

# COMMITTEE OF THE WHOLE

Council of the County of Maui

## MINUTES

December 18, 2015

Council Chamber, 8<sup>th</sup> Floor

**CONVENE:** 1:37 p.m.

**PRESENT:** Councilmember Don S. Guzman, Chair  
Councilmember Stacy Crivello, Vice-Chair  
Councilmember Robert Carroll  
Councilmember Elle Cochran (out 2:10 p.m.)  
Councilmember Don Couch  
Councilmember Riki Hokama  
Councilmember Michael P. Victorino (in 1:58 p.m.)  
Councilmember Mike White

**EXCUSED:** Councilmember Gladys C. Baisa

**STAFF:** Carla Nakata, Legislative Attorney  
Sharon Brooks, Legislative Attorney  
Clarita Balala, Committee Secretary

Ella Alcon, Council Aide, Molokai Council Office (via telephone conference bridge)  
Steve Selee, Legislative Analyst, assisting the Lanai Council Office (via telephone conference bridge)  
Dawn Lono, Council Aide, Hana Council Office (via telephone conference bridge)

**ADMIN.:** *Seated in the gallery:*  
Patrick K. Wong, Corporation Counsel, Department of the Corporation Counsel  
Edward S. Kushi, First Deputy Corporation Counsel, Department of the Corporation Counsel

**PRESS:** *Akaku: Maui Community Television, Inc.*

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**COW-1: SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL FOR THE 2015-2017 TERM** (CC 15-90)

CHAIR GUZMAN: . . .*(gavel)*. . . The Committee of the Whole shall now come to order. I'm Don Guzman, the Chair of the Committee. Before we begin, I would like to make a short announcement. Please put your cell phones on silence mode. I'm going to introduce our Members for today's meeting. We have our Vice-Chair of the Committee, Stacy Crivello.

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VICE-CHAIR CRIVELLO: Aloha, Chair.

CHAIR GUZMAN: Good afternoon. We have Bob Carroll.

COUNCILMEMBER CARROLL: Merry Christmas, Chair.

CHAIR GUZMAN: Merry Christmas. Elle Cochran.

COUNCILMEMBER COCHRAN: Aloha, Chair.

CHAIR GUZMAN: Don Couch.

COUNCILMEMBER COUCH: Aloha, Chair.

CHAIR GUZMAN: Aloha. Riki Hokama.

COUNCILMEMBER HOKAMA: Mr. Chairman.

CHAIR GUZMAN: And Mike White --

COUNCILMEMBER WHITE: Aloha.

CHAIR GUZMAN: --Chair of the Council. Joining us later will be Mike Victorino. Excused is Gladys Baisa. For our Staff, we have our Committee Secretary, Clarita Balala; our Legislative Attorney, Carla Nakata, and we also have our Legislative Attorney, Sharon Brooks. I'm gonna go ahead and check in with our District Offices. In, Hana Office, are you there?

MS. LONO: Good afternoon, Chair. This is Dawn Lono at the Hana Office.

CHAIR GUZMAN: Good afternoon. In Lanai Office, is, Ms. Fernandez, are you there?

MR. SELEE: Today this is Steve Selee in the Lanai Office. Aloha, Chair.

CHAIR GUZMAN: Oh, yes, okay. Sorry. On Molokai Office?

MS. ALCON: Good afternoon, Chair. This is Ella Alcon on Molokai.

CHAIR GUZMAN: Oh, good afternoon, Ms. Alcon. Are there anyone signed up to testify?

MS. NAKATA: No, Mr. Chair.

CHAIR GUZMAN: Okay. I'm gonna check back with our District Offices, which I should have asked initially. In Hana Office, is there anyone wishing to testify?

MS. LONO: There's no one waiting to testify at the Hana Office.

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CHAIR GUZMAN: Thank you. In Lanai District Office, is there anyone wishing to testify?

MR. SELEE: There is no one waiting to testify on Lanai.

CHAIR GUZMAN: And on Molokai Office, is there anyone wishing to testify?

MS. ALCON: There is no one here on Molokai waiting to testify.

CHAIR GUZMAN: Okay. Thank you very much and Merry Christmas. Have a great weekend. Without any objections, Members, would, I'd like to close public testimony?

COUNCILMEMBERS: No objections.

CHAIR GUZMAN: Okay. Public testimony is now closed. Turning to our only item on today's agenda, COW-2, Special Counsel to Advise and Represent the Council for the 2015-2017 Term. I'm, this is before us, the Committee is in receipt of the following: the County Communication 15-90, from the Council Chair Mike White, transmitting a proposed resolution to authorize the employment of special counsel to provide independent legal advice and representation to the Council for the 2015-2017 Council term, for a total compensation not to exceed 50,000 per fiscal year. And No. 2, the Correspondence dated December 11, 2015, from Council Chair Mike White, transmitting a revised proposed resolution entitled Authorizing the Employment of Special Counsel to Advise and Represent the Council on Certain Matters for the 2015-2017 Term. The revised proposed resolution increases the total compensation limit to 75,000 per fiscal year, and provides additional bases for the retention of special counsel by the Council. The Committee may consider whether to recommend adoption of the revised proposed resolution, with or without further revisions. The Committee may also consider the filing of County Communication 15-90 and other related matters. So, as we begin, I think we will go ahead and we'll have the resolution, the amended resolution read in its entirety, so that the Members have a full understanding.

MS. NAKATA: Yes, Mr. Chair. AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL ON CERTAIN MATTERS FOR THE 2015-2017 TERM. WHEREAS, the Council has found a frequent need for independent legal advice and formal legal opinions; and WHEREAS, Section 8-2.3(2), Revised Charter of the County of Maui (1983), as amended, provides that the Department of the Corporation Counsel is the chief legal advisor and representative of the County, including both the legislative and executive branches of government; and WHEREAS, Charter Section 3-6(6) authorizes the Council, by a two-thirds vote, to retain or employ special counsel for any special matter presenting a real necessity for such employment; and WHEREAS, a real necessity for the Council to employ special counsel exists when the Department is unable to provide legal advice and representation to the Council on questions presenting an actual or potential conflict of interest with the executive branch; and WHEREAS, the Council has an occasional need to enter into litigation against the executive branch, as in Maui County Council v. Thompson, 84 Haw. 105 (1996), wherein the executive branch is represented by the

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Department, and the Council must employ special counsel; and WHEREAS, the Council finds that a structural bias exists that leads the Department to inherently favor the executive branch in its advice and opinions because the Mayor is the only official who can initiate termination of the Corporation Counsel under the Charter and the Department is an executive-branch agency under the Mayor's management; and WHEREAS, the Council may from time to time require confidential advice from its attorney, not subject to disclosure to the Mayor, in instances where the Department has an actual or potential conflict of interests; and WHEREAS, specific examples of issues or actions for which the Council may have benefited, or may yet benefit, from independent advice from special counsel include the following: On June 18, 2014, the Mayor issued an Employee Communication Directive, a copy of which is attached hereto as Exhibit "1," purporting to limit the exchange of information between the executive and legislative branches; and On October 13, 2015, the Mayor made a Uniform Information Practices Act request to the Chair of the Council's Policy and Intergovernmental Affairs Committee, a copy of which is attached hereto as Exhibit "2," seeking among other things, executive meeting minutes relating to the Old Wailuku Post Office controversy, in which the Arakawa Administration's exceedance of authority was questioned; and In the context of requests for approval as to form and legality of a proposed bill relating to press release guidelines and requirements and a proposed bill relating to public nuisance information and referral, the Department of the Corporation Counsel has opined that a basis for their inability to approve the bills was Section 3-8(2) of the Charter, which states: "Neither the council nor its members shall give orders to any county employees or county officers other than those appointed pursuant to Section 3-7 or Article 5, either publicly or privately"; and WHEREAS, the Council finds that, because of a conflict of interests, there is a real necessity to retain special counsel to investigate and evaluate the propriety and effect of the Mayor's actions on certain matters and to advise the Council as to whether judicial remedies are appropriate in response thereto; and WHEREAS, the Council finds that there is a real necessity to retain special counsel to advise and represent the Council during the 2015-2017 term on matters that represent an actual or potential conflict of interests; 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 on such matters; now, therefore, BE IT RESOLVED by the Council of the County of Maui: 1. That the Council hereby authorizes the employment of special counsel, to be selected by the legislative branch's chief procurement officer, to advise and represent the Council on matters during the 2015-2017 term that represent an actual or potential conflict of interests; and 2. That the special counsel shall report to the Council's Committee of the Whole on all matters which represent an actual or potential conflict of interests; and 3. That such matters may include: a. The legality of the Mayor's Employee Communication Directive and, if necessary, representation of the Council against the Administration in a declaratory action; b. Whether Charter Section 3-8(2) limits the Council's legislative authority; c. The legality of proposed bills and resolutions the Department of the Corporation Counsel has refused to sign; and d. Defense of the Council if the denial of the Mayor's Uniform Information Practices Act request for Old Wailuku Post Office results in a legal conflict; and 4. That total compensation for the employment of special counsel shall not exceed \$75,000 per fiscal year; and 5. That special counsel shall take all possible steps to minimize the

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level of attorneys' fees and costs; and 6. That the hourly rate for the primary attorney shall not exceed \$350; and 7. That the hourly rate of associates shall not exceed \$310; and 8. That the hourly rate of paralegals shall not exceed \$160; and 9. That compensability of costs shall be in general accord with the intent of 28 U.S.C. Section 1920 and 10. 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 11. 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 12. 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 Council Chair; and 13. That special counsel shall not initiate legal proceedings on the Council's behalf unless the Council adopts a resolution approving such action; and 14. That increases in the total compensation authorized or substantial charges [sic] to the responsibilities of special counsel shall require prior Council approval; and 15. 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 16. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, the Director of Finance and the Director of Council Services.

CHAIR GUZMAN: Thank you. So, the introducer of the resolution is Chair Mike White. You may have the floor at this time.

COUNCILMEMBER WHITE: Thank you, Chair. And you know, I think all of us are very impressed with a lot of the work that is done by Corporation Counsel, but there are items from time to time that in my view require that we have our own second opinion as the case may be. Special counsel in my view is needed to provide independent, unbiased and as importantly, confidential advice to the Council. This is a real necessity. You know, we, under the Charter, Corporation Counsel is the chief legal advisor to both the Administration and the Council. But recently, situations have arisen where the Council's and Mayor's interest come into a bit of conflict. And Corporation Counsel has consistently supported the Administration's perspectives and legal opinions have uniformly favored the administrative branch or Executive Branch, despite clear authority in a argument supporting the view of the Legislative Branch. There's several specific justifications for special counsel and the first is over the last year or so, Corp. Counsel has refused to sign off on bills and resolutions. And the question that comes up is does the Charter prohibition on a Councilmember's giving direct orders to Administration personnel actually limit the Council's ability to pass laws? And just for perspective, there are somewhere in the neighborhood of 240 places in the Code that say either the Mayor or a specific department head shall do something. Well that's not us telling them directly that they need to do something, we're setting policy. So, our Staff's research shows that that is not a correct legal finding in their view so we need to, we need assistance in determining that. In

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addition to that, there's questions about the employee communication directive and does Administration have the authority to prohibit Executive to Legislative Branch communications and to what degree do they have that authority? And once again, our Staff's research finds that that directive may not be correct and I think it's important for us to get an answer to that. Third, the Mayor's records request relating to the old Wailuku Post Office, are the Administration and Council headed for litigation because of that request of confidential executive session minutes? I don't know, but that may become the case. And fourthly, the Council's need for confidential advice. We've had a number of occasions where things that I believed were being shared in a situation where what I was saying was going to be held in confidence, were actually shared with department heads or other members of the Administration. And we had a situation in which you had presented a bill for review and requested an opinion and that opinion was shared with the Administration. We had the situation with naming of special counsel for individuals in one of our recent cases of litigation where you and I had been in a discussion the day before and had been given assurances from Corp. Counsel that they would be able to represent the individuals. But following the discussion that afternoon, which I thought was subject to attorney-client privilege, the Administration was informed and we had several department heads show up at the hearing the next day voicing, you know, significant concern if we weren't gonna pass something. Well, we had no intention of not passing it, but that conversation that I thought was confidential, turned out not to be the case. So it's for these reasons that I feel we have a real necessity to have our own counsel, not that we're gonna use all the time, but just simply to have available to us to answer in a short amount of time whether something is gonna be found in favor of Corp. Counsel or found in favor of our Staff attorneys. I'd also like Corp., a special counsel opinion on whether or not the conversations that we have with our attorneys in-house should be remaining confidential. But it, we've been told by Corp. Counsel that the confidentiality is within the entire County, not in the Legislative Branch and not with us, individually. So it turns out that it's up to Corp. Counsel whether they determine to keep something confidential or not. This was a shock to me and I think it's probably a shock to other Members that attorney-client privilege does not apply to conversations we have with our attorneys. So I think it's important that we find out if that's the right interpretation or not, so. Thank you very much, Chair.

CHAIR GUZMAN: Thank you. Thank you, Chair White. Is there any, I'm going to open up the floor for discussion. Do, Mr. Hokama, would you like to --

COUNCILMEMBER HOKAMA: Chairman.

CHAIR GUZMAN: --weigh in on...

COUNCILMEMBER HOKAMA: Mr. Chairman, thank you. I think all of the Members have something important that they may wish to share, Chairman, so thank you. Historically, you know, I always viewed Corporation Counsel and how previous Corporation Counsels have related to the Council or Legislative Branch, it just surprises me that we have to come to this point in this point in time within the County's governance. Because I felt in the past, Corporation Counsels tried to as best

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can balance the needs of the Legislative Branch and the Administration. And as Mr. White just shared, they need to represent all, so, I find it kind of interesting the comment about confidentiality stays within the general body of the County. Well, that disturbs me, Chairman. When we are in settlement negotiations in executive session, besides Corp. Counsel or an appropriate resource of a department, there's nobody else there. And the only ones that should be making comment about that litigation or case should come from the Council itself or through our attorney that we authorize to send a prepared statement on our behalf. If you notice, there's many times where the Administration is giving out press releases and they're not even in executive session, so how the hell do they have information to give to the public when we are still in litigation and everything still needs to be confined and confidential until a decision is made on that case? That is disappointing. And of course, we all know how media is nowadays, undisclosed source, unidentified source. Well, if you that manini about it, don't say nothing if you that afraid to state who is the source of providing what I would say at times not accurate information. Regarding this subject, I find it ironic, especially with the attachment of the Mayor's request for information. Of course with the Legislative Branch, we deal with open Sunshine Laws and whatnot, yet, when Council needed information from the Executive Branch regarding certain particular issues, they choose not to share or they hide behind the fact that I need one special counsel, one attorney. And for me, that's telling because if the employees, especially collective bargaining employees, follow the contract and do what their job is, why should they be afraid? They shouldn't be even in a situation where the employee will even consider doing something improper. They have a contract to protect them. They have a collective bargaining agent to protect them. They have public law to protect them. So I find it interesting how this is moving forward and I support the request because for me, this continually tells me three things about this Administration that I'm gonna reiterate over and over because this is their legacy for me. I cannot trust 'em, they don't have integrity, and there's no consistence in application of law within this County from the Administration. And that's a sad legacy for this County. But that's the kind of Administration we have. 'Cause I don't trust 'em and I don't think they have integrity in what they tell the Council. And so a lot of my decision is based on that position and they have yet to show us that they deserve the second consideration to be given the additional trust. But it comes with integrity, Chairman. It comes with, I would say, being upfront with the public and stop hiding behind this or that. Because Council responds to actions by the Administration. We don't respond before something happens. And that's why when we do audits, when we do our holding the Administration accountable, it's about actions they have done, not actions they may do or I thinking about doing. We only review what they do in the past and whether it was appropriate or not. So I find it interesting how we've come to this, but I am in no doubt that we need another legal voice to properly represent us, to maintain the confidentiality, and if need be, I don't have a problem looking at legislation to put into the Code to further emphasize and reinforce the Council's position. And like a previous Administration, I don't have a problem going to court to prove the Council's position either because I rather deal with rulings than opinions. Because Corp. Counsel's opinion is as good as another attorney's opinion that's licensed in the State of Hawaii, passed by the Hawaii Bar Association, until then, it's an opinion. And to me, I got my own opinions. So, Chairman, when you ready, I'm

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happy to consider the motion and at this time, I am very much in favor of securing special counsel sooner than later. And again, Chairman, I hope we will reconsider reinforcing it through legislation to put in the Code, because we are not prohibited as the powers given to us by the people under the Legislative Branch, I think we need to follow up. Thank you.

CHAIR GUZMAN: Thank you, Mr. Hokama. Is there any other Members...Mr. Couch?

COUNCILMEMBER COUCH: Thank you, Mr. Chair. And you know, I find it kind of disturbing, too, that you know, things that are said here in executive session I assumed were here in executive session. I also find it disturbing and I'd sure like to hear that opinion. You know, I'm sure Mr. White is hearing it correctly when it was given to himself, but that, anything we say to Corporation Counsel individually is not privileged communication, I'm, I would be very disturbed if that were the case as well. You know, that's, it's been my assumption all this time that, you know, anytime we have a discussion with Corporation Counsel that that's privileged communication. As far as special counsel, you know, you're in the business so you've talked about, I guess they call it, Chinese wall, but I think we turned, changed it to firewall so to make it a little more politically correct, but there's the whole firewall situation and we've had Corporation Counsel sit here and say, look, we can firewall everybody off and it's against their, the code of conduct for them to make the discussions, to break that firewall, so I don't know about going all the way to special counsel yet. I mean, I would like to give that a try. The other thing here is, you know, one of the where, or be it resolved, the legality of the Mayor's employee communication directive, I would just want to point the Members to Maui County Code, Chapter 2.60.010, that the Council, not this Council, 1977 Council created. It says, number one, the only thing in that section is, all communications to the Council from department heads shall be made through the Mayor, except however the Corporation Counsel may respond directly upon request made by Council relative to an investigation by the Council of the operations of any department or function of the County and in any subject matter upon which the Council may legislate. So, right there it says, I mean, this, a Council, not this particular body said, no, those communications have to be, gone through the Mayor, so, I have an issue with that being in here as a reason. Now, I also have an item, I think it's in PIA to change that or repeal that. We haven't heard it yet, it's been in PIA, I think, for two or three years now. Yeah. So, that one I have an issue with. The, I also, but like I said, I'm real concerned that anything we talk to about with the Corporation Counsel can be shared with other people in the County, that that has a, is concerning, disconcerting to me. There are some, there is some wording in here that I can't support right now, so, as it stands right now, I can't support it, but I can certainly support a bunch, you know, some revisions to this. But at this point, I have some issues with the wording in the resolution so. Thank you.

CHAIR GUZMAN: Okay. Thank you, Mr. Couch. Mr. White?

COUNCILMEMBER WHITE: Thank you, Chair. I'd just like to...

CHAIR GUZMAN: Followed by Mr. Victorino.



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COUNCILMEMBER WHITE: I'd just like to point out, a point of clarification. Mr. Couch made reference to executive session and I don't want it to be thought that I was referring to things that happened in executive session.

COUNCILMEMBER COUCH: Oh, okay.

COUNCILMEMBER WHITE: What I was referring to is an opinion that Chair Guzman had requested and the other was a conversation that took place in my office.

COUNCILMEMBER COUCH: Oh, okay.

COUNCILMEMBER WHITE: So, nothing having to do with executive session.

CHAIR GUZMAN: Mr. Victorino?

COUNCILMEMBER VICTORINO: Thank you, Chair. I'm sorry I'm late, but you know, I had a conference call and I will share that with Mr. White and the rest after the meeting is done. But I did have the TV on and we were kinda keeping track on what was going on. First of all, I'm concerned like the others about our discussions and that it gets back to the Administration and others what we have discussed in closed sessions. Okay. In executive session, whatever. That's, you know, I don't know of, you know, the opinion that, at least what Mr. White had explained to me that anyone from the, that anyone in the County is privileged to that information is like, I don't think that's right. So I'm not sure how far that extends, so I want that to be looked into thoroughly. Because if we've had other issues here, what about when we're talking about issues like, for example, employee losses, workers' comp. and all that. Where does that lay? Now nobody's discussed that and I don't want to get into it, but I'd like to know that if we discuss something in here, it stays in here. And that's the first thing. Secondly, I'd like to have our own legal opinion because there have been times when you and me and others have sent down legislation and it's been sent back because the Administration doesn't agree with it. Oh, wait a minute. That's not the whole premise. We're sending it down. We're asking for our Corporation Counsel to review for legality and that's all we're asking for. We're not asking if the Administration agrees or not. That can come later. He wants to veto it, then that's fine. But that's not what we're here for. We're here to make legislation to help the people of Maui County and I don't agree that we've had those opinions come back and so, you know, we have to proceed without Corporation Counsel's approval. And I never like that feeling, you know. I think they, if we're talking about an issue, let's stick with the issue. Whether Administration agrees or not, they can come up later when we have it in Committee and tell us why not. That's not a problem. And the other area I'm concerned with is divided loyalties. You know, is there divided loyalty? I don't know and I think a lot of the attorneys that we work with are terrific people, but I'm always concerned about divided loyalties, especially if it's us and the Administration having a challenge on any issue. We're gonna have that. That's all part of the process. So, in listening to what was going on, there's a whole mess of other things, I, too, am not totally sold in what you're, what is being brought forth. I

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think there's some tweaking that needs to be done, but I appreciate what you've done, Mr. Chair, to, you know, bring this for discussion purpose. I appreciate Mr. White's efforts in this area. I don't totally agree, but there's many areas that I do agree with, so, I'd like some more work on it, but thank you very much for this opportunity and, you know, I thank all of my colleagues for their opinions and their manao because it's important we get it out on the floor so the public understands what this is all about. And even, Mr. Hokama, thank you.

CHAIR GUZMAN: Ms. Crivello, followed by Mr. Carroll.

VICE-CHAIR CRIVELLO: Thank you, Chair. I guess I would need, I would want to have some sort of clarification. I understand why we're trying to push this resolution through. But if I look at our powers of Council, it already signifies in Charter that we're able to retain by the two-third votes. So, how I'm reading this is for us to always have, we don't have to go through this article or Section 6. It's readily available. Okay. So, the other question I have is we do have Legal Analysts and or legal minds, I guess, in the Office of Council Service and how does, how do they compare to help guide us through different situations whether it's working on an ordinance or trying to get some kind of work done? And, you know, do they still then, do they go through special counsel, do they make their own opinions or do they still try and get opinions from Corporation Counsel? I think that those are the kind of dissecting I need to have part of this discussion and, you know, we also approve the Corporation Counsel, you know, and with that comes all the other deputies or what have you. So, I'm really, I really appreciate to have the accessibility to another opinion, but when do we draw some lines that, whose opinion are we really going to accept, I guess, is what I'm asking. Thank you.

CHAIR GUZMAN: Just to limit the scope of what this resolution is before you is special counsel is going to be retained specifically for these issues that are presented in the resolution, nothing more than that. And it's when the, and these issues are when there's a conflict between the Administration and the Council. And so every other work that is being done through Corporation Counsels remains the same. Just specifically, think of it as a getting a second opinion if you have a health concern and getting a second opinion by another physician on certain matters and so, these are the matters that are before us that the Council, or the leadership of the Council has questions on and needs to consult with a special counsel. It's been my understanding that because of the structure in which Corporation Counsel is set up, it's a difficult relationship, you know. I definitely feel their strain and their pressure because of the fact that they have to represent both branches. And it's like having two children and how do you then take one side over the other or build a Chinese wall to consult with one or the other. You know, the conflict lies in that, you know, it's the discretion of the, you know, Corporation Counsel whether it's so important that it, that he needs or that Corporation Counsel needs to share that information with the Administration or vice versa. So there are times where we just need a straight opinion regardless of whether it's going to affect the Administration or not. And these issues that have been placed before us are just specific and narrow enough to just have that second opinion and have it done and over with. These are questions that we have and they haven't

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been answered to, you know, I guess to our satisfaction and if the special counsel says, hey, we agree with Corporation Counsel, well, that's good. We're done and over with. But to have that second opinion, I believe is important for us to do, you know, our job as legislators. I really do sympathize with the position that Corporation Counsel has because of the structure it's set up at. Mr. Hokama? Oh, sorry, I apologize, Mr. Carroll?

MR. HOKAMA: I'm sorry. Mr. Carroll, please.

MR. CARROLL: Thank you, Chair. First of all, I'd like to say and thank the Chair for on the agenda I do not see where we might go to executive session and that makes me very happy because this particular discussion should be in open and it is. Thank you. You pretty much said what I was going to say and I don't like to repeat a lot of things, but basically, we put Corporation Counsel, the County has put Corporation Counsel in a position to where trust becomes an issue and that's really not fair to them. It really isn't. I trust them. I don't think they would do anything outside the scope of what they are hired to do. So we have put them in a bad position to begin with. This is one thing we're trying to do to try to make it to where we don't put them in that position. I wish there was some other way we could structure this. I wish we had somebody full-time for a County employee that was working for us, an attorney, but for the moment, I think this is probably the best action we can take. Saying that, I don't think it's really the best action. It's a stop-gap thing. We see it all in the newspapers and every place else about the relationship between this Council and the Administration. And it's the people's perception that there are a lot of problems inside here, there's a lot of perception outside there if a Councilmember should go over there and work with the Administration or something that he's selling out. Now this is just wrong. We need to get back on track. This is one thing that might take some of the bad feelings and some of the mistrust out of the equation, I would hope. So I will support this now, but I think we really need to continue looking at it. I think there are probably better ways we can do it because this to where, we're totally separate and don't work with each other is not the way we need to go. There needs to be collaboration. We need to be working with the department heads. We need to be working with the Administration. I work with the department heads every meeting I have. It's necessary. I could not do Land Use without working directly with the departments. We need to have those relationships. We need to have that understanding. So I'll support this today, but I hope we can continue to look at the structure that we have and improve on it. Thank you, Chair.

CHAIR GUZMAN: Thank you, Mr. Carroll. Is there any further comments, Mr. Hokama?

COUNCILMEMBER HOKAMA: Thank you, Chairman. And I want to thank my colleague. I appreciate those words, Mr. Carroll. I think you shared some very insightful perspective from your part, so, thank you. And again, Chairman, you look at the, what Council has done in the past as my colleague, Mr. Couch, brought up. But look at that point in time. It went from the ten years of Mayor Cravalho and Mayor Tavares. We just shifted to the Charter form of government not long before that, from a Board of Supervisors format. And again, if you look at what the County was like at

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that point in time and how things were operating, part of what you see in the Code is joint efforts of the Administration and the Council to try and find processes and procedures that made sense. Because in the past, there were a lot of departments because of relationships, you would have a frontline person going straight to the Councilor, not even going through the department head. And so part of it was how to get proper communication within branches of government. And again, I share that, Chairman, branches of government. We're not the same branch. And so, structurally we are going to have our differences because we have different jurisdiction and responsibilities of governance, so I understand that. But second, I would say, whenever Council found it necessary for special counsel and I don't think I'm wrong and Staff can correct me and I'm happy to be corrected, but I don't think Council has ever lost a court battle. Council's position, I believe, prevailed every single time we went to court and that says something. Because Corp. Counsel supported Administration every single time went to court. Okay. So I would say, look at that record, too. Because it says something about why Council took that venue and decided to go for a ruling. And the ruling vindicated the Council. It says something, Chairman. For me, it is major in what it says to us as councilors. So I would say that, again, within the terms of the request, I would say, unlike Mr. Carroll, we need to be very cognizant and disciplined in what we're gonna use special counsel for. I agree with what you and Mr. White is trying to set up properly. And again, I think there are times when I wish we could have that because I think it would help us in some of the decisions instead of deferring decisions, you know. And again, you know, for certain things, time doesn't diminish the importance or the priority of the issue. And for many, they wish time would just do that, erase the issue from the people's mind. Okay. But unfortunately, that is not our role. Our role is accountability of the Administration. And so I would say, Chairman, within the setup of the parameters I understand it and again, I'm, I can see Mr. Couch's point and Mr. Victorino, there may be areas of additional tweaking, but I still feel the Council needs to have this ability to secure licensed legal advice to represent the Legislative Branch properly. You don't see the State Attorney General sitting in the State Legislature advising the State Legislature on potential bills. They make their comments through the Governor's Office and it's either vetoed or not. I don't see the U.S. Attorney General sitting with the U.S. Senate and the U.S. House. My thing is, again, Corporation Counsel provides us two things, form and legality. Jurisdiction of policy is the nine of us, Chairman, not Corp. Counsel, not the ninth floor. It's embedded in the nine councilors...policy. And so, I will say, as policy issues and priorities, special, Corp. Counsel should be leaning toward us, the policy maker on policy issues. If they want to talk about application and implementation, maybe I can see them leaning toward the Administration, but in general, a policy thing, it's within our purview. That's our task given by the people. And so for me, I need the best legal advice and if it can be from special counsel, so be it. And maybe that's where we need to go in the future. Have it split. Because in the past, we only had County attorney. There was no prosecuting attorney. There was no Corporation Counsel. There was just the County attorney. And maybe Honolulu has something for us to consider. I'm not in favor of it in general, maybe we need to look at one elected County attorney, like the Big Island and City and County of Honolulu. Thank you, Chairman.

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CHAIR GUZMAN: Thank you. Just one moment. So, let me put my comment on the record, so. You know, I totally agree with everyone that has presented today and on, where I stand is that, we're not actually replacing Corporation Counsel. I think it needs to be understood that when there's a conflict between the Administration and the Council, Corporation Counsel is caught in between. And so these issues that are presented in the resolution are issues that are questions that we need to be answered and I know that Corporation Counsel may have tried to answer them, but there has been other circumstances that dictate or lend some type of, I wouldn't say, bias or there's an assumption that there's, you know, it's not coming clearly from a neutral stance or and so, I think at this point, to feel that we are comfortable, I think we need that third party just to say, okay, look, this Mayor's directive was legal. The, some of the bills that were not properly signed, well, that's okay. Corporation Counsel was justified or the other remaining issues within this reso, some type of reassurance or like I said, second opinion, that says, okay, we're on the right track or you're not on the right track. But I think we've done enough research, the Council Services side to come up with or at least found that the legal basis for some of these issues need further explanation or at least a special counsel to advise us and that's what we need. And it would be nice to have that special counsel now so that we could go into executive session and discuss this further and it would be the end of it, but we, in order to get special counsel to go into executive session, we have to pass a resolution to allow us to obtain special counsel and then at that point, we can discuss. We may not even need to go any further than that. Special counsel may advise us on what route we need to take in restructuring or other matters, but that's where I stand at this point. Is there any further...Mr. White?

COUNCILMEMBER WHITE: Thank you, Chair. And I just want to again, reiterate that this is not in reference from a confidentiality standpoint. This is not in reference to anything having to, that is having taken place in executive session. This is only with our personal, our one to one contacts with Corp. Counsel outside of executive session. The other thing I think is important to point out is that we have four issues here out of the dozens and dozens and dozens of issues that we deal with and through Corp. Counsel throughout the years and so, to me, this is not a, not at all against Corp. Counsel because they, as I said in the beginning, they do a very good job in the vast majority of things. This is simply allowing us to get a second opinion, ask the question, get the answer and move on. You know, whether we're right or whether they're right, it doesn't matter to me. But if we have a question, I think it's appropriate, fair and necessary for us to be able to get that answer that we're looking for so we can move on, whether it's a policy issue or whether it's something else. So I appreciate everybody's perspective and I, you know, but I think this is something we need to do because we need to be able to get, you know, advice on these issues and keep moving.

COUNCILMEMBER VICTORINO: Chair?

CHAIR GUZMAN: Mr. Victorino?

COUNCILMEMBER VICTORINO: Thank you. Well, Mr. Couch has been waiting --

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CHAIR GUZMAN: Oh, sorry, I apologize, mister...

COUNCILMEMBER VICTORINO: --a long time and you know, and he starts to cry, I don't want to keep that going, so let Mr. Couch go ahead.

CHAIR GUZMAN: You gotta raise...

COUNCILMEMBER COUCH: A little bit higher. Okay. 'Cause Ms. Crivello also has been raising her hand.

CHAIR GUZMAN: Sorry.

COUNCILMEMBER COUCH: Okay. What I'm trying to do is, you know, hopefully avoid any unnecessary use of our taxpayers' funds. We have the ability at least and maybe if the Members aren't comfortable with this, then, I understand, but the whole firewall issue. I mean that's code of, a code of conduct, you have initials for that, but the lawyer's code of conduct, I forgot what it's called. They can't do that. They can't break that confidentiality if we set up the firewall. I would be willing to work on that first before spending money. Also, somebody brought up a good point there. We have a, we have the potential to have, we have legislative analyst attorneys that talk about, you know, help us with crafting our laws. Is there, why can't we hire our own attorney downstairs to be our attorney for these second opinions if you're interested in doing something like that. Have somebody with that. That's a possibility. You know, we talk, and then, you mentioned that this is specific. This is actually fairly wide open in my opinion, of course I'm not a lawyer. If this were more specific, I'd be a little bit more amenable to it, but you know, it talks about occasional, Council has occasional need to enter into litigation. Well, last occasional need was 1996 and my question is, how many of those in, has happened since, you know, the '50s or whatever? I'm not sure that there's been a lot just to have somebody on staff or on call for something if it might come up. Still I'm a little bit concerned about that. I'm fine with the defense of, you know, one of the items being the defense of Council if the denial of the Mayor's Uniform Practices Act request for Old Wailuku Post Office results in a legal conflict, absolutely. But I would like to be it resolved to be more specific. It says in here such matters may include. Let's just say, we want to hire, if we're gonna hire outside counsel, special counsel, specifically say on this matter, this matter and this matter. We are pretty specific on price, which is good. I like that. I, like I said, I have concerns with a lot of the language in here, so, if we're, if we get to the point where we're gonna make any kind of motion or anything, I would like to go through the language and maybe clean it up. Make it more specific as opposed to kind of in general with some may's in here. And you know, what if we get a guy that, it sounds like if we get somebody and they say, yeah, well, Corp. Counsel's right, we're good to go, I'm just, have this fear of well, they, we don't like that opinion, so let's get another opinion. Because we all know how many, if you put three lawyers in a room, you get four different opinions. No offense, but, just like, you know, us, we, a lot of times all have separate opinions and sometimes we can agree and sometimes we can't so, it's just, where are we gonna draw the line? So, those are some of my concerns.

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Especially if, why can't we hire our own, I mean, to do, you know, we're having problems getting written off, the legislation getting written for form and legality so we have something we can do with that, what that person can do, can actually legally advise us. I'm not sure if our attorneys are, they're not hired to be our advisors. Can we legally hire an attorney to be an advisor just for Council? So that's what I want to find out. If we can legally hire as staff, to do more work than just special because I'm sure with staff, we're not gonna charge, we're not gonna pay 'em 350 an hour for, to keep 'em on staff. So those are some of the concerns I would have.

CHAIR GUZMAN: Yeah. It's duly noted on the, let me address, I'm sorry. Should I address your concerns first and then move on? But for the being specific or at least narrow in the resolution, you can't get any more specific than naming the dates of June 18<sup>th</sup>, the Mayor's employee communication, October 13, the Mayor Uniform Practice Act and then you have two other bills here that are named.

COUNCILMEMBER COUCH: No, I was talking about the be it resolved.

CHAIR GUZMAN: Oh.

COUNCILMEMBER COUCH: In the be it resolved.

CHAIR GUZMAN: Well, in, just to answer a few of your questions and I'm not stating my answers as the authoritative person, but it's my understanding that Council Service attorneys cannot serve to advise the Council for legal opinions and write up an independent legal opinion that could be presented to the courts if the, if there was a conflict, so.

COUNCILMEMBER COUCH: And just curious as to where that is written or why they, who says they can't?

CHAIR GUZMAN: No, that's what I've been, that's my understanding and it would be nice if we had special counsel to advise us of that and we could go into executive session and ask those questions. But at this point, we have to, let's pull it in, the scope here is basically when there's a conflict between the Administration and the Council. And these issues that are presented are issues that have been in conflict. So everything else, same as usual. There's, you know, Corporation Counsel is supposed to be serving both, us and the Administration, in all of their capacity. But just narrowing the scope to what is presented here in the resolution, so. Ms. Crivello?

VICE-CHAIR CRIVELLO: Thank you. You know, at the advice, perhaps, attorney from Council Service, you know, we seek opinions from Corporation Counsel. I may not agree with what comes out of there, but for me, personally, it can be frustrating that you cannot depend on your own legal staff to be able to feel that they're gonna help to make things move and yet, do we ever respect the feedback that we get from Corporation Counsel? So, what I'm hearing is and, you know, I don't have a problem for us to putting this through. My problem is I think there needs to be more specifics like Mr. Couch mentions and I truly would like to have more clarification as far as

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what we're paying out today with Council Service as to, you mention that that's not allowed. You know, it's just to help us to put policies together and then have that go through Corporation Counsel for their signature or refusal of signature. The, what I note also, our powers of Council is to legislate as Section 3-6, to conduct investigations of the operation of any department or function of the County. I think sometimes that can get hairy for us coming from the, from Council side and Corporation Counsel as far as Administration and representation on behalf of the County as a whole, you know. We're all there to, including Corporation Counsel and Administration and us, is to make sure that we're serving, we're here to take care of the County, which includes just about everything and everybody else. So, I don't have a problem with the tax dollars as far as us making that determination, but we also pay tax dollars for legal in Council Services, whether or not we should be able to retain a qualified attorney to be part of that organization as far as the third party, you know. Sometimes I feel we're walking on political eggshells that we're just so out of bent on how we're gonna accomplish what we're trying to pursue and, you know, it does get frustrating at times because it just takes such a long time for us to finish a process or get things out there so that becomes real and then we can implement what we're trying to legislate. And so, I think, too, it's what Mr. Carroll said, do we have the trust, you know, and, or do we, and I don't mean the subjective trust, I mean, do we trust the opinions that come back to us from Corporation Counsel? I see discussions or that comes out of Committee that perhaps Corporation Counsel in respond to Committee Chair's inquiry and then we just ignore it. You know, we have our own opinions what should be and not necessarily respect what comes back to us from Corporation Counsel. So to me is, as we have this probably available for us is I think sometimes we have to look is how do, when do we trust the department that we also have the authority to approve serving into that position? And if we don't, then shame on us for even pushing that through. And yes, we've had our challenges and we still do with Administration on, in these specific examples of issues, but I would like to hope that, you know, we don't have to go through Corporation Counsel and say, well, I don't like what they're saying, then go special counsel and then special counsel says, they're right. I'm just looking for something that cannot be so long through the processes for us to do our work. And I'm sorry if I'm going on and on, but I think it's important for us then to truly identify the roles of legal people that were paid for in our staff. If that's, that makes any sense and if it's correct what you're saying, then, clarify that for me with some sort of documentation so I can understand that better. I appreciate it. Thank you, Chair.

CHAIR GUZMAN: Is there...Mr. Victorino?

COUNCILMEMBER VICTORINO: Thank you, Chair. And first of all, I'm going to start by apologizing for my misunderstanding on this issue of confidentiality. The way I was explained it or the way I understood it was really a little bit off so I want to apologize to Corporation Counsel and others that I did make a mistake and I apologize for that. But going back to the mere fact of what is our duties and what is the duties that are at hand, I think, again, you have brought forth and Council Chair White has brought forth a document that in concept I support, but again, not in totality and I am sorry and I am being very honest upfront. I'd like some more work done on it, but I think



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it's necessary. I think there are times when we've been in that quandary as Ms. Crivello has mentioned, so some guidelines would be really appreciative. I can be honest. There have been times when I had Corporation Counsel, I had our Legislative Attorney and I had the department head and asked 'em one question and all three of them gave me a different answer. And that has happened. And I'm like, wow, how do we ever achieve anything. But sometimes, it's the way the situation is perceived by each individual. You know, attorneys, like everyone else, interprets what the law says and, you know, you guys all do a good job, I'm not knocking. It's like insurance, I know there are parameters for which we all fall under. So, I'm willing to say I'd like to see more work done on this and something a little bit more specific like Mr. Couch said. Other than that, I think it's time. I think it's time, Mr. Guzman, and I appreciate what you folks are trying to accomplish.

CHAIR GUZMAN: Do you have any...

COUNCILMEMBER VICTORINO: So, thank you.

CHAIR GUZMAN: Thank you, Mr. Victorino. Do you have any suggestions as to how specific you'd like to tweak this? It sounds as though, you know, in my mind, we're only addressing the Mayor's directive, the...this is the whereases here.

COUNCILMEMBER WHITE: Chair?

COUNCILMEMBER VICTORINO: Yeah, go ahead.

CHAIR GUZMAN: Excuse me.

COUNCILMEMBER WHITE: If you don't mind, I think it would be good to get the issue out of the way as to whether we can, we have the ability to depend on our OCS attorneys or not for this kind of issue. And I think maybe ask Carla or...

CHAIR GUZMAN: Yeah, why don't...Carla or Sharon, would you like to...

COUNCILMEMBER HOKAMA: Chairman?

COUNCILMEMBER COUCH: Yeah. Mr. Chair?

CHAIR GUZMAN: Mr. Hokama?

COUNCILMEMBER HOKAMA: I would ask if you'd allow us to present some questions so at least the Staff has a sense of how to reply.

CHAIR GUZMAN: Okay. Sure. Sure. Why don't you go ahead.

COUNCILMEMBER HOKAMA: So, for me, yeah, Chairman, my understanding, I may be wrong, but through my years, this is my understanding, that Council in its hiring of Legislative Attorneys will also pay for their license or bar fees. So my understanding is

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our attorneys are licensed Hawaii attorneys that passed the Hawaii Bar, is my understanding. So for me, if they've done that, they can practice unless you tell me that having that license and passing the bar does not allow them to practice or if there is an employment condition that they cannot practice as employees of the Council in their capacity as Legislative Attorneys. So I think that would help us because my understanding is they're licensed attorneys. Second, though, Chairman, I think without putting the Corp. Counsel and whatnot in this predicament, I think it's also important that this Committee knows that this is an issue not from just this Administration. This has gone back couple of decades and I bring up the Makawao Highlands issue under Mayor Lingle, an inappropriate, again, what I call Council, even where the Finance Department through its Director did inappropriate actions and then when Council did its review and findings, we had to punt to the State Attorney General because either Corp. Counsel or Prosecutor, they both report to the Mayor, chose not to take action or even consider it. That is a problem when what according to law should be dealt with in a, may be a judicial manner gets side swiped because of who reports to who in an employment structure. So these are some of the things that also needs to be discussed on how we're gonna scope this thing. Because for me, this is not a, just Arakawa Administration problem, this is a problem that has been brewing and growing from the '70s, late '70s, early '80s. Okay. And the role of how Administration chooses to use Corp. Counsel. Because again, people, whenever Council had to go to court and use special counsel, did we lose our case? If we leaned and took Corp. Counsel's role, we wouldn't have gone to court and we wouldn't have had the ruling that was to the benefit of the people of the County, instead of the benefit of the Mayor and the Administration. So, again, I point that out as facts of what has transpired in the past that we need to be at least aware and take into it proper role in our review and decision on this proposal before use today, Chairman. Thank you.

CHAIR GUZMAN: Thank you. Do you have any questions that from, to OSC [sic]? Any Members?

COUNCILMEMBER WHITE: Well...

COUNCILMEMBER COUCH: Yes.

COUNCILMEMBER WHITE: I would like to have Carla explain why we cannot rely on our in-house attorneys? My understanding is because Corp. Counsel is the legal representative for both the Council and the Administration.

CHAIR GUZMAN: Ms. Nakata?

COUNCILMEMBER COUCH: Yeah, Mr. Chair, I brought the question up, so I would like to phrase it a little bit differently is, can somebody, can we, can Council hire somebody in OCS to handle the legal, give us advice, not represent the County in legal proceedings, but give us advice and also look at bills and forms in the, to approve them in form and legality? Those two things?

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CHAIR GUZMAN: I think that's outside the scope of the, because the reso is only talking about when there is a conflict between the Administration and the Council.

COUNCILMEMBER COUCH: Understand. But it says right here...well, what I'm saying is, can we have an in-house person be assigned for that?

CHAIR GUZMAN: For these specific issues?

COUNCILMEMBER COUCH: Yeah. 'Cause one of them is, one of the matters that may include the legality of proposed bills and resolutions the Department of Corporation Counsel has refused to sign, so.

CHAIR GUZMAN: Yeah, that they're talking about the two --

COUNCILMEMBER COUCH: Well, regardless.

CHAIR GUZMAN: --bills that were...

COUNCILMEMBER COUCH: I mean --

CHAIR GUZMAN: Yeah.

COUNCILMEMBER COUCH: --if we're gonna hire, you know, hire somebody, they can do all the sign for form and legality and give us opinions when we are in a situation just like this where they can give us, render advice to us, legal advice.

CHAIR GUZMAN: Ms. Nakata?

MS. NAKATA: Thank you, Mr. Chair. As to Chair White's question about whether OCS attorneys have the authority to represent the Council as its legal advisor, the Charter really does restrict to the Corporation Counsel the authority to provide legal advice to the Council and its Members and that's under Charter Section 8-2.3(2). So 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. So, no, the Council Services attorneys are not authorized under the Charter to be legal representatives of the Council or its Members. I believe the Honolulu Office of Council Services attorneys do have that authority under the Honolulu Charter. There has been in the past a proposal raised to so authorize Council Services' attorneys via Charter amendment, but I don't believe those proposals have been successful.

CHAIR GUZMAN: So it does get back to what Mr. Carroll was saying that this reso is a stop-gap measure. So, we need to go further than that once we, you know, if so happened this resolution gets passed, we need to, you know, look past, you know, if in fact there is an issue as to the, some of these issues that were presented, if it comes back from the special counsel that in fact there is a contradiction between the opinions, then we're really gonna need to figure out what is the next steps. You know

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what is the bigger picture here? And when there's a conflict between the Administration and the Council.

COUNCILMEMBER COUCH: I think Mr. Victorino had a question.

CHAIR GUZMAN: Mr. Victorino?

COUNCILMEMBER VICTORINO: No, you guys all going . . .*(inaudible)*. . . You know, I guess I was forgotten, so that was fine, you know. But I thank you for Carla's, you know, clarification. I think that's important. I guess my question still falls back to the same question I started the whole conversation with is if we pass this, what does this resolve? I guess, is to go out and get a special counsel to give us litigation and that's what this is all about?

COUNCILMEMBER WHITE: No, no, no, no.

CHAIR GUZMAN: No, I...

COUNCILMEMBER VICTORINO: No?

COUNCILMEMBER WHITE: No.

CHAIR GUZMAN: No, no, no, no. This is...

COUNCILMEMBER VICTORINO: Okay. So...

CHAIR GUZMAN: Mr. White, did you wanna, before I...

COUNCILMEMBER WHITE: Yeah, the...

COUNCILMEMBER VICTORINO: And I know you explained it, but I, again please.

COUNCILMEMBER WHITE: Yeah, we're not talking about litigation.

CHAIR GUZMAN: Yeah.

COUNCILMEMBER VICTORINO: No, no, not litigation.

COUNCILMEMBER WHITE: No, but that was the word you used.

COUNCILMEMBER VICTORINO: Oh, okay.

COUNCILMEMBER WHITE: Yeah. Because we cannot depend on legal advice from our own attorneys, we have no choice but to go get special counsel. As Mr. Hokama mentioned, whenever there is a challenge between the Council and the Administration, Corp. Counsel is always going to represent the Administration. My feeling is that they do a very good job of representing the Administration. They do a very good job of

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representing the Council most of the time. And I kinda think we're making a much bigger issue out of this than I'm trying to make because I'm just simply wanting to be in a place where we can get an answer to a question in a relatively short amount of time. And now, to Mr. Couch's thought about the firewall, that again, for me doesn't quite work because we still have the issue of confidentiality and there's been one example made clear to us when we were told that there was going to be a bifurcation within the department and that simply didn't happen, but I'm not gonna get into that. This is simply aimed at giving us the ability to get a second opinion in a relatively quick fashion and move on. And so, you know, if there needs to be more specificity, I'm comfortable with that, but just understand that this is not a big issue. I think that we need to have the ability to get some, I'll give you an example. When we got the request for the executive session minutes, as the head of the Council, I have no one I can turn to to get a second opinion on whether we need to give it, you know, give up the documents or not. So, as Council Chair, or as a Committee Chair, there are times when you all will have a legal question and you'll ask Corp. Counsel. They will always be the go-to group. This only gives us the ability to go and get a second opinion if and in my view, it's not something that I will do on my own, I would do it with, in concurrence with each of the subject matter chairs if there's an issue in your area that you feel needs to be, we need to get a second opinion on it, then if we concur, then we'll go and get that second opinion. But to me, you know, this is, these are issues that we deserve to get answers that we can depend on and we can only do so by hiring special counsel. The \$75,000 is there as a, you know, as a fund that we can go to, but I don't anticipate using anywhere near that. So, anyway, hope that clears up a few things.

CHAIR GUZMAN: So...

COUNCILMEMBER VICTORINO: Yeah. Thank you, Chair. I appreciate the clarification. And again, you know, you had Carla read that and I'm like, we're talking litigation now and, you know, I'm sorry, we seem to move in different circles and I'm missing the boat somehow on this one.

CHAIR GUZMAN: Okay.

COUNCILMEMBER VICTORINO: And I apologize.

CHAIR GUZMAN: That's okay, Mr. Victorino. Let me try to put it into an example. I think Mr. Hokama mentioned the Highland case or and I believe that that was the time when Linda Lingle had purchased some property and there was a question as to whether she had the authority to appropriate monies to buy that property. And Corporation Counsel at the time, I don't recall who that was, but I was told that there was an opinion by Corporation Counsel during that time that supported Linda Lingle's Administration for the appropriation of that purchase of that property. I believe the Council under Rick Medina and Goro Hokama, I have the resolution hiring a special counsel to question that authority or that opinion of the Corporation Counsel during that time to question it or at least to give their, that opinion. Special counsel was hired and then the special counsel had a contrary opinion and thereafter was brought

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forward to a court for a judiciary determination and it was decided that the Council was correct in the special counsel's opinion. And so, this may be very similar to the issues that we have before us. We've got at least four of them that have questions as to the Corporation Counsel's opinion, and Chair White is basically saying, look, can we just get a check just to verify whether this opinion, Corporation Counsel's opinion is correct or not. It's as simple as that. If special counsel says, hey, Corporation Counsel was correct in his opinion, in their assessment, alright, let's move on. Let's move on. Because everything else that has come before us has, you know, they've done a good job. We've basically are just looking at these very narrow issues and asking a second opinion and whether they come out against the original opinion, then maybe it's at that time we need to decide what to do with it. We could be like the Mr. Rick Medina's and Goro Hokama's counsel that took it to a judiciary declaration, but I don't know. We, at this point in time, I believe that there is justification to ask for special counsel for these specific items that are within the resolution, and so my recommendation is to pass this out of Committee today so that we can just start something, you know, in the new year without having a controversy. Let's just get this done and over with and start the new year fresh. So, if there's any other opinions, I'm gonna call for a motion.

COUNCILMEMBER VICTORINO: Recommendation.

CHAIR GUZMAN: Okay. The Chair will entertain a motion to recommend adoption of the revised proposed resolution entitled Authorizing the Employment of Special Counsel...

COUNCILMEMBER COUCH: Excuse me, Mr. Chair. I'm, what part of raising my hand don't you understand?

CHAIR GUZMAN: I did...

COUNCILMEMBER COUCH: I raised my hand and you said, okay --

CHAIR GUZMAN: Hold on.

COUNCILMEMBER COUCH: --I'm gonna go on...

CHAIR GUZMAN: Mr. Couch, what is your problem here?

COUNCILMEMBER COUCH: That you didn't call on me.

CHAIR GUZMAN: Okay. I didn't see your hand up.

COUNCILMEMBER COUCH: I will now...

CHAIR GUZMAN: Alright. Calm, calm...you know, let's take a recess here. . . .(gavel). . .

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**RECESS: 2:58 p.m.**

**RECONVENE: 2:58 p.m.**

CHAIR GUZMAN: . . . *(gavel)*. . . Committee of the Whole shall now reconvene. Mr. Couch?

COUNCILMEMBER COUCH: Thank you, Mr. Chair. We're still talking about the response from Ms. Nakata and my question is, what is the difference between legal advisor and chief legal advisor? Can we have our own? Not necessarily be the chief and final one, but we can have somebody that can do it in my opinion, but I, you know, I'm not a lawyer, so I don't know.

CHAIR GUZMAN: Ms. Nakata, you want to respond to that?

MS. NAKATA: I'm sorry. Is Member Couch's question whether OCS attorneys can provide legal advice in addition to the Department of the Corporation Counsel?

COUNCILMEMBER COUCH: Correct.

MS. NAKATA: Under the Charter, I would say, no, we are not authorized to do that. We are not authorized to be legal representatives of the Council or the Members.

COUNCILMEMBER COUCH: I guess my question is, is there a difference between chief legal advisor and legal advisor? It sounds to me like chief legal advisor says, this is the guy who's the head, we got a bunch of legal advisors here and this guy makes the final decision if there's a conflict.

MS. NAKATA: I don't know if you're referring to the deputies under the Corporation Counsel? We are not under the management of the chief legal advisor who is the Corporation Counsel for the County.

COUNCILMEMBER COUCH: Okay. Well, maybe that's why we need special counsel. We can't even get...we can't agree with our own. Okay. Thank you, Chair.

CHAIR GUZMAN: Let me apologize to Mr. Couch because and I'm going to disclose this because nobody has ever known this. I am blind in the upper coordinate of my left eye. Okay. And when I was elected into office, nobody knew that. So if I miss you on this left side of my upper quadrant, it's because I'm blind on that side. Okay. And I apologize if I didn't see your hand up and I've never disclosed this because I don't want people thinking I'm handicapped. But I am blind in my left eye coordinate, upper coordinate. I apologize. Mr. White?

COUNCILMEMBER WHITE: Thank you. What Mr. Couch is bringing up is something that, I believe, can only be done through a Charter amendment and as Ms. Nakata pointed out, the Honolulu Charter allows their equivalent of OCS lawyers to represent them. Because we don't have that flexibility, getting special counsel is the only way we can address this. So, I appreciate the, you know, Mr. Couch's perspective and he always

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has good points, but the reason that I brought this forward is that there are a number of issues that I think we need to be able to get legal advice that we can, for lack of a better term, take to the bank, because we get legal advice, but we can't depend on that legal advice, so that's, unfortunately, we are in this situation, but. But again, I want to point out, that the vast majority of the advice that we get from Corp. Counsel, we don't disagree with. It's just, you know, from time to time, we're likely to have some differences and we need to be able to address them quickly so that we can move on. And so, that's the purpose of this reso. Thank you, Chair.

CHAIR GUZMAN: Is there any other comments or questions from the Members? Okay. At this time, the Chair will entertain a motion to recommend the adoption of the revised proposed resolution entitled Authorizing the Employment of Special Counsel to Advise and Represent the Council on Certain Matters for the 2015-2017 Term.

COUNCILMEMBER HOKAMA: I make the motion.

CHAIR GUZMAN: Motion moved by Mr. Hokama.

COUNCILMEMBER WHITE: Second.

CHAIR GUZMAN: Seconded by Mr. White. All those in favor...

UNIDENTIFIED SPEAKER: No. Discussion.

CHAIR GUZMAN: Oh, yeah, sorry, excuse me. Discussion?

COUNCILMEMBER HOKAMA: Mr. Chairman, if I may?

CHAIR GUZMAN: Mr. Hokama?

COUNCILMEMBER HOKAMA: Thank you so much, Mr. Chair. I'll support the motion, Chairman, for couple of reasons. One, securing the special counsel, as the title says, is to give us some advice. After that advice, any action that will go forward will be determined by a minimum of six Councilmembers agreeing and until those six Members agree, nothing goes forward. And so it is still be retained by the power of the Council through its membership through a official vote and I would say that during that discussion on the specific issue to determine whether to take the advice to action is, that's the appropriate time and place. But I think at this point in time to be able to secure the advice prior to a decision is warranted and for me, very responsible on our part, Mr. Chairman. So I would ask the Members to take that into consideration in making their decision. Thank you.

CHAIR GUZMAN: Thank you. Mr. White?

COUNCILMEMBER WHITE: And I just, I appreciate Mr. Hokama making that point clear, that this hiring of special counsel is to get brief answers. There is no intent in here to use the information for anything beyond just our own information. If we decide to



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challenge something with the, that the Corp. Counsel has provided us, then it would be done just, you know, on a collegial basis. That we, we'll present our side, they present their side, we can come to some resolution, that's where it ends because we've gotten two sides. The two sides if they agree, then we're, you know, then we're done. This does not, in my view, put us in a position where this can result in any of these items being taken to court or anything beyond just a collegial discussion and I'm more than happy to make that commitment that...I'm not even sure that it's necessary because if we're gonna go, you know, toe to toe on something, that's gonna require another, you know, another vote by Council.

CHAIR GUZMAN: Yeah. For myself, it's difficult to receive a legal opinion from Corporation Counsel and then we have Council Services that have done the research and then present something differently. And so for me, I find it, wow, Council Services did their research, they've presented it to me and then I get a legal opinion from Corp. Counsel that says differently. So then I research it and I, trying to be neutral, find that the basis for the opinion from the Deputy Corporation Counsels are flawed, so I have no else, where to turn because it, they won't sign off on the form and legality, so therefore, we're stuck. So, these issues that are just presented here is the only issues that I, as Chair, want to address, you know, the four that were indicated within the reso in the whereases. So, is there any other discussion? Mr. Couch?

COUNCILMEMBER COUCH: Thank you, Mr. Chair. As I mentioned, I, I'm a little uncomfortable with the looseness of this, so, and some of the implications and some of the wording here, so, just, I'll just go on record, I would like to make a motion to remove the word, frequent, in the very first whereas, if anybody's willing to follow that?

COUNCILMEMBER HOKAMA: Okay. Mr. Couch, can you...

COUNCILMEMBER COUCH: I move that, to amend the resolution to remove the word "frequent" from the first whereas, where it says, whereas, the Council has found a frequent need for independent legal advice.

VICE-CHAIR CRIVELLO: I second.

CHAIR GUZMAN: There's a motion to amend by Mr. Couch, seconded by Ms. Crivello. Any further discussion? Mr. Couch?

COUNCILMEMBER COUCH: Yeah and the reason, I'm fine with, you know, if we tighten this up a little bit, but I don't think there's a frequent need. There is an occasional need, but certainly not frequent, in my opinion.

CHAIR GUZMAN: Any further discussion?

COUNCILMEMBER WHITE: I don't have a problem with that.

CHAIR GUZMAN: Is that, will you accept a friendly amendment, Mr. White?

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COUNCILMEMBER WHITE: Yes.

CHAIR GUZMAN: Or would you like to move forward...

COUNCILMEMBER WHITE: Friendly amendment's fine.

CHAIR GUZMAN: Friendly amendment accepted?

UNIDENTIFIED SPEAKER: Yeah.

CHAIR GUZMAN: Okay. So, without objections, it shall be deleted in the first sentence, frequent.

COUNCILMEMBER COUCH: Thank you, Chair. The only other one, two things. Two other things that are just sticking in me is, one is the directive. The directive, we have a law. I don't know that that's, we might be wasting our money saying, the guy saying, no, no, you got a law, the Council made the law.

UNIDENTIFIED SPEAKER: Where are you?

COUNCILMEMBER COUCH: In the whereas, on June 18, 2014, the Mayor issued an Employee Communication Directive and also the corresponding, be it resolved on 3a, on the following page. I mean, I've read the law to everybody and maybe my interpretation's wrong, which is fine, then we can leave that in there, but it's pretty clear to me that it says that all communications to the Council from the department head shall be made through the Mayor. And we also have an item in one of the Committees, I'll have to take a look and see where it is, I'm pretty sure it's PIA, it's been there for three years, so. To fix this somehow, I think I actually put an item to repeal it. So, I, we might be wasting our money on that.

CHAIR GUZMAN: Well, I would like to get an opinion from a, at least an attorney that would verify that. I know that --

COUNCILMEMBER COUCH: Okay.

CHAIR GUZMAN: --we have an opinion from Corporation Counsel, but I believe that on, when I requested further briefing on it, it was never provided on the analysis, so. And then we got another opinion from Corporation Counsel. I believe that was done during Mr. White's beginning term of his chairmanship. So, I understand that. I did some research on my own back in the day when Linda Lingle had something similar as a Mayor's directive. Councilmember Wayne Nishiki requested a, an opinion from OIP and I do have the OIP opinion and it states basically that to go through this type of process is a violation of the OIP to require Councilmembers to have separate, Councilmembers should be treated the same as normal public citizens. So to make Councilmembers go through this routing, according to this opinion, so, my question is why wasn't that researched? Why did I have to do that, you know? So, I mean, other than looking at the basic law in front of us, shouldn't we be looking at other, you

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know, State law, Federal law to see whether in fact this Mayor's directive is legit. So, I would like a special counsel to do a full on briefing of this Mayor's directive.

COUNCILMEMBER COUCH: Go ahead.

COUNCILMEMBER WHITE: No, go ahead.

CHAIR GUZMAN: Any other further discussion?

COUNCILMEMBER COUCH: Well, on that one, I mean, I'll make the motion to remove those two, the whereas, I want to move to remove them under the whereas on June 18<sup>th</sup>, that bullet point and underneath the be it resolved 3a, remove that. I move that we remove that.

CHAIR GUZMAN: You want to remove the whereas, the June 18<sup>th</sup>?

COUNCILMEMBER COUCH: Yeah, the bullet point on June 18<sup>th</sup>, that whereas, just that bullet point underneath that whereas. And if that, subsequently, you'll also have to take out under the be it resolved 3a, take that out.

CHAIR GUZMAN: So, basically, that's not going to be requested by the special counsel?

COUNCILMEMBER COUCH: That's my motion. I need to get a second and...

CHAIR GUZMAN: Okay. Is there a second? Does everybody understand the motion? The motion is to remove the language regarding the Mayor's Employee Communications Directive, basically, by deleting that that removes that issue for us to request special counsel to brief or give an opinion on. Is there a second? Seeing none, motion fails.

COUNCILMEMBER COUCH: Okay. And the last one, like I mentioned, I had three. That such, the be it resolved that such matters "are," not "may include," because in my opinion, "may include" is wide open for a bunch of other things that may come up. And if you are sincere in it being specific, then, No. 3 should say "that such matters are," and then a, b, c, d and e, d and e, c and d.

CHAIR GUZMAN: Okay. There's a motion on the floor to amend No. 3, be it resolved to delete "may" and substitute "are."

COUNCILMEMBER COUCH: Delete, may include.

CHAIR GUZMAN: Yeah. Yeah. Delete "may include." And, so, it would read, No. 3 would be amended to, this is Mr. Couch's motion, to amend No. 3 to read as follows "that such matters are..."

COUNCILMEMBER COUCH: Or include, either one. I'm fine with taking out the word "may."

CHAIR GUZMAN: Taking, so, it would be amended to, your motion, Mr. Couch, is a motion...

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COUNCILMEMBER COUCH: Is to remove the word “may” in the be it resolved No. 3, “that such matters include.”

CHAIR GUZMAN: Okay. “That such matters include.”

VICE-CHAIR CRIVELLO: Second.

CHAIR GUZMAN: Second by Ms. Crivello. Any further discussion?

COUNCILMEMBER WHITE: Yeah.

CHAIR GUZMAN: Mr. White?

COUNCILMEMBER WHITE: Yeah. I won't support that amendment because, for example, since I've drafted this, the issue of confidentiality came up and I think it's, you know, that's one that we've got to, in my view, we've got to address. And I think because we don't have any other option when there are differences between opinions from the Corp. Counsel and our attorneys, I think it's important for this to be somewhat open. And again, this is just for the initial answers, not for action. Because action can't be taken without a much larger bucket of money than this. So that, any kind of action that will be taken is gonna have to come back to Council for approval. So again, this is just to give us the ability to go and get a second opinion on a relatively quick basis. So, I can't support that amendment. I think it's important that we have that ability because we, until we do a Charter amendment or something to allow our attorneys to act in the same fashion that the City and County of Honolulu allows their staff attorneys to act, I think we need to have that flexibility just for quick resolution of what may be very simple issues.

CHAIR GUZMAN: Mr. Couch?

COUNCILMEMBER COUCH: Thank you, Mr. Chair. And which is fine, I understand that. But then let's represent this as an open-ended as opposed to specific. The Chair of, you know, Chair, you said this is specific to these four items, which now it is not, which is fine if we represent it as that.

COUNCILMEMBER WHITE: Yeah, I've never meant it to...

CHAIR GUZMAN: I assumed it, you know, the way I read it, it was at least in my mind.

COUNCILMEMBER COUCH: Right.

CHAIR GUZMAN: It's, that, well, for me, that's all I wanna go into, is just the issues that are like on the Mayor's directive, the --

COUNCILMEMBER COUCH: Right.

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CHAIR GUZMAN: --request for the uniform...for the executive minutes and the other two bills.

COUNCILMEMBER COUCH: Right. And that's why I made the motion so, that's...

CHAIR GUZMAN: So it appears like we're...

COUNCILMEMBER WHITE: But again, I will bring up the fact that the issue of confidentiality, I think, is a very critical one for us to get our arms around and get an opinion whether or not there is, you know, are we able to expect confidentiality or not? So, anyway, I...

CHAIR GUZMAN: Okay. So are you still behind your motion?

COUNCILMEMBER COUCH: Yes. And we can add that. I mean, we can make another motion to add that as another item, I'm fine. Or if we want to make it open-ended, I just want to, I mean, it sounds like it's your wish to make it these items.

CHAIR GUZMAN: Well, I mean, it sounds like, no, if that's one of the issues that Mr. White is concerned about as the Chair of our --

COUNCILMEMBER COUCH: Right.

CHAIR GUZMAN: --Council, I would be open to adding that in.

COUNCILMEMBER COUCH: Adding that in. Yeah, I'd be open to that as well. But if this motion fails, then we don't have to add it in 'cause everything is open.

CHAIR GUZMAN: Right. Right. Okay. So, any further discussion? All those in favor of...and let me restate Mr. White's motion.

COUNCILMEMBER COUCH: Mr. Couch.

COUNCILMEMBER WHITE: No, no, Couch.

CHAIR GUZMAN: I mean, Mr. Couch. Sorry, Mr. Couch's motion. His motion is to amend No. 3, be it resolved from "that such matters are included?"

COUNCILMEMBER COUCH: No, "that such matters include."

CHAIR GUZMAN: Oh, "such matters include."

COUNCILMEMBER COUCH: Yeah.

CHAIR GUZMAN: Deleting the word "may."

COUNCILMEMBER COUCH: Yeah.

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CHAIR GUZMAN: So all those in favor, say "aye."

COUNCILMEMBER COUCH: Aye.

COUNCILMEMBER CARROLL: Aye.

VICE-CHAIR CRIVELLO: Aye.

CHAIR GUZMAN: All those opposed say, "no?"

COUNCILMEMBER HOKAMA: No.

COUNCILMEMBER VICTORINO: No.

COUNCILMEMBER WHITE: No.

CHAIR GUZMAN: Motion fails.

**VOTE:           AYES:   Vice-Chair Crivello and Councilmembers Carroll and Couch.**

**NOES:       Chair Guzman and Councilmembers Hokama, Victorino, and White.**

**ABSTAIN:   None.**

**ABSENT:    None.**

**EXC.:       Councilmembers Baisa and Cochran.**

**MOTION FAILED.**

CHAIR GUZMAN: Any further? Okay. Getting back to the primary motion which I will restate the motion. Let's see, where are we. Confused. Okay. The Chair will entertain a motion, well, actually, it's the adoption of the revised proposed resolution entitled Authorizing the Employment of Special Counsel to Advise and Represent the Council on Certain Matters for 2015 through 2017 Term. So, if there's no further discussion, I'll call for the vote. All those in...

COUNCILMEMBER VICTORINO: Chair?

CHAIR GUZMAN: Yes, Mr. Victorino?

COUNCILMEMBER VICTORINO: As amended, yeah, even though it was a friendly amendment.



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CHAIR GUZMAN: Okay, so this will...thank you, Members. This will conclude today's meeting. Have a very Merry Christmas and I will see you next year. Thank you. Meeting adjourned. . . .(gavel). . .

**ADJOURN:** 3:22 p.m.

APPROVED:



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DON S. GUZMAN, CHAIR  
Committee of the Whole

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Transcribed by: Joanne Bista



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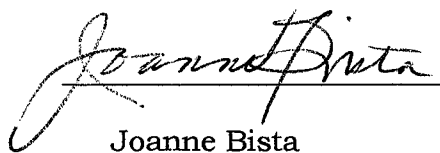
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CERTIFICATE

I, Joanne Bista, hereby certify that the foregoing represents to the best of my ability, a true and correct transcript of the proceedings. I further certify that I am not in any way concerned with the cause.

DATED the 12<sup>th</sup> day of January, 2016, in Kahului, Hawaii

  
Joanne Bista