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The charter amendment increased the signature requirement to 100 signatures. There is little discussion in the charter commission minutes on the issue of payment for defense of impeachment proceedings. There is an exchange between counsel for the commission and a commission member as follows:

MR. OMONAKA: Is it the county's obligation to impeach officials ...

MR. ODA: That is still up in the air, but my shotgun opinion on that would be, no. It can be initiated by the county council, itself, or whomever. Any person can initiate that. Impeachment generally goes through the failure of the official to act or not act, or whatever, so for the county to pay for that defense sounds a little unusual, you might say.

MR. OMONAKA: Yes, and on the other hand, if you only have a hundred electorates that can initiate impeachment proceedings, if the guy is kind of unpopular, takes an unpopular position in the county council, he can be taken to court a lot of times.

June 12, 1979 meeting minutes, page 19. Discussion continued as follows:

MR. SENSANO: Let's say that there is a proceeding, are the signatories to the proceedings petition libel for this?

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MR. ODA: You mean for bringing, let's say, a frivolous action.

MR. SENSANO: Yes.

MR. ODA: I don't ... I suppose it might be possible, but I haven't seen any situation like that. I know, for example, under certain kinds of lawsuits, if you lose the case that you initiated, you can be charged for attorney's fees that are incurred by the other party defending it.<sup>1</sup>

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<sup>1</sup>Transcript from charter meeting of June 12, 1979 attached for your information. Attachment A.



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affects the public interest, relates to the employee's official duties, and the official was acting in good faith. Citing *Machado v. Bal*, 31 Haw. 559, 564 (1930); *Hart v. Sagadahoc*, 609 A.2d 282, 283 (Me. 1992); and 4 McQuillin Mun Corp § 12.137 (3d Ed.).

*Maui County Council, supra*, at 108, 929 P.2d at 1358.

Problems

Ethics Code.

There are some potential problems presented under the unique circumstances of this case. While the County Council is the appropriate body to determine if public funds should be expended and whether a public purpose would be served by such expenditure under these circumstances, six members of the Council are themselves subject to the impeachment action. These members would have to vote then on a matter of financial interest to themselves as individuals. Provisions of the ethics code may apply. Section 2-83(d) provides that “[n]o officer or employee shall ... have a financial interest, direct or indirect, which might reasonably tend to be incompatible with the proper discharge of his official duties or to impair his independence of judgment in the performance of his official duties ....” Section 2-83(b) provides that “[n]o officer or employee shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts or treatment, for himself or others.” Section 14-3 of the Hawaii County Charter provides that:

It shall be incumbent upon all employees or officers of the county to:

(a) Make full disclosure in writing to the appointing authority or to the council in the case of an elective officer, the possession or acquisition of any interests, financial or otherwise as might reasonably tend to create a conflict with the public interest. Any member of the council who knows of a personal interest, direct or indirect, in any action proposed or pending before the council shall disclose such interest prior to the taking of any vote thereon.

(b) File a copy of such disclosure with the county clerk which shall become a matter of public record.

Should the Council determine to vote on an expenditure of funds for these legal expenses, Council members affected should follow the disclosure requirements of the code (§ 2-91.1(g)) and charter and further should determine if they wish to ask the Ethics Board for an advisory opinion on the propriety of voting on the issue. We believe it is likely that since necessity dictates that only Council members can vote on the issue, that it must be allowed. But the Ethics Code sets up the Ethics Board as the body to make these determinations.

Determination by neutral body.

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Another problem is the method of determining whether it is proper for the legal expenses should be paid for or reimbursed. As the *Maui County Council* case discussed, (1) there are three factors to be found for reimbursement to be justified: the disputed action affects the public interest; (2) relates to the employee's official duties; and (3) the official was acting in good faith. The only body which can make these determinations and authorize

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By one or all of its own members for attorney's fees, there would be no such presumption of good faith unless there was an attorney general opinion or a court order upon which the vote was based. *Powers v. Goodwin*, 291 S.E.2d 466 (1982). Another action suggested by the *Powers* case was for the county commission to bring a mandamus action against the appropriate ministerial officer to require him to issue a check for payment of legal fees.

In this situation, all of the above options are available to the Council. The most prudent and simplest would be to proceed to defend against the impeachment proceedings and ask for reimbursement should the action be resolved favorably.

Sincerely,

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By \_\_\_\_\_  
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APPROVED:

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