

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

February 6, 2004

Committee
Report No. 04-13

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

Chair and Members:

Your Committee of the Whole, having met on January 14, 2004, makes reference to County Communication No.03-211, from the Council Chair, transmitting a draft resolution authorizing the employment of special counsel to represent the Council on issues relating to the County's policies governing the issuance of water meters.

Your Committee notes that it previously reported on this matter by Committee of the Whole Committee Report No.03-103. Pursuant to your Committee's recommendation, the Council adopted Resolution No.03-146, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL IN MATTERS RELATING TO COUNTY WATER POLICIES" at its meeting of September 19, 2003. This resolution authorized the employment of special counsel to advise and represent the Council on County water policies, at an hourly rate not to exceed \$150 and total compensation not to exceed \$10,000.

By correspondence dated January 8, 2004, the Director of Council Services proposed that the resolution authorizing employment of special counsel for water-related matters be amended, and transmitted the following:

1. A draft resolution entitled "AMENDING RESOLUTION NO. 03-146 RELATING TO SPECIAL COUNSEL FOR WATER-RELATED MATTERS".

The purpose of the draft resolution is to revise the resolution's description of the process for selecting special counsel to be consistent with recent interpretations of the Hawaii Public Procurement Code (Chapter 103D, Hawaii Revised Statutes), and to clarify and correct certain provisions relating to compensability and administration of costs and fees.

2. A copy of Resolution No. 03-146, adopted by the Council on September 19, 2003.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

February 6, 2004
Page 2

Committee
Report No. 04-13

3. A copy of correspondence dated October 20, 2003, from the Council Chair to the members of the Council, relating to the procurement of professional legal services for fiscal year ending June 30, 2004, and the procurement of special counsel to advise and represent the Council on County water policies.

4. A copy of correspondence dated October 20, 2003, from the Director of Council Services to the Corporation Counsel, requesting a written legal opinion on questions relating to the professional services procurement process.

5. A copy of correspondence dated December 30, 2003, from the Director of Council Services to the Corporation Counsel, requesting a written legal opinion on questions relating to contract administration for professional services contracts.

By correspondence dated January 9, 2004, the Chair of your Committee requested that the Corporation Counsel review and approve as to form and legality the draft resolution.

By correspondence dated January 13, 2004, the Department of the Corporation Counsel transmitted the proposed resolution, approved as to form and legality.

At its meeting, your Committee met with the Director of Council Services, the Director of Water Supply, and the First Deputy Corporation Counsel.

There was no public testimony. The Director of Council Services requested that the proposed resolution be adopted to accommodate a revised understanding of changes to the Hawaii Public Procurement Code this past year. As amended, the resolution would no longer authorize special counsel to be selected directly by the Council or the Council Chair. Although questions over interpretation of the revised procurement procedures are not entirely settled, for purposes of this particular resolution it was necessary to proceed quickly, and the most restrictive interpretations of the procurement procedures are, therefore, being recommended.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

February 6, 2004
Page 3

Committee
Report No. 04-13

The Director of Council Services summarized the proposed amendments to Resolution No. 03-146, which address the selection of special counsel and practical concerns dealing with compensability and administration of costs, and procedures for seeking increases in compensation.

Your Committee notes that the October 20, 2003 correspondence from the Council Chair explains selection process changes implemented as a result of revisions to the procurement code.

Your Committee acknowledged that the proposed resolution represents a change from the norm. The Director of Council Services advised your Committee that it appears that the most prudent way to proceed is to have the Council adopt a resolution that does not identify the proposed special counsel by name. The Director emphasized that it was not certain whether this procedure would be required following receipt of additional interpretations of the procurement code changes. This procurement is not intended to set a precedent for future procurements, but should comply with a conservative reading of the applicable laws.

Your Committee discussed the revised procedures, which leave very little discretion to the head of the purchasing agency in completing the selection process. Your Committee further discussed the Council's ability to terminate the special counsel arrangement in the event the Council deemed the work unsatisfactory. The Director of Council Services advised that his current understanding is that the Council Chair, the Director of Council Services, or special counsel may be in a position to terminate the arrangement.

Your Committee notes that the \$10,000 previously authorized may not be sufficient to cover the breadth of work being considered. The recodification of the rules and the handling of issues relating to the aquifers could be very broadly interpreted. If a broad reading is given to the scope of work, it may not be feasible to cover the entire scope within the current compensation limit. The work will be driven primarily by the Water Resources Committee.

The First Deputy Corporation Counsel informed your Committee that departmental responses to the October 20, 2003 and December 30, 2003 inquiries should be finalized shortly.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

February 6, 2004
Page 4

Committee
Report No. 04-13

Your Committee noted that the proposed resolution would provide clarity to the procurement process and allow the Council to move forward and eliminate any barriers, real or perceived, that may be present as a result of the procurement code changes.

Your Committee discussed the goals underlying the retention of special counsel. A Committee member expressed concerns regarding the reference to the possible resort to judicial remedies and emphasized the need to foster an atmosphere of cooperation rather than confrontation. On that basis, the Committee member declined to support the proposed amended resolution, while indicating agreement that an outside opinion was needed with respect to the water rules. Another Committee member opined that the goal was not to attack the Administration, but to tackle the water rules themselves. The work involved in understanding and revamping the rules is significant, outside resources are needed, and there is a sense of urgency in hiring special counsel. A third member commented that the Mayor had been in agreement with Resolution No. 03-146, and that there was no intention to attack the Mayor through this process.

Your Committee voted to recommend adoption of the proposed resolution amending Resolution No. 03-146.

Your Committee of the Whole RECOMMENDS that Resolution No. _____, attached hereto, entitled "AMENDING RESOLUTION NO. 03-146 RELATING TO SPECIAL COUNSEL FOR WATER-RELATED MATTERS" be ADOPTED.

Adoption of this report is respectfully requested.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

February 6, 2004
Page 5

Committee
Report No. 04-13

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