

Resolution

No. 03-146

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL IN MATTERS RELATING TO COUNTY WATER POLICIES

WHEREAS, a lack of clarity exists in the continued effect of water rules and regulations and in authority for various County water-policy decisions; and

WHEREAS, it is important to establish policies that foster predictability and fairness in the management, control, operation, preservation and protection of the County water works; and

WHEREAS, according to the attached news release dated July 29, 2003, entitled "County halts meter reservations", the Mayor has announced that "the Department of Water Supply stopped the issuance of reservations for water meters on July 21, 2003" (Exhibit "A"); and

WHEREAS, according to the attached *Maui News* article dated August 7, 2003, entitled "Mayor promises water for affordable housing project", the Mayor has also announced that the County "is setting aside an allocation of 1 million gallons a day for affordable housing projects that are being planned around Central and South Maui" (Exhibit "B"); and

WHEREAS, the Mayor's announcements raise serious issues relating to the separation of powers under the Charter of the County of Maui; and

WHEREAS, it appears that the Administration's water-policy decisions are being made consistent with the legal advice of the Department of the Corporation Counsel; and

WHEREAS, the Council finds that, because of a conflict of interests, there is a real necessity to retain special counsel to investigate and evaluate the propriety and effect of the Mayor's announcements and to advise the Council as to whether judicial remedies are appropriate in response thereto; and

WHEREAS, the Council further finds that, because of the need for specialized expertise and shortages in available staff in the Department of the Corporation Counsel, there is a real necessity to retain special counsel to evaluate the water rules and regulations and amendments to the Charter, and to propose legislation to clarify

the governing law and the respective roles of the Department of Water Supply, Board of Water Supply, the Mayor, and the Council; and

WHEREAS, the Council further finds it to be in the best interest of the County of Maui to provide special counsel to the Council in this matter; and

WHEREAS, the Council is authorized to retain or employ special counsel by resolution adopted by a two-thirds vote; now, therefore,

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

1. That the Council hereby authorizes the employment of special counsel, to be selected by the Council Chair, to advise and represent the Council on County water policies, including but not limited to the issues of water meter issuance and reservations and management of the Iao and Waihee Aquifers;
2. That the special counsel shall report to the Council's Water Resources Committee on matters including:
 - a. Proposed legislation to address policy and rule-making authority, and supplement and clarify water rules and regulations.
 - b. What legally effective action, if any, has the County taken regarding water-meter applications? What County agency or official took the action? By what means was the action taken? Under what authority was the action taken?
 - c. Has the action usurped Council authority? If so, how?
 - d. Does the Council possess the authority to rescind, repeal, modify, or validate the action by legislative enactment? If so, how should the Council exercise that authority?
3. That total compensation for the employment of special counsel shall not exceed \$10,000;
4. That special counsel shall take all possible steps to minimize the level of attorneys' fees and costs;
5. That the hourly rate for the primary attorney shall not exceed \$150;
6. That the hourly rate for associate attorneys, if any, shall not exceed \$135;
7. That the hourly rate for paralegals, if any, shall not exceed \$75;

8. That the compensability of costs shall be in general accord with the intent of 28 U.S.C. § 1920;
9. 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;
10. 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 justified by extraordinary or compelling circumstances; (7) investigative expenses; (8) other costs reasonably considered part of a law firm's overhead;
11. 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 County Council;
12. That the expenditures of additional funds or substantial changes to the responsibilities of the parties shall require prior Council approval;
13. That the conduct of special counsel in this matter shall reflect special counsel'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;
14. That special counsel shall not initiate legal proceedings on the Council's behalf unless the Council adopts a resolution approving such action; and
15. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, the Director of Finance, the Director of Water Supply, and the Director of Council Services.

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

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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 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. 03-146, 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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