

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003

**Committee
Report No.**

03-92

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 June 30, 2003, makes reference to County Communication No. 02-21, from the Director of Public Works and Waste Management, transmitting a proposed resolution entitled "AUTHORIZING A GRANT OF A LICENSE TO USE COUNTY REAL PROPERTY IN MAKAWAO, MAUI, HAWAII, TO JOEL ANTHONY KENNEY".

The purpose of the resolution is to authorize a grant of a license to Joel Anthony Kenney to use County real property along Mamalu Place and Maohu Street in Makawao, for the encroaching portions of a wall and walkway on the County right-of-way.

Your Committee notes that County Communication No. 02-21 was referred to the prior Council's Public Works and Transportation Committee at the Council meeting of January 22, 2002. Your Committee further notes that the Public Works and Transportation Committee met regarding this matter on March 13, 2002, June 5, 2002, June 19, 2002, November 13, 2002 and December 4, 2002.

At its meeting of March 13, 2002, the Committee met with the Director of Public Works and Waste Management and a Deputy Corporation Counsel. The Committee posed several questions relating to the encroachments and to the handling of future requests for use of County real property.

The Committee deferred the matter pending further discussion.

By correspondence dated April 2, 2002, the Chair of the Committee requested information relating to the proposed license agreement from the Department of Public Works and Waste Management, including the estimated cost to process documents granting a license, the estimated dates the encroaching wall and walkway were constructed, the circumstances leading to the construction, and whether permits had been issued for the encroaching

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 2

Committee
Report No. 03-92

structures. The Committee further requested that the Department provide such information for all future requests transmitted to the Council for licenses to use County real property.

By correspondence dated April 9, 2002 and April 24, 2002, the Director of Public Works and Waste Management responded with an estimated date the structure was constructed, a chronology of events, and the status of permits for the subject wall and walkway.

At its meeting of June 5, 2002, the Committee met with the Deputy Director of Public Works and Waste Management and a Deputy Corporation Counsel.

The Deputy Director provided the Committee with an overview of the matter, and informed the Committee that the encroachments cover a total of roughly 18 square feet.

The Committee noted that resolutions authorizing encroachments and license agreements have routinely been adopted without any opposition. However, the Committee indicated that alternatives such as requiring the removal of encroaching structures or compensation for use of rights-of-way should be considered.

The Committee further noted that numerous easement requests involve intrusions onto County rights-of-way that may have predated the request for an easement by a number of years.

The Committee requested that the Department of Finance determine whether the subject property owner has been paying real property taxes for the encroachment.

The Committee deferred the matter pending further discussion.

By correspondence dated June 12, 2002, the Chair of the Committee requested that the Department of Public Works and Waste Management provide a cost estimate for relocating the wall and walkway.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 3

Committee
Report No. 03-92

By correspondence dated June 13, 2002, the Chair of the Committee requested that the Department of the Corporation Counsel revise the proposed resolution to reflect the correct tax map key number (TMK) for the subject property.

By correspondence dated June 13, 2002, the Chair of the Committee requested that the Director of Finance respond to the following questions:

1. Whether property taxes are being paid for the encroachments on the County's right-of-way;
2. Whether the County's policy is to assess property taxes for encroachments or easements on County property; and
3. If the County assesses property taxes for encroachments on County property, whether the Department of Finance charges back-taxes once the encroachment has been discovered.

By correspondence dated June 14, 2002, the Department of the Corporation Counsel submitted a revised proposed resolution correcting the TMK of the subject property.

By correspondence dated June 14, 2002, the Director of Public Works and Waste Management provided an estimated cost of demolishing and reconstructing the subject wall, stating it would not be feasible to merely "shave off" the encroaching portions of the wall.

At its meeting of June 19, 2002, the Committee met with the Director of Public Works and Waste Management and a Deputy Corporation Counsel.

The Director provided the Committee with an overview of the matter. He stated that the estimated cost for the demolition and reconstruction of the wall ranged from \$4,000 to \$7,000. He also stated that under the proposed license agreement, the County could request that the encroachments be removed if the property were required for a public purpose.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 4

Committee
Report No. 03-92

The Committee noted concerns about receiving compensation for use of the encroachments. The Committee further noted that the encroachments should be permitted for the current owner of the property, but the proposed license agreement should not be transferable. Furthermore, the Committee expressed a desire to restrict the future transfer of license agreements for use of any County real property. The Committee requested that the proposed resolution be revised accordingly.

The Committee voted to recommend the adoption of the proposed resolution, as revised, and the filing of the communication.

By correspondence dated June 20, 2002, the Chair of the Committee requested that the Department of the Corporation Counsel revise the proposed resolution to: (1) make the license agreement granting the encroachment non-transferable; and (2) require, prior to transfer of the subject property, that the encroachment be removed from the County right-of-way.

By correspondence dated June 24, 2002, the Chair of the Committee requested that the Department of Public Works and Waste Management provide an opinion on whether the transfer of license agreements for encroachments should be prohibited, whether license agreements should require that the encroachment be corrected prior to sale of the property, and whether the County should consider selling the underlying property rather than authorizing the encroachment.

By correspondence dated June 25, 2002, the Director of Finance stated that the Department does not assess real property taxes for improvements utilizing portions of County public rights-of-way.

By correspondence dated June 26, 2002, the Department of the Corporation Counsel stated that the revised resolution and license agreement would not be executed in time for the July 5, 2002 Council meeting.

The Chair of the Committee subsequently was informed by the owner's representative, Janet Lee Anderson, that neither the owner nor the owner's agent had been properly informed of meetings on the matter.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 5

Committee
Report No. 03-92

By correspondence dated September 19, 2002, Ms. Anderson transmitted correspondence dated July 8, 2002 from the Department of Public Works and Waste Management, Land Use and Codes Administration, relating to the revisions that had been recommended by the Committee. Ms. Anderson stated that the conditions placed on the approval were not acceptable and requested that the matter be reconsidered.

By correspondence dated November 7, 2002, the Chair of the Committee informed the Committee members of Ms. Anderson's request and stated that a motion to reconsider the matter would be entertained at the next Committee meeting.

At its meeting of November 13, 2002, the Committee met with the Director of Public Works and Waste Management and a Deputy Corporation Counsel.

The Committee, having previously recommended the adoption of the proposed resolution, as revised, voted to reconsider the matter.

The Committee received testimony from three individuals.

Janet Lee Anderson, the owner's representative, indicated that the Land Use and Codes Administration staff had informed her that the process for approving the grant of license was routine and should not present a problem. She stated that the subject wall was installed during the development of the subdivision and prior to the previous owners. She further stated that neither she nor the owner was informed of previous meetings on this matter. She urged the Committee to reconsider its action and approve the proposed resolution as originally submitted.

Two other testifiers spoke in favor of reconsideration of this matter and urged support of the original proposed license agreement.

The Committee received a metes-and-bounds description and plot plan for Mamalu Place, and pictures of the subject wall and walkway.

The Director provided the Committee with an overview of the matter. He stated that the provisions in the original proposed license agreement are consistent with the Department's policy that the encroachment "run with the

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 6

Committee
Report No. 03-92

land". However, the Department had requested that the applicant revise the license agreement to require, in accordance with the Committee's wishes, that the encroachment be corrected prior to transfer of the property and that the license agreement be non-transferable. The Director further stated that the Department reviews license requests on a case-by-case basis prior to submitting a recommendation. He noted that the proposed encroachment is approximately eight inches onto the public right-of-way and is utilized as a retaining wall, which is adjacent to a cesspool. As a result, the Department supported the license agreement as originally drafted.

The Committee noted that previous meeting notices were mailed to the owner's representative; however, the address provided was outdated and no new address had been provided.

The Committee again noted concerns about granting the use of County real property without receiving compensation. The Director stated that the sale of County real property to owners with encroaching structures may result in certain abuses. Therefore, this practice has been discouraged.

The Director indicated that the license agreement authorizes him to terminate the agreement, without cause, upon 30 days written notice to the licensee. He also stated that it is the licensee's responsibility to remove the encroachments upon notice by the Director.

The Committee requested that the proposed resolution and license agreement be revised to reflect that the use of County real property shall run with the land.

The Committee voted to recommend that the proposed resolution, as revised, be adopted and the communication be filed.

By correspondence dated November 15, 2002, the Chair of the Committee requested that the Department of the Corporation Counsel revise the proposed resolution accordingly.

By correspondence dated November 19, 2002, the Chair of the Committee transmitted correspondence dated November 18, 2002, from the Department of

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 7

Committee
Report No. 03-92

the Corporation Counsel to the Land Use and Codes Administration, requesting that certain language be substituted in paragraph 13 of the license agreement.

At its meeting of December 4, 2002, the Public Works and Transportation Committee recommended that County Communication No. 02-21 be referred to the Council Chair for the term beginning January 2, 2003, for a recommendation as to referral or other disposition.

At its meeting of January 10, 2003, the Council referred County Communication No. 02-21 to your Committee of the Whole (County Communication No. 03-12).

By correspondence dated January 30, 2003, the Chair of your Public Works and Traffic Committee transmitted correspondence dated January 24, 2003, from the Director of Public Works and Environmental Management, forwarding a revised proposed resolution and revised proposed license agreement.

By correspondence dated February 4, 2003, the Chair of your Committee requested that the Department of the Corporation Counsel revise the proposed resolution and license agreement due to the change in Administration and department name, and the lapse in time since the resolution and license agreement had been prepared.

By correspondence dated March 4, 2003, the Director of Public Works and Environmental Management transmitted a revised proposed resolution and revised proposed license agreement.

At its meeting of June 30, 2003, your Committee met with the Deputy Director of Public Works and Environmental Management, a Civil Engineer from the Department of Public Works and Environmental Management, and the First Deputy Corporation Counsel.

Your Committee received testimony from two individuals, both of whom supported the revised proposed resolution and license agreement. The first testifier, Janet Lee Anderson-Pung, summarized the chronology of the application process, which dated back to 2000. The second testifier informed your Committee of the timing of the discovery of the encroachments.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 8

Committee
Report No. 03-92

Your Committee received pictures and a map of the subject wall and walkway.

There being no other testifiers, the Deputy Director of Public Works and Environmental Management provided a historical overview of the matter.

Your Committee discussed restricting transferability of the license agreement and opportunities for the County to negotiate a sale of the property. Your Committee was informed that the value of the property underlying the encroachments was nominal, and that an appraisal would likely cost more than the value of the property. Your Committee was further informed that the license agreement had been revised, on the prior Council's Public Works and Transportation Committee's recommendation, to allow for transferability, as reflected in paragraph 13 of the revised license agreement. Following receipt of that revised license agreement, the only changes that had been made to the resolution and license agreement were to account for the changes in Administration and department name, and the lapse in time.

Your Committee expressed a desire to have the proposed resolution and license agreement revised so that any repairs or modifications to the wall and walkway would be restricted to the portions that had been constructed on the owner's property. Your Committee indicated that such revisions would allow a mechanism for self-correction with respect to the portions of the wall and walkway that encroach on County right-of-ways, as those portions eroded or otherwise ceased to encroach.

Your Committee recommended adoption of the revised proposed resolution, incorporating your Committee's suggested revisions, and the filing of the communication.

Your Committee is in receipt of a revised proposed resolution entitled "AUTHORIZING A GRANT OF A LICENSE TO USE COUNTY REAL PROPERTY IN MAKAWAO, MAUI, HAWAII, TO JOEL ANTHONY KENNEY". The revised proposed resolution incorporates your Committee's suggested revisions.

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 9

Committee
Report No. 03-92

Your Committee of the Whole RECOMMENDS the following:

1. That Resolution No. _____, as revised herein and attached hereto, entitled "AUTHORIZING A GRANT OF A LICENSE TO USE COUNTY REAL PROPERTY IN MAKAWAO, MAUI, HAWAII, TO JOEL ANTHONY KENNEY", be ADOPTED; and

2. That County Communication No. 02-21 be FILED.

Adoption of this report is respectfully requested.

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COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 5, 2003
Page 10

Committee
Report No. 03-92

ROBERT CARROLL Chair

MICHAEL J. MOLINA Member

DAIN P. KANE Vice-Chair

WAYNE K. NISHIKI Member

G. RIKI HOKAMA Member

JOSEPH PONTANILLA Member

JO ANNE JOHNSON Member

CHARMAINE TAVARES Member

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