

COMMITTEE OF THE WHOLE
Council of the County of Maui

MINUTES

February 6, 2015

Council Chamber, 8th Floor

CONVENE: 1:34 p.m.

PRESENT: Councilmember Don S. Guzman, Chair
Councilmember Stacy Crivello, Vice-Chair
Councilmember Robert Carroll
Councilmember Gladys C. Baisa (in 3:45 p.m.)
Councilmember Elle Cochran
Councilmember Don Couch
Councilmember Riki Hokama
Councilmember Mike White

EXCUSED: Councilmember Michael P. Victorino

STAFF: Sharon Brooks, Legislative Attorney
Clarita Balala, Committee Secretary

Ella Alcon, Council Aide, Molokai Council Office (via telephone conference bridge)

Denise Fernandez, Council Aide, Lanai Council Office (via telephone conference bridge)

Dawn Lono, Council Aide, Hana Council Office (via telephone conference bridge)

ADMIN.: Kyle Ginoza, Director, Department of Environmental Management
Patrick K. Wong, Corporation Counsel, Department of the Corporation Counsel
Edward S. Kushi, First Deputy Corporation Counsel, Department of the Corporation Counsel
Moana M. Lutey, Deputy Corporation Counsel, Department of the Corporation Counsel
Richelle M. Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel

OTHERS: Colleen P. Doyle, Esq., Hunton and Williams LLP

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

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ITEM NO. 1(3): LITIGATION MATTERS (SETTLEMENT AUTHORIZATION AND STATUS: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI; CIVIL 12-00198 SOM BMK) (CC 13-41)

CHAIR GUZMAN: . . .*(gavel)*. . . Aloha. Good afternoon. I'm Don Guzman, the Chair of the Committee of the Whole. I'd like to welcome all of you here today. And before we begin, I would like to ask anyone who has a cell phone to please put it on silence mode. I will introduce the Members for today's meeting. We have our Vice-Chair of the Committee, Stacy Crivello.

VICE-CHAIR CRIVELLO: Good afternoon, Chair.

CHAIR GUZMAN: Good afternoon. We have Bob Carroll.

COUNCILMEMBER CARROLL: Good afternoon, Chair.

CHAIR GUZMAN: Elle Cochran.

COUNCILMEMBER COCHRAN: Aloha, Chair.

CHAIR GUZMAN: Don Couch.

COUNCILMEMBER COUCH: Aloha and good afternoon, Chair.

CHAIR GUZMAN: Riki Hokama.

COUNCILMEMBER HOKAMA: Chairman.

CHAIR GUZMAN: And Chair of the Council, Mike White.

COUNCILMEMBER WHITE: Aloha, Chair.

CHAIR GUZMAN: Thank you. And for our Department, we have Corporation Counsel and their representatives. We also have Clarita Balala, for our Legislative [*sic*] Secretary and our Legislative Attorney is Sharon Brooks. I'll check in with our district offices. Lanai District Office, are you there? Are we on? Members, I believe we didn't establish contact, let me take a two-minute recess. . . .*(gavel)*. . .

RECESS: 1:35 p.m.

RECONVENE: 1:37 p.m.

CHAIR GUZMAN: . . .*(gavel)*. . . Committee of the Whole shall now reconvene. I shall now check in with our District Offices. Hana Office, can you please identify yourself?

MS. LONO: Good afternoon, Chair. This is Dawn Lono at the Hana Office.

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CHAIR GUZMAN: Good afternoon, Ms. Lono. Lanai Office, are you there?

MS. FERNANDEZ: Good afternoon, Chair. This is Denise Fernandez on Lanai.

CHAIR GUZMAN: Good afternoon, Ms. Fernandez. On Molokai Office, are you there?

MS. ALCON: Good afternoon, Chair. This is Ella Alcon on Molokai.

CHAIR GUZMAN: Good afternoon, Ms. Alcon. Thank you, District Offices. Before we begin with public testimony, a few announcements. The testimony will be limited to today's agenda item. You'll be allowed three minutes and three minutes only. Please state your name and/or organization which you represent when you come to testify. So at this time, we'll go ahead and call on the Chamber to see whether we have any testifiers.

MS. BROOKS: There are no testifiers in the Chamber.

CHAIR GUZMAN: No testifiers in the Chambers. I'll turn to the District Offices. Are there anybody willing or wishing to testify in the District Office from Lanai?

MS. FERNANDEZ: There's no one waiting to testify on Lanai.

CHAIR GUZMAN: Anyone wishing to testify in the District Office in Hana?

MS. LONO: The Hana Office has no one waiting to testify.

CHAIR GUZMAN: Thank you. On Molokai Office, is there anyone wishing to testify?

MS. ALCON: There's no one here on Molokai waiting to testify.

CHAIR GUZMAN: Thank you, ladies. I will turn to the gallery. Is there anyone wishing to testify? Seeing none, at this time without objections, Members, I would like to close public testimony.

COUNCIL MEMBERS: No objections.

CHAIR GUZMAN: Thank you. Members, due to the fact that our Council member...Council meeting is top priority and all standing committees yield to the Council meeting, I will ask for a recess until about 3:00. So Members, we will reconvene at 3:00 p.m. Thank you. Recess. . . .(gavel). . .

RECESS: 1:38 p.m.

RECONVENE: 3:45 p.m.

CHAIR GUZMAN: . . .(gavel). . . Good afternoon, the Committee of the Whole shall now reconvene. The time is 3:45 p.m. Present for the Administrative side we have

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Corporation Counsel Patrick Wong; Colleen Doyle, Special Counsel; Richelle Thomson; Moana Lutey; and Kyle Ginoza from Department of Environmental Management. Members, on today's agenda we have COW-1(3), Litigation Matters, Settlement Authorizations and Status of HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL CASE NO. 12-00198 SOM BMK. The Committee is in receipt of the following: correspondence dated January 18, 2013, from the Department of the Corporation Counsel, requesting consideration of the proposed resolution to authorize settlement of Hawaii Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM BMK, and transmitting a copy of the complaint. The complaint alleges violations under the Federal Water Pollution Control Act, also known as the Clean Water Act, caused by the discharge of wastewater into the ocean from injection wells operated by the County at the Lahaina Wastewater Reclamation Facility. Correspondence dated January 20, 2015, from the Department of the Corporation Counsel, requesting consideration of the proposed resolution entitled "AUTHORIZING THE SETTLEMENT IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL NO. 12-00198 SOM BMK". The purpose of the proposed resolution is to authorize settlement of the case. The Committee may consider whether to recommend adoption of the proposed resolution with or without revisions. The Committee may also consider other related actions. Members, at our last meeting in regards to this matter, Corporation Counsel, presented in open session a packet of six handouts consisting of the First Amended Complaint, two orders of the court granting Summary Judgment in favor of the Plaintiffs, a Case Docket Report, a Penalty Phase Trial Scheduling Order, Setting Trial and Penalty Phase to begin on August 11, 2015, and the Lahaina Wastewater Reclamation Facility Timeline. While we may need to go into executive session to discuss questions pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee, before that I'd like to open up the floor for any opening comments from Corporation Counsel that he may be able to disclose in open session and after that I would invite the Members to ask questions that could be answered in open session. I'm charging the Corporation Counsel to filter those questions to see whether he could respond to those. If not, we will reserve those for executive session. But please feel free to ask those questions and allow Corporation Counsel to filter those through. Mr. Wong.

MR. WONG: Thank you, Chair. I think it's incumbent upon me to provide a few points for clarity in relation to this litigation. The documents that we have provided to you in open session for your consideration are very important. Those are documents that have already been filed except for the last which is our own timeline summary. The document numbered 5 that you have is the Penalty Phase Trial Scheduling Order and you mentioned it earlier in your opening remarks, Chair, that the trial, the nonjury trial for the penalty phase is set before Judge Mollway on August 11, 2015 of this year. That setting means by pure definition we have not been penalized yet. There has been no penalty of \$100 million issued. It is our obligation to as much as possible establish for the court the reasons why we should not be penalized. Quite frankly moving forward that will be our effort if we are unable to resolve the issues in this case. So without getting into the settlement document itself that we will present to you in executive session. The reason why we don't present it in open session is that communication is a confidential document that's protected by the Federal Rules of

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Evidence. It prohibits our discussion of it in open session. It's the Plaintiffs' proposal and it's for your consideration to be done only in confidence. We cannot waive that. If we attempt to do it or if we release it inadvertently, it would be a violation of the Federal Rules of Evidence and we're bound by that and we're instructed to maintain that in our discussion of the terms. And so in fairness of the Plaintiffs, and in compliance with the rules that we're governed by in Federal Court, we would discuss those terms in executive session. So the general public is clear, the documents we provided to you are, as you mentioned, relative to liability on Wells 1 and 2, and there's nothing in there that establishes that we are responsible for any monetary damages at this point. It is our hope, of course, to try to resolve the case as much as possible. If not, it is also further our hope to try to mitigate the damages that may be assigned to us. So any comments made by this body as a whole or individually, I would caution the body from making remarks as to the issues relative to any penalty or prospective penalty. With that said at the moment I don't have anything further to add in open session.

CHAIR GUZMAN: Thank you. Ms. Doyle, do you have any comments? Okay. Members, I'm going to open it up for any questions that you may have in open session. Ms. Cochran.

COUNCILMEMBER COCHRAN: Thank you, Chair. This August 8...11, 2015 Judge Mollway trial, you said nonjury, so is this open to public or where is this located?

MR. WONG: Thank you for the question. Yes, it is open to the public. It is in Federal District Court in Honolulu.

COUNCILMEMBER COCHRAN: Thank you, Chair.

CHAIR GUZMAN: Thank you. Any other questions? I have a question. Yes, Mr. Hokama.

COUNCILMEMBER HOKAMA: Thank you, Chairman. It's more of a request, Chairman, than a question. I take the guidance from our Department of Corporation Counsel very seriously so I would also recommend that the Administration adheres to this Council also. Because the issue is within the County Council at this time with our attorneys and we'll make the determination eventually on behalf of the County what direction we may or may not go. Therefore, I would also request the Administration not to make statements since they are not part of this current process either. You know, I think we should allow Mr. Wong and his team to work through this body to reach its appropriate conclusion of findings of fact, conclusion of law, and not have it be...I would say interpreted by any other agency of the County at this time. Thank you.

CHAIR GUZMAN: Thank you. Thank you for those concerns. I actually have those similar concerns in terms of the Office of Public Information and statements that were provided by the Mayor, as well as the Managing Director at this stage. I know that executive session binds us fiduciarily. We have a duty to remain silent on discussions that are held in executive session, but let me ask Mr. Wong in terms of is there

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something similar to hold the confidence or confidentiality to the Administration in the same type of setting or aspect or component that would be similar to executive session.

MR. WONG: Thanks, Chair, for that question. Inasmuch as the privilege of the executive session is the protection of attorney-client communication, the privilege is held by the client, which is you, and it is the obligation of the attorney to inform the client if they get close to and/or maybe waiving that privilege. The privilege protects the information from discovery, from third parties outside of that attorney-client relationship. The same exist with the Administration. When there is communication between the Administration and my office as it relates to a litigated matter, that communication is protected by the attorney-client privilege for the most part. Some may be protected by attorney work product if it's a product that's developed by the attorney in response to a interaction with the Administration. The answer is yes, that the Administration is bound by the same privilege as the Council is except that the Administration does not go into executive session. The Administration has a closed door meeting with its attorney and they have discussions. Now, unfortunately, the attorney is not always consulted on comments made to the general media prior to those comments being made and it's not suggesting that in every circumstance the Administration must first consult with its attorney before making a comment. I would echo in Mr. Hokama's concerns and suggest that Administration at this moment that there should not be any comments made about the progress of litigation or any strategy that may be discussed about litigation in an open session. So the Administration which extends to Mr. Ginoza here should not be discussing the strategies that he's aware of in any open forum that extends, in my view, to the Mayor and anyone in the Administration. However, the difficulty is yours is a legislative body that has, to me, additional privileges involved that extends into the entire body and that's where the concept of executive session is developed and it pulls right out of Hawaii Revised Statutes. So inasmuch as one that applies to you for a privilege, that doesn't apply to necessarily to the Administration. But the protection of the communication is the same as attorney to client. That's the same privilege that exists between my office and this body and my office and the Administration. So thank you for the question. I hope I answered that as much as possible.

CHAIR GUZMAN: Thank you. Yeah, gosh, that's very concerning to me because of the fact that open comments from the Administration can very much...very much so jeopardize settlement negotiations and litigation strategies and there's got to be a way. I had this problem in the past with information provided by the Administration regarding settlements. And so maybe...is it possible to create an ordinance to somewhat limit communications that were disclosed by Corporation Counsel to Administration?

MR. WONG: That's a very good question, Chair. I'm not certain that an ordinance would provide the same type of protection that you believe is protected...that is provided by the executive session protections. But it's certainly something we can look into to determine --

CHAIR GUZMAN: Okay. Thank you.

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MR. WONG: --whether or not such an ordinance would be viable.

CHAIR GUZMAN: If you could look into that, that would be great. Mr. White.

COUNCILMEMBER WHITE: Thank you, Chair. It brings up a question in my mind.

CHAIR GUZMAN: Your mic.

COUNCILMEMBER WHITE: Sorry. It brings up a question in my mind that, you know, we're bound by the rules of executive session where we cannot divulge anything that is taking place. I don't know exactly what happens to us if we do, but I'm assuming there is some sort of consequences. There doesn't seem to be any consequences if somebody in the Administration who having been briefed similarly to the way we're being briefed as the case moves along, then divulges that information to the detriment of the County, but there's no sanction because there's no...there's no rule guiding them. So what is the difference in how we're sanctioned or we have an impact by divulging something versus the Administration?

MR. WONG: Thank you, Member White, for that question. Quite frankly, the executive session privilege and the protection, again, it goes to attorney-client communication under most of the circumstances that we present. That, according to your own rules, that privilege can be waived if you as a body move by resolution to waive the confidentiality of the information shared with you in executive session. So too, is every client's opportunity to waive their own privilege. You as the client own the privilege. Myself as your lawyer must protect you from waiving...inadvertently waiving that privilege. So my caution every time when we have executive session discussion is to protect that communication between attorney and client. The ethical rules require me to remind the client that it's yours to keep and waive. It's mines to help you protect it. If you waive it, then there's nothing I can do about that. Same is true with the Administration. The Administration waives it, I can't do anything about that. So there really isn't any penalty in the event you waive it. It's to answer amongst yourselves how will you as a body manage each other in the unfortunate release of protected information. I don't have a method to sanction any one of you should that circumstance occur where there's a waiver of the privilege by one that impacts the whole. There's nothing that I can do about that except to ask you not to do it again and to ask you as a group to govern yourselves. I can tell you though and I can represent to you that inasmuch as I caution this body about the release of confidential information, I equally caution the Administration whether it's the Mayor, the Managing Director, or any of the Directors, or any of the employees that we communicate with in every litigated manner. We constantly remind the person, whoever that person may be, of the seriousness of the issues involved and the communication, and I have personally done that with many in the Administration. So inasmuch as I believe we do our side of the job and that is to raise the issues of concern when necessary, I cannot police it all the time, and when we find out that there's been a, not necessarily a violation of it, but there's been a breach of it, then it's my obligation to raise it again, and I do that. When I become aware that there may be

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a breach or something close to it, then I will raise it directly with the person involved, whether it's the Mayor or anyone else and with this body. If I'm aware that there's a breach with this body, I will raise it with this Chair or with yourself.

COUNCILMEMBER WHITE: So if I'm understanding what you're saying, a waiver does not have to be something voted on by the body. A waiver can be just done by an individual who decides I'm gonna let it out. It seems a little troublesome to me.

MR. WONG: Yeah, and so it's a very good question actually and you're getting into the real nuances of whether or not a privilege can be still identified or not. And I think if we do a quick legal research on it, it really comes to can that information be used in court against you, okay. And if one Member in this body decides to divulge information that's released in a confidential setting, I would take the position that that doesn't waive the privilege. I would take the position that in order for this body to waive its privilege it must be by resolution because that's what your rules say and I would move the court, whichever court it may be, to exclude that information because it's an inadvertent release of information that should not waive the privilege. And so I mean it really depends on the circumstances that are confronted by us and it depends on the setting if it's in a litigated manner and if it's information provided in executive session clearly released by an individual used...attempting to be used against us in court, our effort would be to either get that information stricken from the record based on the privilege or to get that information held in what's called in limine so it's not used against us. And that's how the privilege protection works. So with that said, I understand where you're getting to and the difficulties with understanding how is it that one person can waive it. That's the risk. It really comes down to how do we maintain a defense of that position moving forward.

COUNCILMEMBER WHITE: It seems though that...and I think to Mr. Hokama's point, if there's an ability for you to exclude the information or at least attempt to exclude the information if there wasn't a waiver by the group, there doesn't seem to be that same control on an Administrative leak. Is that...would that be correct?

MR. WONG: I would still maintain that the privilege is still in play and that unless they can show that there's been a...I'm not sure how to phrase this, a outward act that clearly waives the privilege, I would still always maintain that the privilege is sacrosanct and should be protected and we would continue to fight that piece. Whether or not the statements if any are made and taken within context or out of context, you know, we can always work with what is being stated. My concern always is any Administrative individual or Legislative individual providing comments that in my view admits liability. When people make comments like the County is always...yeah, we're liable for that, I really don't like comments like that because liability is an adjudicated issue and we, you know, nobody should be speaking to that whatsoever and that's something that we always defend in court, and you know, even through the appeal process.

COUNCILMEMBER WHITE: Sorry for taking so much time on that but it's kind of a troubling issue for me. Thank you.

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CHAIR GUZMAN: Thank you. Members, any other questions? I have some procedural questions. I know that for the record the trial is set for August 11, 2015. What is the stage that we are in right now in the proceedings and what does the calendar look like? Is there a settlement conference at this stage? I mean just kind of give us a brief update on where we are right now.

MR. WONG: Sure. Thank you, Chair. Again, if you turn to Document 5, the pre-trial order, it does have in there aside from the trial date of August 11, 2015 at 9:00 a.m., we have a pre-trial conference on June 30th at 9:30 before Magistrate Barry Kurren. And we also have a settlement conference date set on May 4th at 10:30 for Magistrate Kurren, and then we're required to submit a settlement conference statement by April 27, 2015. There's other deadlines that are involved that, you know, the order requires us to comply with, identification of witnesses, and submission of exhibits, and conducting of discovery and depositions, and such, all specific to this case. So the primary dates are August 11th for the trial date and the settlement conference date of May 4th.

CHAIR GUZMAN: Thank you very much. So if there are no further questions in open session, Mr. Wong has requested us to discuss the Plaintiffs' proposed settlement in executive session, and so I would entertain a motion to convene an executive meeting for the Committee Item 1(3) pursuant to subsection 92-5(a)(4) of the 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.

VICE-CHAIR CRIVELLO: Chair, so moved.

CHAIR GUZMAN: So moved by Ms. Crivello, Vice-Chair.

COUNCILMEMBER WHITE: Second.

CHAIR GUZMAN: And seconded by Mr. White, Chair White. All those...any discussion? Seeing none, all those in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR GUZMAN: All opposed, say no. Nine ayes, zero noes.

COUNCILMEMBER COUCH: Eight.

CHAIR GUZMAN: Thank you.

COUNCILMEMBER COUCH: Eight.

CHAIR GUZMAN: Oh, sorry, eight. Excused is Mr. Victorino. Thank you, Mr. Couch.

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VOTE: **AYES:** **Chair Hokama, Vice-Chair Crivello, and Councilmembers Baisa, Carroll, Cochran, Guzman, Hokama, and White.**

NOES: **None.**

EXC.: **Councilmember Victorino.**

ABSENT: **None.**

ABSTAIN: **None.**

MOTION CARRIED

ACTION: APPROVE; RECESS open meeting and CONVENE executive meeting.

CHAIR GUZMAN: So we will now proceed into...take a short recess and proceed into executive session. Thank you. . . .(gavel). . .

RECESS: 4:12 p.m.

RECONVENE: 5:56 p.m.

CHAIR GUZMAN: . . .(gavel). . . We shall now reconvene the Committee of the Whole. At this time, Members, without objections, I would like to defer this matter.

COUNCILMEMBERS VOICED NO OBJECTIONS. (Excused: MPV)

ACTION: DEFER PENDING FURTHER DISCUSSION.

CHAIR GUZMAN: Thank you, Members. Thank you for all the hard work that you've done today. At this time, I'm going to adjourn the Committee. Thank you. . . .(gavel). . .

ADJOURN: 5:56 p.m.

APPROVED:



DON S. GUZMAN, Chair
Committee of the Whole