

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

April 6, 2010

**Committee
Report No.** _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Committee of the Whole, having met on March 15, 2010, makes reference to County Communication No. 09-14, from the Chair of your Committee, regarding litigation matters submitted by the Department of the Corporation Counsel.

By correspondence dated March 4, 2010, the Department of the Corporation Counsel requested consideration of the possible settlement of Cheryl Cabebe, et al. v. New Sand Hills, LLC, et al., Civil No. 09-1-0245(1). Attached to the request is a copy of the complaint and a proposed resolution entitled "AUTHORIZING SETTLEMENT OF CHERYL CABEBE, ETAL. V. NEW SAND HILLS, LLC, ET AL., CIVIL NO. 09-1-0245(1)". The purpose of the proposed resolution is to authorize the Department of the Corporation Counsel to settle the case.

Your Committee notes that the complaint seeks damages for various alleged violations of State and Federal laws related to the Plaintiffs' purchase of residential lots in the Sandhills Estates subdivision, within the Maui Lani Project District, and their inability to utilize the lots for residential purposes.

The Deputy Corporation Counsel provided a brief overview of the case. She explained that the lawsuit, brought by individuals who purchased two lots in Sandhills Estates in 2005, involves the application of building height restrictions within the subdivision. When the Maui Lani Project District received approval in 1990 for its second phase of the three-phase project district approval process, the Maui County Code (MCC) defined "building height" as "the vertical distance from finished grade to the highest point of the finished roof surface". In 1991, the definition of height was changed to mean "the vertical distance measured from a point on the top of the structure to a corresponding point directly below on the natural or finish grade, whichever is lower".

The Deputy Corporation Counsel informed your Committee that in a separate lawsuit, the Second Circuit Court prohibited the County from issuing building permits in the Sandhills Estates and Fairways subdivisions, if the building height did not comply with the 1991 MCC definition of height. Because of the amount of fill that the Maui Lani

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developers placed on the Plaintiffs' lots, the Plaintiffs are unable to comply with the building height limitation and, therefore, cannot receive the necessary building permits.

Your Committee notes that proposed legislation is pending before your Planning Committee to amend the definition of building height in the MCC.

Your Committee received written testimony from the attorneys for the developer of Sandhills Estates, urging the County "to take immediate action in enacting the proposed height amendment as part of a settlement of the lawsuit..." filed by the Plaintiffs. Your Committee noted that such action would violate the Sunshine Law because the proposed legislation was not included on the meeting notice. Furthermore, such a commitment would circumvent the charter-mandated procedure for enacting ordinances and would, in effect, bargain away the Council's legislative power. The Deputy Corporation Counsel assured your Committee that any discussion about settling this case would not involve an agreement to pass the proposed building height legislation pending before your Planning Committee.

The Deputy Corporation Counsel noted that a settlement conference is scheduled for June 4, 2010, and a trial is scheduled for July 6, 2010. The County has received a demand letter from the Plaintiffs' attorneys with an offer of settlement. She explained that if the Council is inclined to settle the case, it will be important that she attend the settlement conference with direction from the Council on the scope of her authority to settle the matter. In order to discuss the Plaintiffs' demand letter, the Deputy Corporation Counsel recommended that your Committee convene an executive meeting, closed to the public.

Your Committee voted to convene an executive meeting for the purposes of consulting with legal counsel on liability issues in the matter, pursuant to Section 92-5(a)(4), Hawaii Revised Statutes.

Following the executive meeting, your Committee reconvened in regular session. Based on the information received and the recommendation of the Department of the Corporation Counsel, your Committee voted 8-0 to recommend adoption of the proposed resolution to authorize the settlement of the matter under the terms proposed in the executive meeting. Committee Chair Molina, Vice-Chair Mateo, and members Baisa, Kaho'ohalahala, Medeiros, Nishiki, Pontanilla, and Victorino voted "aye". Committee member Johnson was excused.

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Your Committee of the Whole RECOMMENDS that Resolution No. _____, attached hereto, entitled "AUTHORIZING SETTLEMENT OF CHERYL CABEBE, ET AL. V. NEW SAND HILLS, LLC, ET AL., CIVIL NO. 09-1-0245(1)" be ADOPTED.

This report is submitted in accordance with Rule 7 of the Rules of the Council.



MICHAEL J. MOLINA, Chair

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Resolution

No. _____

AUTHORIZING SETTLEMENT OF CHERYL CABEBE, ET AL. V. NEW SAND HILLS, LLC, ET AL., CIVIL NO. 09-1-0245(1)

WHEREAS, Plaintiffs CHERYL CABEBE, ET AL. filed a Complaint in the Circuit Court of the Second Circuit, Civil No. 09-1-0245(1), against the County of Maui and Alan Arakawa, in his capacity as former Mayor of Maui County, claiming damages relating to the purchase of their Sandhills Estates lots; and

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, will attempt to reach a resolution of these cases by way of a negotiated settlement or Offer of Judgment; and

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under the terms set forth in an executive meeting before the Committee of the Whole; and

WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by the Department of the Corporation Counsel, the Council wishes to authorize the settlement; now, therefore,

Resolution No. _____

BE IT RESOLVED by the Council of the County of Maui:

1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Committee of the Whole; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

3. That it hereby authorizes the Director of Finance of the County of Maui to satisfy said settlement of this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY:



MADELYN S. D'ENBEAU
Deputy Corporation Counsel
County of Maui