

Council Chair
Kelly T. King

Vice-Chair
Keani N.W. Rawlins-Fernandez

Presiding Officer Pro Tempore
Tasha Kama

Councilmembers
Riki Hokama
Alice L. Lee
Michael J. Molina
Tamara Paltin
Shane M. Sinenci
Yuki Lei K. Sugimura



Director of Council Services
Traci N. T. Fujita, Esq.

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

October 8, 2019

MEMO TO: Moana M. Lutey
Corporation Counsel

F R O M: Kelly T. King
Council Chair

A handwritten signature in black ink that reads "Kelly T. King".

SUBJECT: **SPECIAL COUNSEL FOR THE COUNTY COUNCIL IN HAWAII**
WILDLIFE FUND SETTLEMENT (PAF 19-173)

May I request you please transmit to the Council's Governance, Ethics, and Transparency a proposed resolution to approve the employment of special counsel for the County Council in its efforts to settle County of Maui v. Hawaii Wildlife Fund, United States Supreme Court Docket 18-260, in accordance with Resolution 19-158.

The next GET Committee meeting is scheduled for October 15, 2019. Therefore, to meet the posting deadline, please submit the resolution **by 4:30 p.m. on October 8, 2019**.

Please allow me to recount recent communication that justifies the request for a special counsel resolution.

- o By correspondence dated September 25, 2019, I asked to you to execute a settlement agreement and withdraw the Supreme Court appeal on the County's behalf, based on Resolution 19-158.
- o By correspondence dated October 1, 2019, you declined my request.

- In a meeting in my office on October 2, 2019, you informed me the Department of the Corporation Counsel is not and will not be representing the Council on settlement of the Hawaii Wildlife Fund case. I asked you to determine whether one or more attorneys in your office could be assigned to represent the Council, after being screened off from the attorneys representing the Mayor in this matter. As we discussed, both you and your predecessor had been asked about Council-Mayor conflicts in your confirmation processes. The consistent response was that use of an ethical wall separating attorneys in your office could ensure representation for both the Mayor and the Council, without the need to employ special counsel.
- In a meeting in my office on October 4, 2019, you informed me that you consulted with the Office of Disciplinary Counsel. The ODC advised you that the Department of the Corporation Counsel could not file a directly adverse action, such as a declaratory action or injunction, on behalf of the Council against the Mayor. Therefore, you advised me that the Council may employ special counsel to ensure the Council has legal representation in such an action.
- In the October 4th meeting, you agreed to consult with the ODC on the issue of whether the Department of the Corporation Counsel could continue to represent the County and direct the special counsel in the Hawaii Wildlife Fund case because a direct conflict exists between the Mayor and Council.
- The Council and Mayor have concurrent conflicts of interest as described in Rule 1.7(a) of the Hawaii Rules of Professional Conduct (“HRPC”). Simply stated, the Council has voted to withdraw the appeal at issue, and the Mayor wants to pursue the appeal before the Supreme Court. A concurrent conflict of interest exists because the representation of the Mayor will be directly adverse to the Council. Also, a concurrent conflict of interest exists because there is a significant risk that the representation of the Council will be materially limited by the Department of the Corporation Counsel’s responsibilities to the Mayor and a personal interest of the Corporation Counsel in directly serving the Mayor, who has exclusive authority to initiate their removal.

- The Department of the Corporation Counsel formerly represented the Council in the Hawaii Wildlife Fund case. The Department of the Corporation Counsel may not thereafter represent the Mayor in the Hawaii Wildlife Fund case because the Mayor's interests are materially adverse to the interests of the Council. The Council did not consent to such representation after consultation and confirmation in writing, as required by HRPC Rule 1.9(a).

- The Department of the Corporation Counsel should not advise the Mayor or Council or direct special counsel in the Hawaii Wildlife Fund case until the ODC provides its advice to the Department of the Corporation Counsel. The Council provided confidential information, including in executive sessions related to the Hawaii Wildlife Fund case, to the Department of the Corporation Counsel. The Department of the Corporation Counsel should not disclose any information to any party without the express consent of the Council. The duty of confidentiality continues after the attorney-client relationship has terminated. See HRPC Rules 1.9(c)(1)&(2).

Should you have any questions, please contact me.