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OFFICE OF THE  
COUNTY COUNCIL

MEMO TO: Michael J. Molina, Chair  
Governance, Ethics, and Transparency Committee

F R O M: Kelly T. King  
Council Chair



SUBJECT: **TRANSMITTAL OF LEGISLATIVE PROPOSAL RELATING TO  
LITIGATION MATTERS (GET-11) (PAF 19-173)**

The attached legislative proposal pertains to Item 11 on your committee's agenda.

paf:dmr:19-173t

Attachment

# Resolution

No. \_\_\_\_\_

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL  
TO ADVISE AND REPRESENT THE MAUI COUNTY COUNCIL  
RELATED TO INTERPRETATION OF THE CHARTER OF THE COUNTY  
OF MAUI REGARDING LEGISLATIVE AND EXECUTIVE AUTHORITY

WHEREAS, Plaintiffs Hawaii Wildlife Fund, et al. filed a lawsuit in the United States District Court (the “District Court”) on April 16, 2012, Civil No. 12-00198 SOM BMK, against the County of Maui, alleging violations under the Federal Water Pollution Control Act, also known as the Clean Water Act; and

WHEREAS, on January 23, 2015, and June 25, 2015, the District Court granted Plaintiff’s motions for partial summary judgment; and

WHEREAS, the County Council adopted Resolution 15-75 on July 7, 2015, related to approval of settlement of the case under the terms presented to the County Council’s Committee of the Whole by the Department of the Corporation Counsel; and

WHEREAS, then-Mayor Alan M. Arakawa approved and executed the “Settlement Agreement and [Proposed] Order Re: Remedies” on September 24, 2015 (“2015 Settlement Agreement and Order”); and

WHEREAS, the 2015 Settlement Agreement was lodged with the District Court on September 24, 2015, and following federal government review pursuant to 40 C.F.R. §135.5, the District Court entered the Settlement Agreement and Order and entered Judgement on November 17, 2015; and

WHEREAS, pursuant to the 2015 Settlement Agreement and Order, the Parties agreed that the County reserved the right to appeal the rulings of the District Court to the Ninth Circuit Court of Appeals and on to the U.S. Supreme Court; and

WHEREAS, the County of Maui appealed the District Court’s decision to the Ninth Circuit Court of Appeals, No. 15-17447, and the Ninth Circuit Court of Appeals denied the appeal on February 1, 2018; and

## **Resolution No. \_\_\_\_\_**

WHEREAS, County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018, and on February 19, 2019, the U.S. Supreme Court granted the County of Maui's petition, No. 18-260, and will hold oral arguments on November 6, 2019; and

WHEREAS, the Maui County Council, by a vote of 5-4, adopted Resolution 19-158, approving the revision of the 2015 Settlement Agreement according to the terms and conditions described in Plaintiffs' "Confidential Settlement Communication – FRE 408" dated April 26, 2019, (with amendments made on May 9, 2019) ("Plaintiffs' Proposal"); and

WHEREAS, the Department of the Corporation Counsel advised that the terms and conditions of Plaintiffs' Proposal implicate both legislative and executive powers under the Revised Charter of the County of Maui (1983), as amended ("Charter") and thus require the consent and approval of both branches of government; and

WHEREAS, the County Council disagrees with the legal opinion of the Department of the Corporation Counsel; and

WHEREAS, the Department of the Corporation Counsel sought and received the advice of the Hawaii Office of Disciplinary Counsel, which concurred that a situation in which the legislative branch and executive branch disagree on an interpretation of law related to each branch's powers creates a direct conflict of interest such that the attorneys in the Department of the Corporation Counsel are conflicted from representing either branch of government in legal action to resolve this question of law; and

WHEREAS, Subsection 3-6(6), of the Charter, authorizes the Council, by a two-thirds vote, to retain or employ special counsel for any special matter presenting a real necessity for such employment; and

WHEREAS, a real necessity for the employment of special counsel exists as the Department of the Corporation Counsel is unable to represent either branch of government in this matter; and

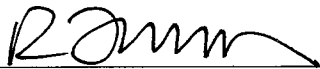
WHEREAS, the Council further finds it to be in the best interest of the County of Maui to provide special counsel to the Maui County Council on the matter; now, therefore,

**Resolution No. \_\_\_\_\_**

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

1. That the Council hereby authorizes the employment of the special counsel to represent the Maui County Council in resolution of the interpretation of law described hereinabove, including if necessary, litigation, under the terms set forth in a meeting before the Governance, Ethics, and Transparency Committee; and
2. That the total compensation for the employment of special counsel shall not exceed \$100,000; and
3. That compensable costs include fees for printing and witnesses; fees for copies necessarily obtained for use in the case; fees of the clerk and marshal; fees of the court reporter for necessary transcripts; docket fees; compensation of court-appointed experts and interpreters; and pre-approved travel; and
4. That non-compensable costs include telephone calls; facsimile charges; postal charges; messenger charges; fees for computerized legal research; investigative expenses; and other costs reasonably considered part of a law firm's overhead; and
5. That certified copies of this resolution be transmitted to the Chair of the Maui County Council, the Director of Finance, and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY:



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RICHELLE M. THOMSON  
Deputy Corporation Counsel  
County of Maui  
PAF 19-173