The Senate

STATE CAPITOL
HONOLULU, HAWAIʻI 96813

July 3, 2021

Chair Mark M. Mugiishi, M.D.
Reapportionment Commission
c/o Office of Elections
Submitted as Attachment to Google Form Registration to Testify

RE: **Attorney General Legal Opinion that Solomon Two-Step Still Applies**

Aloha Chair Mugiishi and Members of the Commission,

Given the delays caused by the belated completion of the U.S. Census Bureau's decennial count, the fast approaching deadline for candidates to file for the 2022 election, and the abbreviated timeline for this commission to complete its assignment, I urge you to avoid the time consuming and costly legal complications that will no doubt result from anything less than a strict compliance with applicable laws in the performance of your duties.

In response to the addition of the term "permanent resident" to what is now Act 14 (which amends HRS Sec. 25-2, Legislative Reapportionment), I requested an opinion from the attorney general as a means to prevent confusion over how this new language would affect the existing two-step reapportionment process. I share that opinion with you now to preempt a repeat of the missteps of the 2011 Commission and avoid the pitfalls that arise when legislation is altered with no provision for public comment or agency review.

The clear affirmations from this opinion (attached below) are that the 2012 holding of the Hawaii Supreme Court in *Solomon v. Abercrombie* still stands and that the data used by the commission under *Solomon* was sufficient for applying the two-step process, which means the commission is compelled to reapportion using that same process, and the amended statutory language just signed into law changed nothing.

Mahalo,

Senator Laura Acasio, District 1 ~ Greater Hilo

DAVID Y. IGE
GOVERNOR

CLARE E. CONNORS
ATTORNEY GENERAL

HOLLY T. SHIKADA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

July 1, 2021

The Honorable Laura Acasio
State Capitol, Room 203
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Senator Acasio:

Re: Legal Opinion Relating to Reapportionment

This is in response to your letter dated June 9, 2021, in which you requested that our office provide a legal opinion relating to the upcoming reapportionment and possible interpretations of Act 14, Session Laws of Hawaii 2021 ("Act 14"). Specifically, you asked the following questions:

1. Under an analysis of Article IV, Sections 4 and 6 of the Hawaii State Constitution; HRS Chapter 25; Solomon v. Abercrombie, 126 Haw. 283, 270 P.3d 1013 (2012); Citizens for Equit. & Respon. Gov't v. County, 108 Haw. 318, 120 P.3d 217 (2005); and any other relevant law – and despite the absence of a definition of "domiciliary" in the amended language of HRS § 25-2 that will take effect on July 1 pursuant to Act 14, what can the term "domiciliary" be interpreted to mean other than the residence of a "permanent resident" of Hawaii as clarified by the Hawaii Supreme Court decision in Solomon?; and

2. Notwithstanding the answer to Question 1 above and given the "two-step" process of reapportionment outlined in Solomon, can the amended language of HRS § 25-2, provided in Act 14 "*[i]n determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year*" (underlining added), be interpreted to mean that the extraction of non-permanent residents, as clarified by Solomon, will be applied "only" to "step one" – "Apportionment Among Basic Island Units" [underlining added] made pursuant to Article IV, Section 4 of the Hawaii State Constitution; and not to "step two" – "Apportionment Within Basic Island Units" made pursuant to Article IV, Section 6?

Pursuant to Act 14, HRS § 25-2(a)[1] provides in relevant part:

> For purposes of legislative reapportionment, a 'permanent resident' means a person having the person's domiciliary in the State. In determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year.

With respect to question number 1, we understand your inquiry to be related to the interpretation of the term "domiciliary" as it is used in the definition of "permanent resident" in HRS § 25-2. It is well-established that,

> [d]omicile is proved by evidence of two facts: physical presence at a particular place *and intention of the party to reside there permanently*; or, as is sometimes said, *to make the place his home with no present intent to leave at any foreseeable future time.*

Matter of Estate of Marcos, 88 Hawai'i 148, 154, 963 P.2d 1124, 1130 (1998) (emphasis in original). Residence, alone, is insufficient to establish Hawaii as one's domicile; there must also be an intent to make Hawaii the person's home with no present intent to leave in the foreseeable future. *Id.* Thus, for purposes of legislative reapportionment, a "permanent resident" is one who physically resides in the State *and* intends to make the State his home with no present intent to leave in the foreseeable future.

With respect to question number 2, we understand you to be asking whether non-permanent residents may also be extracted for purposes of completing "step two" of the reapportionment process. To the extent that there is sufficient data to identify non-permanent residents, we answer in the affirmative. Reapportionment is a two-step process: first, apportionment among the four basic island units, and second, apportionment within the four basic island units. Haw. Const. art. IV, §§ 4 and 6; *see also Solomon v. Abercrombie*, 126 Hawai'i 283, 292, 270 P.3d 1013, 1022 (2012). In step one, the Commission is required to "allocate the total number of members of each house of the state legislature being reapportioned among the basic island units, . . . using the total number of *permanent residents* in each basic island unit[.]" Haw. Const. art. IV, § 4 (emphasis added). In step two:

> [u]pon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of *permanent residents* per member in each district is as nearly equal to the average for the basic island unit as practicable.

[1] Section 5 of Act 14 took effect upon approval by the Governor on May 17, 2021.

Haw. Const. art. IV, § 6 (emphasis added). Although separate processes, both steps require the Commission to identify a "permanent resident" population. *Solomon*, 126 Hawai'i at 293, 270 P.3d at 1023. Inasmuch as only permanent residents "may be counted in the population base for the purpose of reapportioning legislative districts," the Commission is required to extract non-permanent residents where it has sufficient data to identify such residents, notwithstanding the fact that HRS § 25-2 does not expressly prescribe such conduct. *Id.* at 292,-293, 270 P.3d at 1022-23.

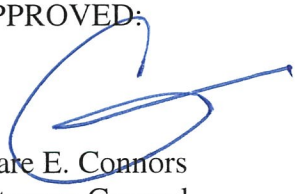
We hope this adequately addresses your questions. Please feel free to contact us should you have any further questions.

Very Truly Yours,

/s/ Lori N. Tanigawa

Lori N. Tanigawa
Deputy Attorney General

APPROVED:



Clare E. Connors
Attorney General

Policy Matters
An LLC Company

July 6, 2021

Re: Public Testimony on Reapportionment Commission Meeting July 6, 2021

Aloha, Commissioners:

My name is Becky Gardner and I am submitting this testimony on behalf of myself as Principal and Founder of Policy Matters LLC. Civic engagement and public awareness of our government institutions and procedures are key goals of my advocacy – and I am exploring ways to help improve the populace's understanding of the reapportionment process.

I developed a keen interest in the reapportionment process in 2011 while I was a Staff Attorney for a Big Island legislator. I was tasked with researching the constitutional, legislative, and judicial history of our reapportionment laws. At that time, I was disappointed to see the 2011 Reapportionment Commission fail to follow its clear legal mandate – despite input from multiple sources redirecting it. Unfortunately, its missteps resulting in protracted federal and state litigation that required the commission to re-do its plan. This was quite frustrating to watch as this waste and delay was wholly unnecessary and avoidable, resulting in a tremendous loss of valuable time and public resources.

However, I am grateful that a wealth of guidance is now available to the 2021 Reapportionment Commission, comprised of new members and fresh eyes. To avoid the disruptions of the past, particularly as it manages the delay in Census data created by the pandemic, I recommend that this commission carefully consult the "two-step" process outlined in:

(1) Solomon v. Abercrombie, 270 P. 3d 1013 - Haw: Supreme Court 2012; (Solomon)
https://scholar.google.com/scholar_case?case=4978340749206894654&hl=en&as_sdt=6&as_vis=1&oi=scholarr

(2) Kostick v. Nago, 960 F. Supp. 2d 1074 - Dist. Court, D. Hawaii 2013; and
https://scholar.google.com/scholar_case?case=2994657226643299668&hl=en&as_sdt=6&as_vis=1&oi=scholarr

(3) State of Hawaii 2011 Reapportionment Commission Final Report and Reapportionment Plan (https://elections.hawaii.gov/wp-content/uploads/2015/03/2012ReapportionmentFinalReport_2012_03_30.pdf)

It is also important to note that the only change to the black letter law on the reapportionment process was made last session, through Act 14 Session Laws Hawaii 2021 (Act 14) in a conference committee draft of SB1350 – language which the public did not have adequate opportunity to review and provide testimony. That language is as follows:

> "*[i]n determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall* ***only*** *extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year*" (emphasis added)

It was not clear to me whether this language was meant to limit the extraction of non-permanent residents to "step 1" - the reapportionment *among* the basic island units; while allowing non-

permanent population numbers to remain while engaging in "Step 2" – the apportionment *within* the basic island units. Unfortunately, the legislative history is silent, as this amendment was made during conference. I have been concerned that such an interpretation would run afoul of our state constitution; which is thoroughly and systematically analyzed in Solomon.

I am glad that this question is now settled by a July 1, 2021 Legal Opinion from the Attorney General's office addressed to Senator Laura Acasio - attached. Unless there are significant problems with the data, once these numbers come out in step 1, they cannot not be re-inserted in step 2. I understand that this ultimately dilutes my voting power, as an Oahu resident; but it is important to me that our institutions maintain their fidelity to our state constitution. If it is the will of the people to change it, proper channels should be followed.

Moreover, I'd like to express my support for the sentiments expressed by Common Cause in their June 10, 2021 letter. Given the delay and erosion of public confidence in the reapportionment process in 2011, I think it is wise for the 2021 Reapportionment Commission to err on the side of greater transparency and accountability – above and beyond the call of our sunshine laws.

Thank you for the opportunity to provide this testimony.

Sincerely,

Rebecca (Becky) Gardner, Esq.

DAVID Y. IGE
GOVERNOR

CLARE E. CONNORS
ATTORNEY GENERAL

HOLLY T. SHIKADA
FIRST DEPUTY ATTORNEY GENE

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

July 1, 2021

The Honorable Laura Acasio
State Capitol, Room 203
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Senator Acasio:

Re: Legal Opinion Relating to Reapportionment

This is in response to your letter dated June 9, 2021, in which you requested that our office provide a legal opinion relating to the upcoming reapportionment and possible interpretations of Act 14, Session Laws of Hawaii 2021 ("Act 14"). Specifically, you asked the following questions:

1. Under an analysis of Article IV, Sections 4 and 6 of the Hawaii State Constitution; HRS Chapter 25; Solomon v. Abercrombie, 126 Haw. 283, 270 P.3d 1013 (2012); Citizens for Equit. & Respon. Gov't v. County, 108 Haw. 318, 120 P.3d 217 (2005); and any other relevant law – and despite the absence of a definition of "domiciliary" in the amended language of HRS § 25-2 that will take effect on July 1 pursuant to Act 14, what can the term "domiciliary" be interpreted to mean other than the residence of a "permanent resident" of Hawaii as clarified by the Hawaii Supreme Court decision in Solomon?; and

2. Notwithstanding the answer to Question 1 above and given the "two-step" process of reapportionment outlined in Solomon, can the amended language of HRS § 25-2, provided in Act 14 "*[i]n determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year*" (underlining added), be interpreted to mean that the extraction of non-permanent residents, as clarified by Solomon, will be applied "only" to "step one" – "Apportionment Among Basic Island Units" [underlining added] made pursuant to Article IV, Section 4 of the Hawaii State Constitution; and not to "step two" – "Apportionment Within Basic Island Units" made pursuant to Article IV, Section 6?

Pursuant to Act 14, HRS § 25-2(a)[1] provides in relevant part:

> For purposes of legislative reapportionment, a 'permanent resident' means a person having the person's domiciliary in the State. In determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year.

With respect to question number 1, we understand your inquiry to be related to the interpretation of the term "domiciliary" as it is used in the definition of "permanent resident" in HRS § 25-2. It is well-established that,

> [d]omicile is proved by evidence of two facts: physical presence at a particular place *and intention of the party to reside there permanently*; or, as is sometimes said, *to make the place his home with no present intent to leave at any foreseeable future time*.

Matter of Estate of Marcos, 88 Hawai'i 148, 154, 963 P.2d 1124, 1130 (1998) (emphasis in original). Residence, alone, is insufficient to establish Hawaii as one's domicile; there must also be an intent to make Hawaii the person's home with no present intent to leave in the foreseeable future. *Id*. Thus, for purposes of legislative reapportionment, a "permanent resident" is one who physically resides in the State *and* intends to make the State his home with no present intent to leave in the foreseeable future.

With respect to question number 2, we understand you to be asking whether non-permanent residents may also be extracted for purposes of completing "step two" of the reapportionment process. To the extent that there is sufficient data to identify non-permanent residents, we answer in the affirmative. Reapportionment is a two-step process: first, apportionment among the four basic island units, and second, apportionment within the four basic island units. Haw. Const. art. IV, §§ 4 and 6; *see also Solomon v. Abercrombie*, 126 Hawai'i 283, 292, 270 P.3d 1013, 1022 (2012). In step one, the Commission is required to "allocate the total number of members of each house of the state legislature being reapportioned among the basic island units, . . . using the total number of *permanent residents* in each basic island unit[.]" Haw. Const. art. IV, § 4 (emphasis added). In step two:

> [u]pon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of *permanent residents* per member in each district is as nearly equal to the average for the basic island unit as practicable.

---

[1] Section 5 of Act 14 took effect upon approval by the Governor on May 17, 2021.

Haw. Const. art. IV, § 6 (emphasis added). Although separate processes, both steps require the Commission to identify a "permanent resident" population. *Solomon*, 126 Hawai'i at 293, 270 P.3d at 1023. Inasmuch as only permanent residents "may be counted in the population base for the purpose of reapportioning legislative districts," the Commission is required to extract non-permanent residents where it has sufficient data to identify such residents, notwithstanding the fact that HRS § 25-2 does not expressly prescribe such conduct. *Id.* at 292,-293, 270 P.3d at 1022-23.

We hope this adequately addresses your questions. Please feel free to contact us should you have any further questions.

Very Truly Yours,

/s/ Lori N. Tanigawa

Lori N. Tanigawa
Deputy Attorney General

APPROVED:

Clare E. Connors
Attorney General

832133_1