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RULEMAKING

HRS Chapter 91, Hawaii's Administrative Procedure Act (HAPA) Governs

The general rule is that government agencies must conform to HAPA when acting in a rule-making capacity. If an agency intends to impose conditions or requirements that are not set forth in the ordinance and that would affect the public, the agency is required to adopt rules, regardless of the "shall" or "may" direction contained in the ordinance.

Of significance, the definition of "rule" does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public. For example, in State of Hawai'i v. Fedak, (1992), the Court ruled HPD regulations which set forth procedures to be followed by the police in announcing sobriety roadblocks, and establishing their times, sites, and locations were exempt from Chapter 91 promulgation requirements. (citation omitted)

Rules are required so that the affected public can fairly anticipate or address the procedure if the applicable enacting law does not specifically describe the process. Aluli v. Lewin, (1992). Without rules, the public and interested parties would be without firm knowledge of the factors that the agency would deem relevant and influential in its decision-making and implementation of the law. (citation omitted)

Finally, HAPA requirements preempt ordinance. If the agency intends to impose any conditions, procedures, or requirements on the process, agreement or applicant, beyond what is specifically stated in the ordinance, the agency would be required to go through rule-making regardless of whether the ordinance makes rule-making discretionary. Even if the ordinance states that an agency "may" adopt rules, if the proposed processes, procedures and/or requirements imposed by the agency upon the applicant fall within the purview of HRS Chapter 91, the agency would be mandated by state law to comply with rule-making requirements. Conversely, if the ordinance contains sufficient specificity to inform the public, even if the ordinance states that an agency "shall" adopt rules, rules would not be mandated by HRS Chapter 91.

Submitted by the Office of the Managing Director for Agenda Item No. 4 Informational Briefing at the August 21, 2024 Committee on Government Efficiency & Customer Services Meeting