

## **Open Work Session**

### **Template Resolution for Hiring Outside Legal Counsel**

**August 6, 2019**

Mr. Taylor said this topic was before Council a couple months ago, and now it is back. He said they received some comments from the Executive Branch and Mr. Wilber, and he addressed what he thinks is the most significant item in an email to Council. He said the Executive Branch, apparently, thinks Council should not be able to terminate special legal counsel, essentially what they call outside counsel. He clarified, they are not talking about the County Attorney, but are talking about special legal counsel who have been retained to perform services the County Law Department, essentially, the County Attorney and his firm, are unable to perform for various reasons. He said, as far as termination is concerned, he thinks Council has the power to do that, and he thinks since Council can terminate the County Attorney, as discussed earlier tonight, logically, it follows that they can terminate special legal counsel. He said he thinks that is the main objection, but there are a few others in the Executive Branch's comments. Mr. McCain said he has a hypothetical question, and he understands what Mr. Taylor is saying, but a lot of the things special counsel is hired for, whatever it may be, Council may not be aware of the issue, such as a Human Resources issue that Council is not privy to. He said there are a lot of instances where Council is not privy to the whole issue that is going on, so should Council terminate an outside counsel that they are not even working with or even part of? He clarified, being they are the Legislative Branch, there could be a lot of things they are not part of, to which Mr. Taylor responded, that is true, but he does not think it is something they would do willy nilly, and he does not necessarily think Council should not know what they are doing. He said he thinks they would, essentially, want to know what the outside counsel is doing, to which Mr. McCain responded, not if it does not have anything to do with a Legislative issue. He explained, there are a lot of things that go on in the County, such as something to do with contracts or the Airport, and there are a host of legal issues, obviously, that go on that are not Legislative issues. Mr. Taylor said, if Council does not want to have that information, he can take it out, and it is up to Council as to what information they want to have as far as what the outside special legal counsel is doing. He said that is his thought on it, but it is up to Council as a Body.

Mr. Hastings asked Mr. Taylor to walk them through this because he was trying to read it and understand. Mr. McCain asked if Mr. Taylor can help them with the language, to which Mr. Taylor responded, there are two parts where details of what the outside legal counsel is doing would come before Council. He said Item G, subpart 1 provides for Council to be informed as promptly as possible of a summary description of each separate matter that is being handled, just a summary description, and not necessarily the details. Mr. Cannon said the termination section is at the end of Section A, and the question there is what would be the worst case scenario? He said they are leaving it open-ended just in case a worst case scenario developed so there might be an out for Council to stop it, though Council, he would hope, would not exploit that privilege, to which Mr. Taylor responded, that is correct, though he is not suggesting Council do it at the drop of a hat or willy nilly, but he thinks Council wants to have that ability. Mr. Cannon said when he read that he wondered why termination would be necessary because Council would have already allowed the proper amount of funding they think is necessary, and he could not think of a worst case scenario that might cause that to come about.

Mr. Wayne Strausburg, Director of Administration, then came before Council and said, from his standpoint, he read the Charter section covering the hiring of special counsel, and to him it is very clear that they have to come to the County Council. He said, when they come to the County Council, they should have a letter of engagement, they should lay out all the details Council is looking for, such as why they are hiring that firm or special counsel, and how much it is going to cost. He said, from his

standpoint, he does not understand why they need a Resolution because it is already in the County Charter. He said it is very clear that they have to come to Council and explain themselves, and get their approval to hire special counsel, so he is puzzled over why they feel they need a Resolution on this, to which Mr. Taylor responded, he thinks, as far as approval is concerned, they normally act by Resolution, and that is why a Resolution is being proposed. He said he thinks that is the simple answer to what Mr. Strausburg just mentioned. Mr. Cannon asked if Mr. Taylor would say another part of that might be the fact that they are trying to be a little more specific on what is being required as far as the services, and costs of the services? He clarified, it is one thing to approve legal counsel, but it is another thing to limit the expenses they might incur because the Charter does not require a limit on expenses. He then asked Mr. Taylor if that is correct, to which Mr. Taylor responded, there is a misunderstanding, he thinks, in the response by Mr. Wilber. He said there is no cap, and the template does not provide for a cap. He said, if Council wants to put a cap on a particular outside legal counsel, they can certainly do that in the Resolution, but what he has proposed does not have a cap in it. He said it has a provision where, if the unpaid bill hits a certain amount, it has to be billed out so they do not get hit at the end with a large bill, and that, if it exceeds a certain amount, the bill would come before Council so they can see it, but there is no cap, per se, on that. He said he thinks, generally, this is to put some provisions on the approval Council would want in the Resolution, in his opinion. He said, if Council sees it differently, that is fine, and it could be different, but he tried to come up with something that he thinks is reasonable based, to some extent, on conversations and matters that have come before Council when he has heard concerns and objections raised over the last two years.

Mr. McCain said he is looking at what Mr. Cannon referred to at the end of Section A, and it says "Unless otherwise stated herein, the engagement may be terminated by either the County Executive or the Council by Resolution." He said he does not know what the right wording there would be, but it does not say anything about "with cause," which is not really what he is trying to say. He clarified, it is just so wide open. He then asked if it needs some kind of parameters around that, to which Mr. Taylor responded, in terms of legal counsel, he thinks they do not want to put any parameters on it. He explained, if they do not want to continue the services with the legal counsel, they should be able to terminate it. He said the rules for the legal profession certainly allow a client to do that under any circumstances, so, if they want to terminate their representation, they can do it, and he does not see this as anything out of the ordinary. Mr. Cannon said, as he said before, how do they know if it is going to be absolutely necessary, and could there be extreme measures that come into effect where Council feels it is getting out of control, but he has never really been part of that where he felt that happened. He said he is looking up the provision in the Charter that says "The County Executive with the approval of the Council may employ special counsel to work problems of an extraordinary nature when the work to be done is of such character, etc." He said he understands Mr. Taylor is doing what he felt was correct based on concerns Councilmembers might have expressed over the last couple of years. He then asked where he thinks this Charter provision falls short where it defines special counsel, and what they can or cannot do, to which Mr. Taylor responded, again, Mr. Cannon is catching him cold because he has not been asked to review the Charter provision as to how it should be changed, if at all. He said it is simply proceeding under the Charter provision that he is doing. Mr. Holloway said he thinks when Mr. Taylor was engaged to do this, it was because the Charter is not quite as clear as it should be. He said changing the Charter is a great task, and has to be voted on in a referendum, and he thought the point of doing this Resolution was to make it more specific. Mr. Cannon said it may have come about by the fact that Council found out sort of in a roundabout way that counsel was being hired without Council approval, so he knows this is Mr. Taylor's response to that to create a Resolution that says they need to have some real specifics, to which Mr. Taylor responded, that is right. He said, as he said, he tried to come up with something, and, to some extent, he infused things that were in agreements he signed in private practice

over the years where different employers had things in their agreements, and he has used some of those, so it is based, to some extent, on experience, but he thinks it is a reasonable document.

Mr. Hastings said he would not want anything that is a solution in search of a problem. He said he appreciates the effort to go through it and come up with better language, but, in general, all they really want is to be able to know when special counsel is being hired, and to know why. He said, as far as the extent, he does not know if an information sheet would be a simpler way to do that, or maybe this document would do that, but he is not quite sure. Mr. McCain said, not to put words in Mr. Hastings' mouth, but it sounds like he is eluding to Council being careful that they are not creating any unintended consequences. He said the intent is clear of what they are trying to do, and it seems pretty simplistic. He said he is a big fan of less is more, and this is pretty simplistic and pretty direct, but he keeps looking at it to see if there could be any unintended consequences that could result from this. He said the Charter, ideally, already covers this, but the Charter might be too liberal. Mr. Taylor said this is what he calls a template Resolution. He clarified, in other words, it is not intended for any specific instance, and it could be changed up or down. He said, as he said earlier, if Council wanted to put a cap on something, they could put that in because there is no cap on this in terms of the fee, so things could be added or taken out depending on the particular circumstances. Mr. Cannon said, in a sense, the Resolution itself is not really establishing the structure that this must be followed every single time because that would have to be, he thinks, more clearly defined in the Charter. He then asked if Mr. Taylor is saying this will be available to Council if they want to have the Executive give them the necessary information? He said there is nothing that says this Resolution is a template for Council to follow in getting approval for legal counsel, but there is no Resolution or Charter amendment in place to force this to take effect, to which Mr. Taylor responded, that is right. He said they can put anything in, or take anything out of their Resolution. Mr. Cannon said this Resolution does not say the County Council must have documentation before approving special counsel, to which Mr. Taylor responded, it does not. He clarified, it is a draft, essentially, template Resolution to be used as a starting point. Mr. Cannon said, if the Executive were to come before Council per the Charter in reference to special counsel, he thinks the only thing they would ask them to do would be to follow this template because Council is not creating a law that demands that this template be followed, to which Mr. Taylor responded, that is right. Mr. Cannon said Council is not looking at a Work Session right now that says they are going to make it the responsibility of the Executive Branch to bring them a completed template. He said that is not what they are talking about today, and they are only talking about this template. He said Council would have to pass some type of Legislation, either a Charter amendment, or some other type of Legislation, that would have to enact the authority for this Resolution, to which Mr. Taylor responded, he does not follow Mr. Cannon on that. He said, essentially, this is saying to the Executive that Council would like him to follow this form of their Resolution, and, obviously, they will consider changes that he might want or that Council might want to make. He said that is it, and it is, essentially, a starting point. Mr. Cannon then asked if Mr. Taylor thinks they would have to have something in place that says the Executive is required to fill out this information, to which Mr. Taylor responded, no, they have the power of approval. He said, if Council does not get the Resolution they want and cannot come to some agreement, they do not have to give approval, or they can give approval with the conditions they want in the Resolution, and if the Executive cares to not go forward on that basis, he can do that.

Mr. Strausburg said, again, he thinks each time they would have occasion to hire special counsel, each circumstance is going to be unique and different, and if this is intended to provide the Executive Administration with some guidance as to what information Council would like to have in terms of its consideration of hiring special counsel, that is fine. He said he is very uncomfortable with the termination provision because, typically, if they are hiring special counsel, it is to deal with an Executive

Administrative issue. He said, if Council wants the Administration to update Council on the progress of whatever the issue may be, that is perfectly fine, but he thinks to have language in a boiler plate Resolution that gives Council the authority to in and of itself terminate an agreement the County Executive has entered into with special counsel is troublesome to him. Mr. Cannon said, even if they were to do away with the termination clause, he guesses the real issue at hand is whether or not Council wants to move forward with a Resolution that would establish these requirements. He said he knows in the past they have found out in a roundabout way that special counsel had been hired, and it is like pulling teeth to try to find out why they were hired, under what authority they were hired, and how much County funds were spent, and, to him, that is a violation of the Charter. He said, again, that is the genesis of this Resolution, to which Mr. Strausburg responded, he understands. Mr. Taylor said, if Council has the power to terminate the County Attorney, which they do, and which they recently exercised, logically it follows that any special counsel that is hired to do something the County Attorney cannot do should also have that provision in it, and that is just a matter of logic in his opinion.

Mr. Holloway said he is sitting there trying to think of why they would and why they would not terminate special counsel, and he thinks the logic to that would be, if they were to discover for some reason or another the attorney was not doing exactly what he was hired to do. He said, in other words, sometimes in the process of whatever is going on they find out through the rumor mill, unfortunately, that the attorney is really not working on what they thought, so he thinks having that option is good, but he does not think Council is going to run out and try to get involved in this. He said, naturally, the best thing to do when they get into these situations is to get it over with as soon as possible because it costs less money, but things happen, whether it is this Administration or the one that comes along next, so he thinks it would be a decent option for Council to be able to do that.

Mr. Cannon asked, when the Executive has to come before Council for approval for special counsel, how would that process differ from what they are looking at here, or is this the template Mr. Taylor has come up with that would make that process easier and more predictable, to which Mrs. Hurley responded, what is being presented is a template Resolution, as Mr. Taylor has explained, and it would be used for the hiring of special legal counsel, such as bond counsel, a pension attorney, or various specialized areas where they need legal expertise. She said a template Resolution is what is being suggested. Mr. Cannon asked how this differs from what they are currently using, if they were to pull a Resolution up from last year or the year before, to which Mrs. Hurley responded, unfortunately, this process pretty much has not been followed in the past. She said, when they hired the opioid attorneys, the Resolution was slightly different. She said to her knowledge she is not aware of any other specialized attorneys that have been approved by Resolution in recent years. Mr. Taylor said they have not been approved, period, to which Mrs. Hurley responded, that was the concern. Mr. Cannon said they are trying to fine-tune the process. Mr. Holloway said this would just guarantee the Charter is being followed.

Mr. Cannon said it is going to be up to Council as to who gets the authority to terminate, to which Mr. Strausburg responded, if they are hiring an attorney and present Council with an engagement letter, and Council understands they need a special attorney, and they present Council with what the hourly rate is going to be, and what the anticipated expenditure is going to be, his concern about termination is he thinks the attorney who is being hired is going to look at that and say wait a minute. He explained, if it were an aviation attorney working on some aviation issue because they do not have that expertise here in the County, if they look at it and see they can be terminated by the County Council, but the County Council is not involved in the project or the process that is being negotiated, if he were that attorney, that would cause him discomfort. He said, going back to the County Attorney, Council will recall that the County Attorney's client is really the County, both the Legislative and the Executive Branch, so that is

different than a special attorney who is being hired to do work for the Executive Branch, and he thinks there is a real distinction there. Mr. Holloway said a special attorney can be fired by the County Executive at any time, to which Mr. Strausburg responded, yes because he or she is working for the Executive, and that is where he has the angst. Mr. Taylor said, in that particular instance, that provision would forego hiring a super duper attorney, and it can be struck because this is a template Resolution, as he said. Mr. Holloway said that is why they are there talking about it.

Mr. Cannon said Mr. Wilber suggested there was a cap on this, and he does not see where there is a cap, but, on the flipside of that, he does not understand why there is not a cap. He said they had a case with a night club on the north end of town, and every so often they would send a bill to the County Council. He said eventually he asked why they kept getting bills for copies when that case was years ago, and that someone needed to notify the law firm that they were not going to be doing that anymore, and those bills stopped, but to this day he never found out why. Mr. Strausburg said it is in everybody's best interest to mitigate the costs of effective representation to the extent that they can, so he is with Mr. Cannon on that. He said his concern with the whole thing was, again, to him the Charter is very clear to what they have to do, and they should be doing that, and the engagement letter should really give Council the information they need to make an intelligent decision as to whether they should hire that attorney. He said he was concerned that this was going to be a rigid template, and this was going to be the Resolution utilized for hiring any special counsel, and, again, that caused him concern, but if it is suggested they negotiate that each time they come forward with hiring a special attorney, that is a completely different avenue to travel. Mr. McCain said they can do that every time because this is a template, but at the same time they are probably not going to remember that six weeks from now when it comes up. He said, once this language is in there, he is sure they are probably going to be following it, and they want some kind of control over the spending, but, unfortunately, with legal cases they just do not know where they are going to go. Mr. Cannon said he is assuming the letters of engagement have not come to this table that often, to which Mr. Strausburg responded, not that often. He said, typically, in his history, the times they have hired special counsel were, obviously, each year when they do the bond sale because that is very specialized, and he believes Council is fully aware of that, and he believes that is pretty transparent. He said at times they do hire counsel for things regarding the pension, healthcare, or employment issues, and they should be bringing that to Council, and the Charter is very clear on that, so he has no argument there. Mr. Holloway said his question is why this has not been done before, to which Mr. Strausburg responded, traditionally, and he will go back to when they had Mr. Baker here, he does not recall doing Resolutions. He said Mrs. Hurley can correct him if he is wrong, to which Mrs. Hurley responded, they did not. Mr. Strausburg said because they had not done it for a long time, he thinks it was one of those things where they just did it, and he does not think it has been intentional. He said they just left it up to when the County Attorney felt they needed special counsel, and they did not do formal Resolutions or presentations. Mr. Cannon said this comes back to what he touched on before. He said this Work Session is discussing a Resolution template, but they do not have any Resolution or Charter amendment that would force the Executive Branch Administration to use that template. He said they could come up with the greatest template idea in the world today and say that it is great, which would be by consensus, but they do not have anything that says this Resolution is going to have to be used. He clarified, they do not have any enforceable means, to which Mr. Taylor responded, their enforceable means is the power of approval. Mr. Cannon said that is what the Charter gives them, to which Mr. Taylor responded, that is right, and there is their power. Mr. Cannon said he understands that, but they can create a Resolution and give it to the Executive and say they want him to use it, to which Mr. Taylor responded, ideally there would be some discussion and give and take. He said, as he said, it is a template Resolution, but the idea is to have a starting point to have something to begin with, and to work from that. Mr. Strausburg said he understands the point Mr. Cannon is making,

but his concern, again, would be, if it was a rigid template, they are affectively amending the Charter, in his opinion, and he does not think that is a place they want to go. Mr. Cannon said he can see that, to which Mr. Strausburg responded, they are trying to give the Administration guidance as to what they would like to look at, and he gets that part, but he thinks in some respects it is a bit overreaching.

Mr. Cannon said, if Council liked everything here today and said they want to use this template, and they gave it to Mr. Strausburg and asked him to bring this back with special counsel, but then Administration came back and said they are not going to use that template, is Council just going to offhandedly say that since they did not use that template, they are not going to approve special counsel, to which Mr. McCain responded, they could just give them this and say this is the template they would like to see, but not have to adopt this as a Resolution. Mr. Cannon said that was what he was getting at. He said the adoption process would have to be a Charter amendment to put any enforcement into this document. He said it would have to be a Charter amendment that Council would approve for special counsel and follow this special procedure. Mr. Taylor said, if they were going to make it an absolute ironclad Resolution, then, yes. He said to take it a little bit further on what Mr. McCain was saying, if the Executive came back and said here is a simple Resolution to hire special legal counsel, Council would have the ability to put some provisions from the template Resolution in their approval Resolution.

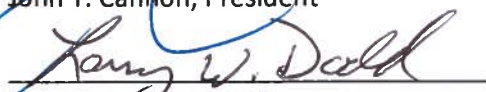
Mrs. Acle said it sounds like there is a lot of history in all of this, and she is just wondering if this history can be put aside, and they move forward from here and work to get this resolved because it sounds like they are getting into a lot of detail that may not even happen. Mr. Strausburg said, again, he thinks it is already covered in the Charter, and he thinks Council already has the authority to say they are going to allow them to hire or not, and if they are going to allow them to hire, what conditions will be placed on them. He said that is already in the Charter.

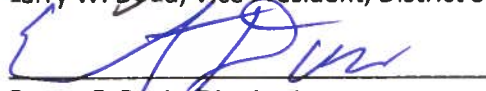
Mr. Cannon said what they are really reviewing is not anything that is going to take any Legislative path after it leaves this Work Session, and is only going to be something they will have as a tool to hand to the Executive saying, if they want Council to approve special counsel, they need to fill this out. He said it can be their prerogative to say they do not want to fill it out, but then Council will not approve the special counsel. Mr. Strausburg said, again, he thinks it is going to depend on the circumstances as to why they are hiring, and who they are hiring, so it is serving as a guideline, and he does not see any issue with that at all. Mr. Cannon said he knows they have not come to a real conclusion on this. There was no further discussion.

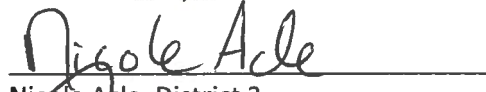
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**Open Work Session  
Template Resolution for Hiring Outside Legal Counsel  
August 6, 2019**

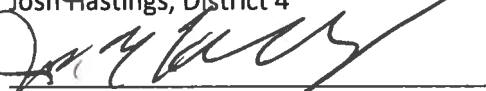
  
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John T. Cannon, President

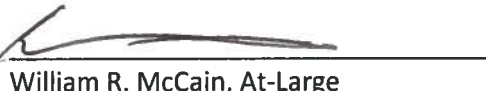
  
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Larry W. Dodd, Vice President, District 3

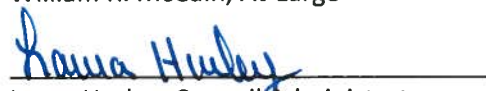
  
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Ernest F. Davis, District 1

  
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Nicole Ade, District 2

  
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Josh Hastings, District 4

  
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Joe Holloway, District 5

  
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William R. McCain, At-Large

  
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Laura Hurley, Council Administrator