

COUNCIL OF THE COUNTY OF MAUI
GOVERNANCE, ETHICS, AND
TRANSPARENCY COMMITTEE

April 23, 2019

Committee
Report No. _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Governance, Ethics, and Transparency Committee, having met on April 4, 2019, makes reference to County Communication 19-123, from Council Vice-Chair Rawlins-Fernandez, transmitting a proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL ON THE MAYOR'S APPOINTMENT AS "INTERIM" ADMINISTRATIVE HEADS THE SAME INDIVIDUALS DISAPPROVED BY THE COUNCIL." The purpose of the proposed resolution is to authorize the employment of special counsel to provide legal services related to the Mayor's authority to appoint as "interim" administrative heads the same individuals disapproved by the Council.

Your Committee notes by Resolution 16-96, the Council proposed an amendment to the Revised Charter of the County of Maui (1983), as amended ("Charter"), to be placed on the General Election ballot to require Council approval of the Mayor's appointment of administrative heads of departments and allow additional qualifications for administrative heads appointed by the Mayor to be established by ordinance. The proposed Charter amendment was approved at the 2016 General Election. The effective date of the ordinance was January 2, 2019.

Your Committee noted the Council disapproved the nominations of John D. Kim as Prosecuting Attorney, David Goode as Director of Public Works, and William Robert Spence as Director of Housing and Human Concerns at its meeting of February 15, 2019, reconvened on February 22, 2019 (Resolutions 19-29, 19-32, and 19-35).

Your Committee noted pursuant to Charter Section 6-2(5), the appointee shall take office upon appointment by the Mayor but shall not continue in office if the Council denies the appointment.

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By press release dated February 26, 2019, the Mayor named John D. Kim as temporary interim Prosecuting Attorney until March 1, William Robert Spence as temporary interim Director of Housing and Human Concerns until March 17, and David Goode as temporary interim Director of Public Works. Your Committee noted the Mayor relied upon Charter Section 6-2(4), which authorized the Mayor to appoint temporary administrative heads.

Your Committee discussed retaining special counsel to investigate and evaluate the propriety and effect of the Mayor's appointments, and recommend appropriate remedies and actions, including the initiation of a quo warranto proceeding under Chapter 659, Hawaii Revised Statutes, if appropriate.

Your Committee noted Charter Section 3-6(6) 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.

Your Committee noted the total compensation for the employment of special counsel shall not exceed \$30,000.

Your Committee discussed whether the matter was moot because the temporary interim department heads are no longer serving in those capacities. Your Committee discussed obtaining a legal opinion would provide guidance for future instances.

Your Committee further discussed a Charter amendment as an alternative option to obtaining a legal opinion. The Charter Commission is tasked with studying and reviewing County operations, and proposing amendments to the Charter at ten-year intervals, pursuant to Charter Section 14-3. The Charter Commission would produce a report, to possibly include proposed Charter amendments, in time for the 2022 General Election. The next Charter Commission is scheduled to be seated in 2021.

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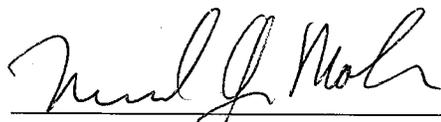
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Your Committee decided obtaining a legal opinion from a special counsel would be a more efficient way of handling this matter.

Your Committee voted 6-3 to recommend adoption of the proposed resolution. Committee Chair Molina, Vice-Chair Rawlins-Fernandez, and members Kama, King, Paltin, and Sinenci voted "aye." Committee members Hokama, Lee, and Sugimura voted "no."

Your Governance, Ethics, and Transparency Committee RECOMMENDS that Resolution _____, attached hereto, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL ON THE MAYOR'S APPOINTMENT AS "INTERIM" ADMINISTRATIVE HEADS THE SAME INDIVIDUALS DISAPPROVED BY THE COUNCIL," be ADOPTED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



MICHAEL J. MOLINA, Chair

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Resolution

No. _____

AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL TO ADVISE AND REPRESENT THE COUNCIL ON THE MAYOR'S APPOINTMENT AS "INTERIM" ADMINISTRATIVE HEADS THE SAME INDIVIDUALS DISAPPROVED BY THE COUNCIL

WHEREAS, at its meeting of February 15, 2019, reconvened on February 22, 2019, the Council adopted resolutions disapproving the nominations of three department heads appointed by the Mayor, namely John D. Kim as Prosecuting Attorney, David Goode as Director of Public Works, and William R. Spence as Director of Housing and Human Concerns; and

WHEREAS, on February 25, 2019, the County Clerk delivered certified copies of Resolutions 19-29, 19-32, and 19-35 to the Mayor, which copies were stamped received by the Office of the Mayor at 11:00, 11:00, and 11:01 a.m., respectively (Exhibit "A"); and

WHEREAS, according to the attached press release dated February 26, 2019, the Mayor advised that he "has invoked the Maui County Charter's temporary appointment provision to maintain three acting department directors in their positions until replacements can be found and appointed." (Exhibit "B"); and

WHEREAS, the press release further stated, "Mayor Victorino announced Monday that he has appointed John Kim as temporary interim prosecuting attorney until March 1. He has appointed William Spence as temporary interim director of the Department of Housing and Human Concerns until March 17, and he has appointed David Goode as temporary interim director of the Department of Public Works."; and

WHEREAS, Subsection 6-2(5) of the Revised Charter of the County of Maui (1983), as amended ("Charter"), outlines the procedure for the Mayor to appoint administrative heads upon taking office and for the Council to confirm or deny such appointments, and provides in pertinent part, "The appointee shall take office upon appointment by the mayor but shall not continue in office if the council denies the appointment."; and

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WHEREAS, in making the "interim" appointments, the Mayor relied upon Charter Subsection 6-2(4), which authorizes the Mayor to appoint temporary administrative heads; and

WHEREAS, the Mayor's appointments of the same individuals disapproved by the Council to serve as "interim" administrative heads create serious questions about the validity of the appointments and actions taken by departments under the direction of the "interim" heads; and

WHEREAS, Charter Subsection 8-2.3(2) provides that the Department of the Corporation Counsel ("the Department") is the chief legal advisor and representative of the County, including both the legislative and executive branches of government; and

WHEREAS, Charter Subsection 3-6(6) 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 Council to employ special counsel exists when the Department has provided advice or representation to the Mayor or other executive-branch officials that results in an actual or potential conflict of interests with the Council; and

WHEREAS, the Council finds the Mayor's "interim" appointments appear to be based in part on advice from the Department; 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 appointments, and recommend appropriate remedies and actions, including the initiation of a quo warranto proceeding under Chapter 659, Hawai'i Revised Statutes, if appropriate; 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 on the matter; now, therefore,

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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 legislative branch's chief procurement officer, to advise and represent the Council on the Mayor's authority to appoint as "interim" administrative heads the same individuals already disapproved by the Council;
2. That the special counsel shall report to the Council's Governance, Ethics, and Transparency Committee on matters including proposed legal actions, including a quo warranto proceeding, if appropriate, to address the "interim" appointments and whether the appointments have usurped Council authority under the Charter to disapprove the Mayor's appointments;
3. That total compensation for the employment of special counsel shall not exceed \$30,000;
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 \$350;
6. That the hourly rate of associates shall not exceed \$310;
7. That the hourly rate of paralegals shall not exceed \$160;
8. That compensable costs shall be limited to: (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; (6) compensation of court-appointed experts and interpreters; and (7) travel costs, only if justified by extraordinary or compelling circumstances and pre-approved by the Council Chair;

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9. That 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 costs, unless justified by extraordinary or compelling circumstances and pre-approved by the Council Chair; (7) investigative expenses; and (8) other costs reasonably considered part of the law firm's overhead;
10. That special counsel shall not initiate legal proceedings on the Council's behalf unless the Council adopts a separate resolution approving such action;
11. That increases in the total compensation authorized or substantial changes to the responsibilities of special counsel shall require prior Council approval by the adoption of a separate resolution by a two-thirds vote;
12. That the conduct of special counsel in this matter shall reflect special counsel's understanding that the Council is a public entity that has obligations, concerns, and interests that may extend beyond those of a similarly situated private litigant; and
13. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, the Director of Finance, and the Director of Council Services.