

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

January 6, 2004

**Committee
Report No.**

04-4

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 July 30, 2003, August 13, 2003, October 1, 2003, and December 8, 2003, makes reference to County Communication No. 03-177, from the Director of Parks and Recreation, transmitting the following:

1. A proposed resolution entitled "AUTHORIZING A GRANT OF A LICENSE TO OCCUPY COUNTY REAL PROPERTY TO BOYS & GIRLS CLUB OF MAUI, INC."

The purpose of the proposed resolution is to authorize the grant of a license to the Boys & Girls Club of Maui, Incorporated (BGCM), pursuant to Maui County Code Section 3.36.090, to occupy approximately 4.367 acres at Kanaloa Avenue, Kahului, Maui, TMK: (2) 3-8-007:001(portion), with a fair market rental value of \$2,754 per annum, at a nominal rental of \$1 per annum for a period of 35 years.

2. A proposed license agreement entitled "LICENSE".

The purpose of the proposed license is to establish the terms and conditions for the use of the property by BGCM.

3. A proposed grant agreement entitled "GRANT AGREEMENT FOR A LICENSE OF COUNTY REAL PROPERTY".

The purpose of the proposed grant agreement is to establish the terms and conditions of a grant of a license to BGCM, to occupy approximately 4.367 acres of real property located in Kahului, Maui, and identified as TMK: (2) 3-8-007:001(portion), having a fair market rental value of \$2,754 per annum, at a nominal rental of \$1 per annum for a period of 35 years, to construct additional facilities and to operate BGCM on the premises.

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At its meeting of July 30, 2003, your Committee met with the Director of Parks and Recreation; the Planning and Development Chief, Department of Parks and Recreation; the First Deputy Corporation Counsel; a Deputy Corporation Counsel; and Colin Hanlon, Executive Director, BGCM.

There was no public testimony. The Planning and Development Chief provided an overview of the request before your Committee. The purpose of the 35-year license and grant of real property is to permit BGCM to construct a clubhouse in Central Maui.

Your Committee discussed who would bear the costs of repair and maintenance at the new facility. Your Committee explored the need to define major repairs and minor repairs under the agreement.

Your Committee also discussed the provision in the license permitting BGCM to charge fees to the County for use of the premises. Your Committee questioned the logic in charging the County for costs of use, such as electricity costs, when BGCM is being offered the premises for \$1 per year, which is well below fair market value. Your Committee was informed that costs associated with third-party use might include staffing oversight, and the fee charged for such use would be limited to what the Department deemed reasonable. Third parties requesting the use of the premises would need the express permission of the Department of Parks and Recreation.

Your Committee was informed that there is an existing appropriation for \$2 million in capital costs for the facility that would lapse in December 2003. The project, therefore, needed to be put out to bid and the contract awarded by December 31, 2003.

Your Committee voiced concerns over the longevity of the license if the County felt the services being provided by BGCM were not in compliance with the grant agreement. Your Committee was informed that the license would lapse if BGCM did not adhere to the conditions of the agreement. The license contains reporting requirements that should keep the licensee accountable. In addition, the agreement could be terminated with 30 days' notice. Your Committee requested that conditions under which termination could occur by either party, with or without cause, be identified in the agreement.

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Your Committee discussed the merits of establishing a predetermined fee schedule that would apply to third-party use of the premises. Your Committee questioned whether the license needed to be revised to specifically require the licensee to comply with any subsequent enactments of law.

Mr. Hanlon stated that BGCM previously obtained year-to-year licenses only for each of its facilities. The subject long-term license would help BGCM obtain funding from private sources. BGCM operates facilities in Makawao, Haiku, Kahului, Lahaina, and Paukukalo. It charges Hui Malama for use of its facilities to operate a home-school enhancement program to offset operational fees. Your Committee was assured that BGCM would partner with others in the community to make sure the premises were fully utilized to serve the County's youth.

Your Committee was informed that membership in BGCM is open to youth from age 9 through 17. Although there is a \$5 annual fee, no one is denied membership in the club. Youth can do chores at the club in exchange for membership. Youth need to complete a membership form for liability purposes.

The Committee deferred the matter pending further discussion.

By correspondence dated July 31, 2003, to the Department of the Corporation Counsel, the Chair of your Committee memorialized the revisions to the proposed license requested at its July 30, 2003 meeting. The revisions covered the following areas: (1) identification of conditions under which the agreement could be terminated, with or without cause, by either party; (2) incorporating a reference to a fee schedule containing predetermined charges for non-club uses; (3) identification of repair and maintenance responsibilities to be borne by the County versus by the licensee; (4) incorporating language requiring compliance with subsequently enacted laws, if not already covered by the agreement; (5) clarification on whether the "assignability" provision should be excised from the license; and (6) correcting a typographical error.

By correspondence dated August 6, 2003, the Department of the Corporation Counsel responded to concerns underlying the requested revisions and transmitted a revised draft license.

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At its meeting of August 13, 2003, your Committee met with the Director of Parks and Recreation; the Planning and Development Chief, Department of Parks and Recreation; the First Deputy Corporation Counsel; and Colin Hanlon, Executive Director, BGCM.

There was no public testimony. The First Deputy Corporation Counsel provided a brief summary of your Committee's prior discussion, then explained the basic differences between a license and a lease. The revised document before your Committee for consideration, though termed a license, is actually a hybrid providing for a much longer term than is customary for a license, and contains clauses that are typical of a lease. Your Committee was informed that separating out a portion of a parcel and leasing out that portion requires compliance with the subdivision law.

The First Deputy Corporation Counsel advised your Committee that it could consider granting a license for a period of a few years, setting forth an express intent to subdivide the property and obtain a lease in the long term.

The Chair of your Committee summarized some of the differences between your Committee's request dated July 31, 2003 and the response dated August 6, 2003, which did not appear to fully address the issues contained in your Committee's request.

The Planning and Development Chief stated that the Department opted for a license because of time constraints, and the delay associated with having to subdivide the property in the event of a lease.

Mr. Hanlon stated that BGCM's goal is to create a facility that will serve more of the County's youth. BGCM is in agreement with whatever mechanism is needed to achieve that goal.

Your Committee inquired whether authorizing a 35-year license would create a precedent that would govern the handling of future requests. The First Deputy Corporation Counsel responded that the situation appears to be fairly unusual and might warrant a solution that is specific to the facts presented. The First Deputy Corporation Counsel opined that not subdividing the property and granting a license for 35 years would be legal. BGCM could not say whether a term shorter than 35 years would suffice to secure funding to construct its facility.

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Your Committee further discussed the fact that it did not foresee Keopuolani Park being subdivided into separate parcels for non-park purposes.

Your Committee discussed incorporating a reference to a fee schedule governing third-party use of the premises into the agreement. Your Committee noted that the proposed standards concerning fees to be charged appeared to leave too much discretion with the Department. Your Committee requested that the fee schedule be presented to the Council for approval, and until the schedule was approved, that no fees be charged for third-party use.

The Planning and Development Chief stated that he had discussed repair and maintenance issues with the Department of the Corporation Counsel, and they determined that, as written in the license, BGCM bears responsibility for all repairs and maintenance. Your Committee noted that the language in the license appears to be somewhat open-ended. However, BGCM indicated that it is willing to accept repair and maintenance responsibilities. Your Committee decided to leave the repair and maintenance provisions as written.

Based on the information received, your Committee voted to recommend adoption of the revised proposed resolution entitled "AUTHORIZING A GRANT OF A LICENSE TO OCCUPY COUNTY REAL PROPERTY TO BOYS & GIRLS CLUB OF MAUI, INC.", incorporating the changes agreed upon by your Committee.

By correspondence dated August 25, 2003, the Chair of your Committee explained that it had been determined that the proposed license for the exclusive use and possession of County real property for a term of 35 years bears the traditional characteristics of a lease and should not be considered a license. As a result of that determination, the matter would be reconsidered by your Committee.

By correspondence dated September 19, 2003, the Chair of your Committee requested a written status update from the Department of the Corporation Counsel.

By correspondence dated September 23, 2003, the Department of the Corporation Counsel informed your Committee of its communications with BGCM, the Department of Parks and Recreation, and the Department of Public Works and Environmental Management. The Department of the Corporation

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Counsel further advised your Committee that the matter should be deferred until the subject parcel could be formally subdivided. Based on the ongoing discussions and investigation, the Department of the Corporation Counsel opined that the subdivision might qualify under Section 18.12.050 of the Maui County Code as a limited subdivision, thereby expediting final subdivision approval and your Committee's consideration of a proposed lease.

At its meeting of October 1, 2003, your Committee met with the Director of Parks and Recreation; the Capital Improvement Project (CIP) Coordinator, Planning and Development Division, Department of Parks and Recreation; the Director of Public Works and Environmental Management; the First Deputy Corporation Counsel; a Deputy Corporation Counsel; and Kelly Pearson, Director of Operations, BGCM.

There was no public testimony. Your Committee received a status report on this matter from the Deputy Corporation Counsel. He advised your Committee of discussions with the Department of Public Works and Environmental Management concerning the subdivision process. The departments considered whether Maui County Code Section 18.12.050, pertaining to limited subdivisions, would apply because no streets, drains, or utilities would be created. The goal would be to carve out approximately 4.367 acres from the entire "pie" of Keopuolani Park. Under Section 18.12.050, the subdivision process might be accomplished within one or two months. BGCM would have its surveyor or engineer survey the property, produce a map, and superimpose that map on the entire property. The subdivision would then proceed for review and comment by the Department of Planning, the Department of Public Works and Environmental Management, and the Department of Water Supply.

Your Committee notes that the water rules require each subdivided lot to have its own separate meter. The subject acreage has its own water meter, so the requirement should not create any problems.

The Deputy Corporation Counsel recommended that the matter remain pending before your Committee until the subdivision has been completed. At that time, a formal, long-term lease would be submitted for your Committee's consideration.

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The CIP Coordinator informed your Committee that the project is not yet ready to go out to bid. Accordingly, the deadline for encumbrance of bond funds for this project would not be met by year's end in any event.

Your Committee deferred the matter pending further discussion.

By correspondence dated December 1, 2003, the Director of Parks and Recreation transmitted the following:

1. A revised proposed resolution entitled "AUTHORIZING A GRANT OF A LEASE TO OCCUPY COUNTY REAL PROPERTY TO BOYS & GIRLS CLUB OF MAUI, INC."

The purpose of the revised proposed resolution is to authorize the grant of a lease to BGCM, pursuant to Maui County Code Section 3.36.090, to occupy approximately 4.248 acres at Kanaloa Avenue, Kahului, Maui, TMK: (2) 3-8-007:001(portion), with a fair market rental value of \$2,754 per annum, at a nominal rental of \$1 per annum for a period of 35 years.

2. A proposed lease agreement entitled "LEASE".

The purpose of the proposed lease is to establish the terms and conditions for the use of the property by BGCM.

3. A revised proposed grant agreement entitled "GRANT AGREEMENT FOR A LEASE OF COUNTY REAL PROPERTY".

The purpose of the revised proposed grant agreement is to acknowledge that BGCM has applied for a grant of a lease to occupy approximately 4.248 acres of real property located in Kahului, Maui, and identified as TMK: (2) 3-8-007:001(portion), with a fair market rental value of \$2,754 per annum, at a nominal rental of \$1 per annum for a period of 35 years, to construct additional facilities and to operate BGCM on the premises.

4. A proposed resolution entitled "AUTHORIZING THE GRANT OF EASEMENTS ON COUNTY OF MAUI REAL PROPERTY RELATING TO THE BOYS & GIRLS CLUB OF MAUI, INC., FOR

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ACCESS AND UTILITY PURPOSES”, along with the attached access and utility easements.

The purpose of the proposed resolution is to authorize the grant to BGCM of two access and utility easements across County real property, comprising approximately 1.353 acres at Kahului, Maui, TMK: (2) 3-8-007:001(portion), pursuant to Maui County Code Sections 3.44.020, 3.44.030 and 3.44.070.

By correspondence dated December 2, 2003, the Chair of your Committee requested that the Department of the Corporation Counsel revise the proposed lease to incorporate earlier revisions and specified changes to Exhibit “2”. The Chair of your Committee also requested that a typographical error be corrected in the proposed resolution authorizing the grant of easements.

By correspondence dated December 5, 2003, the Chair of your Committee transmitted a revised proposed resolution entitled “AUTHORIZING THE GRANT OF EASEMENTS ON COUNTY OF MAUI REAL PROPERTY RELATING TO THE BOYS & GIRLS CLUB OF MAUI, INC., FOR ACCESS AND UTILITY PURPOSES”; a revised proposed lease; and related proposed documents to your Committee.

At its meeting of December 8, 2003, your Committee met with the Director of Parks and Recreation; the Capital Improvement Project Coordinator, Planning and Development Division, Department of Parks and Recreation; the Director of Public Works and Environmental Management; an Executive Assistant, Office of the Mayor; a Deputy Corporation Counsel; and the Executive Director, the Director of Operations, and the Chief Volunteer Officer and Board Chair of BGCM.

Your Committee received testimony from two individuals, both of whom represented BGCM and supported the lease.

The Chair of your Committee opened the discussion by stating that the proposed documents transmitted by correspondence dated December 5, 2003, were the most recent versions to be considered by your Committee.

The Deputy Corporation Counsel provided your Committee with an overview of the progress made on the matter since your Committee last met on

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it. The property had been subdivided pursuant to your Committee's direction. As an integral part of the subdivision, two access and utility easements were required. Accordingly, a second resolution to grant these non-exclusive easements to BGCM has been proposed.

The Deputy Corporation Counsel further clarified the technical aspects of the proposed lease. Because the lease is for less than fair market value, the standard provisions under Maui County Code Chapter 3.40 do not apply. Provisions requiring bidding contained in that chapter are also inapplicable. Instead, Chapter 3.36 applies, and the subject proposal has been submitted through the grants review program.

Your Committee was further informed that the request for access and utility easements is being made pursuant to Maui County Code Chapter 3.44. The easements have not been valued on the basis that it is in the public interest to grant such easements.

Your Committee discussed the decrease in acreage from the 4.367 acres associated with the earlier proposed license to the 4.248 acres associated with the proposed lease. Your Committee notes that the smaller of the two easements accounts for the difference in acreage, while the larger easement is to provide BGCM with use of an adjacent parking lot.

Your Committee discussed the fee schedule referenced under the "Use of Premises" provision in the proposed lease. Your Committee noted that no fee schedule is attached to the proposed lease and that no resolution adopting a fee schedule has been submitted to the Council for approval. Your Committee was informed that the fee schedule would be submitted for approval once it had been prepared. In the interim, the lessee would not be entitled to charge user fees for third-party use of the premises.

Your Committee questioned the need for five administrative representatives to consent or approve of the lease. The Deputy Corporation Counsel informed your Committee that the prior version used boilerplate language, and that revising the lease to require the consent or approval of the Mayor and the Director of Finance only should not be problematic.

Your Committee voted to amend the lease, by changing the definition of "Lessor" in Exhibit "2" on page 8 of the lease, to reference the consent or

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approval of the Mayor and the Director of Finance only, and to conform other references in the lease as necessary.

Based on the information received, your Committee voted to recommend adoption of the revised proposed resolutions authorizing the grant of a lease and the grant of easements, and the filing of the communication.

Your Committee is in receipt of a revised proposed lease incorporating your Committee's suggested revisions.

Your Committee of the Whole RECOMMENDS the following:

1. That Resolution No. _____, as revised herein and attached hereto, entitled "AUTHORIZING A GRANT OF A LEASE TO OCCUPY COUNTY REAL PROPERTY TO BOYS & GIRLS CLUB OF MAUI, INC." be ADOPTED;
2. That Resolution No. _____, attached hereto, entitled "AUTHORIZING THE GRANT OF EASEMENTS ON COUNTY OF MAUI REAL PROPERTY RELATING TO THE BOYS & GIRLS CLUB OF MAUI, INC., FOR ACCESS AND UTILITY PURPOSES" be ADOPTED; and
3. That County Communication No. 03-177 be FILED.

Adoption of this report is respectfully requested.

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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**

DANNY A. MATEO **Member**