

COUNCIL OF THE COUNTY OF MAUI
POLICY COMMITTEE

August 8, 2008

Committee
Report No.

08-93

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

Chair and Members:

Your Policy Committee, having met on July 22, 2008, makes reference to the following:

1. County Communication No. 08-144, from Councilmember Danny A. Mateo, transmitting a draft resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL WITH RESPECT TO POSSIBLE LEGAL CLAIMS ARISING FROM THE ANNOUNCED CLOSURE OF PRIVATE WATER AND WASTEWATER OPERATIONS ON MOLOKAI IN AUGUST 2008", and requesting that the draft resolution and the matter of the closure of private water and wastewater operations on Molokai be referred to the appropriate committee.

The purpose of the draft resolution is to authorize the Council Chair to select a private attorney or law firm to represent the County in possible legal claims against Molokai Properties, Ltd., the State of Hawaii, and other parties arising from the announced closure of private water and wastewater operations in August 2008.

2. County Communication No. 08-153, from Council Vice-Chair Danny A. Mateo, transmitting copies of various correspondence relating to the proposed termination of water and wastewater system services on Molokai by Molokai Properties, Ltd.

By correspondence dated July 8, 2008, your Committee's Chair requested that Dr. Chiyome Fukino, Director, State Department of Health (DOH), provide copies of all relevant correspondence and documents issued by the DOH, or if the DOH has not issued any correspondence on this matter, the steps the DOH will take to ensure the continuing safe operation of the private water and wastewater systems on Molokai.

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By separate correspondence dated July 9, 2008, your Committee's Chair requested that the Director of Water Supply, the Director of Environmental Management, and the Fire Chief provide contingency plans in the event water and wastewater systems on Molokai are closed, including how each department will respond to fire, public safety, or health concerns if the system is shut down.

By correspondence dated July 14, 2008, the Department of the Corporation Counsel transmitted a proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL BRONSTER & HOSHIBATA WITH RESPECT TO POSSIBLE LEGAL CLAIMS RELATING TO WATER AND WASTEWATER UTILITY SERVICE ON MOLOKAI". The purpose of the proposed resolution is to authorize the employment of the law firm of Bronster & Hoshibata as the County's special counsel to represent the County in all legal matters pertaining to Molokai Properties, Ltd., dba Molokai Ranch; Molokai Public Utilities, Inc.; Wai'ola O Moloka'i, Inc.; and Mosco, Inc., for a total compensation not to exceed \$100,000.

By correspondence dated July 14, 2008, your Committee's Chair transmitted copies of various documents relating to the proposed termination of water and wastewater system services on Molokai by Molokai Properties, Ltd.

By correspondence dated July 21, 2008, your Committee's Chair transmitted copies of various documents related to the DOH's orders to the County. The orders require the County to assess what is needed to provide drinking water and wastewater services on Molokai and prepare to provide those services, if needed.

At its meeting, your Committee met with the Public Information Officer from the Office of the Mayor and the Corporation Counsel.

Your Committee received written testimony from one person relating to the State Public Utilities Commission (PUC) hearings, the development of Laau Point on Molokai, and the closure of Molokai Ranch. Your Committee also received copies of various correspondence relating to the proposed termination of water and wastewater system services on Molokai by Molokai Properties, Ltd. from the Public Information Officer.

The Public Information Officer gave a brief overview of the potential closures. She stated that the Office of the Mayor is attempting to obtain information from the State on what options and assistance are available. She also stated that the Administration has been unable to obtain information on the exact location and condition of the utilities or

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the required financial information related to the acquisition and/or operation of the utilities. Furthermore, Molokai Properties, Ltd. has not given the County permission to inspect the utilities.

The Corporation Counsel provided a brief overview of the orders from the DOH related to the closure. He stated that the DOH has ordered Molokai Properties, Ltd. to continue service for at least 90 days and the County be prepared to provide services, if needed. He also stated that he has sent attorneys to the DOH hearing, which is being held at the same time as your Committee meeting, to argue that the DOH should not have issued orders against the County. His Department is arguing that the County has not violated any rule or statute related to the utilities, and the DOH does not have the authority to force the County to take over the operation of a private utility.

The Corporation Counsel clarified that the PUC and the DOH have now ordered the affected Molokai utilities to continue operations.

The Public Information Officer stated that the Office of the Mayor is hoping that the utilities will not be closed before the County or a private business can take over the systems, and the Mayor hopes the Governor will exercise her right to declare an emergency and keep the systems operational if it appears the systems will be shut down.

She also stated that the Administration is developing County-wide contingency plans to address any breaks in water or wastewater services.

The Corporation Counsel stated that the pending lawsuits involving the PUC and the DOH, the regulatory and funding concerns involved in taking over a private utility, and the precedent-setting implications for the County and other privately owned utilities, create a multi-faceted problem for the County. He recommended that the Council authorize the employment of special counsel to assist his Department in dealing with these issues.

Your Committee discussed both the draft resolution that authorizes the employment of special counsel selected by the Council Chair, and the proposed resolution that authorizes the employment of the law firm of Bronster & Hoshibata as special counsel.

Your Committee voted to recommend the adoption of the proposed resolution authorizing the employment of the law firm of Bronster and Hoshibata as special counsel.

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Your Committee notes that resolutions authorizing employment of special counsel must be adopted by a two-thirds vote of the Council, pursuant to Section 3-6.6 of the Revised Charter of the County of Maui (1983), as amended.

Your Policy Committee RECOMMENDS that Resolution No. _____, attached hereto, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL BRONSTER & HOSHIBATA WITH RESPECT TO POSSIBLE LEGAL CLAIMS RELATING TO WATER AND WASTEWATER UTILITY SERVICE ON MOLOKAI", be ADOPTED.

Adoption of this report is respectfully requested.

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DANNY A. MATEO Chair

BILL KAUAKEA MEDEIROS Member

G. RIKI HOKAMA Vice-Chair

MICHAEL J. MOLINA Member

MICHELLE ANDERSON Member

JOSEPH PONTANILLA Member

GLADYS C. BAISA Member

MICHAEL P. VICTORINO Member

JO ANNE JOHNSON Member

Resolution

No. _____

AUTHORIZING THE EMPLOYMENT OF
SPECIAL COUNSEL BRONSTER & HOSHIBATA
WITH RESPECT TO POSSIBLE LEGAL CLAIMS
RELATING TO WATER AND WASTEWATER
UTILITY SERVICE ON MOLOKAI

WHEREAS, Molokai Properties, Ltd., dba Molokai Ranch, the largest private landowner on Molokai, has unilaterally announced that it intends to cease operating its water and wastewater utilities, namely, Molokai Public Utilities, Inc., Wai`ola O Moloka`i, Inc., and Mosco, Inc. (hereafter collectively referred to as "the Utilities") which provide water and wastewater service to residents, businesses, and public facilities in West Molokai; and

WHEREAS, § 128-9(4), Hawaii Revised Statutes, grants to the Governor emergency powers to take over and operate the Utilities, if necessary to assure continuation of utility service; and

WHEREAS, § 342D-10, Hawaii Revised Statutes, grants to the Governor or the Director of the State Department of Health emergency powers to avoid adverse health consequences and environmental impacts that will likely result if the Utilities abandon their wastewater treatment facilities; and

WHEREAS, the Utilities are subject to regulation by several State agencies, including the Public Utilities Commission, the State Commission on Water Resource Management, the State Department of Health, and the State Department of Agriculture; and

Resolution No. _____

WHEREAS, the County has filed a formal complaint against the Utilities with the Public Utilities Commission, bearing Docket No. 2008-0116; and

WHEREAS, the Public Utilities Commission has made the County a party to a Temporary Rate Relief proceeding, bearing Docket No. 2008-0115; and

WHEREAS, to protect public health and safety, to prevent environmental harm, and to avoid substantial financial costs to the affected Molokai residents, businesses, and public facilities, as well as to the County's taxpayers, the County may need to pursue a variety of legal and equitable claims arising under County, State, Federal and/or international law; and

WHEREAS, the potential legal and equitable claims may encompass a wide range of legal specialities, including environmental law, public utility law, administrative law, water law, constitutional law, plaintiff's *qui tam*, international law, and complex litigation; and

WHEREAS, the Selection Committee of the Department of the Corporation Counsel has met as required by the State Procurement Code, and has identified and ranked three law firms on the County's eligibility list, of which the firm Bronster & Hoshibata was ranked first; and

WHEREAS, the recommendation of the Selection Committee was accepted by the Corporation Counsel; and

Resolution No. _____

WHEREAS, pursuant to Chapter 3-6.6 of the Revised Charter of the County of Maui (1983), as amended, the Council alone is authorized to retain or employ special counsel by resolution adopted by a two-thirds vote; and

WHEREAS, the Council finds that, because of the need for specialized expertise and the urgency and complexity of these matters, there is a real necessity to retain the law firm of Bronster & Hoshibata as special counsel to advise and represent the County; and

WHEREAS, Bronster & Hoshibata and the Department of the Corporation Counsel shall work as a team in this matter and take all possible steps to minimize the amount of attorneys' fees and costs; and

WHEREAS, Bronster & Hoshibata's conduct in this matter shall reflect the firm'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; now, therefore,

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

1. That the Council hereby authorizes the employment of the firm Bronster & Hoshibata as special counsel to represent the County of Maui in all legal matters pertaining to the Utilities; and

Resolution No. _____

2. That total compensation for the employment of the firm Bronster & Hoshibata as special counsel shall not exceed \$100,000.00; and

3. That the hourly rate for partner Margery Bronster shall not exceed \$275.00; and

4. That the hourly rate for all other attorneys in the firm shall not exceed \$225.00; and

5. That the hourly rate for paralegal staff shall not exceed \$100.00; and

6. That the compensability of costs shall be in general accord with the intent of 28 U.S.C. § 1920; and

7. 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

8. 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 pre-approved by the Corporation Counsel; (7) investigative expenses, unless pre-approved by the Corporation Counsel; and (8) other costs reasonably considered part of a law firm's overhead; and

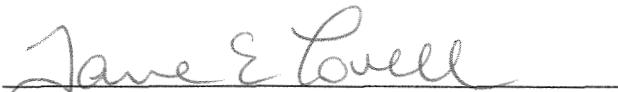
Resolution No. _____

9. That in instances of travel, both inter-island and out-of-state travel includes travel on regular coach economy fare and must be pre-approved by the Corporation Counsel; and

10. That the expenditures of additional funds or substantial changes to the responsibilities of the parties shall require Council approval; and

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

APPROVED AS TO FORM AND LEGALITY:



JANE E. LOVELL
Deputy Corporation Counsel
County of Maui