

SPECIAL COUNCIL MEETING

November 26, 2008

The Special Meeting of the Council of the County of Kaua'i was called to order by the Council Chair at the Council Chambers, Historic County Building, 4396 Rice Street, Room 201, Lihue, Kaua'i, Hawai'i on Wednesday, November 26, 2008 at 3:22 p.m.

Honorable Tim Bynum  
Honorable Shaylene Iseri-Carvalho  
Honorable Daryl W. Kaneshiro  
Honorable Ron Kouchi  
Honorable Mel Rapozo  
Honorable JoAnn A. Yukimura  
Honorable Jay Furfaro, Council Chair

APPROVAL OF AGENDA:

Mr. Rapozo moved for approval of the agenda as circulated, seconded by Ms. Iseri-Carvalho, and unanimously carried.

JAY FURFARO, COUNCIL CHAIR: We have two (2) communication items for this special Council meeting and I believe I would probably like to move these actual items to the end of the agenda and I would also like to point out that perhaps item C 2008-340 we should take first.

PETER A. NAKAMURA, COUNTY CLERK: (Inaudible)

Chair Furfaro: I am sorry, I have that, yes, so we will take item C 2008-339 first. Thank you Mr. Clerk for that correction. On that note, I first like to call up the County Attorney to acknowledge our need to move into executive session.

Mr. Nakamura: Mr. Chair, just for the record, this would be on executive session item ES-364.

Chair Furfaro: Yes, thank you.

JAMES TAGUPA, DEPUTY COUNTY ATTORNEY: Good morning Council Chair and members of the Council. James Tagupa, Deputy County Attorney. Pursuant to Haw. Rev. Stat. ("H.R.S.") §92-7(a), the Council may, when deemed necessary, hold an executive session on any agenda item without written public notice if the executive session was not anticipated in advance. Any such executive session shall be held pursuant to H.R.S. §92-4, H.R.S. §92-5(a), and Kaua'i County Charter §3.07E.

ES-364 Pursuant to Haw.Rev.Stat. §§92-4 and 92-5(a)(4) and (8), and Kaua'i County Charter section 3.07(E), the Office of the County Attorney requests an executive session with the Council to provide the Council a briefing on the lawsuit filed against the County of Kaua'i and Department of Transportation entitled Kathleen Ah Quin v. County of Kaua'i, et al., Civil No. CV 08-00507 JMS/BMS and related matters. This briefing and consultation involves consideration of the powers, duties, privileges, immunities and/or liabilities of the Council and the County as they relate to this agenda item.

Chair Furfaro: First of all, for the County Attorney, I would like to say that the reason we are having this executive session as a special session... it was brought to our attention over a week ago, the need to have this and it was strongly advised that we do not amend last week's agenda, but rather move into a new posting which created this special session. So I just wanted to share with you that that is how we arrived at this. On that note, Councilwoman Iseri-Carvalho?

SHAYLENE ISERI-CARVALHO: Just point of clarification that we are holding this executive session pursuant to a written public notice that was duly filed on November 20, so there was ample time for parties to be present and know about this executive session in full compliance of the Sunshine law.

Chair Furfaro: Thank you for reinforcing my earlier comments, but you are correct. The actual date was November 20. Thank you. So we have a request from the County Attorney to go into an executive session on this particular matter (364), and I guess before I make a query on this, is it not typical that the merits of the case that might deal with possible Federal labor law and so forth is not handled in-house?

Mr. Tagupa: It depends on the type of case. In this case, a decision was made to have this matter held, you know... sent to special counsel to represent the County.

Chair Furfaro: Thank you. Other questions from other members?

MEL RAPOZO: I just have one question and it is pertaining to the time. Is this time sensitive? Is this...

Mr. Tagupa: Yes, it is because we were served with a complaint and it is a Federal court complaint, therefore, there is a 20 day time period where the County must answer.

Mr. Rapozo: Right, and there is no opportunity to get an extension on that 20 day like we have done with so many others?

Mr. Tagupa: I am not aware of that at this time.

- Mr. Rapozo: Is it possible to get an extension?
- Mr. Tagupa: It is always possible. Yes, if it is... if the other counsel agrees.
- Chair Furfaro: So let me clarify that question I think the way Mr. Rapozo... are you aware of the fact that we have filed a request for an extension?
- Mr. Tagupa: No, I am not aware of that.
- Mr. Rapozo: And we were served on which date?
- Mr. Tagupa: I believe our office was served on November 19.
- Mr. Rapozo: November 19, so we have until?
- Mr. Tagupa: December the 9<sup>th</sup>.
- Mr. Rapozo: December the 9<sup>th</sup> would be the deadline and that is the 20 days.
- Mr. Tagupa: That is correct.
- Chair Furfaro: Thank you Mr. Rapozo. Any other questions? We will need a motion to go into... May I ask for public testimony on this one item 364?

There being no objections, the rules were suspended.

GLENN MICKENS: Thank you. For the record, Glenn Mickens. Thank you Jay. My testimony... I hope you members take this in the right. I am not pointing the finger to anybody, I am not trying to criticize... basically, it is an informational type of a thing that maybe you can straighten this thing out for me, okay. Let me read my testimony for the record and then I welcome anybody who wants to reply. Jay or anybody else. After testifying before this Council for over 1 ½ years about the executive session conflicts between Section 92-4 and 92-5(a) of the State Sunshine law and part 6 of the State Sunshine law Section 920-71 which mandates that if the local Charter is more stringent than Section 92-5(a). Then since the local Charter under Section 3.07(E) only allows executive sessions for claims and the definition of claims narrowly defined under case law, we have made the case that this Council should follow our Charter Section 3.07(E). Ken Taylor and I have asked over and over if our premise is not correct and, you know, please tell us why. And after months of making our case, 3.07(E) mysteriously appears on the agenda and no one on the Council or in our legal department has given us the courtesy of telling us why. And now to exasperate the situation, one member of the

Charter Review Commission proposed eliminating Section 3.07(E) from the Charter and with the aid of the other members, plus putting confusing wording on the ballot for me. He accomplished his mission. To summarize, if 3.07(E) was not a valid reason for usage of going into executive sessions, why was it finally put on the agenda and why was it put on the ballot to be eliminated when no one except the CRC wanted it removed.

After months of hearing the Council tell us that "we know the answer, but due to attorney-client privilege, we can't tell you, shouldn't we be given the courtesy of an explanation? In the OIP letter to me and you all had copies of this of September 5, 2008... it is stated, "Section 92-71 H.R.S. allows the County to provide more stringent meeting standards without being in conflict with the Sunshine law. You are familiar with that Jay obviously and I think the rest of you are also. Anymore stringent County provisions, however, would be in the addition to the requirements the Council must comply with under the Sunshine law. For me, there is still is ambiguity here between 92-4, 92-5(a), and 92-71 as certainly some decision must be reached as to which section of the Sunshine law is used in the executive session. Obviously, Ken and I have made the case that 92-71 and thus 3.07(E) rules, and that (inaudible) Charter should govern. Again, I am not criticizing any member of this Council. I am only trying to get clarification which you all well know... we have been after for well over a year and a half, and you know, I know that Jay, you've from time to time said that somebody has given you a reason for it happening, but you weren't entitled because of client-attorney privilege or whatever... you couldn't come back and tell us what it was.

Chair Furfaro: Well, on this particular one, I will hear if there is other testimony. I will see if the County Attorney's Office wants to answer your question along with maybe any others that come by. I wanted to be very clear here... you know, this is a Federal labor issue right now. It is a personnel matter, it is on a matter that, really, we need to hear the merits of what is going on.

Mr. Mickens: And I fully understand. This is a claim and I am not questioning that fact. I am just going through this testimony and, you know, again, if Ken and I are wrong in our evaluation of this thing, I just would like to know what is because I see ambiguity here, and I can't get it clear in my mind what... even OIP has not really clarified this in my mind, and I am not calling them wrong, I am only trying to get clarification... there are two (2) sections of that Sunshine law, Section 6 and Section 1. So, to me, they are ambiguous, and there is a conflict there.

Chair Furfaro: I will stand on my comment to you that after I get all comments on this matter, I will ask the County Attorney if they wish to comment.

Mr. Mickens: Okay, thank you Jay.

Chair Furfaro: Mr. Taylor?

KEN TAYLOR: Chair and members of the Council, my name is Ken Taylor. I certainly agree with the issues that were raised by Glenn. I think it is really sad that it is a year and a half since this issue was first brought to the table and we have not gotten any answers. There is something terribly wrong with that and the other day you were all talking about aloha... allowing this to linger for a year and a half, is not aloha. I hope as we move forward in the future that whether it is me, Glenn, or anybody else from the community asked for some clarification on law, State law that is forthcoming in a reasonable amount of time because this just isn't right. It is not right for the community, it is not right for us as individuals, and I think that we can all do better and I hope that as we move into the new year with the new Council that we will all work and do better. Thank you.

Chair Furfaro: Thank you. Is there anyone else that would like to testify on this item? May I ask the County Attorney if they would like to offer any comments to the questions posed to this Council?

Mr. Tagupa: James Tagupa, Deputy County Attorney. No comment at this time.

Chair Furfaro: Thank you and I do want to point out the comment on aloha. Certainly, I tried to live it as well as the rest of this Council. The verbiage was very much directed at the need to access the information, but I think this Council is attempting to live that value of aloha by steering the appropriate question to the appropriate department, but thank you Mr. Tagupa. Mr. Clerk, is it possible that we would like to also acknowledge the second item before we go into executive session?

Mr. Nakamura: I think because of the recusal involved, we will just do this one.

Chair Furfaro: I wanted your advice on that. I am going to call this meeting back to order on item ES-364.

The meeting was called back to order, and proceeded as follows:

Mr. Kaneshiro moved to go into executive session on item ES-364, seconded by Ms. Yukimura, and unanimously carried.

There being no objections, the Chair called for a recess at 3:36 p.m. The meeting was called back to order at 3:57 p.m., and proceeded as follows:

Chair Furfaro: I would like to now since we have had executive session on item ES-364, go back to the agenda item that references that a request

for the expenditure of funds up to \$50,000 be identified for the County Attorney on this. May I have some offer of dialogue on this request for approval?

C 2008-339 Request (11/20/2008) from the Office of the County Attorney for authorization to expend funds up to \$50,000 for special counsel to represent Defendants County of Kaua'i and Department of Transportation in KATHLEEN AH QUIN V. COUNTY OF KAUA'I, DEPARTMENT OF TRANSPORTATION (USDC) CIVIL NO. CV 08-00507 JMS/BMK and related matters: Ms. Yukimura moved to approve C 2008-339 up to \$25,000.

Chair Furfaro: No, we are going to amend that request. Let's do the motion to approve and amend it.

Ms. Yukimura moved to approve C 2008-339, seconded by Mr. Kouchi.

Chair Furfaro: Any further discussion? Is there an offer of an amendment?

Mr. Kaneshiro moved to amend the amount from \$50,000 to \$20,000, seconded by Mr. Bynum, and unanimously carried.

Chair Furfaro: So it has been moved and seconded to amend the request to \$20,000. Is there any further discussion? Councilwoman?

Ms. Iseri-Carvalho: Yes, for the public's benefit, this case involves a lawsuit against the County that is filed against the County of Kaua'i, Department of Transportation and in particular, the Department Head Janine Rapozo. This is a complaint that was duly filed in District Court... United States District Court on November 10 and for persons who want to know what the complaint is, it is Civil No. CV08-00507. This is brought by Kathleen Ah Quin... this is, again, a public document and basically the allegation is that Ms. Ah Quin who was an employee... a part-time employee for the Department of Transportation had applied more than several times to obtain full-time employment beginning back in 2005 despite the fact that had 11 years of experience driving under commercial driver's license and that she was not promoted, but, in fact, many males were given opportunities for promotion to the job that she had sought full-time. Thus, she brought a claim against the Department of Transportation and, in particular, again, the Department Head Janine Rapozo claiming that there was gender discrimination against Ms. Ah Quin. The concern that I have with respect to this claim is that this claim was brought back on December 2007 when it was initially filed. The gender discrimination complaint was filed with the Hawai'i Civil Rights Commission. That claim was also filed with Equal Employment Opportunity Commission back over almost a year ago.

To my knowledge, it appeared that there was absolutely zero investigation that was done with respect to this matter. Now we have been served with a

lawsuit. It was filed on November 10 and it appears that there is an answer that is due... that is coming up, I believe mid-December. In light of the fact that the County Attorney's Office, it appears, has not engaged in any investigation with respect to this matter despite the fact that they have been duly informed of this complaint back on December 29, 2007 and now wants to have a special meeting to request special counsel to file a complaint in response to one filed on Ms. Ah Quin, but also to utilize the attorney to engage in investigative services which I feel that the County has every opportunity to review its own files and provide that initial discovery. However, that has not taken place and in light of that, I appreciate that the amount was reduced to \$20,000, but in light of the fact that there has not been absolutely any interest... it appears by the County in resolving these issues prior to filing a lawsuit despite the fact that there was a complaint filed back in 2007 with the Civil Rights Commission.

I cannot support utilizing the taxpayer's money for something that the County has failed to take any action at all on and until we have some commitment by the County that they will investigate these kinds of cases as soon as it occurs, and that there is sufficient in-house work that is done by County employees, I cannot continually see supporting counsel, special counsel, taxpayer's money to pay for attorneys and attorneys and attorneys and investigators when our in-house counsel has failed to do absolutely nothing on this case. Therefore, I will not be supporting the decreased amount nor the initial amount which was \$50,000. I still have not heard any justification of why they needed \$50,000 to begin with except some generic response that we normally get is to hire special counsel and see what special is going to do. Therefore, that is how I intend to proceed. I think that especially in these kinds of economic times, that we need to especially scrutinize these kinds of complaints. It is almost disgusting the amount of times that the County gets sued especially within the last couple of years. It is just horrendous the amount of taxpayer's money that I feel was wasteful spending on litigation. Therefore, I will not be supporting any more use of public funds for this purpose unless it was justified and in this case, I feel there was no justification for support of special funds.

Chair Furfaro: Thank you for your comments and your acknowledgement that you will not be supporting the amended amount. Mr. Rapozo?

Mr. Rapozo: Thank you. Likewise, you know, I think our briefing although an executive session basically covered the complaint which is a public document and I would encourage you to go get a copy of it. It is quite telling of how we run our operations here in the County. The problem is, from back in December 2007, it appears that we haven't even spoken to the employees, the operation managers, the Division Head... in fact, really did no checking into these allegations. In my opinion, the County Attorney's Office should be screening these cases and if they come to us and say, hey, we need additional funds because this case exceeds the level of our expertise... (inaudible)... Federal discrimination law is a difficult

one, but in my experience, the response to a complaint... this complaint was served on the County on the 19<sup>th</sup> I believe... November 19, so November 20, someone should have been preparing the response because there is a 20-day window. What happened was, they asked this Council for money, so they could go hire someone to go do the response... to hire someone to go screen the case to see if it is even valid. Now, that I expect to come out of our County Attorney's Office. What is even more troubling is the attorney that was sent today to brief us, was not involved in the screening of the case. So we are not even being... given the opportunity to question the attorney that screened the case to tell us why we going have to hire special counsel. So whether it is \$20,000 for a response, I think it is quite high at \$200 an hour, a response, I think \$20,000 is quite high. I think the response should be able to be done out of our office. We pay our attorneys good money, almost \$100,000 a year and a response is quite generic when it comes to these types of cases.

It is basically we deny all claims and we will weigh the information in the process of discovery. And at that point, we will make the determination whether we are going to try and settle or we are going to try and fight it. If we are going to go and fight it, Councilmembers, we want the best attorney on board and we are coming to you for money at that point. But to go hire special counsel to do your response, your discovery, why have County Attorneys? Let's just contract out the office, so I am not going to be supporting this request for those reasons that I stated. Thank you.

Chair Furfaro: Thank you Mr. Rapozo for your comments and acknowledging that you will not be supporting the amended amount. I am going to make some comments as Chair. I just want to say to all of the audience, the fact of the matter is, I am going to call for the vote after my comments. We need five (5) votes on this and I would like to point out that, you know, a civil rights commission complaint is very serious and very serious in the terms that you are dealing with the Federal government. I am... I wanted to acknowledge the County Attorney's Office to allow us to at least reduce the amount until we could have a better understanding of the merit of this complaint. Consequently, I think this just makes a better case for us having a loss prevention department going forward. On that, I would like to see if I call for the vote on the amended amount of \$20,000. All those in favor of the amended amount?

The motion to approve C 2008-339 as amended to \$20,000 was then put, and carried by a vote of 5-2 (Councilmembers Iseri-Carvalho and Rapozo voting "no").

Chair Furfaro: We will move into the next item. On that note, I will look to go to the next item, but before I do, I will give Mr. Kouchi an opportunity for the floor.

RONALD KOUCHI: Thank you Mr. Chairman. Based on an advisory opinion that I received from the Ethics Commission, I am going to recuse myself and step out of the room on this item. Thank you very much.

Mr. Kouchi recused himself at 4:08 p.m.

Mr. Rapozo: And this is your last meeting Mr. Kouchi.

Chair Furfaro: Could I have the County Attorney up for the agenda as displayed as ES-365?

There being no objections, the rules were suspended.

MONA CLERK, DEPUTY COUNTY ATTORNEY: I am Mona Clark, Deputy County Attorney.

ES-365 Pursuant to Haw.Rev.Stat. §§92-4 and 92-5(a)(4) and (8), and Kaua'i County Charter section 3.07(E), the Office of the County Attorney requests an executive session with the Council to provide the Council a briefing on the petition for administrative review claim filed against the Department of Finance, County of Kaua'i and County of Kaua'i entitled CUSHNIE CONSTRUCTION CO., INC. V. DEPARTMENT OF FINANCE, COUNTY OF KAUA'I, PCH-2008-18, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i and related matters. This briefing and consultation involves consideration of the powers, duties, privileges, immunities and/or liabilities of the Council and the County as they relate to this agenda item.

Chair Furfaro: And for the County Attorney's Office, I do also want to make note that we are only a six (6) member body today based on one excused member. I also would like to point out to the public that we did have some left over questions before we could move into executive session. I think it is very possible if we don't get the five (5) votes from the six (6) remaining members, we may not even go into executive session. That is a possibility, so on that note, are there any follow up questions of the County Attorney based on their request to have this special executive session?

Mr. Rapozo: I just have one question. My question is, when we receive the item on October 22, 2008... I know you weren't here, but the reason for the request... they had actually asked for a deferral because they wanted some time to negotiate with the claimer and this was all discussed in open session back on the 22<sup>nd</sup> of October. Did those negotiations occur? And I don't need to know specifics, I just need to know if we, in fact...

Ms. Clark: There were discussions.

Mr. Rapozo: Negotiations? Were there negotiations?

Ms. Clark: I would say that those would qualify as negotiations.

Mr. Rapozo: Okay, thank you.

Chair Furfaro: Thank you very much. I am going to ask if there is any members in the public that want to comment on going into executive session and I want to point out, again, this is an agenda item to go into executive session. It is not an agenda item to discuss items that pertain to the discussion as shared earlier from the County Attorney as Mr. Rapozo pointed it. It was not necessarily going to those particulars. Is there anyone who would like to speak on this? Mr. Taylor?

KEN TAYLOR: Mr. Chair and members of the Council. My name is Ken Taylor. I am really disturbed about this situation here because you had two (2) items to discuss today. The first one you discussed, the party wasn't even here for one reason or another. This 365, the individual that is involved in this process showed up...

Chair Furfaro: First of all, I want to say if you are going to challenge me on the rationale, let me make it very clear. One is a personnel matter dealing with the employment laws of the United States of America. The other item here is a procurement item dealing with the State laws of procurement and that is the difference.

Mr. Taylor: That is fine, but you are going to address both of the issues today I presume one way or another.

Chair Furfaro: We have addressed one Mr. Taylor.

Mr. Taylor: And all I am saying is that, out of courtesy, the fact that he did show up, he should have been dealt with first, so he could go on and take care of his business instead of putting him off. Fortunately, this first issue didn't take too long, but nevertheless, when there is just two (2) items on the agenda, it has nothing to do with Federal law. It is courtesy...

Chair Furfaro: Mr. Taylor, if you are going to talk to me about the order I put items on there, I will give you the answer. We have one member by ruling of the Ethics Commission that had to be excused. We took that courtesy first because this is a special meeting and we are traveling. On the second note, if you could speak to the agenda item, it would be appreciated because as we go into the Thanksgiving weekend, I do not want to point out to you that I have been most generous in allowing you folks to comment on these items. The agenda item is about funding for the County Attorney's Office in a violation, a potential violation, that deals with the procurement laws. The procurement laws of the State of Hawai'i.

Mr. Taylor: I understand.

Chair Furfaro: Now if you would address those, I would appreciate it. If you would address those items, they would be very much appreciated and not criticize me as the Chair on your perception that I am being rude because of the order I took that. Sir, please address those items.

Mr. Taylor: Again, I would say that because of 3.07(E), you are in violation of going into closed session as it is spelled out in 92-4 and 92-5(a)(4), and (8)... we know and understand that 3.07(E) was put before the voters and in a very, very sad state of affairs and the voters bought into...

Chair Furfaro: Do not comment on the outcome of the voting. The agenda item... I will bring up the County Attorney again for you to speak... if they choose to address your concerns and my aloha will be focused on always delivering the truth. As I said to you last week, sometimes aloha is delivering the bad news too, so we all know where we stand. I will ask the County Attorney if they would like to comment on that as well.

Mr. Taylor: Thank you.

Chair Furfaro: Mr. Taylor, we have a question for you.

Ms. Yukimura: I am just curious as to why you think this violates the Charter provision because it is about a claim against the County.

Mr. Taylor: The way it is... for the last year have put these items on the agenda... 92-71 says that if the Charter is more stringent than the Sunshine law that you have to follow the Charter.

Ms. Yukimura: And we are following the Charter because this is a claim.

Mr. Taylor: What I am saying is that by putting on here Hawaiian... 92-4 and 92-5(a)(4) and (8), you are not going into or you shouldn't be going into closed session under those terms.

Chair Furfaro: Thank you Mr. Taylor. If that is your opinion. Thank you. May I ask the County Attorney if they would like to add anything to the commentary made as to potential violation of going into a session on procurement laws? You have to go to the mike please.

Ms. Clark: Mona Clark. I don't think there is any issue here because this is a claim as it is currently allowed under the Charter and under the Sunshine, so I don't perceive any problem.

Chair Furfaro: Thank you. Did you have any problems with my commentary regarding procurement laws and Federal employment laws?

Ms. Clark: No.

Chair Furfaro: Thank you very much. Okay, let me ask if there is anyone else in the audience that would like to comment please?

RALPH CUSHNIE: Ralph Cushnie. I guess this thing is a little bit misleading because it says a claim against the Department of Finance, but really what is happening here is that the County Attorney's Office has no authority to rescind the contract and maybe you can take that up with them.

Chair Furfaro: First of all, Ralph, let me apologize that you had to wait here, but I think you also see the urgency of us having a quorum to do this. I understand and I have raised that question that although we have a procurement department, the Finance Director is the Chief of Procurement for the County of Kaua'i. That is how it was explained to me and that is why it is listed as such.

Mr. Cushnie: The Attorney's Office wrote the letter rescinding the contract.

Chair Furfaro: I wanted to answer the first part of your question. The second part of your question as I have seen the concern dealing with the authority of the County Attorney's Office being able to cancel contracts. I have been informed as such that they do such reserve such a right as the Chief Legal Advisor for the County. I just want to share with you those two (2) comments and I am not trying to deviate from that, but I asked those questions.

The meeting was called back to order, and proceeded as follows:

Chair Furfaro: Is there any comments and discussion amongst our members themselves? I would, again, remind you that we need five (5) votes to go into executive session. Councilmember Yukimura?

Ms. Yukimura: I just want to say that I think that Mr. Cushnie has a point and that is partly why there is a need for some other attorney to represent the County.

Chair Furfaro: I want to make sure that the Councilwoman does realize that I am not necessarily agreeing. I am trying to answer the question as I pose the question and that is how it has been posed to me.

Ms. Yukimura: I am not assuming any assumption on your part, but just my own personal understanding of the County government as governed by the Charter. I think Mr. Cushnie may be right and that may be part of the issue here in getting another attorney.

Chair Furfaro: That is quite possible Councilwoman and thank you for those comments. Mr. Rapozo?

Mr. Rapozo: I guess I asked that question back in October that I wanted to see the authority on the County Attorney's ability to rescind the contract that has already been awarded. I have not received the answer and I understand, Mr. Furfaro, by your comment right now that maybe you have, but...

Chair Furfaro: I only received a verbal query.

Mr. Rapozo: I have asked... I have actually asked the Finance Director to be here and he hasn't been here, so I have a serious problem because I have read the Charter, I have read the State procurement law, and to me it is quite clear that only person that can really rescind the contract is either the Finance Director who is the Chief Procurement Officer for the Administration and the Council Chair who is the Chief Procurement Officer for the Legislative body. That is the two (2) Chief Procurement Officers, so I have not seen... we still have time. They are still working. They have 10 more minutes and if someone can send me the authority that you just described that was given to you verbally...

Chair Furfaro: I am going to tell you again. I was told... I do not have anything to share with you, but I have had this conversation and on behalf of Mr. Cushnie, I did raise those two (2) questions. Again, I want to point out, I am the Chief Procurement Officer for Council Services and not for the County of Kaua'i.

Mr. Rapozo: So you would be able to rescind the contract of the financial audit that we administer, but as far as what we are talking about today, the Finance Director has the authority unless that is delegated to someone else, and if that is what Mr. Finance Director wants to come up here and testify on the record, then it is a different story. But going forward, I don't see that a lawful act as occurred, so I am not going to sup... so that is my comments and we will see what happens. I appreciate Mr. Cushnie being here today. Can we get somebody from staff to call the Finance Director to see if he can be here?

Mr. Kaneshiro: I don't need the Finance Director, but for me, if the Finance Director, you know, is the only one authorized, then if someone else and the authorization then more so to me, we better get counsel, and get someone to represent the County, to find out what the hell is going on.

Mr. Rapozo: I guess, for me, Mr. Kaneshiro, and I appreciate that because you are starting to sound like me. This is where I am coming from Mr. Kaneshiro and we have heard Mr. Kouchi cite this out of the Charter many times. If someone acts outside of his scope, why should the taxpayer pay? Why should you... all of you out there watching, why should you pay if a County Attorney acted outside of his scope of authority. That is my position.

Mr. Kaneshiro: But that is what we are going to find out...

Chair Furfaro: Excuse me gentlemen. You have the floor and the volume is not necessary.

Mr. Rapozo: Well, I just...

Chair Furfaro: I know you are passionate about it, but...

Mr. Rapozo: Because I have asked the question and it has only been since October 22, little over a month... simple question, give me the authority. Tell me what he did was right and then we can defend them, but don't expect me to approve thousands and thousands of dollars to basically condone and act that wasn't lawful. I am not going to do it and, yes, you need five (5) votes, maybe you can get five (5) on this Council. It is not going to come from me unless I know that we acted in the best interest of the County and for some reason, we have someone that doesn't agree with the act, and then, yea, let's go defend it. But don't ask me to go defend an unlawful act with taxpayer money, I am not going to do it.

Chair Furfaro: Then Mr. Rapozo, we may not find ourselves having the five (5) votes to go into executive session, but would you consider deferring this as it possible that we could have a new County Attorney and a new Council to deal with it.

Mr. Rapozo: Like I said at the last meeting, I am not deferring this issue because I disagree with the whole philosophy entirely. In fact, I believe there is a hearing date that is coming up that they need to respond. They need to act on it. They had a date, it was extended because they needed special counsel. They didn't get it from the County and now they need to go and defend their action. I am not going to support deferring it. I mean I will just not support the funding.

Mr. Kaneshiro: My understanding is that the County Attorney cannot defend itself because they are also a cause of action in this lawsuit. For me, you know, I am looking... You know, I am not an attorney... I am just a basic layman person. What I see this case is happening is that the County Attorney is in conflict because they may really be in conflict, and this is why we need an attorney to be able to say, if they are or if they are not, and that is what we are looking at.

Chair Furfaro: And all that I want to say here...

Mr. Kaneshiro: If we are not going to get the vote, that is fine, but I am just saying that...

Chair Furfaro: We understand your point Mr. Kaneshiro and I think it is very valid and structured, but what I am saying is that if we do not get five (5) votes to go into executive session, we cannot resolve that.

Mr. Kaneshiro: We ain't going to resolve anything.

Chair Furfaro: Mr. Bynum?

Mr. Bynum: I am surprised that we are discussing this at all. It seems that is what this case is all about and we shouldn't be discussing it here. Obviously, a respective member of our community feels like a wrong has been done and we have to get to the bottom of it. We need the Council, so I will be supportive of the executive session.

Chair Furfaro: Councilwoman Yukimura?

Ms. Yukimura: Well, I think we need to go into executive session or we need just to approve the amount, but I don't know that we have five (5) votes for either which means that we may not be able to move anything on this item.

Chair Furfaro: And, therefore, my offer of a deferral because it can come up with the new Council. I want to make sure that I am in favor of going into executive session, but I can't get there unless I have five (5) votes.

Ms. Yukimura: And I think four (4) votes to defer is what you need, so that may be an appropriate option.

Mr. Rapozo: I don't have a problem going into executive session because I want to hear what negotiations took place because that was the purpose of the last request to get into executive session, but you still need five (5) votes for the money, and I am not going to support the money, but I am curious to hear what the negotiations are because I think...

Chair Furfaro: Well, I have heard what you said at this point that we could count on your vote for going into executive session. Mr. Bynum, before I call for the vote... I will call for the vote. Is there a motion to go into executive session?

Mr. Kaneshiro moved to go into executive session on item ES-365, seconded by Ms. Yukimura, and unanimously carried.

There being no objections, the Chair called for a recess at 4:27 p.m. The meeting was called back to order at 4:59 p.m., and proceeded as follows:

Chair Furfaro: We are back in session. I believe we will be looking at a deferral on this item.

C 2008-340 Request (11/20/2008) from the Office of the County Attorney for authorization to expend funds up to \$25,000 for special counsel to represent Respondents Department of Finance, County of Kaua'i in CUSHNIE

CONSTRUCTION CO., INC. V. DEPARTMENT OF FINANCE, COUNTY OF KAUAI, PCH-2008-18, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i and related matters.

Mr. Bynum moved to defer.

Mr. Rapozo: Out of respect for your time requirement, I just want to say that I will not be supporting the motion to defer for the reasons stated before going into executive session simply saying that I think we need to determine whether or not... in fact, the action by the County Attorney was within the scope. Until that time, I am not going to be supporting the funding, and that same concerns were brought up a month ago, and they have not been resolved, so I would not be supporting. I will only support a receipt of the item.

Ms. Yukimura: Actually, there is no executed contract... there does not exist... an executed contract that has been approved as to form and legality by the County Attorney. So to rescind something isn't really the issue.

Chair Furfaro: So there... I will state it again and thank you for your comments Mr. Rapozo and Councilwoman Yukimura. I am looking for a motion to defer.

Mr. Bynum moved to defer C 2008-340, seconded by Mr. Kaneshiro.

Mr. Rapozo: Mr. Chair, just for the audience and Mr. Cushnie, when is that next meeting, the deferral, when will this show up again?

Mr. Nakamura: December 17.

The motion to defer C 2008-340 was then put, and carried by a vote of 5-1 (Councilmember Rapozo voting "no").


Mr. Rapozo: Personal privilege. Happy Thanksgiving. You know, last week they told us that it was our last meeting, we cried, we shed tears, we broke bread, we rubbed elbows and shoulders, and they called us back, but I know it is impossible now because Monday is Inauguration. Congratulations and good luck to all of you. Happy Thanksgiving, happy holidays, and we will see you guys on the 17<sup>th</sup> from that side of the aisle. Thank you.

Chair Furfaro: Thank you Mr. Rapozo and Happy Thanksgiving to you and your family, it has been a pleasure. We are adjourned.

ADJOURNMENT.

There being no further business, the meeting was adjourned at 5:02 p.m.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. A. Nakamura', with a long horizontal flourish extending to the right.

PETER A. NAKAMURA  
County Clerk

/lki