9, 2001

The Honorable Donna Kim, Senator
Twenty-First Legislature, State of Hawaii
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Sunshine Law Application to Vision Teams and Neighborhood Board Members' Attendance at Vision Team Meetings

Dear Senator Kim:

In a letter dated August 2, 1999, Senator Kim has asked the Office of Information Practices ("OIP") for advice and guidance as to (1) whether part I of chapter 92, Hawaii Revised Statutes (the "Sunshine Law") applies to Vision Teams established by the Mayor of the City and County of Honolulu ("City"), and (2) whether Neighborhood Board members violate the Sunshine Law by their decision-making during Vision Team meetings.

The application of the Sunshine Law to the Vision Teams is problematic due to the unusual nature of Vision Teams. On the one hand, Vision Teams do not resemble a traditional government board – their membership and procedures are much more fluid and informal – and the provisions of the Sunshine Law seem to have been drafted with the operational practices of traditional government boards in mind, not those of less formal community assemblies such as the Vision Teams. If the Sunshine Law applies to Vision Teams, that raises further questions about how the Vision Teams can comply with Sunshine Law provisions that are drafted with traditional government

boards in mind, without altering the Vision Teams' flexible and community-based nature. On the other hand, the Vision Teams have had a continuing connection to the City government from their inception onward, which distinguishes them from other community groups. The Sunshine Law is a remedial law intended to open up government decision-making wherever it may be found, and as such, it must be liberally construed in favor of open meetings. Haw. Rev. Stat. § 92-1 (1993).

How the Sunshine Law affects the Vision Teams is a difficult question. This issue must nonetheless be resolved. It has been presented to the OIP for resolution, and the OIP has the authority and the duty to resolve it. Haw. Rev. Stat. § 92F-42(18) (Supp. 2000). The OIP does not have the authority to change the Sunshine Law's requirements, or to make exceptions to those requirements: that is the role of the Legislature of the State of Hawaii. Rather, the OIP must resolve the issues presented to it based on the Sunshine Law as it exists as of the date of this letter.

ISSUE PRESENTED

1. Whether the Vision Teams are subject to part I of chapter 92, Hawaii Revised Statutes, the "Sunshine Law."

2. Whether the attendance of more than two members of a Neighborhood Board at a Vision Team meeting violates the Sunshine Law.

The OIP's jurisdiction over these issues is provided in sections 92F-18(42)[1] and 92-1.5,[2] Hawaii Revised Statutes, which requires the director of

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[1] Section 92F-42(18), Hawaii Revised Statutes, states that the director of the office of information practices:

Shall take action to oversee compliance with part I of chapter 92 by all state and county boards including:

(A) Receiving and resolving complaints;
(B) Advising all government boards and the public about compliance with chapter 92; and
(C) Reporting each year to the legislature on all complaints received pursuant to section 92-1.5.

[2] Section 92-1.5, Hawaii Revised Statutes, states:

the OIP to take action to "receiv[e] and resolv[e] complaints" and to "advis[e] all government boards and the public about compliance with chapter 92." § 92F-18(42), Haw. Rev. Stat. (Supp. 2000). Pursuant to that authority, this advisory opinion represents the OIP's legal advice, as the body charged with giving such advice regarding the Sunshine Law, to the City, to the Vision Teams, to the Neighborhood Boards, and tothe public.

BRIEF ANSWER

1. The OIP construes an ambiguity in the Sunshine Law liberally to carry out the Sunshine Law's purpose of ensuring that government processes remain open to the public. Although it is possible that a court might construe this ambiguity narrowly to reach a different conclusion, in the absence of any judicial precedent the OIP advises Vision Teams to follow the more prudent course of action and to follow the Sunshine Law's requirements.

Based on the OIP's construction, the OIP concludes that the Vision Teams can be considered "boards" covered by the Sunshine Law, and as such should provide public notice and keep minutes of their meetings. However, given the peculiar nature of membership in a Vision Team, participants are Vision Team "members" only when they are actually attending a Vision Team meeting. For this reason, when outside of the Vision Team meetings, Vision Team members are not required to restrict their interactions or otherwise act as board members.

2. As to Neighborhood Board members, the OIP concludes that these members are restricted in their ability to attend and participate in Vision Team meetings unless those meetings are jointly noticed as Neighborhood Board meetings. To resolve concerns about the inability of Neighborhood Board members to participate in Vision Team meetings and thus gather information about issues of concern to the Neighborhood Boards, the OIP recommends that the Neighborhood Boards jointly notice their meetings with the relevant Vision Team meetings. If a Vision Team meeting

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The director of the office of information practices shall administer this part. The director shall establish procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with this part. The director of the office of information practices shall submit an annual report of these complaints along with final resolution of complaints, and other statistical data to the legislature, no later than twenty days prior to the convening of each regular session.

is not noticed as a Neighborhood Board meeting, and official Neighborhood Board business is discussed there, two or more members of a particular Neighborhood Board may attend the meeting only through a "permitted interaction" provided by the Sunshine Law, as described in detail below.

FACTS

In a letter dated August 2, 1999, then City Councilmember Donna Mercado Kim requested that the OIP investigate whether Vision Teams are subject to the Sunshine Law, and whether the participation of Neighborhood Board members in the Vision Team process violates the Sunshine Law. Similar questions have been raised by the media. "Visioning Teams Need Openness, Many Say," Honolulu Star-Bulletin (July 19, 1999). In addition, the Kailua Neighborhood Board, Small Business Hawaii, a member of the Downtown Neighborhood Board, and several interested members of the community have formally or informally asked the OIP for its opinion about these issues.

The OIP contacted the Mayor to determine his position on these issues, and the Mayor responded on September 24, 1999, by forwarding a copy of a letter dated August 5, 1999, from the Corporation Counsel to City Councilmember Duke Bainum, which concluded that Vision Teams were not subject to the Sunshine Law. As to the participation of Neighborhood Board members in Vision Teams, the Corporation Counsel's letter referred to an attached memorandum from the Corporation Counsel to David Paco, Executive Secretary for the Neighborhood Commission, dated August 29, 1996, which concluded (*inter alia*) that board members could generally attend community meetings and discuss ideas.

After further correspondence between the OIP, Councilmember Kim, the Corporation Counsel, and others, the OIP set a meeting (discussed in detail below) for July 19, 2000, to narrow the issues and clarify the facts.

I. NEIGHBORHOOD BOARDS

Neighborhood Boards were created to "increase and assure effective citizen participation in the decisions of government . . ." § 14-101, Revised Charter of the City and County of Honolulu 1973 ("RCH" or "Charter"). The Neighborhood Commission is required to develop and periodically revise a neighborhood plan. § 14-103, RCH. Among other things, the neighborhood

plan must set out the powers, duties, and functions of the Neighborhood Boards. § 14-104, RCH. These powers, duties, and functions of the Neighborhood Boards are set out in section 1-7.1 of the Revised Neighborhood Plan of the City and County of Honolulu, 1986 ("RNP" or "Neighborhood Plan"). In pertinent part, the Neighborhood Plan states:

> The boards are responsible for actively participating in functions and processes of government by articulating, defining, and addressing neighborhood problems. Their actions should reflect the needs and wants of the neighborhood.... The powers, duties and functions of the board shall include, but not be limited to the following:
>
> (a) Review and make recommendations on any general plan, development plan, and other land use matters within its neighborhood...
>
> (b) Prepare a list of recommended capital improvement projects which reflect the needs of the neighborhood and state the priorities thereof and review and make recommendations on proposed capital improvement plans.
>
> (c) Set goals and objectives, with priorities, which reflect the growth needs of the neighborhood...

§ 1-7.1, RNP.

The Neighborhood Board members are elected by the constituencies they represent, and follow the rules and procedures set out in the Neighborhood Plan in conducting their meetings. Chapter 1, Art. 8, and Chapter 4, RNP. The parties do not dispute that the Neighborhood Boards are subject to the provisions of the Sunshine Law. See Att. Gen. Op. No. 86-5 (Feb. 10, 1986) (a board created by Charter is subject to the Sunshine Law.) Further, the OIP agrees with the Attorney General's reasoning and conclusion in a letter dated July 23, 1998, to Mr. Richard G. Poirier, that the Neighborhood Boards and their committees must abide by the Sunshine Law.

The Neighborhood Commission Office ("NCO") lends administrative support to the Neighborhood Commission and the thirty-two Neighborhood Boards. Their budget for fiscal year 2001 is $955,000, only a portion of which provides the boards publicity assistance, the printing and mailing of minutes and agendas for the Neighborhood Boards, and eight neighborhood assistants. Letter dated August 25, 2000, from Benjamin Kama, Jr., the Executive Secretary of the NCO, to the OIP (Exhibit A). Mr. Kama informed the OIP that the City Administration also makes available, upon request by a Neighborhood Board, consultants on City projects to assist board members in understanding proposals, plans or projects. Id.

II. VISION TEAMS

While the Neighborhood Boards were created by the Charter, the Vision Teams were initiated by the Mayor in 1998. See letter from Mayor Jeremy Harris to Community Leaders, dated September 16, 1998 (Exhibit B) ("Mayor's letter"). This island-wide, community-based effort to plan the future of the city entailed the creation of nineteen teams to plan the different geographic areas of the island. Each team was asked to review, provide input on, and help develop the vision it wanted for the island and for its individual community. The Mayor's letter "invit[ed] all the task force members to a kick-off workshop..." Id. About one thousand people attended the workshop, which was held at the Hawaii Convention Center on September 26, 1998.

Although the Vision Teams do not have any powers or duties defined by law, in 1999 the Mayor did announce that each Vision Team community would have two million dollars each year to spend on community priorities. See letter dated March 5, 1999, from Director of the Department of Enterprise Services and Interim Team Leader of the Salt Lake/Moanalua Vision Team, Alvin K.C. Au, to Vision Team members (Exhibit C). The primary focus of the Vision Teams has been to determine priorities for capital improvement projects in the team's respective communities. The priorities are then translated into recommendations, which are forwarded to the City's Department of Design and Construction, and ultimately put into the administration's capital budget and program bill. See letter of March 31, 1999, from Randall K. Fujiki to John Felix, attaching a list of Vision Team projects contained in Fiscal Year 2000 Executive Capital Budget and Program Bill No. 7 (1999) (Exhibit D). Although some Vision Team

expenditure recommendations do not make it into the administration's budget proposal, a majority of them do.[3] See id.

David Arakawa, Corporation Counsel for the City, stated at the July 19th meeting (discussed below) held by the OIP that Vision Teams do not follow any formal or official procedures. Indeed, sample Vision Team notices, agendas, and minutes provided to the OIP indicate that Vision Team procedures vary widely. Mr. Arakawa also informed the OIP that the Vision Teams do not have any set membership and are open to all who wish to participate. When a Vision Team decision is made, it requires only the vote of a majority of those present at that particular meeting.

Malcolm Tom, the Deputy Managing Director of the City and County of Honolulu, stated at the same meeting that the City administratively supports the Vision Teams by providing up to one hundred and fifty "volunteers" who are City employees. Although he used the term "volunteers," Mr. Tom did state that the administration required these employees to provide support to the Vision Teams. The OIP notes that the City's administrative support of the Vision Teams is evident in the Vision Team notices, agendas, minutes, and correspondence, which are frequently sent out by a City office. According to Mr. Tom, the Vision Teams also are able to utilize City paid engineers and consultants to help develop proposals and plans. The Corporation Counsel stated in a letter to the OIP dated July 27, 2000, that "[w]hile Vision Teams have been meeting with architectural and construction consultants to plan and design the approved projects, these consultants are volunteers donating their time to the Vision Teams. . . ." However, a news report raised the question of whether the consultants' work for the Vision Teams is done in the expectation of City payment.

III. THE MEETING

On July 19, 2000, the OIP held a meeting to narrow the issues and clarify the facts. The OIP invited the parties who had initially asked the OIP to address the issues raised in this letter, as well as parties such as the

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[3] The OIP asked for but did not receive the percentage of Vision Team recommendations accepted by the administration and placed in the capital budget and program bill, and similar information regarding Neighborhood Board recommendations. While this information was not provided to the OIP, the participants at the July 19, 2000 meeting, were generally consistent in their view that nearly all of the Vision Team proposals made it into the bill, while few Neighborhood Board proposals did.

Mayor, the Corporation Counsel, and the Neighborhood Commission Office, with whom the OIP had been corresponding to get information and legal positions. The meeting was well attended. In addition to those invited, many supporters of both the Neighborhood Board and Vision Team processes participated.

Many points were made and concerns brought forth at the meeting, including the following:

- *The Vision Teams get things done.* The general sentiment was that Vision Team recommendations are acted upon, while those of the Neighborhood Boards usually fall by the wayside. One comment was made that while Neighborhood Boards do a lot in addition to capital improvement project recommendations, 100% of Vision Team effort is put into capital improvement project proposals.

- *The Vision Teams encourage more community participation.* Although the Neighborhood Boards were created with the specific purpose of increasing and assuring effective citizen participation in the decisions of government, the Vision Teams are more effective in this regard because they are less formal and have a successful record.

- *The Vision Teams lack procedures to ensure their openness.* The Vision Teams vary greatly in the way their meetings are announced, in whether they provide an agenda and how specific it is, and in the conduct of their meetings. There were concerns that variations even occur within the same Vision Team from meeting to meeting.

- *The Vision Teams receive more support from the administration and consultants than do the Neighborhood Boards.* The allegation was made that the Vision Teams receive more support from the City administration than do the Neighborhood Boards. In response, it was stated that volunteers provided the support, and engineers and consultants are made available to both the Vision Teams and the Neighborhood Boards.

- *The Vision Team process undermines the prescribed duties of the Neighborhood Boards.* There was a concern that the Vision Teams, which offer little in the way of procedural protections to ensure openness and fairness, undercut the authority of the Neighborhood Boards, which under the Neighborhood Plan are charged with duties similar to those undertaken by the Vision Teams, and whose members are duly elected to represent their constituencies in such matters.

- *Some Neighborhood Board members fear violating the Sunshine Law by attending Vision Team meetings.* It was noted that Neighborhood Board members are often those most active in their communities. The fear of violating the Sunshine Law could inhibit Neighborhood Board members from participating in community forums, or result in a general aversion to serving as Neighborhood Board members.

The OIP asked for and received written comments from meeting participants and others within the week after the meeting. The written comments generally reiterated the points raised at the meeting.

DISCUSSION

It is the policy of this state that the formation and conduct of public policy be conducted as openly as possible. Haw. Rev. Stat. § 92-1 (1993). The legislature declared that "[t]he intent of [Hawaii's Sunshine Law is to] protect the people's right to know." Haw. Rev. Stat. § 92-1(1) (1993). "Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. § 92-1 (1993).

The goal of the Sunshine Law, to provide for and ensure public participation in the operation of government, is consistent with the aim of the Vision Team process, namely, to encourage community participation in the planning and improvement of their communities by the government. See Mayor's letter (Exhibit B). While the Vision Teams are not formed and run in a manner typical of a "board" subject to the Sunshine Law, they have become an important part of a **governmental process** that plans and shapes communities.

Meanwhile, the elected Neighborhood Boards perform functions similar to those undertaken by the Vision Teams and are by law charged with identifying and addressing neighborhood problems, wants, and needs. § 1-7.1, RNP. The Neighborhood Boards, being subject to the Sunshine Law, are required to comply with the requirements and restrictions the Hawaii Legislature has found necessary to ensure openness in government. See Att. Gen. Op. No. 86-5 (Feb. 10, 1986). Many Neighborhood Board members are active and participate in the Vision Team process and other forums addressing community concerns. Therefore, there is need to clarify the applicability of the Sunshine Law with respect to such interactions.

I. APPLICABILITY OF SUNSHINE LAW TO VISION TEAMS

The Sunshine Law requires, with certain exceptions, that "[e]very meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting..." Haw. Rev. Stat. § 92-3 (1993). Thus, the Sunshine Law applies to Vision Teams only if they can be considered a "board" under chapter 92, Hawaii Revised Statutes.

The Sunshine Law defines a board as:

> any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.

Haw. Rev. Stat. § 92-1 (1993).

A. Elements of the Definition of a Board

In Green Sand Community Ass'n v. Hayward, Civ. No. 93-3259, slip op. at 9 (Haw. 1996) (mem.) ("Green Sand.")[4], the Hawaii Supreme Court was

[4] Pursuant to sections 35(b) and (c) of the Hawaii Rules of Appellate Procedure, memorandum opinions are without precedential effect, not published and may not be cited in legal briefs to the court. However, in providing this advisory opinion, the OIP finds that the

asked to define the term "board" under the Sunshine Law. In that case, the Department of Business, Economic Development and Tourism ("DBEDT") had established the Hawaii Space Development Authority as an advisory committee, and the Office of Space Industry, a part of DBEDT, had established Space Advisory Committees. Green Sand at 3-4. DBEDT was authorized to create advisory committees by section 201-7, Hawaii Revised Statutes. Green Sand at 4. The Court examined whether the Hawaii Space Development Authority and the Space Advisory Committees were "boards" required to hold public meetings under the Sunshine Law. Green Sand at 7-17.

The Court broke into five distinct elements the definition of a board in section 92-1, Hawaii Revised Statutes. Green Sand at 9. The Court stated that a board must be:

> (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) which is created by constitution, statute, rule, or executive order; (3) to have supervision, control, jurisdiction, or advisory power over specific matters; (4) which is required to conduct meetings; and (5) which is required to take official actions.

Id. It would appear that, to come within the jurisdiction of the Sunshine Law, a body must satisfy each of these five elements. The OIP will examine each element in turn to determine whether the Vision Teams satisfy all five elements.

1. An Agency, Board, Commission, Authority, Or Committee of the State or Its Political Subdivisions

The first Green Sand element is that the body be an agency, board, commission, authority, or committee of the State or its political subdivisions. As detailed below, the OIP is of the opinion that the Vision Teams are committees of the City and County of Honolulu so as to satisfy this first Green Sand element.

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analysis provided by the Court in its memorandum opinion is helpful and can provide insight into how a court might handle a particular issue. The memorandum opinion is particularly helpful in light of the OIP's inability to find relevant case law in this or other jurisdictions.

While chapter 92, Hawaii Revised Statutes, does not define "committee," its common meaning is "a body of persons delegated to consider, investigate, take action on, or report on some matter. . . ." Webster's Ninth New Collegiate Dictionary 265 (1983). In Green Sand, the Court stated that chapter 92, Hawaii Revised Statutes, does not limit the application of the Sunshine Law to boards governed by the formal appointment procedures of section 26-34, Hawaii Revised Statutes. Id. at 11. Therefore, the court found that, regardless of what they were called, the bodies at issue were committees of the State. Id. at 9.

The Mayor established Vision Teams to advise his administration on community planning projects. The nineteen Vision Teams were created "to plan the different geographic areas of [the] island," and were to "review, provide input and help develop the vision they want for [the] island and their individual communities." See Mayor's letter (Exhibit B).

Because the Mayor created the Vision Teams and because their stated primary purpose is to help plan and recommend community projects to the City, the OIP is of the opinion that they are committees of the City under the first element of the Green Sand test.

2. Created By Constitution, Statute, Rule, Or Executive Order

The second Green Sand element for a body to be considered a "board" is that it be created by constitution, statute, rule, or executive order. It has been argued that the Vision Teams were not created by constitution, statute, rule, or executive order, and so are not "boards" subject to the Sunshine Law. However, the OIP is of the opinion that the Vision Teams were established pursuant to the Mayor's authority to appoint advisory committees under the Revised Charter of Honolulu. As such, the Vision Teams satisfy the second Green Sand element.

In Green Sand, the court found that DBEDT created the committees at issue pursuant to a statute[5] that gave it the power to appoint advisory

[5] DBEDT's authorization to appoint advisory committees is found in section 201-7, Hawaii Revised Statutes, which provides:

committees. Id. at 11. The court cited the legislative history of the Sunshine Law, which makes clear that "boards" need not be specifically named in a statute to be subject to the Sunshine Law, but may be established "pursuant to" a statute. Id. at 13.

The Revised Charter of Honolulu provides the Mayor and executive department heads with the authority to appoint advisory committees:

> 1. The Mayor or department heads, with the approval of the mayor, may each appoint advisory committees for departments, other than the public transit authority. Such advisory committees shall not exist beyond the term of office of the appointing authority.
>
> 2. The function of the advisory committees shall be limited to counsel and advice. The members of advisory committees shall not be paid, but their authorized expenses shall be paid from appropriations to the appointing authority. Advisory committees shall have no employees, but each appointing authority shall cause employees of the department to furnish such services as may be needed by the committees.

Rev. Chtr. Hon. § 4-103 (2000).

The Department of the Corporation Counsel, in its July 27, 2000 letter to the OIP, argued that the Mayor's letter by itself is not enough to create an advisory committee under section 4-103, Revised Charter of Honolulu. This

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The department of business, economic development, and tourism may appoint advisory committees as it deems advisable for the purpose of obtaining expert and specialized council and advice on specific matters under consideration by the department and may include as members of the committees officers and employees of any government department or agency. The department may assign its own staff to aid and assist the advisory committees and may reimburse any member of any committee for necessary expenses incurred in the performance of the member's work for the department.

argument is supported by three statements: (1) the Mayor's letter did not reference section 4-103, Revised Charter of Honolulu; (2) the Vision Teams are not advisory committees for any specific City department; and (3) although the Mayor's letter used "appoint" language, the membership in the Vision Teams includes individuals who did not receive the Mayor's letter.

First, the Sunshine Law does not require a reference to section 4-103, Revised Charter of Honolulu, when the Mayor or a department head creates an advisory committee. If mere lack of mention of the legal authority under which a committee is established rendered the Sunshine Law inapplicable to that committee, the law could too easily be avoided. The OIP declines to interpret the law in a manner that would provide such a loophole for the creator of a body to thwart the spirit and intent of the Sunshine Law.

Second, in the Mayor's own words, the Vision Teams were established "to plan the different geographic areas of [the] island," and were to "review, provide input and help develop the vision they want for [the] island and their individual communities." See Exhibit B. Once developed, the Vision Team recommendations are forwarded to the City Department of Design and Construction[6] and the majority of them are placed into the administration's capital budget and program bill.

The OIP has reviewed the listing of Vision Team recommended projects that were included in the fiscal year 2000 executive capital budget and program bill. See Exhibit D. The vast majority of the projects appear to be within the purview of the department of design and construction. The OIP

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[6] Under the Charter, the director of the department of design and construction shall:

(a) Direct and perform the planning, engineering, design, construction and improvement of public buildings.
(b) Direct and perform the planning, engineering, design and construction of public streets, roads, bridges and walkways, and drainage and flood improvements.
(c) In consultation with the respective departments, direct and perform the planning, engineering, design and construction of wastewater facilities, parks and recreational facilities, and transportation systems.

Rev. Chtr. Hon. § 6-503 (2000).

believes this indicates that the Vision Teams advise the City generally, and the Department of Design and Construction in particular, regarding desired improvements to each of their communities.

Third, the Mayor's letter initiating the Vision Teams was addressed to about four thousand "Community Leaders." In the letter the Mayor states: "I am appointing nineteen community teams. . . . As a resident and a valued community leader, I would like to appoint you to be a member of one of the teams." Exhibit B. Regardless of the make-up of the Vision Teams today, the teams were initiated by Jeremy Harris in his governmental capacity as the Mayor, who appointed the original members. Jeremy Harris did not make those appointments in his capacity as a candidate for political office. The Mayor's letter was sent to a select group of people, and told them they were being "appointed" to be members of the Vision Teams. In this act of appointment, the Mayor's letter could not be clearer. The fact that there are Vision Team members who did not receive the Mayor's letter does not vitiate the fact that the letter appointed community leaders to be members of the Vision Teams.

Finally, section 4-103, Revised Charter of Honolulu, requires the appointing authority to "cause employees of the department to furnish such services as may be needed by the committees." The City requires employees of the various departments to furnish services to the Vision Teams. Additionally, the City provides the Vision Teams with access to City paid engineers and consultants to help develop proposals and plans. The Corporation Counsel's letter of July 27, 2000, says that "City employees who are Vision Team members are members because they wish to assist in the effort to plan the future of the City." Nonetheless, the City's requirement that City employees provide services to the Vision Teams supports the OIP's conclusion that the teams were created pursuant to section 4-103, Revised Charter of Honolulu.

3. Supervision, Control, Jurisdiction, Or Advisory Power Over Specific Matters

The third Green Sand element is that a body have supervision, control, jurisdiction, or advisory power over specific matters. The OIP is of the opinion that the Vision Teams do have advisory power over capital improvement projects, and thus satisfy this third element.

The Green Sand court equated the authority to make recommendations with possession of advisory power. Green Sand at 16-17. Some of the committees at issue in Green Sand "serve[d] as a conduit for advice from local communities to the [office of the executive department] on space-related projects. Therefore, they also ha[d] 'advisory power' over the 'specific matter' of space-related projects affecting their particular communities." Id. at 14.

Here, Vision Teams are also conduits for input from local community members to the City. The Vision Teams have been given the authority to recommend each year how two million dollars is spent on community priorities. See Exhibits C and D. Not only are these recommendations encouraged and facilitated by the City administration, but they are accepted nearly *in toto* and put into the administration's capital project and budget bill, which is then presented to the City Council.

Furthermore, these recommendations are on specific capital improvement projects within the Vision Teams' communities. Thus, the OIP concludes that Vision Teams have "advisory power" over the "specific matter" of capital improvement projects in their communities.

4. Required To Conduct Meetings

The fourth Green Sand element is that the body be required to conduct meetings. The OIP concludes that Vision Teams satisfy this fourth Green Sand element.

The Green Sand court found that the committees involved in Green Sand were required to conduct meetings so as to satisfy this element because they had in fact held "meetings," as defined by section 92-2(3), Hawaii Revised Statutes (1993). There is no dispute that the Vision Teams have convened and continue to convene to deliberate and decide on recommendations to be made to the City regarding capital improvement projects in their communities. A question remains, however, as to whether the convening of a Vision Team is a "meeting" as defined in the Sunshine Law. The Sunshine Law defines a meeting as:

> [T]he convening of a board for which a quorum is required in order to make a decision or deliberate

> toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

Haw. Rev. Stat. § 92-2(3) (1993).

The OIP's opinion that the Vision Teams do have advisory power over the matters they take up was set forth in the section above. The remaining part of the definition of "meeting" to be analyzed is whether Vision Teams are a board for which a **quorum is required**[7] to make a decision or deliberate toward a decision. Under the construction of section 92-2(3), Hawaii Revised Statutes, that the OIP considers more consistent with the purpose of the Sunshine Law and canons of statutory construction, the Vision Teams are a board for which quorum is required. In other words, when a Vision Team convenes, the OIP is of the opinion that it holds a "meeting" under section 92-2(3), Hawaii Revised Statutes, and those "meetings" satisfy the fourth Green Sand element.

A reading of section 92-2(3), Hawaii Revised Statutes, in isolation, could lead to the conclusion that when a board convenes, but no statute, rule, or other authority sets a specific quorum requirement for that particular board, no "meeting" occurs, and, therefore, no notice of meeting is required. In other words, a body with advisory power but no specific quorum requirement would not have to comply with the Sunshine Law's notice requirements because such a body would never hold "meetings" as defined in section 92-2(3), Hawaii Revised Statutes.

Such a reading would contradict section 92-15, Hawaii Revised Statutes, though. Section 92-15, Hawaii Revised Statutes, provides for a "default" quorum requirement when the specific number of members to constitute quorum is not specified in law.[8] Section 92-15 provides:

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[7] Generally, a "quorum" is that number of members necessary to validate an act: "The number of members who must be present in a deliberative body before business may be transacted.... The idea of a quorum is that, when that required number of persons goes into a session as a body, . . . the votes of a majority thereof are sufficient for binding action." Black's Law Dictionary 1255 (6th ed. 1990).

[8] Although the OIP does not have jurisdiction over section 92-15, Hawaii Revised Statutes, the OIP cannot interpret section 92-2(3), Hawaii Revised Statutes, without reference to other statutes on the same subject. Statutes relating to the same subject matter

> Whenever the number of members necessary to constitute a quorum to do business, or the number of members necessary to validate any act, of any board or commission of the State or any political subdivision thereof, is not specified in the law or ordinance creating the same or in any other law or ordinance, a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, and concurrence of a majority of all the members to which the board or commission is entitled shall be necessary to make any action of the board or commission valid; provided that due notice shall have been given to all members of the board or commission or a bona fide attempt shall have been made to give the notice to all members to whom it was reasonably practicable to give the notice.

Haw. Rev. Stat. 92-15 (1993).

While section 92-2(3), Hawaii Revised Statutes, limits the application of the Sunshine Law to those "meetings" held by boards that are required to gather a quorum to make decisions, section 92-15, Hawaii Revised Statutes, on the other hand, provides a default quorum requirement for any board without a specific quorum requirement. The law is circular in that respect. A board does not hold "meetings" subject to the Sunshine Law unless the board has a quorum requirement, and yet the law specifically provides a quorum requirement for boards that have no other quorum requirement. See Haw. Rev. Stat. §§ 92-2(3) and –15 (1993).

The OIP is therefore of the opinion that the Sunshine Law is ambiguous as to the legal effect when a board has no specific quorum requirement, and there are two possible constructions. Under the first construction, a body with no specific quorum requirement avoids the Sunshine Law because the body could not meet the definition of "meeting" under section 95-2(3), Hawaii Revised Statutes, which requires that a board

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should be construed together. 2B N. Singer, Sutherland Statutory Construction § 51:02 (Sands 6th ed. rev. 2000).

have a specific quorum requirement. The end result of this construction is to give no effect to the default rule of section 92-15, Hawaii Revised Statutes.

Under the second construction, section 92-15, Hawaii Revised Statutes, would impose a "default quorum" on a body with no specific quorum requirements. This construction would subject a body with no specific quorum to the Sunshine Law. The end result of this construction is to give no effect to the phrase "board for which a quorum is required" in section 92-2(3), Hawaii Revised Statutes.

Either interpretation of this apparent ambiguity would, therefore, require that one provision or phrase be given no effect. "All words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent." In Re Island Airlines, 47 Haw. 87, 112 (1963) (quoting McDonald v. Thompson, 305 U.S. 263, 266). Nonetheless, although:

> no clause, sentence, or word shall be construed as superfluous, void or insignificant if a construction can legitimately be found which would give force to and preserve all the words of the statute, it is also true that, even when strictly construing a statute, [the court's] primary duty in interpreting and applying statutes is to ascertain and give effect to the legislature's intention to the fullest degree.

Bragg v. State Farm Mutual Auto Ins. Co., 81 Haw. 302, 306 (1996) (citation omitted). An "ambiguity must be construed with reference to the whole system of law of which it is a part...and in *pari materia* or with reference to laws upon the same subject matter." Survivors of Bennett G. Cariaga v. Del Monte Corp., 65 Haw. 404, 409, 652 P.2d 1143, 1147 (1982) ("Cariaga"). The Cariaga court explained that when interpreting an ambiguity "we must look to the object to be accomplished, the purpose to be subserved, and place a reasonable or liberal construction which will best effect its purpose..." Id. In this instance, as there is considerable government action involved in the creation, maintenance, and follow-through of Vision Teams, there is an equally considerable need for the processes resulting from that government involvement to be open to the public. See Haw. Rev. Stat. § 92-1 (1993).

Because neither possible interpretation would give effect to all the words of both statutes, the OIP concludes that the appropriate interpretation is to give effect to the default quorum provision of section 92-15, Hawaii Revised Statutes, thus giving no effect to the limitation found in section 92-2(3), Hawaii Revised Statutes. By preventing a loophole through which a board with no specific quorum requirement could avoid the Sunshine Law, this interpretation would better carry out the Sunshine Law's requirement that "[t]he provisions requiring open meetings shall be liberally construed," and further "the policy of this State that the formation and conduct of public policy . . . shall be conducted as openly as possible." Haw. Rev. Stat. § 92-1 (1993).

A question remains whether the Vision Team memberships are so indeterminate that Vision Teams cannot decide whether a quorum is present under the default quorum requirement of section 92-15, Hawaii Revised Statutes. The Corporation Counsel advised the OIP in its letter of July 27, 2000, that the Vision Teams have fluid memberships, and whoever shows up at a meeting is allowed to vote on any decisions to be made at that meeting. Decisions are carried by a simple majority of those in attendance. The Corporation Counsel argues that these facts are "fatal to the argument that Vision Teams are government 'boards' that are subject to the Sunshine Law."

To decide whether section 92-15, Hawaii Revised Statutes, is applicable to Vision Teams, the OIP must consider what constitutes the "members" to which a Vision Team is "entitled." Section 92-15, Hawaii Revised Statutes, does not require that a board have a set membership to determine quorum; rather, it explains what portion of a board's members makes up a quorum of the board. When the law does not specify a quorum, it is a majority of all members to which the board is entitled. Haw. Rev. Stat. § 92-15 (1993).

Based on arguments and comments presented to the OIP, there are three possible ways in which the membership of a Vision Team could be defined.

First, the members to which a Vision Team is entitled could arguably be defined as everyone in the world.[9] This definition would make it almost impossible to determine the number of members, and if a number could be ascertained, such a group could never meet to make a decision or deliberate toward a decision in any meaningful way.

Second, the membership of a Vision Team could be defined as those individuals in attendance at any particular meeting. This fits with the statements made by the Corporation Counsel characterizing the Vision Teams as "varied and fluid." This characterization of a Vision Team's membership is also compatible with the fact that decisions are made by a majority vote of those in attendance at any meeting. However, the Corporation Counsel stated in the same letter that "not all members come to all meetings...." This suggests that Vision Team participants may consider themselves members even when they are not present at a meeting.

Third, the membership of a Vision Team could consist of anyone who has ever attended a Vision Team meeting.

The OIP concludes that the second approach best describes the Vision Team membership. The first approach, which would create the absurd result that only a tiny fraction of a Vision Team's "members" would ever meet, or even care about the issues discussed by the Vision Team, is unreasonable. The third approach is more reasonable, but the facts presented to the OIP suggest that the Vision Teams do in fact deliberate and make decisions based on the majority vote of those present, without regard to whether persons who have attended a meeting in the past are present. Further, it would be extremely difficult to determine with any certainty a Vision Team membership consisting of anyone who has ever attended a meeting. Thus, it appears to the OIP that the second approach best describes the Vision Teams' own understanding of when they are empowered to deliberate and make decisions.

The OIP concludes that the membership of a Vision Team consists of those persons present at any given meeting, and the vote of a majority of those present is sufficient for it to make decisions. When a Vision Team is

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[9] This is based on statements made at the July 19, 2000 meeting and in the Corporation Counsel's July 27, 2000 letter to the OIP that "the Vision Teams welcome anyone and everyone."

not actually holding a meeting, it has no members. A Vision Team has members only during a meeting. The quorum at any Vision Team meeting is a majority of those present, even though this number may change from meeting to meeting.

Resolving the ambiguity created between sections 92-2(3) and 92-15, Hawaii Revised Statutes, the OIP concludes that Vision Teams do hold "meetings" at which a majority of the membership is required to be present to make a decision or deliberate toward a decision. The OIP is therefore of the opinion that the fourth Green Sand element of the definition of a "board" is satisfied.

5. Required To Take Official Actions

The fifth Green Sand element required to bring a body under the definition of a board is that the body be required to take official actions. The OIP concludes that Vision Teams satisfy this element because they make advisory capitol improvement project recommendations to the City.

The Green Sand court concluded that making a recommendation is an "action," and that the action is "official" if it is somehow connected to the government. Green Sand, at 15:

> The term "official actions" is not expressly defined in Hawaii Revised Statutes ch. 92. However, the plain meaning of the term does not limit "actions" to any particular type, so long as they are "official" in some way. Therefore, "actions" could include making decisions, spending funds, issuing formal rules, or making recommendations. To be "official" these actions would have to be somehow connected to the government. In the present case, the [committees] are advisory committees whose purpose is to make recommendations on space policy. These recommendations are official because they come from committees established by an executive department of the state government. Therefore,

> the "official actions" of the [committees] are to make official recommendations.

Id. The court found the connection to government in the fact that the government established the committees.

The OIP notes that the City perceives the Vision Teams to be the same as other community interest groups, ranging from paddle clubs to *ad hod* task forces that provide input to the City. However, the critical distinction between a Vision Team and any other community interest group is that the motivation and support for the creation of the Vision Teams came directly from the City government – not from the public. Community groups in general may make recommendations to government, but those recommendations are not "official" under the reasoning of the Green Sand court unless they have a connection to government.[10]

Vision Teams do make recommendations to the City, which are considered "actions" by the Green Sand court. The requisite connection to government exists in that the Vision Teams were first created and are continually heavily supported by the City. More importantly, the fact that the recommendations by the Vision Teams are incorporated into the City's Executive Capital and Program Budget Bill speaks to the close and direct relationship between the City and the Vision Teams. See Exhibit D. Thus, the Vision Teams satisfy this element of the definition of "board."

6. Conclusion Regarding the Green Sand Elements

It is possible that a court, applying a narrow construction of section 92-2(3), Hawaii Revised Statutes, would conclude that a Vision Team is not a board because it has no specific quorum requirement. However, the OIP is of the opinion that a liberal construction of section 92-2(3), Hawaii Revised Statutes, is more appropriate, and, therefore, the OIP is further of the opinion that Vision Teams satisfy all five Green Sand elements and are "boards" subject to the Sunshine Law.

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[10] The OIP has no opinion on whether a task force providing input to the City, or a similar group, might have a connection to government similar to that of the Vision Teams. The OIP has not been asked for advice on the application of the Sunshine Law to groups other than the Vision Teams, nor does the OIP have information about such groups that would allow it to determine their connection (or lack of connection) to government.

The OIP advises the Vision Teams to prudently follow a liberal construction of the Sunshine Law and implement procedures under the Sunshine Law to ensure openness and public participation. Specifically, the OIP recommends that Vision Teams provide public notice of meetings and keep minutes under the Sunshine Law.

Moreover, this practice will have the additional benefit (as discussed below, and assuming that the OIP's further recommendation of joint notice is followed) of allowing Neighborhood Board members to attend Vision Team meetings freely without having to jump through complex procedural hoops.

The OIP is further of the opinion that Vision Team participants are **not** required by the Sunshine Law to restrict their interactions with one another outside the context of Vision Team meetings. Because of the unusual, flexible nature of Vision Team membership, the OIP concluded in section 4 above that Vision Team participants are Vision Team "members" only while attending a Vision Team meeting. This means that Vision Team participants inherently cannot interact as Vision Team members outside a Vision Team meeting. A Vision Team meeting occurs when the Vision Team takes some action requiring a quorum – for instance, votes on a recommendation. Thus, although the OIP recommends publicly noticing Vision Team meetings, it does **not** advise that Vision Team participants should restrict their discussions of Vision Team business outside of Vision Team meetings.[11]

The conclusion that Vision Team "members" are members only during a Vision Team meeting also means that it is not possible for a Vision Team to fail to give notice of a meeting to its own members. Section 92-15, Hawaii Revised Statutes, requires that regardless of what quorum is, notice be given (or a bona fide attempt be made to give notice) to all members of the board. Because the "members" of a Vision Team are those who attend a Vision Team meeting, those members have obviously received actual notice of the meeting. The OIP would nonetheless recommend that when giving public notice of meetings, Vision Teams make a reasonable attempt to ensure that frequent Vision Team participants are notified of meetings. One method of achieving

[11] The OIP does not opine as to how financial disclosure or other requirements applicable to board members under the traditional government board model would apply to the transitory and unusual nature of vision team membership.

this would be by allowing interested persons to be on a mailing list for notices, as is required by section 92-7(e), Hawaii Revised Statutes.

The OIP realizes that the Vision Teams were created to allow more openness and public participation in community planning, and some of the Vision Teams have endeavored to make their meetings as open as possible, including providing advance notice and a detailed agenda. However, failure to comply with Sunshine Law procedures could have the unfortunate result of undermining the very openness and public participation that the Vision Teams seek to promote. The OIP would urge that all Vision Teams follow the Sunshine Law, and implement procedures to ensure that the Sunshine Law continues to be followed.

II. ATTENDENCE OF NEIGHBORHOOD BOARD MEMBERS AT VISION TEAM MEETINGS

The comments made at the July 19, 2000 meeting and statements submitted to the OIP after that meeting, indicate the challenge those trying to serve their community often face when trying to determine the applicability of the Sunshine Law. In the case of Neighborhood Board members, it is difficult to anticipate the many situations that may call into question the parameters of the law by which they sincerely want to abide. Neighborhood Board members are naturally concerned about keeping informed of community hopes and concerns so that they can intelligently carry out their duties as board members. Because of this conscientiousness, and because Neighborhood Board members, as individuals, are typically among those most interested and likely to participate in community issues and affairs, they often attend Vision Team and other community meetings. This conscientiousness should be applauded.

No one has suggested to the OIP that it is the intention of Neighborhood Board members who attend such community meetings to evade the Sunshine Law or hide information from the public. Nonetheless, a question remains whether their attendance at these meetings could violate the law, and if so, how they may best avoid violation while preserving their ability to participate in the community.

A. Permitted Interactions of Board Members

Under the Sunshine Law, the permissibility of two or more Neighborhood Board members' attendance at a Vision Team meeting depends upon whether a "meeting" of the Neighborhood Board is taking place. The following provisions of the Sunshine Law give us some guidance as to when a gathering of several board members is not a "meeting" subject to public notice requirements:

> "Chance meeting" means a social or informal assemblage of two or more members at which matters relating to official business are not discussed.

Haw. Rev. Stat. § 92-2(2) (1993).

In addition to chance meetings, board members are allowed to discuss board business outside of a duly noticed meeting in limited circumstances:

> **Permitted interactions of members.**
>
> (a) Two members of a board may communicate or interact privately between themselves to gather information from each other about official board matters to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought.
>
> (b) Two or more members of a board, but less than the number of members which would constitute a quorum for the board may be assigned to:
>
> (1) Investigate a matter relating to the official business of their board; provided that;
>
> (A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;

> (B) All resulting findings and recommendations are presented to the board at a meeting of the board; and
>
> (C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board; or
>
> (2) Present, discuss, or negotiate any position which the board has adopted at a meeting of the board; provided that the assignment is made and the scope of each member's authority is defined at a meeting of the board prior to the presentation, discussion, or negotiation.
>
> ....
>
> (f) Communications, interactions, discussions, investigations, and presentations described in this section are not meetings for purposes of this part.

Haw. Rev. Stat. § 92-2.5 (Supp. 2000). Thus, if no "official business" is discussed, or if the attendance of the Neighborhood Board members is a "permitted interaction," no meeting has taken place and the Sunshine Law's open meeting requirements do not apply. However, these provisions cannot be used to circumvent the requirements of the law:

> **§ 92-5 Exceptions.**
>
> ....
>
> (b) No chance meeting, permitted interaction, or electronic communication shall be

> used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.

Haw. Rev. Stat. § 92-5(b) (Supp. 2000).

B. Constitutionality of Limitations on Board Members' Speech

Freedom of association, although not explicitly mentioned in the first amendment, has been held to be implicit in the rights of free speech, assembly and petition. Healy v. James, 408 U.S. 169, 181 (1972). However, freedom of association in the first amendment context is not absolute. The United States Supreme Court has held that "infringements on the right to associate may be justified by laws adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

Adherence to the Sunshine Law undoubtedly places restrictions on board members' ability to freely associate with one another and freely discuss board business. Neighborhood Board members are elected public officials, though, and therefore public servants. This raises the question of whether some restrictions on their freedoms of speech and association are permissible. In a memorandum dated May 19, 2000, from Deputy Corporation Counsel Jane H. Howell to Benjamin Kama, Jr., the Executive Secretary of the Neighborhood Commission, the Corporation Counsel opined that:

> In view of the myriad issues which a [Neighborhood] Board is authorized to take up and does not, a category which includes any community issues which might at some time involve a government approval, a conclusion that Board members may not discuss such matters in community meetings designed to elicit the sentiment of individuals would, in our view, place an intolerable burden on the rights of those

> individuals under the First and Fourteenth Amendments to the United States Constitution.

In US Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973), the United States Supreme Court found that "the government has an interest in regulating the conduct and the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the[government], as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 564 (citations omitted).

Just as the federal government has legitimately and constitutionally balanced the interests noted above, the OIP is of the opinion that the Sunshine Law balances in a constitutionally permissible manner, the interests of elected Neighborhood Board members and the public interest in open government. While the OIP has found no case law directly on point, challenges to the constitutionality of other states' open meetings laws have not been successful. In Cole v. State, 673 P.2d 345 (Colo. 1983), it was argued that the Colorado Open Meetings Law was not applicable to legislative caucus meetings, or in the alternative, that it was unconstitutional because it violated legislators' rights to freedom of speech and association guaranteed by the U.S. Constitution. The Colorado Supreme Court found the law applicable to caucuses, and concluded that "the Open Meetings Law strikes the proper balance between the public's right of access to information and a legislator's right to freedom of speech. The people have determined that they are willing to assume the detriment of a potential stifling of discussion among legislators to secure the advantages of open government." Id. at 350. See also People ex rel. Difanis v. Barr, 397 N.E. 2d 895 (Ill. 1979) (holding that the Illinois Open Meeting Act does not violate the constitutional rights to free speech and due process because the right to free speech protects the expression of ideas, not the right to conduct public business in closed meetings, and because the Act is not so vague as to deny due process - at least a modicum of ambiguity and uncertainty must be tolerated); Dorrier v. Dark, 537 S.W. 2d 888 (Tenn. 1976) (holding that the Tennessee Open Meetings Act, by requiring that any deliberation toward an official decision must be conducted openly, does not infringe the rights of free

speech of members and does not exercise a chilling effect upon free expression).

C. Definition of "Official Business"

The Sunshine Law does not define "official business." Neighborhood Boards deliberate on a wide variety of issues that affect their communities. Thus, almost any community issue could be brought before a Neighborhood Board for discussion. A broad definition of "official business" could conclude that every community issue is "official business."

However, such a broad definition would create problems with other portions of the Sunshine Law for Neighborhood Board members due to the wide scope of issues that may come before them. For example, when two or more board members assemble informally and "matters relating to official business" are not discussed, it is a "chance meeting" that does not require notice or minute-keeping under the Sunshine Law. Haw. Rev. Stat. § 92-2(2) (Supp. 2000). Using a broad definition of "official business," though, attendance by two or more Neighborhood Board members at any community meeting other than the Neighborhood Board meetings could include discussion of "matters relating to official business" and thus be a violation of the Sunshine Law. In contrast, other types of boards, such as a County Liquor Commission or the State Real Estate Commission, have relatively narrowly defined sets of duties, and their members are able, under any interpretation of the Sunshine Law, to engage in community discussion of almost any other issue without fear of violating the Sunshine Law.

The United States Supreme Court offers guidance on the definition of "official agency business" under the federal Sunshine Act, which defines "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business..." 5 U.S.C. § 552b(a)(2). The only Supreme Court decision the OIP could find interpreting this provision held that to fit within the definition of meeting, "discussions must be 'sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding **matters pending or likely to arise before the agency**.'" FCC v. ITT World

Communications, Inc., 466 U.S. 463, 471 (1984) (citations omitted) (emphasis added) ("FCC").

Section 92-1, Hawaii Revised Statutes, calls for a liberal interpretation of the Sunshine Law in favor of "open meetings." Nonetheless, because the Sunshine Law represents a balance between constitutional rights of free expression and association, and the public interest in open government, interpretation of the Sunshine Law must similarly balance the constitutional rights of board members with the Sunshine Law's purpose of ensuring open government. For this reason, the OIP is in general agreement with the Corporation Counsel's conclusion in its memorandum dated May 19, 2000, that:

> the narrow definition of "official business" would be adopted by the courts so as to place such interactions in the category of "chance meetings" and thereby avoid a finding that the Sunshine Law is unconstitutional.

In this context, the OIP believes that a narrow construction of the term "official business" is warranted. See 2A N. Singer, Sutherland Statutory Construction § 45:11 (Sands 6th ed. rev. 2000) ("If the law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the court must adopt the interpretation that upholds the law's constitutionality.") A broad interpretation of "official business," which in the case of a Neighborhood Board could include almost any item of community interest, would raise questions about the Sunshine Law's constitutionality. The OIP concludes that the narrower interpretation applied by the United States Supreme Court better suits the competing purposes of the Sunshine Law and the constitutional rights to free expression and association.

An interpretation based on the FCC holding would limit the "official business" of Neighborhood Boards to those discrete proposals or issues that are actually pending before a Neighborhood Board or that are likely to arise before a Neighborhood Board. This narrower interpretation would allow members to discuss in **general, non-discrete terms** issues that are of concern to the Neighborhood Board, without triggering Sunshine Law requirements for discussion of "official business." On the other hand, discussion of discrete proposals would certainly be "official business."

For example, a general discussion of land use in a neighborhood would not be "official business," although discussion of a specific capital improvement project or other land development proposal might well be. Items of community interest that are not likely to arise before a Neighborhood Board would also be excluded from the category of "official business" of that board, even if those items are discrete proposals or issues. If "official business" of the Neighborhood Board is not discussed at a community meeting, such a meeting would be considered a "chance meeting" and any number of board members may attend.

However, a narrow interpretation of "official business" is no great help to Neighborhood Boards in the context of Vision Team meetings. As discussed above in section I of this letter, the primary focus of Vision Teams is on determining priorities for capital improvement projects in their communities, and most such recommendations presented to the City by the Vision Teams do appear in the City administration's budget proposal. The Neighborhood Boards are charged with reviewing and making recommendations on proposed capital improvement projects in their communities. § 1-7.1, RNP. Thus, discrete proposals or issues discussed at Vision Team meetings are very likely to arise before a Neighborhood Board at some point, if they are not already pending there. Even under a narrow interpretation of "official business," it appears that the "official business" of a Neighborhood Board will frequently be discussed at a Vision Team meeting for the same community.

D. Procedures for Neighborhood Board Members to Attend Vision Team Meetings

If two or more Neighborhood Board members wish to attend a Vision Team or other community meeting where official Neighborhood Board business will be discussed, their freedoms of speech and association will be somewhat restricted. These restrictions are set out in section 92-2.5, Hawaii Revised Statutes, entitled "Permitted interactions of members," which is quoted from extensively above. In the context of Neighborhood Board members attending Vision Team or other community meetings, these restrictions could be addressed in several different ways.

1. Joint Notice of Vision Team and Neighborhood Board Meetings

If a meeting is noticed as a joint meeting of the Neighborhood Board and Vision Team, and so long as that Neighborhood Board has quorum, members of that Neighborhood Board may attend and discuss official business. When the meeting is jointly noticed and the Neighborhood Board has a quorum, the Neighborhood Board members may also deliberate and make decisions, both as a Neighborhood Board, and as part of the Vision Team.

When the meeting is jointly noticed and less than a quorum, but more than two members of the Neighborhood Board attend it, the Neighborhood Board members **may not deliberate toward, nor take, a binding vote on Neighborhood Board official business**. The OIP advises that when the meeting is jointly noticed, if Neighborhood Board official business is discussed and less than a quorum of the Neighborhood Board is present, the Neighborhood Board members should, at a minimum, refrain from discussing official Neighborhood Board matters within earshot of other Neighborhood Board members.[12]

2. Vision Team Meetings Not Noticed as Neighborhood Board Meetings

When the Vision Team meeting is not jointly noticed as a Neighborhood Board meeting, and only two members of a Neighborhood Board attend a Vision Team meeting at which Neighborhood Board official business will be discussed, these two members can communicate or interact privately between themselves to gather information from each other about Neighborhood Board official business so long as no commitment to vote is made or sought. Haw. Rev. Stat. § 92-2.5 (Supp. 2000). When the meeting is not jointly noticed, because no Neighborhood Board meeting was noticed and no Neighborhood Board quorum is present at the Vision Team meeting under these circumstances, the two members of the Neighborhood Board cannot vote on any Vision Team business that is also official Neighborhood Board business.

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[12] The question of whether, when the meeting is jointly noticed, less than a quorum of a Neighborhood Board could deliberate and vote on **Vision Team** business is reserved for another time.

Alternatively, when the meeting is not jointly noticed, if two or more neighborhood board members (but less than a quorum) wish to attend a Vision Team meeting at which Neighborhood Board official business will be discussed, the members may be assigned by the Neighborhood Board to investigate a matter relating to the board's official business, or assigned to present, discuss, or negotiate a position that was adopted by the board at a meeting. Haw. Rev. Stat. § 92-2.5(b) (Supp. 2000) The assignment and scope of each member's authority must be defined at a previous meeting of the Neighborhood Board. Id. In the case of an investigation, all findings and recommendations must be presented to the Neighborhood Board at a meeting and any deliberation or decisionmaking based thereon must occur only at a subsequent duly noticed meeting. Id. Again, when Vision Team meeting is not jointly noticed as Neighborhood Board meeting, because no Neighborhood Board meeting was noticed and no Neighborhood Board quorum is present at the Vision Team meeting under these circumstances, the assigned members of the Neighborhood Board cannot vote on any Vision Team business that is also official Neighborhood Board business.

3. Summary of Procedures for Neighborhood Board Member Attendance of Vision Team Meetings

The OIP recommended in section I above that Vision Teams follow the Sunshine Law's requirements by providing public notice of meetings. If this recommendation is followed, it should be a relatively simple matter to have the Vision Team meetings noticed as joint meetings of the Vision Team and the Neighborhood Board or Boards for the Vision Team's community. With such notice, the Neighborhood Board members may attend the Vision Team meetings in any number and, if a quorum of the Neighborhood Board is present, deliberate toward and make decisions on Neighborhood Board business. Without such notice, if "official business" of the Neighborhood Board will be discussed at a Vision Team or other community meeting, and more than two Neighborhood Board members will attend, they should be assigned pursuant to section 92-2.5(b)(1) and (2), Hawaii Revised Statutes. Further, only less than the number of members that constitutes a quorum of the Neighborhood Board could attend. If two or more Neighborhood Board members attend a meeting in their individual capacities (i.e., have not been "assigned") and matters are raised that are pending or are likely to come

before their board, they should, as a matter of caution, excuse themselves from the meeting, or at least refrain from commenting.

FURTHER CONSIDERATIONS

The OIP heard concerns that Vision Teams, which offer little in the way of procedural protections to ensure openness and fairness, undermine the authority of the Neighborhood Boards. The following example is quoted from a letter dated September 18, 2000, from the Kailua Neighborhood Board No. 31 to the Director of the City's Department of Planning and Permitting, Randall Fujiki, regarding a project to improve Kawainui Community Park (Exhibit E):

> There is concern among many members of the Kailua Neighborhood Board, as expressed at many monthly meetings and in various letters, that the Mayor's Vision Team is diluting the responsibility and capacity of the Kailua Neighborhood Board No. 31 to carry out its chartered role (under the City and County's Neighborhood Plan (R)) to develop and submit CIP projects to the City & County Government. In this case, the Vision Team launched, and revised this project and brought it to the Draft Environmental Assessment level, with a public hearing scheduled for September 28, 2000, without knowledge or input from Kailua Neighborhood No. 31.

The Neighborhood Boards were created by the Revised Charter of Honolulu, and under the Neighborhood Plan are charged with, among other things, making recommendations regarding capital improvement projects in their communities, and regarding any general plan, development plan, or other land use matter within their neighborhoods. § 1-7.1, RNP. These duties are similar to those undertaken by the Vision Teams. However, while the Vision Teams have not adhered to any defined procedures, the Neighborhood Boards have been obliged to adhere to the Sunshine Law and other procedural requirements designed to promote open government.

It is no part of the OIP's role or authority to dictate to the City how it should organize itself. For this reason, the OIP declines to speculate on the need for two different types of bodies, one "official" and one "unofficial," both expending City resources to perform the same function. The OIP does, however, have the authority and the duty to take action to oversee compliance with the Sunshine Law. Haw. Rev. Stat. 92F-18(42) (Supp. 2000). The OIP is very concerned when the presence of an "official" and an "unofficial" body both performing the same function causes the Sunshine Law to be evaded or bypassed. In the present situation, the OIP advises that the prudent and sensible way to ensure compliance with the Sunshine Law is for the Vision Teams to give notice of their meetings under the Sunshine Law, preferably as joint meetings of a Vision Team and one or more Neighborhood Boards.

CONCLUSION AND RECOMMENDATIONS

The OIP cannot change the State's public policy as set forth in the Sunshine Law: only the Legislature can do so.[13] The OIP's opinion is given based on the Sunshine Law as it exists on the date of this advisory opinion, and does not consider possible changes to the Sunshine Law that may be enacted. Those who want to change the Sunshine Law, whether to eliminate ambiguities or to alter the Sunshine Law as it applies to the issues addressed here, should seek legislative amendment of the law.

An ambiguity in chapter 92, Hawaii Revised Statutes, leaves section 92-2(3), Hawaii Revised Statutes, subject to two constructions, under the more liberal of which the Vision Teams would be subject to the Sunshine Law, and under the narrower of which they would not. It is the OIP's opinion that the more liberal construction is more consistent with the purpose of the Sunshine Law and canons of statutory construction, and better reconciles the language of section 92-2(3), Hawaii Revised Statutes, with section 92-15, Hawaii Revised Statutes. Applying the more liberal construction, it is the OIP's opinion that the Vision Teams are subject to the Sunshine Law. The OIP is charged with overseeing compliance with the Sunshine Law. Haw. Rev. Stat. 92F-18(42) (Supp. 2000). As such, the OIP strongly recommends that Vision Teams follow the more liberal construction. It is possible that a

[13] For example, S.B. 1487 and H.B. 382 S.D. 1, which as of the date of this advisory opinion are pending in the Legislature, would address the issues presented here.

court might use a narrow construction and reach a different conclusion from the OIP. However, in the absence of judicial guidance, the OIP's advice is based on its opinion that the Vision Teams are subject to the Sunshine Law.

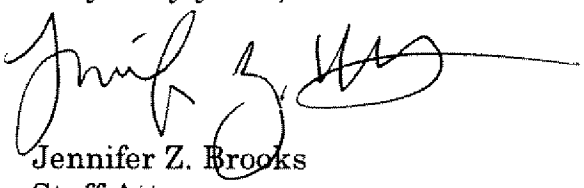
The OIP advises Vision Teams to follow the Sunshine Law by providing notice of meetings and keeping minutes of meetings as required by the Sunshine Law. The OIP does **not** advise Vision Team participants to follow the restrictions on board member interactions outside a meeting, because it is the OIP's opinion that Vision Team participants are only Vision Team members during the time they are attending a Vision Team meeting. Outside of a Vision Team meeting, the Vision Team has no "members." Thus, even frequent Vision Team participants are not board members subject to the Sunshine Law except when they are actually attending a meeting.

The OIP further recommends that the Vision Team meetings be noticed as joint meetings of a Vision Team and any Neighborhood Boards covering the same community. This joint notice will allow Neighborhood Board members to attend Vision Team meetings without a limit as to how many Neighborhood Board members may attend or how fully they may participate (although Neighborhood Board members may not deliberate toward a decision or vote as Neighborhood Board members unless a quorum of the board is present). The Vision Team meetings are of great interest to Neighborhood Board members, both as Neighborhood Board members and as active members of their communities. The OIP recommends this joint notice as a practical way to allow and encourage members of Neighborhood Boards to attend and participate in the Vision Team process.

If the OIP's recommendation is not followed and a Vision Team meeting is not noticed as a Neighborhood Board meeting, two or more Neighborhood Board members may attend the meeting only if no "official business" of the Neighborhood Board is discussed, or if the attendance of the Neighborhood Board members is a "permitted interaction" under the Sunshine Law. Thus, if two or more Neighborhood Board members wish to attend a Vision Team or other community meeting that has not been noticed as a Neighborhood Board meeting but where official Neighborhood Board business will be discussed, their freedoms of speech and association will be permissibly restricted by the Sunshine Law.

Finally, **the OIP recommends increased education of Neighborhood Board members regarding their obligations under the Sunshine Law.** Many of the Neighborhood Board members are not aware of their obligations under the Sunshine Law. Although the NCO does provide training once every election cycle, it is not mandatory and attendance at the training is typically low. The OIP recommends making training in this area mandatory so that Neighborhood Board members better understand the importance of open governmental processes and the procedures the legislature found necessary to protect the "people's right to know."

Very truly yours,



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