

COMMITTEE OF THE WHOLE

Council of the County of Maui

MINUTES

March 11, 2015

Council Chamber, 8th Floor

CONVENE: 9:36 a.m.

PRESENT: Councilmember Don S. Guzman, Chair
Councilmember Stacy Crivello, Vice-Chair
Councilmember Gladys C. Baisa
Councilmember Elle Cochran
Councilmember Michael P. Victorino
Councilmember Mike White

EXCUSED: Councilmember Robert Carroll
Councilmember Don Couch
Councilmember Riki Hokama

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
Richelle M. Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel

OTHERS: Rosemary Robbins

United States Magistrate Judge Barry M. Kurren
Colleen P. Doyle, Esq., Hunton and Williams LLP

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

CHAIR GUZMAN: . . .(*gavel*). . . Good morning. The meeting of the Committee of the Whole shall now come to order. I'm Councilmember Don Guzman, Chair of the Committee. Before we begin, may I ask anyone who has a cell phone to please put it on silence mode. I'll introduce the Committee Members starting with the Committee Vice-Chair Stacy Crivello. Good morning.

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VICE-CHAIR CRIVELLO: Good morning, Chair.

CHAIR GUZMAN: Gladys Baisa.

COUNCILMEMBER BAISA: Good morning, Chair.

CHAIR GUZMAN: Good morning. Elle Cochran.

COUNCILMEMBER COCHRAN: Aloha. Good morning, Chair.

CHAIR GUZMAN: Good morning. And Mike White.

COUNCILMEMBER WHITE: Good morning, Chair.

CHAIR GUZMAN: Good morning. And Councilmember Victorino. Good morning.

COUNCILMEMBER VICTORINO: Good morning and aloha, Chair.

CHAIR GUZMAN: Thank you. I'd also like to introduce our Corporation Counsel here today, Patrick Wong.

MR. WONG: Good morning.

CHAIR GUZMAN: As well as his Deputy Corporation Counsel, Richelle Thomson --

MS. THOMSON: Good morning.

CHAIR GUZMAN: --and Colleen Doyle from Hunton & Williams LLP. As well as the Honorable Barry M. Kurren, United States Magistrate Judge for the District of Hawaii, along with our Department of Environmental Management represented by the Director Kyle Ginoza. For our Staff, we have Legislative Attorney Sharon Brooks, as well as Committee Secretary Clarita Balala. For anyone who is wishing to testify, please sign up at the lobby area. You will be limited to three minutes and pursuant to the Council Rules. At this time I'd like to check in with our District Offices. For the record, the Hana Office communications are not available at this time. I'll go ahead and check in with Lanai Office. Are you present?

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

CHAIR GUZMAN: Good morning, Ms. Fernandez. And Molokai Office, are you there?

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

CHAIR GUZMAN: Good morning, Ms. Alcon. Thank you very much District Offices. I'm going to turn back to the Chambers. Are there any testifiers?

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MS. BROOKS: The first testifier is Rosemary Robbins.

. . .BEGIN PUBLIC TESTIMONY. . .

MS. ROBBINS: Thank you. Good morning, everybody.

CHAIR GUZMAN: Good morning.

MS. ROBBINS: Rosemary Robbins, concerned citizen. And we have only one item on the docket today and it has to do with Civil Docket Case 1:12-CV-0098 [sic] and it has to do with the injection wells and the damage that has been done. I came down the other day and went through the records that were in the binder upstairs. One thing that I found extremely helpful was the docket. The number docket is like a table of contents with the papers that are in there and they're done chronologically so anybody else who would like to come down to the seventh floor, take a right after the elevator, and they're all there. They'll give you a seat and the materials. This docket is 23 pages. It has 162 entries and it has to do with the Clean Water Act, which was enacted by the United States in 1972 by the EPA, Clean Water. So on April 16 of 2012, there was a complaint filed by four not for financial profit corporations. Remember we're talking about the Clean Air Act from '77, so this was 2012, and in less than a month, the County filed a motion to dismiss that complaint. There were multiple, multiple hearings, questions back and forth among attorneys, and they managed to stall this through the elections of '14. All these meetings that they were having with the Magistrate Judge before the Chief Justice for the Ninth Circuit Court U.S., which includes our geography here in Hawaii, they managed to get through the election time with meetings that were held in private so there was no information going out. Sort of what happens with the executive sessions here when those of us as concerned citizens are asked to leave. In all of these that they had with the Magistrate Judge, there were no records. They don't have to keep them.

MS. BROOKS: Thirty seconds.

MS. ROBBINS: Thank you. So when you get a chance to go through this, keep in mind that the Federal Judge has designed that on August 11, 2015 this year, there's going to be a non-jury trial on this issue also in there. And the last one is that the County has determined that there will be more than \$450 million that the taxpayers are going to have to shell out for that.

MS. BROOKS: Three minutes.

MS. ROBBINS: Sorry.

CHAIR GUZMAN: Hold on. Any questions or clarifications for the testifier? Seeing none, thank you very much for your testimony.

MS. ROBBINS: You're welcome.

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

CHAIR GUZMAN: Thank you. I will check in with our District Offices starting with Hana Office. Are you now in connection with us?

MS. LONO: Yes. Good morning. This is Dawn Lono at the Hana Office and there is no one waiting to testify.

CHAIR GUZMAN: Thank you, Ms. Lono. Lanai Office is there anyone wishing to testify?

MS. FERNANDEZ: There is no one waiting to testify at the Lanai Office.

CHAIR GUZMAN: Thank you, Ms. Fernandez. Also, 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, Ms. Alcon. Thank you, Ladies. At this time, Members, I'll have one more last call. Anyone wishing to testify in the Chambers? Seeing none, without any objections, Members, I will close public testimony.

COUNCIL MEMBERS: No objections.

CHAIR GUZMAN: Thank you.

. . .END OF PUBLIC TESTIMONY. . .

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

CHAIR GUZMAN: Members, I turn your attention to agenda item, COW-1(3), Litigation Matters, Settlement Authorization and Status, Hawaii Wildlife Fund, et al. versus County of Maui, Civil No. 12-00198 SOM BMK. The Committee is in receipt of the correspondence dated January 18, 2013, from the Department of the Corporation Counsel, requesting consideration of the proposed resolution to authorize settlement of the case, 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, and seeks injunctive relief, penalties, and attorneys' fees and costs. Specifically, the Plaintiffs allege that the County discharged wastewater and other pollutants from its injection wells at the Lahaina Wastewater Reclamation Facility through hydrologically connected groundwater systems into the waters of the United States and failed to obtain and comply with the terms of the National Pollutant Discharge Elimination System permit. Last week, Members, this Committee discussed the status and

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potential settlement of the case. We were informed by the Deputy Corporation Counsel of the possibility of meeting with the Judge in the case, United States Magistrate Judge Barry M. Kurren, as part of an ongoing settlement negotiation. Today, we have the fortune to have Judge Kurren here with us for that purpose.

A brief introduction of Judge Kurren. The Honorable Barry M. Kurren has served as the United States Magistrate Judge for the District of Hawaii since 1992. Prior to his appointment to the Federal bench, Judge Kurren served briefly as the Hawaii District Court Judge after having been engaged in private practice in Honolulu for several years. At the onset of his legal career, Judge Kurren was a Law Clerk to the United States Judge Martin Pence. Judge Kurren is the past president of the Federal Magistrate Judges Association and previously served on the Administrative Office of the U.S. Courts Magistrate Judges Advisory Group and the Ninth Circuit Magistrate Judges Executive Board. He has also served as an Acting Associate Judge for the Supreme Court of the Republic of the Marshall Islands and instructed at the William S. Richardson School of Law and National Advocacy Centers in Columbia, South Carolina. Judge Kurren received his undergraduate degree from the University of Hawaii with highest honors in 1973 and his law degree from the William S. Richardson School of Law, University of Hawaii, in 1977.

The item on today's agenda involves confidential settlement discussions. Corporation Counsel will be requesting that we go into executive session 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, and to discuss confidential information from Corporation Counsel pursuant to 92-5(a)(8).

Members, before we go into executive session, however, I would like to request that Corporation Counsel provide us with information that can be presented in open session. Ms. Thomson or Mr. Wong, would you please briefly give us a summary of the case and describe the most recent court filings and any settlement procedures you can discuss without going into confidential details.

MS. THOMSON: Thank you, Chair. So as you know, the District Court found Clean Water Act liability for the operation of all four of the Lahaina Wastewater Reclamation Facility's wells. So that occurred last year and we have filed a motion to certify those decisions for appeal. That hearing is on April 20th. Yesterday, we filed a motion for summary judgment related to lack of fair notice and that involves proceedings leading up to the penalty phase of this trial. So that hearing is scheduled for May 5th. The penalty phase trial currently is scheduled for August of this year. Settlement conferences have been held since the inception of the case continuing on through today. So generally, that's a statement as far as where the case is presently.

MR. WONG: Chair, if I may add to that? As the testifier earlier presented, we have provided this body and the general public with information that is available and I appreciate the testifier taking the opportunity to look at those items filed with this body. They're all public record, they're all available. Quite frankly, there are references in there to

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numerous settlement conferences with the court and the testifier's correct. There is no record taken of those matters and that's because we deal with those in confidence and the parties are able to provide the court with their insight into the liability phase and the damages phase of their case, and that's true for both sides of the case—the Plaintiffs and ourselves in terms of the defense. With that said, I would invite the general public to again look at the docket as it's complete and we do up-to-date filings. You know, they're welcome to come in and testify in that regard. Thank you, Chair.

CHAIR GUZMAN: Thank you, Mr. Wong. Judge Kurren, do you have any comments that you would like to enter into open session.

MR. KURREN: Yes. Thank you, Chair, and good morning, everyone. And thank you very much for inviting me to be here today and talk with you about this case. I am here today not as a presiding judge, but rather as a settlement judge in this case. In most of our cases...in many of our cases, we have in addition to the judge that is assigned to rule on matters in the case and ultimately resolve the case in a more conventional sense, another judge is often assigned to participate as a settlement judge, which is very much like a mediator, and that is my role in this case. I am not the presiding judge in this case. I'm not deciding any of the issues in this case. That is Judge Mollway who is handling that aspect of the case. But my role here is to meet with the parties and engage with the parties and their lawyers in discussions that hopefully may result in some agreement to resolve the case, you know, outside the normal course of litigation. And that is...and my appearance here today really is a part of that process. And what often happens in these sessions, in the settlement sessions, is that the settlement judge or mediator meets with the parties privately and I have done that with the other side in Honolulu. I recognize that it is difficult to have all of the Members of the Council come to Honolulu and attend these sessions in my courtroom so for a case like this, you know, I'm more than happy to reach out and have, you know, that kind of meeting with the Council here on Maui. So it is my hope that I can answer any questions you may have during the executive session. Share with you some thoughts that I may have about ways in which we might consider a possible settlement, you know, in this case and facilitate, you know, that process, and I look forward to talking with you in just a few moments about that.

CHAIR GUZMAN: Thank you. Due to the sensitive nature and confidential issues involved in this matter, the Chair will entertain a motion to convene an executive meeting for Committee Item 1(3) pursuant to the the Subsection [sic] 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, and to discuss confidential information from Corporation Counsel pursuant to Section 92-5(a)(8).

VICE-CHAIR CRIVELLO: So moved, Chair.

CHAIR GUZMAN: Moved by Vice-Chair Crivello.

COUNCILMEMBER VICTORINO: Second.

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CHAIR GUZMAN: Seconded by Member Victorino. Any discussion? Seeing none, all in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR GUZMAN: All opposed, say no. Six ayes, no noes, three excused, Carroll, Couch, Hokama. Motion carries.

VOTE: AYES: Chair Guzman, Vice-Chair Crivello, and Councilmembers Baisa, Cochran, Victorino, and White.

NOES: None.

ABSTAIN: None.

ABSENT: None.

EXC.: Councilmembers Carroll, Couch, and Hokama.

MOTION CARRIED.

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

CHAIR GUZMAN: At this time, Members, I will take a recess in open session to convene executive session. So recess. . . *(gavel)*. . .

RECESS: 9:52 a.m.

RECONVENE: 11:43 a.m.

CHAIR GUZMAN: . . . *(gavel)*. . . The Committee of the Whole shall now reconvene in open session. The date is March 11, 2015. The time is 11:43 a.m. Members, pursuant to our discussions in executive session, without objections I would like to defer this matter.

COUNCILMEMBERS VOICED NO OBJECTIONS. (Excused: RC, DC, and RH)

ACTION: DEFER PENDING FURTHER DISCUSSION.

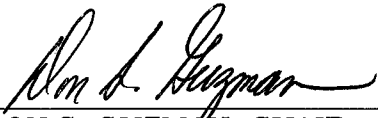
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CHAIR GUZMAN: Thank you. Members, this will conclude our item for today's agenda. I thank everyone for being here, as well as the Staff and Administration, and so everybody have a wonderful rest of the day. Thank you. Meeting is now adjourned. . . .(gavel). . .

ADJOURN: 11:44 a.m.

APPROVED:



DON S. GUZMAN, CHAIR
Committee of the Whole

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Transcribed by: Clarita Balala