

**Law Offices of  
Leslie K. Iczkovitz  
1350 Ala Moana Boulevard, Ste. 1508  
Honolulu, HI 96814  
Phone: 808.523.8449 / Fax: 808.356.0832  
Email: lesisko@aol.com**

RECEIVED  
AUG 14 4 22 PM '12  
CITY CLERK  
HONOLULU, HAWAII

August 14, 2012

Ikaika Anderson (ianderson@honolulu.gov)  
Tom Berg (tberg@honolulu.gov)  
Romy Cachola (rachola@honolulu.gov)  
Stanley Chang (cldistrict4@honolulu.gov)  
Tulsi Gabbard (tgabbard@honolulu.gov)  
Nestor Garcia (ngarcia@honolulu.gov)  
Breene Harimoto (bharimoto@honolulu.gov)  
Anne Kobayashi (akobayashi@honolulu.gov)  
Ernest Martin (emartin@honolulu.gov)

Sent via e-mail

Re: Bill 11 Override Vote

Dear Council Members,

Bill 5, now known as Ordinance 12-2, passed and signed into law earlier this year. As a result of Bill 5, as of July 1, 2011, it is legally indisputable that all commercial activities in all County of Honolulu beach parks and inland parks, including Kailua and Kalama Beach parks, require a permit issued by the Director of Parks and Recreation of the County of Honolulu. Ordinance 12-2 also forbids any permits from ever being issued for commercial activities in Kailua and Kalama Beach parks only, from Saturdays 1 p.m. to Mondays 6:30 a.m.

Ordinance 12-2 also forbids commercial activities, including recreational stops by tour companies, at any time at city owned or operated beach rights-of-way and easements from Lanikai to Kapoho Point.

Currently, there is no permit process setup by the Parks Department of the County of Honolulu for commercial activities for which no permit process previously existed. Windsurfing and surfing lessons are examples of commercial activities for which a permit process already exists.

My understanding is that no new permits are currently being issued for commercial activities for which there is no current permit process. As a result, all commercial activities currently taking place in all County parks, which do not have permits, are technically illegal and the vendor is subject to citation, and possible fine and imprisonment. The provisions regarding banning tour buses in Kailua Beach Park seems to be of little effect because commercial tour bus operators are able to obtain permits to use city bus stops to drop-off and pickup customers.

Currently, in terms of enforcement of the current law, there is much uncertainty and confusion as to what is a commercial activity that requires a permit. All of the yoga teachers, bouncy houses, Segway tours, weddings, and kayak drop-offs apparently require a permit. Commercial kayak tours originating from Kailua Sailboards and Kayaks, with 20 tourists at a time being led through Kailua Beach Part by

MISC. COM. 2200

COUNCIL

the kayak tour leader, are not being considered by the police to be commercial activities. Placing a kayak on a customer's car, and the customer driving to and parking in Lanikai, and dragging the kayak down a right of way to go kayaking, is definitely not a commercial activity and is not prohibited under Bill 5 or Bill 11, any day of the week.

Since all County parks are affected by Bill 5 / Ordinance 12-2, it is important that the law be implemented logically and strategically and enforced fairly and uniformly in every County park. Several companies have already been ticketed under the new law, and it will take time for the judicial system to sort things out.

Gary Cabato, the Director of Parks and Recreation for the County of Honolulu is reportedly developing a permit process to address these new permit requirements that now apply to hundreds of vendors who have perhaps thousands of employees, for whom there was no prior permit required.

Many people believe that regulating commercial activities, and enforcing those regulations is the only reasonable solution that should be pursued for dealing with commercial activities in County parks. While a small vocal minority is in favor of banning all commercial activities in Kailua, they do not speak for most of Kailua residents or the rest of the island residents who visit Kailua.

Given that Bill 5 with its very significant impacts on all County parks has only recently has taken effect, we are urging the City Council to not override the Mayor's Bill 11 veto. Please give Bill 5 a chance to be implemented, enforced, and resolved in the Courts. Then take a look at the new, current reality, and then decide if more lawmaking in this area is required. This is the reasonable, responsible action to take, rather than pass another law that is likely to have unintended consequences.

Bill 5 has already had huge consequences which the City Council apparently had no intention of creating. It is logical and reasonable to give the County of Honolulu's Parks Department the necessary time to create administrative rules and further develop their permit process so it can accommodate and service the hundreds of commercial activities that now require a permit.

### **BILL 11 OVERRIDE LEGAL CONSIDERATIONS**

The current issue on the table is whether the City Council will override Mayor Peter Carlisle's veto of Bill 11, which the Honolulu City Council passed by the vote of 7 -2 (3 members voted yes "with reservations"). Bill 11 extends Bill 5 to another level. If Bill 11 passes, then all commercial activities at Kailua and Kalama Beach Parks will be prohibited forever, and no permits ever allowed.

As reported in the Star Advertiser in May, my understanding is that the City Council received a letter from Corporation Counsel which put the City Council on notice that Bill 11 would be violating the "separation of powers" doctrine that is incorporated within the Charter of the County of Honolulu.

The Hawaii Supreme Court issued a strong decision supporting separation of powers in *CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU v. FRANK F. FASI, MAYOR OF THE CITY AND COUNTY OF HONOLULU, ET AL.*, 52 Haw. 3; 467 P.2d 576; (1970).

In the Fasi case, City Council Resolution No. 436 required the director of finance to offer the Queen's Surf property at public auction as a restaurant and night club concession for ten years from January 1, 1970. The Queen's Surf property is a part of Kapiolani Park in Waikiki, and is city and county property within the jurisdiction and control of the department of parks and recreation. The legal issue in the

appeal was whether the director of finance was required to follow the directives of this resolution and offer a concession at Queen's Surf.

In that case, the Hawaii Supreme Court held that the power to decide whether or not to permit a concession on park property belongs to the department of parks and recreation. Since Resolution 436 provided "for the exercise by the council of executive power which is inconsistent with the principle of separation of powers", the Hawaii Supreme Court held that it was unenforceable.

The same issue / principle, though reversed, arises with Bill 11. In the Fasi case, the Council ordered the County to offer a concession at a county park, which the Hawaii Supreme Court decided was unenforceable. With Bill 11, the City Council is preventing the County from issuing concessions or permits for commercial activities for Kailua and Kalama Beach Parks, which is usurping the County's executive power of deciding how to control, maintain and operate all County parks in the same way the Hawaii Supreme Court found unenforceable in the Fasi case.

As with the Council's resolution in the Fasi case, if the Bill 11 veto is overridden and it becomes law, it will be challenged in Court and it will be held to be unenforceable as an invalid violation of the separation of powers doctrine between the Mayor and City Council.

The City Council is already experiencing the effects of unintended consequences with the language included in Bill 5. Bill 11 can only confuse the situation further, and generate unnecessary litigation expenses. For all of these reasons, we urge you to not override the Mayor's veto of Bill 11.

Sincerely,

Leslie K. Iczkovitz