

**GET Committee**

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**From:** Samuel Small <info@mauicauses.org>  
**Sent:** Wednesday, January 23, 2019 11:50 AM  
**To:** Mike J. Molina; GET Committee  
**Subject:** David Cain's 2014 scathing critique of Patrick Wong  
**Attachments:** Cain Requests for Investigation.pdf

Dear Council Member,

The attached letter written by attorney David Cain in 2014 regarding administrative abuse of 3 Lot-or-Less Deferral Agreements and SMA Permits is extremely critical of Corporation Counsel Patrick Wong and tells a very different story than Mr. Cain's testimony today.

The investigation demanded by Cain never happened at the Council level. However the Council did unanimously vote to escalate the Deferral Agreement issue into a formal independent audit recommendation, which validates Mr Cain's original concerns. Maui's Independent Auditor agreed to perform this audit this year and it is pending.

Perhaps Mr. Wong should be questioned as to whether there's been any settlement agreements recently negotiated with Mr. Cain or his firm that may have influenced Mr. Cain's drastic change in tune today.

Respectfully  
Sam Small  
Director, Maui Causes

# CAIN & HERREN

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Friday, February 21, 2014

Maui County Council  
Policy and Intergovernmental Affairs Committee  
250 South High Street - 8th Floor  
Wailuku, HI 96793

Attention: Committee Chair - G. Riki Hokama

RE: Council Investigation of Subdivision Deferral Agreements  
Council Communication No. 13-238 (PIA-45)

Dear Council Member Hokama:

This correspondence is a follow up to my letter and exhibits sent to the members of the Maui County Council on June 25, 2013. I appreciate your honorable posting of this issue on the Council record as communication No. 13-238 (PIA-45) on August 2, 2013.

Regretfully, I must bring forth even further evidence of dishonorable acts by the County Administration and the Department of Corporation Counsel as exhibited on my attached letter to County attorney Pat Wong. Specifically, we now have in possession over 10,000 pages of developer deferral agreements that has exposed my own personal home along with countless other Maui property owners who have one of these open ended damaging clouds on their title.

Evidence now confirms that public taxpayer funds, both County and Federal, have already been intentionally used by the Administration to complete developer's subdivision obligations in direct violation of Section 9-12 of the Maui County Charter. The Administration and Corporation Counsel cannot provide any proof they ever intended to keep track of these developer financial obligations or even consider collecting upon them.

Of equal concern, evidence suggests that developers' environmental mitigations required by the Federal Coastal Zone Management Act (SMA) may have also been paid with public funds. And finally, as exhibited by the attached letter sent to County attorney Michael Hopper, it appears as though this unlawful breach of public trust has expanded to non collection or proper record keeping of developers' Park Fee obligations. Corporation Counsel is blocking further public discovery and investigation of these acquisitions.

G. Riki Hokama  
Thursday, June 13, 2013  
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To ensure the wrongful acts are stopped and reconciled, and mitigate further damage to the public interest, I respectfully call for the Maui County Council to take immediate action to investigate the irrefutable violations of the Maui County Code and Maui County Charter by the Department of Public Works, Department of Planning, and Corporation Counsel.

In a follow up correspondence, I will be providing a complete summary of findings of facts and conclusions of law that the Maui County Council has the power to investigate. The violations are subject to penalties and punishment under Section 13-10 of the Maui County Charter.


The investigation process must protect and preserve the independent duties of County Government. The Department of Corporation Counsel must cease and desist from any further influence or intimidation towards the Council Members. Corporation Counsel is at the center of this investigation and there are documented conflicts of interests and attorney client relationships with both the Administration and private developers.

Please be advised, the unlawful County cloud on my client's property is preventing resolution with a Federal Savings Bank that will cause immense damages if Corporation Counsel does remediate the consequences of unauthorized decisions of former Public Works Director Milton Arakawa. Indisputably, Director Arakawa acted outside of his authority by signing off on a former client's subdivision with incomplete SMA permit obligations and secret shifting of their "3 Lots or Less" subdivision obligations onto 5 properties.

No law adopted by the Maui County Council supports these unethical acts. With the facts in evidence and currently in your possession, these violations of the Maui County Code require minimal expense of Council time to address. By concluding the same, responsible resolution is immediate and prevents unnecessary escalation.

In closing, my concern is this matter will rupture into yet another public display of dodging responsibility and finger pointing between the Administration and the Council at the expense of the public trust and further waste of public resources. To avoid this from occurring, the Council must immediately exert their powers of investigation.

Sincerely,

  
David W. Cain

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Tuesday, June 25, 2013

County of Maui  
County Council  
250 South High Street  
Wailuku, Hawaii 96793

Dear Council Members,

My name is David Cain. As many of you know, my firm specializes in bankruptcy.

Bankruptcy takes on many faces and brings forth a sea of emotions and personal challenges. Fear, desperation, and a sense of disillusionment encompasses the spirit of many who are forced to choose this agonizing path. To the best of my abilities, my personal and professional ambition is to raise hope to offset my client's humiliation.

I bring to your attention a disturbing bankruptcy case involving a former executive assistant to the Maui County Council and a dedicated volunteer in the west Maui youth programs. It is unsettling to encounter a case in which a family must resort to bankruptcy because of the dishonorable decisions of government officials sworn to protect the public interests. I fail to understand why Maui citizens are continually forced to legally defend their property rights and the laws adopted by the Maui County Council.

Something must change. Over the last decade, vast amounts of public funds have been unnecessarily spent defending illegitimate decisions by County Directors. With the powers afforded in the Maui County Charter, the Maui County Council has the duty and sole authority to investigate and produce findings on the operation of any department on any subject the Council legislates. The Council has the power to adopt by ordinance the appropriate punishment of violations of ordinances and rules having the force and effect of law. The loss of public funds could have been avoided.

On this case history, to avoid yet another case of prolonged dispute, the Maui County Council is hereby called upon to immediately investigate the private interests being served and disguised by the administration and Corporation Counsel that is the direct cause of my client's bankruptcy.

For over 12 years, my client Christopher Salem has insisted the developers adjacent to his west Maui home honor the Maui County Code and Rules of the Planning Commission on their oceanfront re-subdivision of a prior 3 Lot subdivision. Evidenced by the enclosed findings, the immense personal expense of exposing the exploited loopholes in the Maui County code, conflicting relationships between the County administration, Corporation Counsel, and private interests, has my client's family on the verge of losing everything they have worked for, including their home through foreclosure.

My findings conclude, had the proper administration of the developer agreements referred to as "3 Lots or Less" Subdivision Agreements occurred in 2001, along with the strict enforcement of the developers' signed SMA Permit conditions prior to the subdivision approvals, an unlawful cloud would not exist on my client's title. Moreover, none of the prior and current legal conflicts would have occurred.

While the public interest has been served by my clients' unveiling of the previously unaccounted for developer financial obligations, the unnecessary damages my client has suffered are unacceptable. My client and my firm do not seek recourse against the County of Maui to cause further harm to the people of Maui County. The recovery must occur from the parties responsible.

### **Brief History**

In 2001, during the initial chapters of the Montana Beach debacle, Attorney Tom Welch represented Developer Lot 48A, LLC on the oceanfront subdivision next door to my client's property. Attorney Welch denied his developer clients were obligated to perform public hearings, environmental studies, provide public shoreline parking, and complete drainage and roadway improvements required by Title 18 of the Maui County Code. As evidenced by the attached letter from former Council Member JoAnne Johnson Winer, Attorney Welch's clients already had the disputed obligations in their back pocket (see Exhibit 1).

The issued and signed developer SMA permits and entitlements on the 2nd subdivision of the parent parcel satisfied the obligations of the underlying one time 3 Lots or Less Subdivision Agreement (see Exhibit 2). The Planning Director refused to enforce the signed permits and Corporation Counsel once again defended director decisions that were not supported by law. This clear breach of public trust by politically appointed officials is, unfortunately, just the beginning.

As further exhibited in the attached "History of Uncollected Developer Obligations," the deceptive administration of the previously unaccounted for developer "3 Lots or Less" subdivision deferral agreements is a key contributing cause to my client's personal and professional demise (see Exhibit 3).

Attorney Welch's brash written statement to my client years ago speaks volumes. The suggestion that my client retain legal counsel to confirm the likelihood of the County ever collecting upon developer agreements reeks of arrogant exploitation of inside information. By their own admissions, prior to my client's relentless efforts and discovery, hundreds of recoverable developer contracts involving thousands of properties were not worth the paper Corporation Counsel wrote them on. Attorney Welch's law partner was formerly employed by the Department of Corporation Counsel.

### **Violations**

In direct violation of Article 9, Section 9-12 of Maui County Charter, for 38 years, the Department of Public Works and Corporation Counsel appear to have knowingly and intentionally manipulated a County ordinance to shift private developer financial obligations to the County of Maui. While they continue to deny any wrongdoing, they refuse to release public documents and assessment rolls of the outstanding developer agreements. Requests for production of documents by my client and the County Council have been denied by Corporation Counsel and labeled as "privileged" and a "frustration of a legitimate government function" (see Exhibit 4).

In a court of law or public opinion these administrative decisions are not defensible. The prior conduct of the administration and continued concealment of public documents is blameworthy under the powers of this Council.

Contrary to Attorney Welch's overconfident prediction, the administration finally admits the agreements must be collected. However, once again the administration is violating the Maui County Charter. The recent letter sent by Public Works Director David Goode informing Mayor Arakawa his department will work with Corporation Counsel to establish the assessment amounts and send bills to property owners bypasses the public hearing and legislative process (see Exhibit 5). This unconstitutional form of government collection could lead to political favors, coercion, and taking of citizens' land through foreclosure if the amounts assessed by politically appointed County officials were left unpaid.

The Maui County Charter is very clear on where the assessment responsibility lies. Assessments must be adopted by ordinance by the Maui County Council. To facilitate and serve the public interests, my client, along with the insight from Council members, created the "Fairness Bill" (PC-17; see Exhibit 6). Late last year, the bill was forwarded by the Chair of the Council to the Planning Committee. Evidence suggests Corporation Counsel instructed Council Member Couch to extinguish the proposed legislation and keep it out of the public eye.

Council member Couch is a former member of the administration and my client brought the abuse to his attention over a decade ago. No action was taken by Mr. Couch. The administration and Corporation Counsel continued to author over a hundred more subdivision deferral agreements without notifying the Council. In 2007, those rights to defer developer financial obligations were removed by the Maui County Council through legislation.

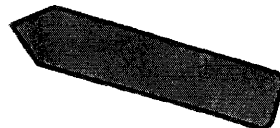
Immediately upon entering office in 2011, Mayor Arakawa attempted to address the exposure Maui County faces on the unaccounted for developer agreements. Mayor Arakawa met with my client and Transportation Director JoAnne Johnson Winer to review my client's proposed resolution for the unaccounted-for assessments, which was researched by Mr. Salem while he was employed by the County Council.

Mayor Arakawa personally instructed my client and Transportation Director Winer to work with Corporation Counsel to present to the Council a prudent formula for assessment and collection of the developer agreements. Corporation Counsel canceled all meetings on the matter without explanation. When these decisions were made, developer Lot 48A, LLC's legal representative Margery Bronster was under Corporation Counsel's direct employment. Despite their clear violations of the Hawai'i Supreme Court Rules of Professional Conduct, Corporation Counsel continued to advise and influence every branch of Maui County government.

#### **Client Bankruptcy Case**

As the senior open-ended lien holder on my client's property, the County of Maui is a named creditor in United States Bankruptcy Court, Case #13-00392. On May 7, 2013, a meeting of the creditors was held by the United States Bankruptcy Court in Wailuku. The County of Maui failed to attend the hearing and as of this date has not responded to the Bankruptcy Court with a Proof of Claim on the senior lien that unlawfully clouds my client's title.

Evidence confirms the underlying subdivision improvement obligations remain vested in Lot 48A, LLC's issued and unfulfilled subdivision conditions and SMA permits. The very day the entitlements were granted to Developer Lot 48A, LLC to allow further division of the parent parcel, the "3 Lots or Less" subdivision cloud on my client's title should have been immediately removed by Corporation Counsel. With no records being kept of the developer agreements in 2001 by either the administration or Corporation Counsel, this required action was not possible.



### Resolution

I want to be clear with the Council Members on my legal position. My client and my firm do not seek harm to the County of Maui or the use of public funds to repair the damages my client has suffered. My firm requests the Maui County Council immediately exert their powers of investigation and confirm the attached findings to prevent this action from escalating to the discretion of the Court (see Exhibit 7), specifically as follows:

- The Council will find developer Lot 48A, LLC was issued final subdivision approval by Public Works Director Milton Arakawa with their signed entitlements and SMA Permits left unfulfilled and not bonded for. The attached evidence proves the developers and their consultants attempted to shift hundreds of thousands of dollars in their financial obligations to the taxpayers as part of the Phase IV of Lower Honoapiilani Road Capital Improvement Project (see Exhibit 8).
- Through this initial Council finding, the public interest will be immediately served. Developer Lot 48A, LLC will be forced to return to their prosperous development and complete their obligations. The Maui County Planning Commission will be able to perform their duties on the developer's expired SMA Permit. The unlawful "3 Lots or Less" open-ended cloud on my client's property will be removed without the involvement of the Court and prevent further harm to my client and the bankruptcy creditors. The County of Maui will also avoid future legal challenges from the four other property owners bound by "3 Lots or Less" subdivision agreement.
- Next, to further avoid future legal conflicts, the Maui County Council must provide to the public an assessment roll of all developer agreements throughout Maui County they deem lawfully collectable. For this action to occur, the Maui County Council must demand from Corporation Counsel the release of all developer assessment agreements. They must clearly delineate which developments have already been completed at public expense. The Council will be able to immediately track future County revenues as a part of the annual budget process. This action is required by the Charter and has been violated for decades.
- Finally, an unbiased formula for assessment must be adopted through legislation by the Maui County Council. The Council should take under advice and consideration the re introduction the "Fairness Bill" which not only provides the formula for assessment, but also through Title 18 eliminates the ability of the administration to approve incomplete subdivisions such as my client's and numerous others in Maui County.

### Conclusion

Rule 1.6 (c) (5) of the Hawaii Rules of Professional Conduct is very clear on the obligations of attorneys employed by government agencies to prevent injury to the public good (see Exhibit 9). Instead of rectifying the consequences of prior unlawful Director decisions and their own negligent and conflicting acts, Corporation Counsel has been self serving and gone in the complete opposite direction.

For decades Corporation Counsel has prevented the Council from performing their duties established under the Maui County Charter. By concealing developer contractual agreements and conflicting private developer client relationships, Corporation Counsel is responsible for the ongoing frustration of legitimate functions of the Maui County Council. Evidenced by the attached findings, they have personally placed my client and the public interest at risk.

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If I am forced to file a motion in Federal Bankruptcy Court to publicly remove this unlawful cloud to preserve my client's property rights and protect the bankruptcy creditors, the County of Maui and public officials will be personally exposed to legal claims of violations of Article 9, Section 9-12 of the Maui County Charter.

To protect the rights of the legislative branch of Maui County and prevent their members from being accused of playing any role in the shifting of private obligations to the public, I am requesting the Council immediately employ non-partisan and un-biased legal counsel. The millions in development debts owed to public coffers that have been uncovered at my client's expense must be assessed and protected. There must be an individual instantly appointed by the Council for my firm to engage in respectful dialogue to mitigate further harm to the County and my client.

Corporation Counsel must disclose all conflicts of interest with private developers and their legal representatives on all matters involving the developers of my clients subdivision and the unclear developer deferral agreements. In strict compliance with the Hawaii Rules of Professional Conduct, Corporation Counsel must immediately present to the Council how the consequences of their wrongful official acts and the admitted misuse of public funds by their clients in the administration will be rectified. Furthermore, Corporation Counsel must be warned by the Council to cease and desist from any further defamation and intimidation tactics against my client.

As the attached evidence documents, from cover to cover the constitution of the County of Maui has been violated by Corporation Counsel and the Administration. The Hawaii Rules of Professional Conduct have been completely disregarded by the attorneys in Corporation Counsel under the disguise of protecting the County of Maui. Corporation Counsel clearly needs to be reminded they are ethically employed to advise solely within the limits of the laws adopted by the County Council and to serve of the public interest at every turn.

While my loyalty lies with repairing my client's damages, my heartfelt professional request of the Council is to exhibit courage and conviction on this investigation to forever change the culture of Maui County Government. No citizen or County employee should be forced to stand alone and endure personal bankruptcy to uphold the laws publicly adopted by the Maui County Council.

Sincerely,

A handwritten signature in black ink, appearing to read 'DW Cain', with a long horizontal line extending to the right.

David W. Cain, Esq.  
*Attorney for Chris Salem*