

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

September 19, 2003

Committee
Report No. 03-103

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 September 3, 2003, makes reference to County Communication No. 03-211, from the Council Chair, transmitting a draft resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO REPRESENT THE COUNCIL IN THE MATTER RELATING TO THE MAYOR'S JULY 29, 2003 ANNOUNCEMENT HALTING THE ISSUANCE OF WATER METERS" and requesting consideration of legal issues relating to the County's policies on the issuance of water meters.

The purpose of the draft resolution is to authorize the employment of special counsel, on behalf of the Council, to investigate and evaluate the propriety of the Mayor's announcement that a decision had been made not to accept any new water meter reservations as a result of the designation of the Iao Aquifer as a State groundwater management area, effective July 21, 2003.

Your Committee notes that the Mayor's announcement raises serious questions relating to separation of powers under the Charter of the County of Maui.

By correspondence dated August 27, 2003, the Chair of your Committee transmitted the following:

1. An opinion dated August 8, 2003, from the Department of the Corporation Counsel to the Director of Water Supply, relating to proposed interim measures by the Department of Water Supply in response to the State Commission on Water Resource Management's designation of Iao Aquifer (August 8, 2003 Opinion);
2. Authorities cited in the August 8, 2003 Opinion; and
3. An opinion dated July 28, 2003, from the Department of the Corporation Counsel to the Chair of the Water Resources Committee, relating to the Board of Water Supply Rules.

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By correspondence dated August 28, 2003, the Council Chair transmitted a revised draft resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL IN MATTERS RELATING TO COUNTY WATER POLICIES". The purpose of the revised draft resolution is to authorize the employment of special counsel to advise and represent the Council on County water policies, including the Mayor's announcement that, effective July 21, 2003, no new water meter reservations would be issued, and the subsequent promised allocation of one million gallons per day for affordable housing projects being planned around Central and South Maui. The proposed authorization contemplates an hourly rate not to exceed \$150 and total compensation not to exceed \$10,000.

Your Committee further notes that it received correspondence dated September 3, 2003, from Martin DuPont, expressing the view that the Council should have control over water resources.

At its meeting of September 3, 2003, your Committee met with the Mayor, the Director of Water Supply, the Corporation Counsel, and two Deputy Corporation Counsel.

There being no public testimony, your Committee discussed the revised draft resolution. Your Committee noted that the revised draft resolution was worded broadly enough to encompass a review of the water rules and regulations, in addition to the entity or entities authorized to make various policy decisions, in the wake of amendments to the Maui County Charter. Your Committee also clarified that its intent was not to suggest that the Executive Branch had done something wrong, but was simply to clarify the roles and responsibilities of the Board of Water Supply, the Director of Water Supply, the Mayor, and the Council on County water policies.

The Mayor stated that the decision not to take water meter reservations was not functionally different from the Department's prior dispensation of reservations with a disclaimer that water could not be guaranteed. The Mayor informed your Committee that under either scenario, the actual application is the same, regardless of whether a reservation is accepted or not. The difference is one of perception. The Mayor expressed the view that there was no major policy change because, for a number of years, the Department has not guaranteed water meters under its disclaimer.

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The Mayor suggested that a review of authority for County water policies also include a review of how authority is allocated on issues relating to the Department of Public Works and Environmental Management and the Department of Transportation.

The Mayor further suggested that, if the Council chose to implement a policy requiring the Department to continue issuing water meter reservations, that the Department would abide by such a policy; however, the Council needed to be prepared for a lawsuit if water was not available.

Both the Director of Water Supply and the Corporation Counsel declined comment.

Your Committee asked the Mayor whether he had any objections to the revised draft resolution. The Mayor indicated that he did not have any objections to the revised resolution, which would define the Council's rights with respect to County water policies. The Mayor further stated that the Department of the Corporation Counsel had issued an opinion on the propriety of the July 29, 2003 announcement covered by the original draft resolution. The Mayor opined that, in contrast to the scope of the earlier resolution, an evaluation by special counsel of the water rules and separation of powers issues from a much broader perspective would serve the public interest.

Your Committee clarified that it had not had access to the August 8, 2003 Opinion prior to the Council's August 19, 2003 meeting, when it considered the original draft resolution. Your Committee thanked the Mayor for his comments and participation at the meeting.

Your Committee further expressed a desire to steer special counsel's role toward a broad review of water rules and authority for policy decisions, to enable the Council to get to the root of the problem and more effectively address the Department of Water Supply's needs.

Your Committee also expressed a need to have a better understanding of water allocation procedures and requirements under Maui County Code Chapter 2.90A, entitled "Regulation of Permits and Water Use". As a result of the levels of withdrawal from the Iao Aquifer and the subsequent designation of the aquifer as a State groundwater management area, the County's whole economy depends on how the Council passes an allocation program by land use categories. Your Committee noted that Section 2.90A.040(E) provides that, "No

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permit shall be processed for any projects for which estimated water use . . . would cause the allocation for the land use category of the appropriate community plan to be exceeded, unless the applicant executes an agreement, . . . acknowledging that water through the department's water system may be unavailable for the project and that applicant assumes the risk of such unavailability".

While noting the Council's authority to make allocations under Chapter 2.90A, your Committee also discussed the Mayor's commitment to provide water for affordable housing projects. Your Committee stressed its desire to ensure the Department of Water Supply could move forward, operate, and do its job. Your Committee stressed equally the Council's need to do its job and adopt an allocation program.

Your Committee voted to recommend adoption of the revised draft resolution.

Your Committee is in receipt of a proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL IN MATTERS RELATING TO COUNTY WATER POLICIES" approved as to form and legality.

Your Committee of the Whole **RECOMMENDS** that Resolution No. _____, attached hereto, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL IN MATTERS RELATING TO COUNTY WATER POLICIES", be **ADOPTED**.

Adoption of this report is respectfully requested.

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