

**MINUTES**

**COMMITTEE OF THE WHOLE  
October 29, 2008**

A meeting of the Committee of the Whole of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember Ronald Kouchi, Chair, at the Historic County Building, Room 201, Lihu'e, Kaua'i, on Wednesday, October 29, 2008, at 12:24 p.m., after which the following members answered the call of the roll:

Honorable Tim Bynum  
Honorable Jay Furfaro  
Honorable Shaylene Iseri-Carvalho  
Honorable Daryl W. Kaneshiro  
Honorable Ronald Kouchi  
Honorable Mel Rapozo  
Honorable JoAnn A. Yukimura

Minutes of the October 1, 2008 Committee of the Whole Committee Meeting

Upon motion duly made by Councilmember Bynum, seconded by Councilmember Furfaro, and unanimously carried, the Minutes of October 1, 2008 Committee of the Whole Meeting was approved.

The Committee proceeded on its agenda items out of order as follows and as shown in the following Committee Report which is incorporated herein by reference:

**CR-W 2008-28:** on Bill No. 2289

AN ORDINANCE AUTHORIZING THE ISSUANCE OF SPECIAL TAX REVENUE BONDS OF THE COUNTY OF KAUAI FOR THE PURPOSE OF FINANCING CERTAIN PUBLIC IMPROVEMENTS AND INCIDENTAL EXPENSES RELATING TO THE COUNTY'S COMMUNITY FACILITIES DISTRICT NO. 2008-1 (KUKUI'ULA DEVELOPMENT PROJECT); FIXING OR AUTHORIZING THE FIXING OF THE FORM, DENOMINATIONS, AND CERTAIN OTHER DETAILS OF SUCH BONDS AND PROVIDING FOR THE SALE OF SUCH BONDS TO THE PUBLIC  
[Approved.]

There being no objections, the meeting was recessed at 12:24 p.m. The meeting was reconvened at 2:42 p.m., and proceeded as follows:

Bill No. 2288      A BILL FOR AN ORDINANCE AMENDING SECTION 2-1.1 OF THE KAUAI COUNTY CODE RELATING TO THE DUTIES OF THE OFFICE OF THE COUNTY ATTORNEY  
[This item was deferred pending County Attorney response.]

RONALD KOUCHI, COMMITTEE OF THE WHOLE CHAIR: Committee of the Whole is called to order. We have one item left, Bill 2288 which is relating to the opinions and the County Attorney. The motion that I'm going to be asking for is

one of deferral. So, do we have anyone who wishes to speak on this matter, please come forward. If there are no objections, the rules are suspended. Hearing none, so ordered.

There being no objections, the rules were suspended.

BRUCE PLEAS: First, I'd like some clarification on what this bill will accomplish. What I have from my notes from October 22 is the County Attorney states that all questions of law are now released. I would like clarification from the County Attorney on that statement that they gave that day on the questions of law. Also, I would like a definition from...I should have it here...well, whatever it is, it's section B. I'd like a definition on what "the opinions upon questions of law," I believe that's what the wording is in the bill. I know I have it somewhere, but those are the two questions I have to clarify to me what this bill is really to accomplish. Because if the questions of law have already been released as stated by the County Attorney, then that's nice, but I want to know exactly what opinions on the questions of law are, what the definition of that is. What are we really going to get released by this ordinance? Thank you.

Mr. Kouchi: Thank you. Any questions for Bruce?

Ms. Iseri-Carvalho: No.

Mr. Kouchi: Anyone else wishing to speak? If not, the meeting is called back to order.

There being no one else wishing to speak, the meeting was called back to order.

Mr. Kouchi: The members have any discussion before entertaining the motion?

Ms. Iseri-Carvalho: Yes, I do. I do want to know the answer to that question. What is...based upon the bill that's been submitted, it says the County Attorney shall give opinions upon questions of law submitted, which shall be available for public inspection. What is a question of law? And who is to make that determination? Based upon the bill that has been submitted, who is to make the determination of what is a question of law?

Mr. Bynum: I think that's a reasonable question. This is a bill that closely mirrors the state law that's been in existence for over 40 years and the definition of a question of law has been defined by the Attorney General. We're in receipt of a 16-page long opinion from the County Attorney regarding this issue and we've begun dialogue with them and the intent is...of the law is to provide public...a public record when questions of law that are straight forward and uncomplicated by facts are brought before the...for discussion when we are addressing issues of public policy and legislation. The intent is for the public to be more fully informed. That occurs regularly in other jurisdictions and that's the intent. The county attorneys indicated in discussions that we can address the concerns that he raises in his opinion and that's why they're asking for a deferral to have time to work out amendments to the bill that would meet those...address those concerns.

Ms. Iseri-Carvalho: That doesn't answer the question. The question is and I guess maybe I'd like to ask the County Attorney if we could have the County Attorney up as to whether or not the County Attorney has at any time not released an opinion that was purely a question of law in its own opinion.

Mr. Kouchi: If there are no objections, the rules are suspended.

There being no objections, the rules were suspended.

Mr. Kouchi: Mr. Kawate or Mr. Suzuki, who's going to be coming forward to entertain the question?

Ms. Iseri-Carvalho: Perfect timing, Mr. Kawate. Did Mr. Suzuki text message you to walk in at the appropriate time?

HARRISON KAWATE, Deputy County Attorney: I'm not that aware how to use my text message, so...and forgive me, Harrison Kawate, Deputy County Attorney.

Ms. Iseri-Carvalho: The question is has the County Attorney ever, under your administration or since you've worked at the County Attorney's office, have you ever have provided an opinion to the County Council that was purely in your opinion a question of law?

Mr. Kawate: We have not received a request that was purely for a question of law and it's been our understanding that the opinions that we have provided to the Council was advice and counsel and opinion based on the request that was made.

Ms. Iseri-Carvalho: Okay and that...

Mr. Kawate: So that would be a yes.

Ms. Iseri-Carvalho: Yes, I knew...maybe at your private attorney job you get paid by the word, but clearly as the County Attorney you don't, so yes would have sufficed. But I, you know, appreciate the question (sic). And so...and then the issue becomes one of who would make that determination. Under this bill, the way that it's provided, there does not appear to be a person who will be making that decision on what is a question of law. Based on what you've reviewed in the bill, is it your opinion that the decision of whether an opinion by your office is a question of law or not is one to be made by your office or is one to be made by the County Council or some other party?

Mr. Kawate: It'd be...the response would be our general response, which is haven't had an opportunity to fully look into it insofar as that question has been posed and in order for us to do that we would need to review and research that particular question.

Ms. Iseri-Carvalho: Okay well, I guess Mr. Bynum has indicated that you guys have been in discussions with respect to what is a question of law and so I would think concurrent with that discussion it would necessarily be an ancillary question as to who will make that determination. But if you would want a...

Mr. Kawate: I believe that even though there may have been discussions, I don't think there's been any...the discussions have been relating to the bill as a whole and the full ramifications of certain aspects...I don't think that particular question has been directly answered or opined or requested. So, at this time it would be premature to respond.

Ms. Iseri-Carvalho: Okay, but based right now on what the bill says...just based on what the bill says, you're not able to make that determination either...

Mr. Kawate: Correct.

Ms. Iseri-Carvalho: ...because it's not clear who's going to make that decision as to what is a question of law or not.

Mr. Kawate: Correct, I'm not able to respond at this time.

Ms. Iseri-Carvalho: Okay.

Mr. Kouchi: Ms. Yukimura.

Ms. Yukimura: What was the question and what was the answer?  
Sorry.

Mr. Kawate: No.

Ms. Iseri-Carvalho: Oh my.

Ms. Yukimura: It was has...there has ever to...Oh, it was no.

Ms. Iseri-Carvalho: No, it was yes.

(Inaudible.)

Mr. Kawate: We're talking about the last question?

Ms. Iseri-Carvalho: The first question.

Ms. Yukimura: The first question was has the County Attorney ever issued an opinion on a question of law, right?

Mr. Kouchi: If they withheld...

Ms. Iseri-Carvalho: Withheld. Yeah, it's the opposite.

Ms. Yukimura: I'm sorry.

Mr. Kouchi: And the long answer was that they've never been asked to simply render an opinion of law, so they've not released anything...

Ms. Yukimura: Okay.

Mr. Kouchi: ...they've written because they've all been advisory opinions. But if you wanted an answer to the first question, the answer would be yes because they've never denied a request for an opinion of law.

Ms. Yukimura: Thank you very much for the clarification. So now...

Mr. Kawate: Sorry.

Ms. Yukimura: Now I want to ask my question. Can you give us an example of a question...a question that we would ask you that would render from you an opinion on a question of law?

Mr. Kawate: I believe that question would require me to speculate as to what you may or may not ask and...

Ms. Yukimura: Okay, then may I ask this then.

Mr. Kawate: ...so I cannot answer that at this time.

Ms. Yukimura: Okay. So, if I...if I sent you a question, does the State law pre-empt a County law, is that...or a proposed County law, is that a question of law?

Mr. Kawate: It would depend on the context in which the request was being made and the context in which the response is being made.

Ms. Yukimura: Okay, so give me an example of a context that would be a question of law and one a context that would be a question of advice and counsel.

Mr. Kawate: That's the same question...

Ms. Iseri-Carvalho: It's a speculation.

Mr. Kawate: ...another way around.

Ms. Yukimura: Okay, then let me ask you this. If my question was does the law just passed by the legislature regarding solar water heating pre-empt the proposed bill that I had requiring solar water heating. I mean, there's no...I mean, it's just a question of pre-emption, one law over a proposed law. Is that not a question of law?

Mr. Kawate: Well, it...

Ms. Yukimura: I mean there's no persons involved, you know, no particular set of facts involved.

Mr. Kawate: I'm just waiting.

Ms. Yukimura: I'm finished.

Mr. Kawate: So, okay. Now, that assumes a lot of different facts that would need to be taken into account, and at this time I cannot respond to that question because the...for one I don't know the entire particulars of your bill. I know what the gist of it was but just knowing the gist of it doesn't necessarily refer to what is contained in the bill, what it seeks to address. Additionally, the context in which the request is being made as to whether or not the Council should pass a law that ...

Ms. Yukimura: No, that's not the question at all.

Mr. Kawate: Can I finish?

Ms. Yukimura: Sorry, go ahead.

Mr. Kawate: I'm trying to explain why something may or may not be as simple as you put it out to be. So, all those things have to be addressed and so you cannot put it in a vacuum and say just because I think it's this and I think it's this, then it's a simple answer. It's not that simple.

Ms. Yukimura: Okay, but I mean we would never ask you whether we should pass a law or not. That's a judgment for us to make. But we would ask you whether a law is legally sufficient or we would ask you whether a law...a proposed law has been pre-empted by a State law. I mean...and I have already made that request. So, you know, I guess what your office could then take that and tell me whether it is (the rendered opinion) is an opinion on a question of law or an opinion...advice and counsel.

Mr. Kawate: I think the safest course would be for you to submit the request and we can review it and we can respond accordingly.

Ms. Yukimura: All right.

Mr. Kouchi: And this is a little frustrating, but I think that it underscores what is trying to be either determined or accomplished because I do agree with Shaylene's reading of the bill. It does not make it clear. I don't think that the County Attorney...that office would feel very comfortable as a matter of policy that they would start determining by themselves what should or shouldn't be released because those are opinions to the Council and that there needs to be some kind of process by which the Council would have indicated or created a policy by which opinions should be released if this is going to be passed. Now, that's not as easy as it sounds to get to and I believe part of the question is how do we get there. If Mr. Kawate is telling me that that is not a formally asked question, to me that's the question that's at the heart of the matter and let's get that in writing as soon as possible so that we both would have no misunderstanding as to what we're expecting because I hate to think that we'd be back and then the response is about everything else except this and then we're not going to be able to do anything anyway. Yes.

Ms. Yukimura: So, is there such a thing as an opinion on a question of law?

Mr. Kawate: Again, I don't...I don't mean to be or seem to be evasive, but the way the question is posed, in a vacuum? Sure there is.

Ms. Yukimura: So...if so, then how would you define a question of law?

Mr. Kawate: And again, it depends on the situation that that question arises.

Ms. Yukimura: So are you saying that if we can't define a question of law, then we can't use it as a criteria for release.

Mr. Kawate: No, you're saying that and you made that inferential leap off of my answer.

Ms. Yukimura: Well, because I'm...I'm counting on some legal advice about what a question of law is.

Mr. Kawate: And I understand that, but I need something in writing submitted so we can address it as it's being submitted and look at it in the light that it's being submitted.

Mr. Kouchi: And I just think, again, this underscores that we go back and forth in debating as to what we believe to be or not to be and since ultimately, you know, we are the ones that the opinions are being generated for, I do believe that, you know, should this go forward, there needs to have a process about how the Council makes the determination and it certainly can be in conjunction and in consultation with. But to believe that this would wind up being in the sole discretion of the County Attorney I don't think that that's a practical expectation to be an outcome because, again, I still would see that there are going to be, you know, depending on the set of facts or circumstances at that time, those kind of determinations as to should this be out or not, I think the Council would want to have that ability. The other thing on the flip side is that if the public feels that, you know, it really needs to be clear and objective policy that pulls the Council out because open is open is open, I mean that would be an interesting discussion and debate. But I think, you know, you're going to have to weigh down on one side or the other, though.

Mr. Kawate: On that issue or on those issues, the...part of the problem is what we receive and how what we interpret may not be what the questioner is interpreting. So, if it's interpreted to be something that may be released, the person who asked the question may not want it released and that would be problematic for us because of the attorney-client privilege and the client is the one who holds the privilege. And just like you are a client and if you decided as a body to release any opinion, that would be well within the purview of the body because you are the client.

Mr. Furfaro: Mr. Kouchi? Mr. Harrison, I'm sorry. To all of the others, I had a 2 o'clock appointment. Let me just ask this question. If this Council as a body came up with a policy and we put the policy on the table that said it is the wishes of this Council with a supermajority to release County Attorney opinions that go through the Chairman's signature, would you consult with us on that if the County Council as a body came up with the rule?

Mr. Kawate: We would consult with you, but it's still your privilege to hold.

Mr. Furfaro: So, it is our privilege.

Mr. Kawate: Correct.

Mr. Furfaro: So we could get at a point that we could write this whether it's pure majority or...

Mr. Kawate: Unanimous.

Mr. Furfaro: ...unanimous majority, you know, all councilmembers. We could start from there, could we not, by submitting this body's request for a review of our rules to release opinions?

Mr. Kawate: That's, that's correct.

Mr. Furfaro: Okay. And could we come up with rules that then said if individual councilmembers choose to have consultation about a bill, a product, something they're introducing, that that particular piece is used for the development of a bill or consultation, is that something you would give us advice on?

Mr. Kawate: Correct, but again that the...the privilege would be with the client at that point also.

Mr. Furfaro: I understand, but we're trying to find out the privilege of the body having a piece of information that can be shared with the public versus getting legal consultation for an individual councilmember that may be trying to do a bill.

Mr. Kawate: Correct.

Mr. Furfaro: But we could start at that point.

Mr. Kawate: Correct.

Mr. Furfaro: That's all I wanted to hear. I don't want to have a lot of discussion about it. I just wanted to ask that question. We could come up with our rules that say a supermajority could release something that goes through the Council Chair.

Mr. Kawate: Yes.

Mr. Furfaro: Thank you. Thank you, Mr. Kouchi.

Mr. Kouchi: Ms. Yukimura.

Ms. Yukimura: So, if an individual council asks for an opinion regarding a bill they want to propose, is that opinion that comes back...in that opinion that comes back, is the client the councilmember who requested it?

Mr. Kawate: It is our policy that we request that any opinion come from for a matter that the body or the Council is working on, that it come through the Chairman or the Vice-Chairman or Chairman of the Committee.

Ms. Yukimura: That's not my question.

Mr. Kawate: Can I finish?

Ms. Yukimura: Mm-hm.

Mr. Kawate: Please?

Ms. Yukimura: Mm-hm.

Mr. Kawate: So once that request is made to us for work that the body is going to be working on, then it's deemed to be...we provide the opinion of the advice and counsel for purportedly the body to review. Now, my understanding is that it's not or has not been the procedure of the body, of the Council to disseminate opinions from our office to everybody despite the fact that it's been signed off by the

Chairman or the Vice-Chairman. So that's definitely your kuleana, but the...our perspective is if it's work that's for the Council, it's council work, then it's the Council who's the client.

Ms. Yukimura: Okay. So the Council is the client and if the public interest is that there be good legislation and people, both the public and the Council and the legislature or whatever understands what the legalities are of it, why would the Council just by a 5-2 vote or a supermajority be entitled to hold that from the public.

Mr. Kawate: You're asking me a rhetorical question.

Ms. Yukimura: No. I'm asking...

Mr. Kawate: Yes, you are.

Ms. Yukimura: ...you a legal question.

Mr. Kawate: No, it's not a legal question. It's a rhetorical question. The fact is it's up to the Council as a body to decide its policies and procedures. That fact that you haven't up to this point in time indicates that you have not chosen to address that issue. Whether or not you address that issue by passing rules has nothing to do whether or not it's a legal thing.

Ms. Yukimura: Okay, so you're saying it is a policy decision for the Council to make.

Mr. Kawate: Correct.

Ms. Yukimura: Okay.

Mr. Furfaro: I think that reconfirms my earlier question to you. I will be taking over the Committee of the Whole as Mr. Kouchi has a previous engagement. Are there any more questions of the County Attorney?

Ms. Yukimura: Yeah, one more question.

Mr. Furfaro: Did you have your hands up Mr. Bynum? No.  
Councilwoman Yukimura.

Ms. Yukimura: So, if there's...if withholding of that opinion...does not really fit the advice and counsel of the attorney, then it may violate the Sunshine law.

Mr. Kawate: Wow.

Ms. Yukimura: Right? Because that would be the only exception that it can be withheld under.

Mr. Kawate: No. There is the attorney-client privilege.

Ms. Yukimura: Well, that's what I meant.

Mr. Kawate: If the client feels that it is something that they want to disseminate, okay, they may. But let me advise you also that without policies and procedures there is an ordinance that in the Kaua'i County Code that

makes it illegal for you to disseminate any information you...confidential information you obtain as a result of your position in your employment or your appointment as an officer or elected official.

Ms. Yukimura: Okay.

Mr. Kawate: So, if you act outside the scope of your duties and you act on your own without policies and procedures in place, then there may be some personal liability there.

Ms. Yukimura: Okay, so what is...how do you define confidential information?

Mr. Kawate: If we get a request for advi...for an opinion as to advice and counsel, that's what we determine that to be and it's up to the client at that point to decide what they want to do with that information.

Mr. Furfaro: Mr. Bynum.

Mr. Bynum: While I find this discussion interesting, it's been the policy of the County Attorney to respond to questions in writing. It seems to be a limit that you place pretty clearly. Is that correct?

Mr. Kawate: Correct.

Mr. Bynum: And in this case, we submitted a bill in writing, asked for an opinion about the legal sufficiency, got a 15-page response, and...which is the way...the kind of boundaries that I think the county attorneys tried to set to formalize our discussion in a way that's documented and appropriately confidential and you know, subsequent to (inaudible)...that opinion's been circulated to all councilmembers and now we have an opportunity to try to address any concerns that may be there. We have a memo from the County Attorney's Office requesting let's defer because we're in dialogue to address those concerns which will probably result in amendments to the bill and so I think we should defer this item and I'd like to make a motion to defer pending those discussions with the County Attorney.

Vice Chair Furfaro: Okay, I'm going to say that prior to your motion, there were other councilmembers that have hands up. I'm going to ask to go around the table just one more time on this and then I will want to make reference to your request for deferral. Councilwoman Iseri, may I recognize you.

Ms. Iseri-Carvalho: Yes and the question though that was posed Harrison is not simply, you know, whether... you know, what the Attorney General says. The question is the bill as it's submitted right now. It's not for legal sufficiency. I mean, it's on its face legal when you're saying that the County Attorney shall give opinions upon questions of law. The issue becomes a factual issue as to what is an opinion of law, number one, and whether that should be determined...I guess it's almost laughable in a sense that we're going to have people who are not attorneys trying to determine what is a question of law. I mean, that's pretty ridiculous to me. If you're not a lawyer but you're going to say, oh, I think this that came from the attorney is a question of law opinion and that is ludicrous, but that is an issue that is not something that, you know, you're going to decide, but that's the one that Councilmember Bynum proposed that basically it says that, you know, the County Attorney shall give opinions about questions of law submitted. That's what the bill says. It's totally legal in a sense, but it's totally flawed in implementation because how are you going to implement a bill like this and I think

that's important which is what you're probably saying. I mean we can go in circles all day, but clearly no matter what comes back from the Attorney General's Office, it's still not going to answer that question.

Vice Chair Furfaro: Thank you. Mr. Rapozo, I'll give you the last question.

Mr. Rapozo: My question is as it pertains to the release of the opinions and, you know, we hear a majority, super majority, unanimous and I've stated my position many times that, you know, for me it has to be unanimous because as a client, one of seven that makes up the client and I agree with you, I mean you're the lawyer, but the client is the Council and as a member of the Council, one part of the membership of the Council, that I should have a say whether or not what I feel is confidential should be released. So obviously I won't be here when the final vote for this bill is taken. But...since...in the six years that I've been here, I've been involved probably in several hundred opinions. What are my rights as a, and this is probably the wrong place to ask you the question, but does my right to my discussions and decisions made in the past years stay with me even though I'm not part of the body or...and you don't have to answer that. That's just something that...I'm thinking out loud now because as we discuss this, you know, there's some opinions that I think I would not want to see released simply because of issues that I feel may affect the County. There's really no personal liability, in my opinion. I mean, it's just...we've discussed a lot of things, but in my opinion it may affect the County, in the best interest of the County. So I think that's something that I guess we gotta pursue, but it's no different than any company hiring a corporate attorney and one employee going to the attorney or going to the...releasing opinions from that corporate attorney that an opinion or confidential information that was made in behalf of the company. I think it's a terrible violation of the confidentiality law. I think that...no one has the right to waive the rights of any other member. And I think that's where my position is and as you develop your answer to the questions that may be forthcoming, I'd like you to think about that, that I have my rights, I want to preserve my right as a member of this body and no one else on this table should have the right to waive that for me and that's what a super majority would do. It would basically say five members of this body can waive two members' rights and I think that's not right. I think that's...I think it's unconstitutional. For me personally, if anyone does that, I'll sue. That's just my opinion, but you know whatever the Council decides is what they decide. Interestingly, four members can decide in the rules what would require five or six or seven. That's interesting, but that's the way it is, that's the process, so.

Vice Chair Furfaro: Thank you for those comments, Mr. Rapozo, and I want to make sure that the sample or example I was making was just for discussion purposes. I don't have any (inaudible) to that point. Mr. Bynum, you were going to make a move to deferral.

Ms. Iseri-Carvalho: Well...

Mr. Bynum: Move to defer pending feedback from the County Attorney.

Ms. Iseri-Carvalho: Okay, we are...I don't know if it's finished with public testimony.

Vice Chair Furfaro: Okay, I'm sorry, I'm at a disadvantage as you know I was across the street.

Mr. Bynum: Yes, we had public testimony.

Ms. Iseri-Carvalho: No, but then we need to call back the meeting to order and then we have an opportunity for discussion.

Vice Chair Furfaro: Yes.

Mr. Bynum: No, not if a motion...

Vice Chair Furfaro: One moment, please and do not argue...

Ms. Iseri-Carvalho: Well, excuse me, do you have a second? No.

Vice Chair Furfaro: ...the points here. Councilwoman Iseri, Mr. Bynum, I would like you to recognize me as the Vice Chair of the Committee of the Whole and Chairman of the Council. Now, if you could give me a briefing. Did we have public testimony?

Ms. Iseri-Carvalho: We had public testimony. We did not call the meeting back to order here for discussion that was what I was referring to before Mr. Bynum was rude enough to speak when he was not recognized.

Vice Chair Furfaro: Thank you, that was where I was going with the question. Thank you. So I am going to...We are finished with public testimony. I am going to call the meeting back to order. I'm sorry, Bruce, that is my discretion if we did have and I'm sorry I wasn't here to note that. And now we are back in order here. Is there any further discussion?

Ms. Iseri-Carvalho: I do. I do have a floor amendment that I have circulated for the members and I would like to read that floor amendment so the public has an opportunity to review the floor amendment. We are running out of time. It is important, I think this issue, for the public to understand what the concerns are of its members. It think it's been misrepresented many times. So I want my position to be on the record that my amendment as requested, I (1) have some problems with Mr. Bynum's amendment because it does not clarify who will make that determination upon what is an opinion about a question purely of law. That...simply because of that question or that dilemma, this bill is flawed. I mean it cannot go as passed just in and of itself because it would never ever be implemented because we would never know who was going to make that determination. But despite that with the limited time, I do want to indicate that I want full and honest and transparent. If we want to be transparent, it is my position that we be transparent on every item and it does not become a discretionary issue. And so I have proposed as proposed by a lot of the members of the public that have come forward that whenever a County Attorney is called upon to give advice, the County Attorney shall at all times give advice and counsel to the mayor, the council or its members, department heads or board or commission members in all matters connected to their public duties, and to otherwise assist them in every way requisite to enable them to perform their duties faithfully. Where advice and counsel is related to proposed legislation, policies or resolutions and such advice and counsel is provided in a non-public forum, for example in executive session, the county attorney shall file an accurate and comprehensive statement of such advice and counsel and any ensuing discussion which I would hope would contain the verbatim minutes of the discussions in executive session with the County Clerk within 30 days of the date that such advice and counsel was provided and such statement shall be available for public inspection. This is really an opportunity to have true and open, transparent government. If people want to

say that we want to be transparent, then we shouldn't pick and choose which items we should be transparent on. If it's the philosophy that this body wants to have, then we should have the public not only be limited by what Mr. Bynum has said that we be limited to, it's just opinions of law which cannot ever be interpreted because the County Attorney or the County Council has not decided who's going to make a decision as to what is an opinion of law. Instead what we can say is that this Council wants to be full, open, honest and transparent and wants to release everything that was discussed and so there would be no need to go into executive session. We would simply have it in open or else if we went into executive session that within 30 days we would have all of the opinions, all of the statements that were made by all of the Councilmembers fully available to the public so the public would be well aware of each councilmembers position and we could not, as some may have tried to perceive, that we were hiding in executive session. So, let's be frank, let's be open, let's be transparent, let's have the public attend the executive sessions in essence, but the only thing that it says here is so that the Clerk can prepare verbatim minutes. For me, it's why we ever go into executive session? Let's have everything in open session, let's not go halfway if that's what Mr. Bynum is proposing because we already are there. The county attorneys have said and have confirmed today again that they have never released an opinion...that they have never withheld an opinion from the public that was purely an opinion of law. So, they have been abiding by this all the time, so this in effect, this bill absolutely did nothing. What my amendment does, it says it basically provides the opportunity for the public to basically be in executive session with the councilmembers and get that information, the discussion, the advice that the attorneys give readily and available within 30 days and I think that's the only way to be open and transparent and we could have all of that and there would be no...none of this discussion about this cloak of secrecy. So, clearly this is the most open amendment. I am hoping and asking that all of the councilmembers support this amendment for open and transparency for the public so that they are fully aware of each councilmembers' positions and they are readily and able to make an informed decision whether they want that councilmember back or not. So that is my position. I hope that I'll get an opportunity to vote on this. That was my reason for having this amendment come forward. I believe our last meeting is on November 17. I think this is an issue that the public would be happy about this Council dissolving or resolving before the next Council takes effect because it's been on the table for many years. As the Council Chair has indicated, he actually was one of those that was the foremost proponent before Councilmember Bynum was even on the table in one to discuss these issues and bring forth these issues about what should and should not be revealed by the County Attorney's Office. I believe my amendment resolves that in its entirety, leaves it up to no discussion, that basically the public would be entitled to everything that the councilmembers discuss in executive session.

Vice Chair Furfaro: Thank you, Councilwoman.

Ms. Iseri-Carvalho: Thank you. I appreciate that.

Vice Chair Furfaro: I think your point is made and Mr. Bynum, would you like to have anything to say? If not I'm going to go to Councilman Kaneshiro. Councilman?

Mr. Kaneshiro: I have a question in regards to this floor amendment. In a situation where there will be some liability issues, how do we address this with this type of amendment?

Ms. Iseri-Carvalho: There would be...

Mr. Kaneshiro: Oftentimes there are some policies that we have to make, policy decisions that we have to make or there's some legislation that we have to pass, but at some times there may be some liability issues that we need to hear previously to accepting the resolution or policy and so forth for legislation. So, how would that affect...

Ms. Iseri-Carvalho: I believe...

Mr. Kaneshiro: You know, I don't know. So I need to know how do we address this.

Ms. Iseri-Carvalho: I believe every case that we decide basically we're getting an interpretation on whether that will be held up in court or not. It depends on all the different facts that are proposed, so there's always a liability issue. And here, by this amendment we're saying that what will take precedence is openness and transparency over whatever potential liability there exists. That's what this amendment is saying. And so, you know, it's a...I guess, a weighing of a benefit and cost analysis, if you may. For me, after hearing the discussions about people wanting open and transparent discussion, it appears that the liability, if that happens on behalf of the councilmembers, that will be paid by the taxpayers as we've seen before in other cases that have happened. So, it appears that there is a philosophical...I would say a philosophical position being taken by myself that it is better to be open with the public and to have all of the discussions available for the public because in essence if there is liability, it's the public that's going to be exposed to that liability. So, they'll be able to have all the information readily available to them, which is what they have requested time and time again. There have been many accusations against the Council that we have not been as open and candor as possible and this amendment allows that to happen with a caveat that potentially by allowing all of these openness to happen and the transparency to happen that there may be liability that's going to be attached and they are well aware of that as we've utilized that as a reason why we were not revealing certain opinions that were provided by the county attorneys to begin with. But it appears that the members in the community have advocated despite the potential for liability in releasing information that they would rather be made aware of all of our discussions and should we face potential liability, they are aware of it and they are the ones who's going to pay for that liability.

Vice Chair Furfaro: Thank you. Mr. Kaneshiro.

Mr. Kaneshiro: Just a backup to that question and I need to understand the real meaning of "and such advice and counsel is provided in a non-public forum." What do you mean by "such advice and counsel is provided..."

Ms. Iseri-Carvalho: That is relating to an executive...

Mr. Kaneshiro: It has to be related to proposed legislations, policies and resolutions? Is that what you're saying?

Ms. Iseri-Carvalho: Right

Mr. Kaneshiro: Okay.

Ms. Iseri-Carvalho: And then it says and...yeah, is provided in a non-public forum. So if we're discussing this legislation, policies or resolutions in a non-public forum, meaning if it would be in an executive session...

Mr. Kaneshiro: Correct.

Ms. Iseri-Carvalho: Then that is information that would otherwise be made available to the public.

Mr. Kaneshiro: So, this doesn't necessarily mean that any discussion in a non-public forum...

Ms. Iseri-Carvalho: No.

Mr. Kaneshiro: ...could be released.

Ms. Iseri-Carvalho: No. For example like claims, we're not talking about claims. We're talking about legislation, policies and resolutions.

Mr. Kaneshiro: This is just for legislative policies. I just wanted to be clear.

Ms. Iseri-Carvalho: Yeah, yeah and it may not be necessarily clear. This was rushing. We may be able to type in the language, but the intent was surely what you've intended. The legislation, policies and resolutions.

Mr. Kaneshiro: And resolutions.

Ms. Iseri-Carvalho: Yes.

Mr. Kaneshiro: Okay. Thank you for that clarification.

Vice Chair Furfaro: Okay, I am going to recognize Councilwoman Yukimura and then I would like to say something as Chair before we move for a deferral if that's the motion. Councilwoman Yukimura.

Ms. Yukimura: Thank you. I just have a question for Councilmember Iseri-Carvalho about her amendment. Councilmember Iseri-Carvalho, have you vetted this with the County Attorney because it does...

Ms. Iseri-Carvalho: No.

Ms. Yukimura: Oh, so maybe in the interim if we defer this we can get their opinion.

Ms. Iseri-Carvalho: Yup, we could. This was, if you recall, this was basic language that was taken from Carl Imperato who had testified at the last hearing. So, you know, that is his language that I had put forth and I was willing to introduce it as I had indicated to him. So, I had not brought it through the County Attorney's Office and that would be a question that would be appropriately made.

Ms. Yukimura: Thank you, yes I know it was a well-intentioned proposal on the part of Mr. Imperato and the public doesn't always think about the legal ramifications of it. So getting that opinion would be a good idea and I appreciate that you're willing to do that.

Vice Chair Furfaro: Thank you.

Ms. Iseri-Carvalho: I believe that would come from the Chair.

Vice Chair Furfaro: Thank you. Any further discussion? No? You know, I would like to say this is a very important subject and I want to thank Mr. Bynum for bringing this, but, you know, over the years we have all struggled with this particular question. You know, the Charter basically says we need to be as public as we possibly can with the exception of claims and liabilities. I also want to point out that the State of which when we take our oath makes reference to the Sunshine Law and certainly there are a number of cautions that deal in terms of personnel action, theft investigations, all of those particulars and it's very important that the Council understands what I think Mr. Bynum is trying to accomplish here for transparency. But those items under the Sunshine Law, those particular things that reference all seven of us doing the best possible fiscal responsibility we can for the County of Kaua'i are within those Sunshine Laws and are those exceptions. Now I do want to say that we as a body, this is a passionate item and we need to hold our decorum and I am never happy when I have to knock on the gavel to ask for the decorum to come back to our meeting forum, but it is a very important item. And I too have been working on this for a long time and if I certainly have summarized what I said to the County Attorney earlier that we'll make the rules and we'll make the rules for the body and we'll get some feedback and we'll try to be as open as we possibly can on legislative action, and on that note, I'm going to ask for a deferral.

Councilmember Bynum moved to defer pending County Attorney opinions, seconded by Councilmember Yukimura.

Vice Chair Furfaro: It has been moved and seconded for a deferral. All those in favor say aye. Thank you very much.

Ms. Iseri-Carvalho: It is my...

Vice Chair Furfaro: Yes.

Ms. Iseri-Carvalho: I guess it is my assumption that the County...when we say deferral pending County Attorney that it will be back on the agenda in two weeks.

Mr. Rapozo: No, it doesn't and that's why I did not vote because it...

Ms. Iseri-Carvalho: Well, if not, then they should take a vote, I guess.

Vice Chair Furfaro: I will call for the roll one more time and I would like a voice vote on a motion to defer and seconded.

Mr. Rapozo: I want to clarify the motion, Mr. Chair, because if it's a motion to defer, I'm going to support it. If it's a motion to defer pending, I'm not.

Vice Chair Furfaro: Okay and I appreciate both of you taking the time and I would like to ask for the motion to be restated and I will call for a voice vote.

Mr. Bynum: Move to defer pending County Attorney response.

Ms. Yukimura: I second it.

Vice Chair Furfaro: Okay. May I have a roll call vote.

Wilma Akiona, Secretary: Councilmember Bynum.

Mr. Bynum: Aye.

Ms. Akiona: Councilmember Iseri-Carvalho.

Ms. Iseri-Carvalho: No.

Ms. Akiona: Councilmember Kaneshiro.

Mr. Kaneshiro: Aye.

Ms. Akiona: Councilmember Rapozo.

Mr. Rapozo: No.

Ms. Akiona: Councilmember Yukimura.

Ms. Yukimura: Aye.

Ms. Akiona: Vice Chair.

Vice Chair Furfaro: Aye.

Ms. Yukimura: Is this...this is the Committee...oh yea, it's the Committee of the Whole.

Vice Chair Furfaro: I'm Vice Chair in this Committee.

The motion to defer Bill No. 2288 pending the County Attorney's response was carried by a vote of 4-2-1.

Ms. Iseri-Carvalho: And I guess my question then would be, what County Attorney opinion because I'm going to be proposing as I had suggested earlier, my amendment. It is apparent that this is an important issue, but it appears that the parties here do not want this decided as soon as possible.

Vice Chair Furfaro: I would like to say, Councilwoman, I would be glad to join you on any communication you would like to send over to the County Attorney.

Ms. Iseri-Carvalho: Okay, well and I would also like to put on the agenda another motion, I guess I'll put it at the Council agenda, regarding the rules that we are going to be setting in order to vote on how we're going to do the super majority or majority because I think that can be resolved just in one meeting.

Vice Chair Furfaro: So noted.

Ms. Iseri-Carvalho: Very good.

Vice Chair Furfaro: Okay, I believe that brings us to the end of the Committee of the Whole. Are there any additional items on the Committee of the Whole? Are there any additional items on our agenda?

Ms. Iseri-Carvalho: Yes, we do have a recognition.

Vice Chair Furfaro: Very good. I was waiting for you to raise your hand and the floor is yours Councilwoman. This Committee meeting is adjourned.

There being no further business, the meeting was adjourned at 3:28 p.m.

Respectfully submitted,

*Wilma Akiona*

Wilma Akiona  
Secretary

APPROVED at the Committee Meeting held on January 7, 2009.

*Bill "Kaipo" Asing*  
BILL "KAIPO" ASING  
Chair, Committee of the Whole

(October 29, 2008)  
FLOOR AMENDMENT

Bill No. 2288, Relating To The Duties Of The Office Of The County Attorney

Introduced by: Shaylene Iseri-Carvalho

Amend Section 2-1.1 to read as follows:

“Sec. 2-1.1 Office of the County Attorney.

(a) There shall be an office of the county of attorney as provided by law.

(b) When requested by the mayor, council or its members, department heads or board or commission members, the county attorney shall give opinions upon questions of law submitted. The county attorney shall file a copy of each opinion with the county clerk within three days of the date of its issue. Opinions on file with the County Clerk shall be available for public inspection.

(c) When called upon, the [County Attorney] county attorney shall at all times give advice and council to the mayor, the council or its members, department heads or board or commission members in all matters connected to their public duties, and to otherwise assist them in every way requisite to enable them to perform their duties faithfully. Where advice and counsel is related to proposed legislation, policies, or resolutions and such advice and counsel is provided in a non-public forum, the county attorney shall file an accurate and comprehensive statement of such advice and counsel and any ensuing discussion with the County Clerk within thirty (30) days of the date that such advice and counsel was provided. Such statements shall be available for public inspection.”

(Material to be deleted is bracketed. Material to be added is underscored)

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