

# COMMITTEE OF THE WHOLE

Council of the County of Maui

## MINUTES

January 14, 2010

Council Chamber, 8<sup>th</sup> Floor

**CONVENE:** 9:00 a.m.

**PRESENT:** Councilmember Michael J. Molina, Chair  
Councilmember Gladys C. Baisa, Member  
Councilmember Sol P. Kaho'ohalahala, Member  
Councilmember Bill Kauakea Medeiros, Member  
Councilmember Wayne K. Nishiki, Member (In 9:02 a.m.)  
Councilmember Michael P. Victorino, Member

**EXCUSED:** Councilmember Jo Anne Johnson, Member  
Councilmember Danny A. Mateo, Vice-Chair  
Councilmember Joseph Pontanilla, Member

**STAFF:** Kirstin Hamman, Legislative Analyst  
Camille Sakamoto, Committee Secretary  
Leinaala Kihm, Executive Assistant to Councilmember Bill Kauakea Medeiros

**ADMIN.:** Jane E. Lovell, Chief, Litigation Section, Department of the Corporation  
Counsel (substituting for Deputy Madelyn S. D'Enbeau) (Item No. 1(24))  
Cheryl A. Tipton, Deputy Corporation Counsel, Department of the Corporation  
Counsel (Item No. 1(25))  
Lori Tshako, Director, Department of Housing and Human Concerns  
(Item No. 1(25))

**OTHERS:** None

**PRESS:** *Akaku: Maui Community Television, Inc.*

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CHAIR MOLINA: . . .(*gavel*). . . The Committee of the Whole meeting for January 14, 2010 is now in session. For the record, we have in attendance Committee Member Gladys Baisa, good morning.

COUNCILMEMBER BAISA: Good morning, Chair.

CHAIR MOLINA: Good morning. Committee Member Sol Kaho'ohalahala.

COUNCILMEMBER KAHO'OHALAHALA: Good morning.

CHAIR MOLINA: And Committee Member Bill Medeiros.

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COUNCILMEMBER MEDEIROS: Aloha, good morning, Chair.

CHAIR MOLINA: Good morning. And Committee Member Mike Victorino.

COUNCILMEMBER VICTORINO: Good morning and aloha, Chair.

CHAIR MOLINA: Good morning. Excused today is the Committee Vice-Chair Danny Mateo, Committee Member Joe Pontanilla, Committee Member Wayne Nishiki, and our colleague Jo Anne Johnson. And, of course, as many of you know, Jo Anne lost her husband, Jim, and we extend our prayers and condolences to her and Jim's family. He is indeed a very nice and good man. All our prayers to you, Jo Anne. And we have from the Corporation Counsel, we have Jane Lovell here with us this morning. And we have our very dedicated, hard working Staff, our Legislative Analyst, *[sic]* Kirstin Hamman; and our Committee Secretary, Camille Sakamoto. Members, we have two items on our agenda today but before we do that, Committee Secretary, do we have any sign ups for public testimony this morning?

MS. SAKAMOTO: No, Mr. Chair.

CHAIR MOLINA: Okay. And seeing that there's no one in the gallery approaching the podium, the Chair will close public testimony on our two agenda items. Any objections?

COUNCIL MEMBERS: No objections.

CHAIR MOLINA: Okay, seeing no objections, so ordered. Public testimony is closed. And joining us this morning is Committee Member Wayne Nishiki. Good morning, Mr. Nishiki.

**ITEM NO. 1(24):** LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: HI-TECH ROCKFALL CONSTRUCTION, INC. V. COUNTY OF MAUI, ET AL.; CIVIL NO. 08-00081 DAE LEK) (C.C. No. 09-14)

CHAIR MOLINA: All right, Members, we'll go right into our first item, which is Committee of the Whole 1(24), Settlement Authorization: Hi-Tech Rockfall Construction, Inc. v. County of Maui, et al.; Civil Case No. 08-00081 DAE LEK. The Committee is in receipt of a correspondence dated December 4th, 2009, from the Corporation Counsel's Office requesting consideration of a proposed resolution to authorize settlement of this case, and we also have attached a copy of the Complaint. The Complaint seeks Declaratory and Injunctive Relief, attorney's fees, and damages resulting from the County's award of a contract to Janod, Inc. to complete Rockfall mitigation after an October 2006 earthquake resulted in a major rockfall along Piilani Highway in Kaupo, Maui, Hawaii. And the Committee is also in receipt of a correspondence dated December 14th, 2009, transmitting a revised proposed resolution entitled "AUTHORIZING SETTLEMENT OF HI-TECH ROCKFALL CONSTRUCTION, INC. V. COUNTY OF MAUI, ET AL.,

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CIVIL NO. 08-00081 DAE LEK". And again, the purpose of the revised proposed resolution is to authorize settlement of the case. At this time, the Chair will turn matters over to Ms. Lovell to give the Committee a brief overview of the matter.

MS. LOVELL: Thank you, Chair. Good morning, Members of the Committee. What I would like to do today is give you a brief overview of this litigation and then request an executive session in which I could discuss the details of the proposed settlement as well as give you my recommendations as to the pros and cons of entering into that settlement. This is a case that arose out of a contract that was let to do rockfall mitigation in East Maui as a result of the 2006 earthquake. Ordinarily, a bid protest or issues that arose between one proposed contractor and another would have been settled under the rather streamline procedures that are allowed for in our Procurement Code. And it would have gone to the DCCA and would have been resolved quickly. The wrinkle here was that as a result of the earthquake, the Procurement Code was suspended. Now the ironic thing is that the County could have given this contract to virtually anyone because the Procurement Code was suspended. However, our County engineers felt and I think quite understandably that the public would get a better price if they did go through a bid process. So it was put out to bid. Janod was the low bidder, Hi-Tech was the high bidder; the contract was awarded to Janod. Janod, in fact, did the work on time, more or less on budget to the satisfaction of the County, and the road was reopened. Unfortunately, the disappointed high bidder, Hi-Tech, chose to file a lawsuit in Federal Court. The lawsuit went through many motions to dismiss. It took them three tries to get a complaint that would stick, and that at the end of the day we were looking at a trial date of Monday of this week to go to trial on the only items in the Complaint that were left, and that was a claim that the County had conspired with the low bidder and had committed fraud on the high bidder. We had one sort of last ditch settlement conference a few weeks ago with Magistrate Judge Kobayashi, and she worked very hard with the parties in an all day session. And then at the end of the day achieved a proposed settlement subject to your concurrence which my colleague, Madelyn D'Enbeau, and I are willing to take to you and recommend its adoption. So I think that's really all I feel comfortable discussing in open session although certainly if you have any questions for the open session, I will either answer them or indicate my preference to have them in an executive session.

CHAIR MOLINA: Okay. Thank you very much, Ms. Lovell. Committee Members, any questions in open session related to the remarks from Ms. Lovell? We'll start with Mr. Victorino.

COUNCILMEMBER VICTORINO: No, no, my questions I prefer in executive session, so I will wait till that point. Thank you, Mr. Chair.

CHAIR MOLINA: All right, Mr. Nishiki?

COUNCILMEMBER NISHIKI: Yeah, um, what was the bid that Janod bid? What was it that they . . . how big was it?

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MS. LOVELL: The amounts and don't hold me to the actual dollars and cents but in rough terms, Janod bid approximately 5.8 million and the Hi-Tech bid was in the 8 million territory. So there was approximately \$3 million difference between the two bids.

COUNCILMEMBER NISHIKI: Okay. And I guess on Page 11, I guess this was the whole concern of what perhaps the crux of the matter is. It talks about County's engineer divulging to Janod some information and, therefore, perhaps was being able to successfully bid.

MS. LOVELL: Well, the allegation of the Third Amended complaint and as you point out, Councilmember Nishiki, on Page 11 of the Third Amended complaint the allegation was that our County engineer asked for Janod's help in drafting the specifications.

COUNCILMEMBER NISHIKI: Right.

MS. LOVELL: And because he had that assistance, therefore, somehow the specifications were jiggered so that Janod had an unfair advantage. That is the allegation.

COUNCILMEMBER NISHIKI: That is . . . *(inaudible)* . . .

MS. LOVELL: As they say, this was a very unusual situation in which the Procurement Code was suspended. Some people within the County thought and expected that it would not be put out to bid; that it would just be a sole source contract, it would be done that way so that it could be handled more quickly. Others within the County felt that the County would get a better price if it were sent out to bid even if it was not legally necessary to do it that way.

COUNCILMEMBER NISHIKI: I guess the question is, how many other companies bid under?

MS. LOVELL: Those were the only two.

COUNCILMEMBER NISHIKI: Those were the only two.

MS. LOVELL: There was a third company that had the expertise to do this kind of work but they did not get a bid in. I think it was a timing problem. They just weren't able to bid on the project within a time frame.

COUNCILMEMBER NISHIKI: Okay. I guess my question surmises the fact that if somebody bid that high and the other bid quite a bit lower, 1.2 million, you know, was it . . . is it normal that someone can come to our employers and get clarification and use their expertise or whatever to do this? I mean, is that something that is normal?

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MS. LOVELL: Well, there is, as I understand it, and I must say that I'm not the world's greatest expert on the government procurement process but my understanding is that there is an opportunity for bidders to have a pre-bid meeting where they can ask questions.

COUNCILMEMBER NISHIKI: Oh, okay.

MS. LOVELL: My understanding also is that it is not unusual for someone in the position of our engineer to ask questions of potential bidders. And, for instance, in the deposition of the president of the Plaintiff, Hi-Tech, we asked him if he ever gave any . . . potential clients of his company help with the bid specifications. And he said, yes, he had done that himself. So, a little bit unusual but certainly not done with nefarious intent.

COUNCILMEMBER NISHIKI: Okay, I'll just wait to ask the rest of my questions in executive session.

CHAIR MOLINA: Okay, thank you, Mr. Nishiki. Committee members, any other questions in open session for Ms. Lovell related to Committee of the Whole Item 1(24)? Mr. Medeiros?

COUNCILMEMBER MEDEIROS: Mahalo, Mr. Chairman. Yes, I wanted to follow up on Member Nishiki's questions. And my initial question is, you mentioned that some of the County officials thought that it wasn't going out to bid. Under procurement law and contracts how is that done that you don't have to offer a bid?

MS. LOVELL: Well, ordinarily, you certainly would have to put it out to a bid.

COUNCILMEMBER MEDEIROS: Right.

MS. LOVELL: The government Procurement Code is very strict and it has all kinds of requirements that have to be followed. But because this was an earthquake-related emergency what happened was the Governor almost immediately suspended the Procurement Code so that earthquake related work could be done quickly. And in this particular case, this was the last piece of the road that had to be worked on. And as I'm sure you're aware, Councilmember Medeiros, the closed road was causing terrible hardship to people in Kaupo and Kipahulu, in particular. But this last little piece of highway could not be worked on until the all the work was done on the other parts of the highway because my understanding is they couldn't get their heavy equipment through if they had gone the Hana Highway. They had to go the back route, the back road, and they couldn't get through there until all the rock fall stuff had been done on earlier phases. Now interestingly enough, Hi-Tech got the bid and did the rock fall remediation work on the Manawainui part of the project. So they got it; they got a big chunk of County money to do that and my vague recollection is it was somewhere around 9 or 10 million dollars.

COUNCILMEMBER MEDEIROS: Okay.

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MS. LOVELL: And Janod was hired to do the second part.

COUNCILMEMBER MEDEIROS: And then part of your answer you said the Governor almost suspended. So she didn't suspend.

MS. LOVELL: No, no, she did. She did. She suspended immediately.

COUNCILMEMBER MEDEIROS: Oh, okay. You said almost.

MS. LOVELL: I said almost immediately is what I meant to say.

COUNCILMEMBER MEDEIROS: Okay. So she did suspend the procurement requirements.

MS. LOVELL: She suspended Procurement Code requirements and that is why the County then had a choice. We could either follow the Procurement Code voluntarily or we could follow parts of it or we could ignore it completely.

COUNCILMEMBER MEDEIROS: I see.

MS. LOVELL: And so what our County engineers tried to do was to follow it because they felt that the County would get a better, you know, a better bid in the end. But there were also these pre-bid discussions on how to do these specifications, and this was a very unusual rock phase. The actual cliff overhangs the highway and you're actually driving under the cliff as you drive through there. So just hanging a net on the side of the cliff isn't going to work and they worried about rocks going into the ocean, they were worried about rocks falling down on the road itself and damaging the road bed. So it was highly technical and kind of an unusual geologic feature. And also this project is right at that place where the park ranger from Haleakala was killed by rock fall before the earthquake. So it was a tricky project.

COUNCILMEMBER MEDEIROS: Yeah, I'm very familiar with that area. But thank you for that clarification. Mahalo, Mr. Chairman.

CHAIR MOLINA: Thank you, Mr. Medeiros. Committee Members, any other questions in open session for Ms. Lovell related to Committee of the Whole Item 1(24)? Okay, seeing none. Members, if there are no objections, the Chair would like to go on to the next Committee item because there's a possibility of that matter being considered for executive session. And if that be the case, the Chair would prefer if we go into executive session we do it all in one motion for both committee items. Any objections to moving procedurally that way?

COUNCIL MEMBERS: No objections.

CHAIR MOLINA: Okay, thank you, Members.

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**ITEM NO. 1(25): LITIGATION MATTERS (SETTLEMENT AUTHORIZATION:  
VERANIO S. TONGSON, ET AL. V. COUNTY OF MAUI, ET AL.; CIVIL  
NO. 08-1-0267(3)) (C.C. No. 09-14)**

CHAIR MOLINA: Okay, Members, we're now on Committee of the Whole Item 1(25), related to a settlement authorization: Veranio S. Tongson, et al., v. County of Maui, et al., Civil Case No. 08-1-0267(3). The Committee is in receipt of a correspondence dated December 9, 2009, from the Corporation Counsel's Office requesting consideration of this particular matter and proposed resolution, and attaching a copy of the complaint. The complaint alleges intentional infliction of emotional distress and violations of the Hawaii Whistleblowers' Protection Act while the plaintiffs were employed with the Department of Housing and Human Concerns. And we have joining us this morning from the Housing and Human Concerns Department, the Director Lori Tzuhako. Good morning.

MS. TSUHAKO: Good morning, Mr. Chair.

CHAIR MOLINA: And from the Corporation Counsel's Office, we have Cheryl Tipton. Good morning.

MS. TIPTON: Good morning, Mr. Chair and Council members.

CHAIR MOLINA: And at this point, the Chair would like to turn the microphone over to Ms. Tipton to give the Committee a brief overview of the matter.

MS. TIPTON: Yes, thank you, Mr. Chair. The three plaintiffs in this matter have at all relevant times and are currently employees of the Department of Housing and Human Concerns and they are in the Housing Division. On October 27, 2005, plaintiffs filed a lawsuit in Federal court in Honolulu seeking an unspecified amount of damages. The lawsuit alleged violations of constitutional and civil rights, employment discrimination, violations of the Hawaii Whistleblowers' Protection Act, intentional infliction of emotional distress, breach of implied contract and defamation. That lawsuit also named former Director of Housing and Human Concerns Alice Lee, and Grants Management employee Wendy Stebbins as individual defendants. Former Deputy Corporation Counsel Lauren Martin and I have represented the defendants throughout all the proceedings in that case. I only tell you about that case because after in April of 2008 after a series of motions and orders, the Federal court granted Summary Judgment for the County and the individually-named defendants on all the claims with one exception related to the County not the individual defendants. So the only remaining act was the alleged whistleblower retaliation violations that occurred between May 13, 2004 and October 27, 2005 that had not been previously dismissed by the Federal Court. Since only State Court claims remain from that action, the Federal court refused to retain jurisdiction over that matter and referred the plaintiffs back to State court. Judgment was entered for the County in the Federal court case. However, under law, they were then

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able to file on their State claims the remaining State claims in State court and that is what we're here to address today. I might mention too that plaintiffs paid the County its cost in the Federal court claim which totaled over \$14,000. As I said, plaintiffs subsequently filed their complaint in State courts seeking damages from the County for the remaining violations of the Hawaii Whistleblowers' Protection Act. And that case is scheduled to go to trial before jury and Judge August in March 2010. In the complaint itself, they did not knock out the individual, the intentional infliction of emotional distress claims that had been raised in Federal court. However, those had already been determined and by subsequent stipulation those were, it was agreed between the parties that those were removed from the State court complaint. So the only thing that remains are Whistleblower Protection Act claims. Plaintiff claims that they reported violations of law by the County's Department of Housing and Human Concerns relating to the Grants Management Program and to the Administration of the Section 8 Housing Program. Not only does it appear that such reports, as defined by law, were not made but that there have been no violations of law. I want to assure you that our review shows that there's been no violations of the law. Moreover, plaintiffs can only recover damages if they were discharged, threatened or otherwise discriminated against because of their whistleblowing. Plaintiffs have not been discharged. They're still employees. They have not been threatened. They have not otherwise been discriminated against in any manner. However, plaintiffs have alleged a long list of retaliatory behavior including being asked not to record Staff meetings, having to park County vehicles in County designated parking stall, having to use a sign-in/sign-out board, being singled out in a training course by an outside trainer, and other various violations. None appeared to have . . . to support any claim for a Whistleblower Act retaliation. All actions that have been identified would have occurred regardless of whether they whistle blew, which is a legal defense to their claims.

On January 7th, 2010, the County filed three motions asking for rulings in favor of the County on all remaining claims of all three plaintiffs. The County believes the State court action was not filed in a timely manner, and therefore, that the case must be dismissed. Even if timely filed, plaintiff Tongson's claim should be dismissed because all were resolved by the Federal court case and he is not entitled to have those claims re-litigated a second time. The County is also arguing that plaintiffs Nemoto and Javier were not subjected to any retaliatory action even if they did make a report. The current date for arguments on these motions is January 28th, 2010. However, because Mr. Tongson recently hired a new attorney, the hearing as well as the trial are likely to be rescheduled to later dates. That is a brief summary of where we are. I'll be happy to respond to all questions about what occurred in the Federal case as well as the pleadings and matters of public record in the pending State court case. However, because I'm here to discuss a possible settlement offer and strategy, I respectfully request that an executive session be convened for discussions on those issues.

CHAIR MOLINA: Okay. Thank you very much, Ms. Tipton. Members, any questions in open session from Ms. Tipton related to this matter? Member Baisa followed by Member Victorino.

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COUNCILMEMBER BAISA: Thank you very much, Chair. What I have is not a question that pertains to the case but a disclosure. I don't know how to handle it. I do have some prior information about this. You know it was, there was a lot of gossiping speculation when it happened that I've heard, and I don't know if this disqualifies me to be here making a decision or not.

COUNCILMEMBER VICTORINO: Chair, I would like to know more.

CHAIR MOLINA: Yeah.

COUNCILMEMBER VICTORINO: I'm sorry. That didn't really tell me anything, Member Baisa. I would like to know more.

COUNCILMEMBER BAISA: Well, I don't know if I want to discuss it in open session.

CHAIR MOLINA: I presume because the matter is still in litigation and . . .

COUNCILMEMBER BAISA: Right.

CHAIR MOLINA: Interesting issue. Well, I tell you what, let's continue with the line of questioning, well, you know what Members, the Chair would like to call for a brief recess. Please don't leave the room. Meeting in recess. . . .(gavel). . .

**RECESS: 9:25 a.m.**

**RECONVENE: 9:30 a.m.**

CHAIR MOLINA: . . .(gavel). . . The Committee of the Whole meeting for Thursday, January 14th, 2010 is now back in session. At this point, the Chair would like to recognize Member Baisa.

COUNCILMEMBER BAISA: Yes, Chair, thank you very much. Thank you for the opportunity to confer with Corporation Counsel. And from what I'm told, the issues that I was aware of will, are not what we'll be discussing today and have no relevancy so no problem. I'd be able to participate. Thank you.

CHAIR MOLINA: Thank you very much, Member Baisa. Committee Members, any other questions in open session related to Committee of the Whole Item 1(25)? Mr. Nishiki followed by Mr. Medeiros.

COUNCILMEMBER NISHIKI: Yeah . . .

COUNCILMEMBER VICTORINO: Chair?

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CHAIR MOLINA: Oh, I'm sorry. I apologize Mr. Nishiki. Mr. Victorino?

COUNCILMEMBER VICTORINO: You had said and I was waiting.

CHAIR MOLINA: Yes.

COUNCILMEMBER VICTORINO: Okay. Thank you. Um . . . couple of things and I hope we can discuss this in open session but I understand the Federal dismissed all this but the whistle blowing part. And you mentioned this repeatedly about the whistle blowing that these people were not terminated nor disciplined, nothing has occurred that would trigger that part of the allegation. And you also mentioned which was really interesting that they were required to do certain things, sign in -- my question is, is that standard procedure for everybody within that Department or that segment? Then again, if everybody has to do it, then again I'm seeing little relevance to that. So . . .

MS. TIPTON: That's correct, Member Victorino. Everyone uses the sign-in/sign-out board. The directions were given about not taping were given to people that did not claim that they whistle blew because there are sensitive issues talked about in their staff meetings.

COUNCILMEMBER VICTORINO: Right.

MS. TIPTON: It was asked that nobody tape the meetings.

COUNCILMEMBER VICTORINO: So if it's done for everybody then I'm comfortable.

MS. TIPTON: Yes.

COUNCILMEMBER VICTORINO: The other interesting question or the statement you made, the parking of cars, the County vehicles, I really don't understand what that meant, what relevance that had but can you explain that because I thought that was an inter . . . dynamic you brought up.

MS. TIPTON: Of course. You may recall or may know that the Housing Division was located in an old bank building behind what used to be the Ah Fook's Store.

COUNCILMEMBER VICTORINO: Right.

MS. TIPTON: And there are County cars assigned to that Division. And everybody on the Staff could sign up to use those cars for various things. Mr. Javier is an investigator in the Housing Program and he would often take one of the County-owned vehicles out. But the Director of the Division wanted all the cars parked in one place in the designated County stalls so that anyone else who needed to use the car would know immediately what cars were out and available for use. So it was again just for Mr. Javier; it was for the benefit for the whole County Housing Division.

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COUNCILMEMBER VICTORINO: And were these alleged parking stalls labeled or had signage, you know, something that would clearly define where they need to park so that -

MS. TIPTON: Right. Everyone . . .

COUNCILMEMBER VICTORINO: --so even me I would go there and I would say, oh. I have to park here.

MS. TIPTON: Yes, they knew where they were. I don't know how they were marked but they were clearly, everyone knew that this is where the designated parking was for the Housing Division.

COUNCILMEMBER VICTORINO: Okay.

MS. TIPTON: They have since moved to another building.

COUNCILMEMBER VICTORINO: That's correct. I understand that but while they were there, were there clear, definitive parking stalls that had signs, like we have where we know where to park, and all that?

MS. TIPTON: I'm not sure if they're clear as the ones here but everybody knew where the parking spots were.

COUNCILMEMBER VICTORINO: Well, sometimes when everybody knows that means somebody doesn't know, and I'm sorry to say it that way but I'm not going against. . .

MS. TIPTON: Yeah.

COUNCILMEMBER VICTORINO: And the last thing I had is, because all of this has come to this point and we've done our due diligence, how did it, how is it still ending up in court and I know you're going to talk settlement and all that but how is it ending up in court when from everything I've seen and heard we've done our due diligence, we've been fair, we've been equitable, how can you put this across? And I'm just asking why wasn't it dismissed at the Federal level?

MS. TIPTON: That's a good question, Member Victorino. I wished the Federal court had done it but Federal courts have limited jurisdiction. You can only be there if you have a Federal court claim, and once their Federal claims were dismissed the court has the discretion of refusing to hear any remaining State court claims. And the Federal court has routinely made that, used their discretion to say that we're not going to continue to hear any State court claims. We would rather the State court decide what State court law is.

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COUNCILMEMBER VICTORINO: Okay. That makes sense. It's kind of redundant but I guess that's the way it is, yeah.

MS. TIPTON: It was disappointing.

COUNCILMEMBER VICTORINO: Okay. Thank you, Mr. Chair. I have other questions but I'll let the other Members ask and then maybe in closed session. Thank you, Chair.

CHAIR MOLINA: Alright, thank you, Mr. Victorino. Prior to recognizing Mr. Nishiki, Mr. Medeiros, the Chair has been informed that Director Tsuhako must leave at 10 o'clock so if there's any questions you may have for her in open session, this would be time. And if we do take this matter to executive session, if there are no objections the Chair would ask for your consideration to take up this item first out of consideration for Ms. Tsuhako --.

MS. TSUHAKO: Thank you.

CHAIR MOLINA: -- who has to leave, so if there are no objections, Members. Mr. Nishiki?

COUNCILMEMBER NISHIKI: I'll ask Lori the question. I don't think that any of these things that I've read after during your watch or were you working for the County?

MS. TSUHAKO: I was not.

COUNCILMEMBER NISHIKI: Okay. I end with that question from her but I have some questions now. If it was one person, Mr. Chairman, I'd say act, you know, maybe because of my attitude, because of, you know, the questions that I've asked and authority and maybe doesn't care that much why. But this is three individuals. And I read about the work that they did. I read about some of them receiving outstanding recognition for the work that they've done, not that education matters but a lot of these people in the complaint, such as Tongson had a Bachelor of Arts Degree from Trinity College in the Philippines, and a Master's Degree from Cal State University. So these are outstanding employees. Nemoto same thing - outstanding County employee for many years. And so, why, and again if any of them had maybe been injured or seeing some kind of a psychological doctor I can see that. Mentally maybe they may have tweaked but this is not the case. Isn't it quite concerning for the County that three people would complain --

CHAIR MOLINA: Ms. Tipton?

COUNCILMEMBER NISHIKI: -- at one time?

MS. TIPTON: Well, of course, we took it very seriously when we received the complaint initially and we did look into it. But again, for instance, let me tell what Mr. Javier is complaining about, and maybe that will give you an idea.

COUNCILMEMBER NISHIKI: . . . one individual. Let's talk about all three.

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MS. TIPTON: Well, they each of three different, they have different concerns.

COUNCILMEMBER NISHIKI: Yeah, I know but you could . . . Go ahead. I'll listen to you and then I'll . . .

MS. TIPTON: I'll be glad to discuss the claims of all three but I'll start with Mr. Javier. He's an inspector in the Section 8 Program. That means he goes out to look and determine whether or not the potential rental units meet minimum housing, safety requirements. He believes that if there is something that isn't working and needs correction that you need to physically go out and re-inspect the unit again before it can pass. And he was claiming that documents were being changed because and nobody went out to re-inspect those units. And, therefore, they were being falsified. In fact, HUD does not require a physical re-inspection. He has been told that repeatedly, but he has it stuck in his mind that he should go out every time and re-inspect even though it's a minor repair such as putting in a window, louver or a stove top element. It isn't cost effective. We have over 1,200 recipients in the Section 8 Program. The units have to be inspected before a new unit is rented and each year thereafter. We have, at the most, three inspectors to do all of those inspections. Yet, he complained that there was a violation of law because we didn't go out and physically re-inspect. There's also another procedure where if inspectors see something in the unit that is probably going to need attention, they record that it's a pass with comment, and that means that we need to watch it for the next inspection. He refused to use those "pass with comments" and, therefore, would fail certain units that should have properly been passed. He had been told many times that this was, that HUD encouraged using "pass with comment". So those are the kinds of complaints he had. Inspectors also set rental rates based on market rates. He complained that when he was overridden on what rental rates should be allowed or permitted, yet he admits that his supervisors has the authority to do that when there are good arguments for it. And we're talking about, we're not talking about big amounts here. We're talking about maybe a hundred dollars difference a month. So those were his allegations of violations of the law.

Ms. Nemoto is very young; she's 26, she was hired . . . she hadn't finished college at that point. She did to her credit go ahead and finish work, I mean, finish her degree. She was hired as a Housing Specialist to do the paperwork for the Section 8 Program. She's very good at details, and we know that with all the paperwork that's involved in the HUD applications that there are going to be some mistakes made. HUD monitors our program as well as every other Section 8 Program. We have an office in Honolulu that's responsible for monitoring us. We always get good reviews. There's always something we can do better but we know we make mistakes so we chose to create a position, a quality control position to identify as many of these errors by the Housing Specialist as possible. She used, she was hired, she was promoted to do that job. Then she turned around and said, well, we're violating the law because look at all these errors that I have found. We knew they were errors. That's not whistle-blowing. That was a quality control measure. It was such an innovative program that HUD asked the County to share

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the statistics with them, which we did. She claimed that by sharing that with HUD she also made a report. But that's not whistle-blowing because we already knew that, that was a problem and we were just trying to correct and control, and use that device as a problem. She, too, had problems with the use of "pass with comment", and not physically re-inspecting the units. She and Tongson and Javier are very close, a very tight group.

Mr. Tongson, his . . . I believe all of his complaints, his were mostly of the Grants Management. He's not involved in the Section 8 Program. But all of those claims have been dismissed by the Federal court so I don't think we need to second guess the court here at this point. His claims involve monitoring of the grants program and allegedly having slush funds and things that the court just recognized were not true. I hope that maybe addresses your question.

COUNCILMEMBER NISHIKI: Let me ask you this question. Did any of the people ever been disciplined or have been sent letters in regards to their job performance or have any kind of evaluations done?

MS. TIPTON: They are not regular evaluations. We have been encouraging the Department to complete regular evaluations. However, several years ago probably about a year or so after Nemoto was hired she did have a written evaluation by her then supervisor. I don't think it's really appropriate at this point to discuss a staff evaluation. I'd be happy to answer that in closed session.

COUNCILMEMBER NISHIKI: In the Federal case that you spoke about and one thing that I was concerned about you mentioned Nemoto being young. In here it talks about being singled out because of their youth. Is that something that is germane as we look at people?

MS. TIPTON: Well, she alleged in a Federal court complaint and what happened in the State court complaint is that it was basically copied. Her attorney didn't remove the issues that had already been determined in Federal court. I think where it's germane in Ms. Nemoto's case is that she came in as a young Housing Specialist and she demonstrated very good abilities, and then she was promoted or placed in actually it was a new position but it was a slight promotion for her as well. She was placed in this new position where she was reviewing everyone else's work and that created some problems because of her newness and youth, you know, looking at the work of the older employees who were in that division. It was personality problems.

COUNCILMEMBER NISHIKI: I'll just wait to get into executive session.

CHAIR MOLINA: Okay. Thank you, Mr. Nishiki. Mr. Medeiros?

COUNCILMEMBER MEDEIROS: Mahalo, Mr. Chairman. I think I can wait until executive session. The only comment I'd like to make if Ms. Tsuhako is not going to be able to be

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here after 10 a.m., is there a department representative that can be here just to answer the regular questions about operations even though that person may not have been familiar or close to this case?

CHAIR MOLINA: Okay.

COUNCILMEMBER MEDEIROS: Thank you, Mr. Chairman.

CHAIR MOLINA: Okay. We'll ask Ms. Tshako, do you have someone on standby that you could provide the Committee to come up and join us should we go into executive session?

MS. TSUHAKO: Mr. Chair, I'm able to stay until 10:15 a.m. I'm due down at the Cameron Center for a Community Partnership Grants. But if we can go until 10:15 we'll be fine.

CHAIR MOLINA: Okay. Thank you, Ms. Tshako. Committee Members, any other questions in open session for the Department or Ms. Tipton relating to Committee of the Whole 1(25)? Member Baisa?

COUNCILMEMBER BAISA: Just one quick question. The time period of when these alleged events happened, you know how long it takes for anything to finally get through the process and to us. When did these things occur?

CHAIR MOLINA: Ms. Tipton or Ms. Tshako, if you're able to answer Member Baisa's question?

MS. TIPTON: Member Baisa, the lawsuit was filed in late 2005. So there were alleging events that happened from around 2003 forward. But because of some statute of limitation issues and the required notice that has to be given to County for claims, some of the claims were dismissed because of failure to comply with the applicable statute of limitations. That's why we have a very narrow time period for the whistleblower claims.

COUNCILMEMBER BAISA: Thank you very much. That clears up a lot. Thank you.

CHAIR MOLINA: Okay, thank you, Member Baisa. Member Medeiros, I have been informed by Staff that if you have just general questions about Department procedures that would be permissible in open session, if you choose to ask those questions now to Director Tshako.

COUNCILMEMBER MEDEIROS: Mahalo, Mr. Chairman. No, in case in closed session what's being discussed raises some questions about operations, then I thought it would be important to have a representative from the Department there.

CHAIR MOLINA: Okay. Well, I'll tell you what, the Chair will, if you'd like to give it a shot and I'm sure Corporation Counsel will let us know if it may be a question . . .

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COUNCILMEMBER MEDEIROS: No, I don't have a question now. I'm saying in the discussion in closed session, it may raise some questions about operations of the Department and program. So if we have a representative that can answer that or at least address that, that would be helpful.

CHAIR MOLINA: Okay. Well, the Committee will do our best to see if those questions can be answered for you.

COUNCILMEMBER MEDEIROS: Thank you, Mr. Chairman.

CHAIR MOLINA: All right, Members, seeing no other questions in open session . . .

COUNCILMEMBER NISHIKI: I have.

CHAIR MOLINA: Mr. Nishiki?

COUNCILMEMBER NISHIKI: And tell me if it's too sensitive. Did I hear that all three employees are still working for the County?

MS. TIPTON: That's correct.

COUNCILMEMBER NISHIKI: Okay. And then in regards to any kind of a discipline that would be taken up in executive session?

MS. TIPTON: That's correct.

COUNCILMEMBER NISHIKI: Okay. Thank you.

CHAIR MOLINA: Okay, thank you, Mr. Nishiki. Any other questions in open session, Members, before the Chair makes a recommendation?

COUNCILMEMBER VICTORINO: Recommendation?

CHAIR MOLINA: Okay.

COUNCILMEMBER MEDEIROS: Recommendation?

CHAIR MOLINA: All right, Members, the Chair will entertain a motion to go into executive session for Committee of the Whole Items 1(24) and 1(25) pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, to consult with legal counsel on questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee.

COUNCILMEMBER VICTORINO: So moved, Mr. Chair.

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COUNCILMEMBER MEDEIROS: Second, Mr. Chairman.

CHAIR MOLINA: Okay, it's been moved by Member Victorino and seconded by Member Medeiros. And Members, again as an FYI, the Chair would. . . would like to take up Committee of the Whole Item 1(25) first in executive session due to Ms. Tshako's availability.

COUNCILMEMBER MEDEIROS: No--

CHAIR MOLINA: So are there no objections?

COUNCILMEMBER MEDEIROS: Yeah, no objections.

COUNCILMEMBER VICTORINO: No objections.

CHAIR MOLINA: All right. Okay, Members, the Chair will call for the vote for executive session. All those in favor, signify by saying "aye".

COUNCILMEMBER VICTORINO: Aye.

COUNCILMEMBER MEDEIROS: Aye.

COUNCILMEMBER BAISA: Aye.

CHAIR MOLINA: All those opposed? Thank you. The Chair will mark it 6 "ayes" with 3 "excusals", Members Mateo, Pontanilla, and Johnson.

**VOTE: AYES: Councilmembers Baisa, Kaho'ohalahala, Medeiros, Nishiki, Victorino, and Chair Molina.**

**NOES: None.**

**ABSTAIN: None.**

**ABSENT: None.**

**EXC.: Councilmember Johnson, Pontanilla, and Vice-Chair Mateo.**

**MOTION CARRIED.**

**ACTION: APPROVE; RECESS Open Session and CONVENE Executive Session for Items 1(24) and 1(25).**

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CHAIR MOLINA: Okay. . .and no objections to that. So, Members, we will go into executive session. We will prepare the Chambers for the two items. So this meeting is in recess . . .(gavel). . .

**RECESS: 10:01 a.m.**

**RECONVENE: 12:05 p.m.**

CHAIR MOLINA: . . .(gavel). . . Our Committee of the Whole meeting for January 14<sup>th</sup>, 2010 is now reconvened back in open session. It's five minutes after the hour of 12 o'clock, Members. The Chair is ready to offer a recommendation for Committee of the Whole Item 1(24), as well as Committee of the Whole 1(25).

COUNCILMEMBER VICTORINO: . . .(inaudible). . .

CHAIR MOLINA: Let's start first with Committee of the Whole 1(24).

**ITEM NO. 1(24): LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: HI-TECH ROCKFALL CONSTRUCTION, INC. V. COUNTY OF MAUI, ET AL.; CIVIL NO. 08-00081 DAE LEK) (C.C. No. 09-14)**

COUNCILMEMBER VICTORINO: Ready, Chair.

CHAIR MOLINA: Okay. Recommendation is Chair will entertain a motion to support a revised proposed resolution entitled "AUTHORIZING SETTLEMENT OF HI-TECH ROCKFALL CONSTRUCTION, INC. V. COUNTY OF MAUI, ET AL., CIVIL NO. 08-00081 DAE LEK".

COUNCILMEMBER VICTORINO: So moved, Mr. Chair.

COUNCILMEMBER MEDEIROS: Second.

CHAIR MOLINA: Okay. It's been moved by Member Victorino, and seconded by Member Medeiros. Any discussion?

COUNCILMEMBER VICTORINO: No.

CHAIR MOLINA: Seeing none, all those in favor, signify by saying "aye".

COUNCILMEMBER VICTORINO: Aye.

CHAIR MOLINA: Aye.

CHAIR MOLINA: All those opposed? Thank you. The Chair will mark it 6 "ayes" with 3 "excusals", Members Mateo, Johnson, and Pontanilla.

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**VOTE: AYES: Councilmembers Baisa, Kaho‘ohalahala, Medeiros, Nishiki, Victorino, and Chair Molina.**

**NOES: None.**

**ABSTAIN: None.**

**ABSENT: None.**

**EXC.: Councilmember Johnson, Pontanilla, and Vice-Chair Mateo.**

**MOTION CARRIED.**

**ACTION: Recommending ADOPTION of revised resolution.**

CHAIR MOLINA: Okay, Members, moving on to Committee of the Whole Item 1(25), the Chair will offer a recommendation on that.

**ITEM NO. 1(25): LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: VERANIO S. TONGSON, ET AL. V. COUNTY OF MAUI, ET AL.; CIVIL NO. 08-1-0267(3)) (C.C. No. 09-14)**

COUNCILMEMBER MEDEIROS: Recommendation?

COUNCILMEMBER VICTORINO: Recommendation?

CHAIR MOLINA: Okay, recommendation is to . . . rec. . . Chair will entertain a motion to approve a proposed resolution entitled “AUTHORIZING SETTLEMENT OF VERANIO S. TONGSON, ET AL. VS. COUNTY OF MAUI, ET AL., CIVIL NO. 08-1-0267(3)”.

COUNCILMEMBER VICTORINO: So moved, Mr. Chair.

COUNCILMEMBER MEDEIROS: Second.

CHAIR MOLINA: It’s been moved by Member Victorino, seconded by Member Medeiros. Members, any discussion?

COUNCILMEMBER NISHIKI: Mister--

CHAIR MOLINA: Mr. Nishiki?

COUNCILMEMBER NISHIKI: Yeah, I, I, I’m gonna be voting “no” on this. Um. . . you know, trying to understand the whistleblowers’ case and looking at how many people have

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really. . .complained and some of the allegations, I, I, I just feel that just because specifically a lot of 'em were thrown out because of the. . .time that had elapsed or the fact that because these allegations were not filed properly, you know, for me it takes a lot of guts for someone working for Maui County to be complaining against their bosses. It's just an uncomfortable situation. But when I read some of the allegations that we never discussed in executive session but are pretty glaring in, you know, in what has been made public I just feel that, as I said, it really took guts for these people that work in Maui County to bring some of the concerns to us and go and file it in court. And, for me, personally, I just don't feel that a settlement is the best way to deal with the situation. Finally, I would hope that as we now look at what has occurred and some of these allegations, Mr. Chairman, that we must I think Alice brought up about a, something about a certain thing that you give to your people to alert them about perhaps these kinds of concerns, whistleblower concerns. I think that we need to be more vigilant in how we deal perhaps with our employees and giving them their rightful information to, if they decide to whistle-blow, that we give them the correct information to, how to go about doing it. Again, these individuals have also had to pay from their own personal money to hire attorneys to fight the County for which they work for and that again, I'm sure that they knew ahead of time but it's something that for me is bothersome the fact that they may have had valid reasons why and yet a lot of these were thrown out because of the time or the way that they didn't fill out the, to follow the process. So, for that reason, I guess, not I guess, I know that I am not going to support this. Thank you, Chair.

CHAIR MOLINA: Thank you, Mr. Nishiki. Mr. Kaho`ohalahala?

COUNCILMEMBER KAHO`OHALAHALA: Chair, can I ask for a brief recess?

CHAIR MOLINA: Recess subject to the call of the Chair. . . .*(gavel)*. . .

**RECESS: 12:11 p.m.**

**RECONVENE: 12:20 p.m.**

CHAIR MOLINA: . . .*(gavel)*. . . The Committee of the Whole meeting for Thursday, January 14<sup>th</sup>, 2010, is now back in session. Members, thank you for that recess to discuss a procedural matter. We have a pending motion on the floor for Committee of the Whole Item 1(25) related to the resolution -- Veranio S. Tongson, et al. v. County of Maui, et al., and the floor is still currently open for discussion on the motion that is pending. Otherwise, if the Chair hears no further discussion, the Chair will call for the vote on the motion.

COUNCILMEMBER VICTORINO: Call for the question.

CHAIR MOLINA: Members, any discussion?

COUNCILMEMBER VICTORINO: Go ahead.

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CHAIR MOLINA: Okay. Question has been called. So ordered by the Committee. Okay, all those in favor of the motion to approve the resolution signify by saying "aye".

COUNCILMEMBER VICTORINO: Aye.

COUNCILMEMBER MEDEIROS: Aye.

COUNCILMEMBER BAISA: Aye.

CHAIR MOLINA: Aye.

CHAIR MOLINA: All those opposed?

COUNCILMEMBER NISHIKI: No.

COUNCILMEMBER KAHO`OHALAHALA: No.

**VOTE: AYES: Councilmembers Baisa, Medeiros, Victorino, and Chair Molina.**

**NOES: Councilmember Kaho`ohalahala, Nishiki.**

**ABSTAIN: None.**

**ABSENT: None.**

**EXC.: Councilmember Johnson, Pontanilla, and Vice-Chair Mateo.**

**ACTION: MOTION FAILED.**

CHAIR MOLINA: Okay, we have one, two, three, four "ayes", two "noes" Members Nishiki and Kaho`ohalahala. The matter does not achieve the necessary five votes to pass. So, Members, if there are no objections, the Chair will defer the matter.

**COUNCIL MEMBERS VOICED NO OBJECTIONS.** (excused: JJ, DAM, and JP )

**ACTION: DEFER pending further discussion.**

CHAIR MOLINA: Okay, thank you, so ordered. So, for the record, we had four "ayes", Molina, Victorino, Baisa, Medeiros; two "noes", Members Kaho`ohalahala and Nishiki; and three excusals, Members Mateo, Johnson and Pontanilla. Committee of the Whole Item 1(25) is now deferred. So, Members, that concludes business for today. It's 12:22. Just as a reminder, tomorrow 9 a.m. we have a Council meeting to be followed later at 1:30 p.m. for a public hearing related to the Policy Plan, which was moved out of Member Kaho`ohalahala's Planning Committee. So just a reminder for all of you. Chair would

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like to thank all of you for your very hard work today. We had a long but productive day. I'd like to thank the Corporation Counsel's office, the Administration as well as our hard-working Committee Staff. Okay, Committee of the Whole meeting for Thursday, January 14, 2010 is now adjourned. . . .(gavel). . .

**ADJOURN:** 12:22 p.m.

APPROVED:



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MICHAEL J. MOLINA, Chair  
Committee of the Whole

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Transcribed by: Jo-Ann Sato