

COUNCIL OF THE COUNTY OF MAUI
**POLICY AND INTERGOVERNMENTAL
AFFAIRS COMMITTEE**

December 19, 2014

**Committee
Report No.** _____

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

Chair and Members:

Your Policy and Intergovernmental Affairs Committee, having met on December 8, 2014, makes reference to County Communication 13-41, from Council Chair Gladys C. Baisa, regarding litigation matters.

By correspondence dated May 17, 2013, Councilmember Mike White transmitted a proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL REGARDING THE POTENTIAL MISUSE OF COUNTY FUNDS". The purpose of the proposed resolution is to authorize the employment of special counsel, for a sum not to exceed \$20,000, to advise and represent the Council regarding the potential misuse of County funds appropriated for the rehabilitation of the Old Wailuku Post Office.

Your Committee notes that by County Communication 14-17, the County Auditor informed the Council an audit of expenditures from the Fiscal Year ("FY") 2012 Budget appropriation for the Old Wailuku Post Office Rehabilitation Project had been included in the Office of the County Auditor's plan of audits, proposed to be conducted in the remaining six months of FY 2014.

Your Committee further notes that by County Communication 14-171, the County Auditor informed the Council the audit of expenditures from the FY 2012 Budget appropriation for the Old Wailuku Post Office Rehabilitation Project is an ongoing project for FY 2015.

Because the County Auditor has undertaken the audit, it appears unnecessary for the Council to pursue its own investigation at this time. Therefore, special counsel to advise and represent the Council is also unnecessary, and the correspondence transmitting the proposed resolution can be filed.

COUNCIL OF THE COUNTY OF MAUI
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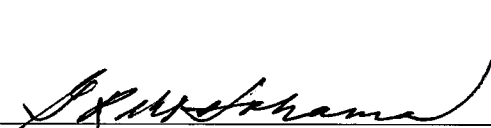
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**Committee
Report No.** _____

Your Committee voted 7-0 to recommend filing of the correspondence from Councilmember Mike White, transmitting the proposed resolution. Committee Chair Hokama, Vice-Chair Couch, and members Carroll, Cochran, Crivello, Victorino, and White voted "aye". Committee members Baisa and Guzman were excused.

Your Policy and Intergovernmental Affairs Committee RECOMMENDS that the correspondence dated May 17, 2013, from Councilmember Mike White, transmitting the proposed resolution, attached hereto, be FILED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



G. RIKI HOKAMA, Chair

pia:cr:14001(18)aa:cmn

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May 17, 2013

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**OFFICE OF THE
COUNTY COUNCIL**

MEMO TO: G. Riki Hokama, Chair
Policy and Intergovernmental Affairs Committee

F R O M: Mike White 
Council Member

SUBJECT: **TRANSMITTAL OF LEGISLATIVE PROPOSAL RELATING TO
COUNCIL EMPLOYMENT OF SPECIAL COUNSEL REGARDING THE
POTENTIAL MISUSE OF COUNTY FUNDS (PAF 13-150)**

The attached legislative proposal pertains to Item PIA-1 on your committee's agenda.

paf:kmh:13-150d

Attachment

Resolution

No. _____

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL REGARDING THE POTENTIAL MISUSE OF COUNTY FUNDS

WHEREAS, the Council alone is authorized to retain or employ special counsel by resolution adopted by a two-thirds vote, pursuant to Section 3-6(6) of the Revised Charter of the County of Maui (1983), as amended; and

WHEREAS, when asked whether the County violated the Fiscal Year (“FY”) 2012 Budget (project description from the FY 2012 Program Budget attached as Exhibit “A”) or other laws by entering into a contract to demolish the Old Wailuku Post Office and a contract to begin the Kalana O Maui master plan, the Corporation Counsel, in a memorandum dated April 15, 2013 (attached as Exhibit “B”), declined to provide a legal opinion, citing Rule 1.13(f) of the Hawaii Rules of Professional Conduct; and

WHEREAS, the Corporation Counsel suggested alternative courses of action for the Council to consider, including retaining special counsel; and

WHEREAS, the Department of the Corporation Counsel is unable to provide legal advice and representation to the Council on the question of whether the above-referenced contracts and associated expenditure of County funds were lawful; and

WHEREAS, the Council finds that there is a real necessity to retain special counsel to advise and represent the Council regarding the potential misuse of County funds; and

WHEREAS, the Council further finds it to be in the best interest of the County of Maui to provide special counsel to the Council in this matter; now, therefore,

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

1. That special counsel shall be retained or employed to advise and represent the Council regarding the potential misuse of County funds with respect to the above-referenced contracts; and
2. That the special counsel shall report to the Council’s Policy and Intergovernmental Affairs Committee on matters including:

Resolution No. _____

- a. Whether any County official violated Section 9-12(1) of the Revised Charter of the County of Maui (1983), as amended; the FY 2012 Budget; Chapter 3.44, Maui County Code; or other laws by entering into the above-referenced contracts and spending funds appropriated for the rehabilitation of the Old Wailuku Post Office for those contracts;
 - b. If violations did occur, what recourse is available to the Council to address the violations on behalf of the citizens of the County of Maui; and
3. That the total compensation for the employment of special counsel shall not exceed \$20,000; and
 4. That special counsel shall take all possible steps to minimize the level of attorneys' fees and costs; and
 5. That the hourly rate for the lead attorney shall not exceed \$295; and
 6. That the hourly rate for associate attorneys, if any, shall not exceed \$210; and
 7. That the hourly rate for paralegals, if any, shall not exceed \$145; and
 8. That the compensability of costs shall be in general accord with the intent of 28 U.S.C. Section 1920; and
 9. That the compensable costs shall include: (1) fees for printing and witnesses; (2) fees for copies necessarily obtained for use in the case; (3) fees of the clerk and marshal; (4) fees of the court reporter for necessary transcripts; (5) docket fees; and (6) compensation of court-appointed experts and interpreters; and
 10. That the non-compensable costs shall include: (1) telephone calls; (2) facsimile charges; (3) postal charges; (4) messenger charges; (5) fees for computerized legal research; (6) travel, unless justified by extraordinary or compelling circumstances; (7) investigative expenses; and (8) other costs reasonably considered part of the law firm's overhead; and
 11. That in instances of travel, both inter-island and out-of-state travel shall include travel on regular coach economy fare and must be pre-approved by the contract administrator; and

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12. That increases in the total compensation authorized or substantial changes to the responsibilities of the parties shall require prior Council approval; and
13. That the conduct of special counsel in this matter shall reflect special counsel's understanding that the County of Maui is a public entity that has obligations, concerns, and interests that may extend beyond those of a similarly situated private litigant; and
14. That special counsel shall specifically advise the Council whether the Council is justified in pursuing judicial remedies with respect to the violations of law that might have occurred relating to the contracts and expenditure of County funds to demolish the Old Wailuku Post Office and begin the Kalana O Maui master plan, but shall not initiate legal proceedings on the Council's behalf unless the Council adopts a resolution approving such action; and
15. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, the Director of Finance, and the Director of Council Services.

SIX YEAR CAPITAL PROGRAM

Wailuku-Kahului

Old Wailuku Post Office Rehabilitation

District Wailuku-Kahului

Department Management

Project Type Government Facilities

Description and Justification Rehabilitation of Old Wailuku Post Office acquired by the County of Maui in 2009 to allow for occupancy for offices, meeting rooms, and storage. Improvements anticipated include rehabilitation of roof to prevent water intrusion and to extend life span, upgrade 50-year old electrical, removal of asbestos on the first and second floors, removal of lead where necessary throughout building, removal of mold in the basement, fire sprinkler improvements, exterior concrete repairs, and necessary structural repairs.

Operating Impact No impact on staffing or operating budget anticipated.

Anticipated Life 20 Years

\$ in 1,000's

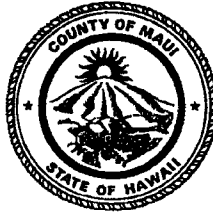
Project Phase	Fund	Prior Yrs Encl	Fiscal Year						6-Yr Total	
			2011 Appr	2012	2013	2014	2015	2016		2017
Construction	GB				4,250					4,250
Design	LB			1,500						1,500
TOTAL		0	0	1,500	4,250	0	0	0	0	5,750



Old Wailuku Post Office (right) with County Building and Old Wailuku Courthouse

Fund Source: BW = Bikeway Fund GB = G.O. Bond GF = General Fund FD = Federal Grant HF = Highway Fund LBF = Lapse Bond Fund OT = Other PA = Park Assessment Fund SRF = State Revolving Loan ST = State Grant SW = Solid Waste Fund WF = Wastewater Fund WR = Water Restricted Fund WU = Water Unrestricted Fund

ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
Corporation Counsel

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April 15, 2013

MEMO TO: MIKE WHITE, CHAIR
BUDGET AND FINANCE COMMITTEE

FROM: PATRICK K. WONG
CORPORATION COUNSEL

SUBJECT: Amending FY 2013 Budget: Kalana O Maui Campus Expansion (BF-29)

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OFFICE OF THE
COUNTY COUNCIL

This memorandum is in response to Budget and Finance Committee Chair, Mike White's request dated March 25, 2013, wherein the following questions were asked:

1. Did the *County* violate Ordinance 3840 (2011), Draft 1; or Ordinance 3837 (2011) by entering into a contract to demolish the Old Wailuku Post Office? Please explain.
2. Did the *County* violate Ordinance 3840 (2011), Draft 1; or Ordinance 3837 (2011) by entering into a contract to begin the Kalana O Maui master plan? Please explain.
3. If it is determined that Ordinance 3840 (2011), Draft 1; or Ordinance 3837 (2011) was violated:
 - a. What is the status of the contracts to demolish the Old Wailuku Post Office and begin the Kalana O Maui Master Plan?
 - b. What recourse does the Council have to address these violations?

EXHIBIT 'B'

Initially the aforementioned questions were assigned to a deputy corporation counsel with a response deadline of April 5, 2013. However, after closer review of the questions presented, we are compelled to provide context and guidance on questions propounded to the Office of the Corporation Counsel as those questions relate to the County of Maui ("County"). Continued patience and consideration in this delayed response is greatly appreciated.

Pursuant to Section 8-2.3 of the Charter of the County of Maui ("Charter"), the Corporation Counsel shall "be the chief legal advisor and legal representative of the *County of Maui*; of the council, the mayor, all departments, and all boards and commissions; and of all officers and employees in matters relating to their official duties." By operation of the Charter, an attorney client relationship exists between the Corporation Counsel and the County. Therefore, in responding to your questions, we must first look to the Hawaii Rules of Professional Conduct ("HRCP") in evaluating and responding to questions directed toward action or inaction of a client.

HRCP Rule 1.13(f) provides in pertinent part, as follows:

If a government lawyer knows that an officer, employee or other person associated with the government is engaged in action, intends to act or refuses to act in a matter related to the lawyer's representation that is a violation of a legal obligation to the government or the public, or a violation of law which reasonably might be imputed to the government, the lawyer shall proceed as is reasonably necessary in the best interest of the government or the public. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, governmental policies concerning such matters, governmental chain of command, and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the

governmental functions. Such measures may include among other things:

- (1) asking for reconsideration of the matter;
- (2) referring the matter to a higher authority in the government, including if warranted by the seriousness of the matter, referral to the highest government official that can act in behalf of the government on the particular matter as determined by applicable law even if the highest authority is not within the agency or department the lawyer represents; and
- (3) advising that a separate legal opinion on the matter be sought and considered; and
- (4) divulging of information to persons outside the government pursuant to the limitations provided in Rule 1.6.

Therefore, based on Rule 1.13(f), HRCP, we shall proceed as is reasonably necessary and in the best interest of the County while minimizing the disruption of the government functions. Additionally, the relevant comments to Rule 1.13 states that “when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved.”

Based on the questions presented, the applicable Rules of Professional Conduct, the best interests of the County, and giving due consideration to the events in its entirety, we suggest one or more of the following:

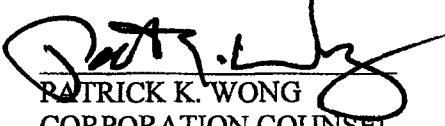
1. Reconsider the matter by amending the FY2012 budget ordinance to clearly rectify the use of FY2012 funds relating to the demolition of the Old Wailuku Post Office and the initial master planning of the Kalana O Maui Campus Expansion Project; and/or
2. Refer the matter to a higher authority in the government; and/or
3. Seek and consider a separate legal opinion on the matter from Special Counsel retained pursuant to Section 3-6(6) of the Charter; and/or

Mike White, Chair
Budget and Finance Committee
April 15, 2013
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4. Subject to the limitations of HRCP Rule 1.6 relating to confidentiality of client communication, divulge the information to persons outside the County.

Please understand the context within which this response is provided and please recognize the unusual nature of the matter. Should you need additional information or need further clarification, please do not hesitate to contact me.

Respectfully submitted,


PATRICK K. WONG
CORPORATION COUNSEL