

# COMMITTEE OF THE WHOLE

Council of the County of Maui

## MINUTES

January 12, 2016

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

**CONVENE:** 9:05 a.m.

**PRESENT:** Councilmember Don S. Guzman, Chair  
Councilmember Gladys C. Baisa  
Councilmember Elle Cochran  
Councilmember Don Couch  
Councilmember Riki Hokama  
Councilmember Mike White (in 9:32 a.m.)

**EXCUSED:** Councilmember Stacy Crivello, Vice-Chair  
Councilmember Robert Carroll  
Councilmember Michael P. Victorino

**STAFF:** Carla Nakata, Legislative Attorney  
Clarita Balala, Committee Secretary

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

**ADMIN.:** Moana M. Lutey, Deputy Corporation Counsel, Department of the Corporation Counsel  
Richelle Thomson, Deputy Corporation Counsel, Department of the Corporation Counsel  
Brian A. Bilberry, Deputy Corporation Counsel, Department of the Corporation Counsel

**OTHERS:** Rosemary Robbins

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

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CHAIR GUZMAN: ...*(gavel)*... Good morning. Welcome to the Committee of the Whole. It shall now convene. The date is Tuesday, January 12, 2016. Before I begin I'd like to tell everybody to please turn down your cell phones or any other noise-making devices. I'm going to introduce our Members for today's meeting. We have Gladys Baisa.

COUNCILMEMBER BAISA: Good morning, Chair.

CHAIR GUZMAN: Good morning. Elle Cochran.

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COUNCILMEMBER COCHRAN: Aloha. Good morning, Chair.

CHAIR GUZMAN: Don Couch.

COUNCILMEMBER COUCH: Good morning, Chair.

CHAIR GUZMAN: Riki Hokama.

COUNCILMEMBER HOKAMA: Chairman.

CHAIR GUZMAN: Good morning. And also from our Corporation Counsel's Office we have Richelle Thomson.

MS. THOMSON: Good morning, Chair.

CHAIR GUZMAN: Good morning. And Moana Lutey.

MS. LUTEY: Good morning, Chair.

CHAIR GUZMAN: Good morning. And for our Staff we have our Legislative Attorney Carla Nakata, and also our secretary, Clarita Balala. And so I'm going to go ahead and check in with our district offices. Members, Lanai Office is not available for today so we won't be acknowledging their presence in the meeting. Is Molokai Office, are you present?

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

CHAIR GUZMAN: Ms. Alcon, is there anyone wishing to testify there?

MS. ALCON: There is no one here waiting to testify.

CHAIR GUZMAN: Okay. Thank you. In Hana Office, are you present?

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

CHAIR GUZMAN: Very good. Thank you. I'm going to turn to the Chamber. Is there anyone wishing to testify? We have one testifier this morning – Rosemary Robbins. May you please come down to the podium and just introduce yourself.

**. . . BEGIN PUBLIC TESTIMONY. . .**

MS. ROBBINS: Good morning, everybody. Rosemary Robbins, concerned citizen, here this morning to speak in view of the second item on our agenda today. It's litigation matters asking for the additional, this will be the fifth or sixth time, after the words not to exceed original price of \$250,000 to hire legal experts to defend the County for its wrongful actions as it turns out in the Federal Court decision as to injection wells

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up on the Lahaina side. I came down and went over the items that's just the agenda now. Went over the items that are on here and the first one mentions December 3<sup>rd</sup>. Again, 7<sup>th</sup> floor folks are wonderful. Got the paperwork for me. I read every piece that was in there and it talked on December 3<sup>rd</sup>, that was a letter to the Chairperson today asking that this be brought up. December 3<sup>rd</sup> was addressed on December 23<sup>rd</sup> and it was the request for like I say a cost of \$3,050,000 that the taxpayers would be liable for. I went and got the court decision itself. This had been filed on the 17<sup>th</sup> of November and in that order it was adjudged that the Fed had found indeed that Maui had been guilty of putting wastewater by way of injection wells into the land but then it reached the ocean, which is a violation of a number of laws. So here are the actual...this is the actual document and it identifies that there is paperwork attached to it. I read the documents and the paperwork that was attached to it and I'd like to read on the second page of this 18-page document. Whereas, on May 30, 2014 and on January 23, 2015, the court found that the County's discharges of treated wastewater from each of the four Lahaina recycled water injection wells without having the National Pollution Discharge Elimination System permit violated the Clean Water Act, keeping in mind --

MS. NAKATA: Three minutes.

MS. ROBBINS: --that that was enacted by the U.S. Government in '73, fourteen years after Hawaii went from Territorial to Statehood status. So that's 43 years ago that that law has been in the books and now we're up to an arm and a leg to pay for the violations of that law. Not fair to the citizens.

CHAIR GUZMAN: Thank you, Ms. Robbins, for your time.

MS. ROBBINS: Yeah. Thank you.

CHAIR GUZMAN: Members, do you have any follow-up questions for the testifier? Seeing none, thank you very much for your testimony.

MS. ROBBINS: You're welcome.

MS. NAKATA: Mr. Chair, no one else is signed up to testify in the Chamber.

CHAIR GUZMAN: Okay. Thank you. I'm going to turn back to our district offices. Molokai Office, is there anyone wishing to testify?

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

CHAIR GUZMAN: Okay. In Hana Office, did anyone appear thereafter to testify?

MS. LONO: There's no one waiting to testify at the Hana Office.

CHAIR GUZMAN: Okay. Thank you. Thank you, Ladies. Without any objections, Members, I'd like to close public testimony.

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COUNCIL MEMBERS: No objections.

CHAIR GUZMAN: Thank you.

**. . .END OF PUBLIC TESTIMONY. . .**

CHAIR GUZMAN: Members, without objections, I would like to I guess push back COW-1(26) to the end of the agenda. Mr. Bilberry, which is the Deputy Corporation Counsel that is handling this case is in a conference...settlement conference call as we speak. So without objections, I'd like to push that to the end of the agenda.

COUNCIL MEMBERS: No objections.

CHAIR GUZMAN: Thank you, Members.

**COW-1(3): LITIGATION MATTERS (SETTLEMENT AUTHORIZATION, SPECIAL COUNSEL AUTHORIZATION, AND STATUS: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK) (CC 15-6)**

CHAIR GUZMAN: Okay. Moving on to the next item on the agenda. We have the Authorization and Status of the Hawaii Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM BMK. The Committee is in receipt of the following: 1) the correspondence dated December 3, 2015, from the Department of the Corporation Counsel, requesting consideration of the proposed resolution to authorize settlement of Plaintiffs' claim for attorneys' fees and costs related to the case. The case involves allegations of 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 of Maui at the Lahaina Wastewater Reclamation Facility, 2) the correspondence dated December 23, 2015, from the Department of the Corporation Counsel, requesting consideration of the proposed resolution, entitled "AUTHORIZING AN INCREASE IN FUNDING RELATED TO THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON & WILLIAMS LLP, IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET NO. 15-17447, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT," and an opportunity to provide a status update. The purpose of the proposed resolution is to authorize \$300,000 in addition to the compensation for special counsel for the appeal in this case, for a total compensation not to exceed \$3,050,000. The Committee may also consider to recommend adoption of the proposed resolution noted in paragraph 2, with or without revisions and may also consider other related matters. I believe this is going to be Richelle Thomson's case and you may go ahead and present any opening statements.

MS. THOMSON: Thank you, Chair. So I'll take up the December 3<sup>rd</sup> request first. Briefly, we did meet with this Committee previously and received instruction related to the settlement of attorneys' fees claim and I can provide the details of those...of the agreement in executive session, but we have been able to successfully resolve that claim. Moving on to the request for an increase in attorneys' fees for special counsel

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related to the appeal. As you know, the settlement agreement for the lower court was entered in November of 2015 and the County filed its appeal of the matter in 2015 to the Ninth Circuit Court of Appeals which set a briefing schedule with the County's opening brief due in mid-March. So the current efforts are focused toward...I'm preparing for that appeal filing the opening brief and garnering support...amicus support from other municipalities and agencies and industries across the nation. So Corporation Counsel has taken a lead on that effort and we have been...basically, we have divvied up a quite extensive list of agencies and municipalities, et cetera, and have worked to give information to those entities and educate the entities and try to garner support for the amicus effort in the appeal. So that's basically where we are with that and things are moving along very quickly.

CHAIR GUZMAN: Members, do you have any question in open session? I guess just for clarification, what is the amicus support? What are you talking about?

MS. THOMSON: Thank you, Chair. So amicus support would be entities, other municipalities that may be similarly affected by the Hawaii court's decision. So obviously entities in the Hawaii district would be directly affected and sets precedent in this district. But as we go up to appeal in the Ninth Circuit, the Ninth Circuit includes the Pacific states generally and Hawaii, and depending on the Court of Appeals decision there, it can have far reaching effects...very serious effects on other municipalities and agencies in those states. So amicus support is a friend of the court brief so these are entities not involved in the lawsuit but which would be affected by a decision made by the Appeals Court and then can file briefs either supporting the Plaintiffs or supporting the County and the positions raised on the appeal and they can inform the court how a decision would affect their operations and their economies. So it's a very important effort and there's quite a bit of interest across the nation I should say in this case in the outcome.

CHAIR GUZMAN: So Ms. Thomson, so did you say that you had this done in-house? Our Deputy Corporation Counsels called various jurisdictions to see if there was an interest in supporting this type of brief?

MS. THOMSON: Right. So basically what we did for the last several months actually has been to, you know, go out and look at which agencies, municipalities, states, that we thought would be very interested and affected by the court and the appellate court's decision and then make contact with those entities and provide them with information about the case and basically develop a relationship so that they were aware of the case and its status and provide them whatever information they needed if they decide to join either individually, or you know, form coalitions to file amicus briefs in support of the County's position on appeal.

CHAIR GUZMAN: You had mentioned that there were several I guess maybe entities that were interested. Do you have a somewhat of an estimation of how many that would be? Or if you can't relay that in open session just let us know.

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MS. THOMSON: Right. I think that it would be, you know, fine to say that there's been support from entities that are of national standing so very important regulatory agencies and municipal organizations across the country and also, especially in states such as California which obviously has a, you know, a large coastline which uses injection wells for various purposes both for disposal of treated effluent and also for saltwater intrusion barrier. So our technology that we're using here in Hawaii is replicated in other states and having a court's decision such as the Hawaii court play out either, you know, within the Ninth Circuit or being used as precedent in other cases can dramatically affect other municipalities. So we're getting a lot of support and interest on a national level, but I prefer not to mention the entities by name at this point.

CHAIR GUZMAN: Okay. Very good. So basically we are the...this is the first type...first case of this type nationwide?

MS. THOMSON: It is. The judge's decision extends the Clean Water Act in a way that it has not been previously extended and exposes not only Maui County, but you know, all of the State of Hawaii, and then other municipalities or agencies that use similar technology to legal uncertainty. So it's both legal uncertainty and then financial uncertainty, you know, with the disposal methods that are environmentally sound and now being exposed to them being perhaps found legally wanting. That leaves us with a, you know, leaves us and other entities in very precarious situations. So it's quite...it can have dramatic effects this judge's decision if it's upheld by the Ninth Circuit. So it's one of the reasons that we felt it was imperative to appeal and to have the Appellate Court be very well educated on the effects of the court's decision here in Hawaii.

CHAIR GUZMAN: Very good. Thank you. Members, is there any questions you would like to ask in open session? Seeing none, is there a request to convene a executive session?

MS. THOMSON: If the Members have questions that should be answered in executive session, then we could but I don't have anything further to present at this point.

CHAIR GUZMAN: Okay. Members, do you have any questions that you would like to pose in executive session? Mr. Hokama.

COUNCILMEMBER HOKAMA: Are we going to review the information that she brought up regarding attorneys' fees.

CHAIR GUZMAN: Yes, we can review that. So why don't I go ahead and entertain a motion to convene an executive meeting pursuant to Section 92-5(a)(4), HRS, to consult with our legal counsel on questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of this Committee, the Council, and the County.

COUNCILMEMBER COUCH: So moved.

COUNCILMEMBER BAISA: Second.



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this is more of an update. So we have Ms. Moana Lutey who is handling this case and the floor is yours.

MS. LUTEY: Thank you, Chair. This matter actually settled within discretionary limits provided by the County Charter so we don't need to have any further action done by this body. It can be filed.

CHAIR GUZMAN: Thank you. Members, do you have any questions?

COUNCILMEMBER HOKAMA: Chairman?

CHAIR GUZMAN: Yes, Mr. Hokama.

COUNCILMEMBER HOKAMA: Just so and I understand what our Deputy just mentioned regarding within the current authority bounds, I'm still trying to figure out how this...about this gate. I mean, did the wind swing it? Did another vehicle like a pickup truck bump the fence because the driver's too lazy to go out and push the fence open? I'm trying to understand this settlement because I don't get anything from the report.

CHAIR GUZMAN: Ms. Lutey.

MS. LUTEY: I don't have any information either than the report, but if we need to get into a deeper discussion of this, we'd have to get into executive session because there are some things that were negotiated in this matter that can't be discussed in open session.

CHAIR GUZMAN: Mr. Hokama, would you like to. . .

COUNCILMEMBER HOKAMA: I'd like to know what...who agreed to what for who.

CHAIR GUZMAN: Okay. Very good. There is a...the Chair will entertain a motion to convene an executive meeting pursuant to Section 92-5(a)(4) of the HRS, to consult with legal counsel on questions pertaining to powers, duties, and privileges, immunities, and liabilities of this Committee, the Council, and the County.

COUNCILMEMBER COUCH: So moved.

CHAIR GUZMAN: Moved by Mr. Couch.

COUNCILMEMBER HOKAMA: Second.

CHAIR GUZMAN: Seconded by Mr. Hokama. Any further discussion? Seeing none, all those in favor say aye.

COUNCIL MEMBERS: Aye.



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CHAIR GUZMAN: All those opposed say no. We have five ayes, four excused. Motion carries. Okay. Thank you.

**VOTE:           AYES:   Chair Guzman, and Councilmembers Baisa, Cochran, Couch, and Hokama.**

**NOES:       None.**

**ABSTAIN:   None.**

**ABSENT:    None.**

**EXC.:       Vice-Chair Crivello, and Councilmembers Carroll, Victorino, and White.**

**MOTION CARRIED.**

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

CHAIR GUZMAN: Members, we're gonna go ahead and take a brief recess so that we can enter into executive session. Open session is now in recess. . . .(gavel). . .

**RECESS:           9:27 a.m.**

**RECONVENE:   10:09 a.m.**

CHAIR GUZMAN: . . .(gavel). . . Committee of the Whole shall now reconvene in open session.

**COW-1(3):       LITIGATION MATTERS (SETTLEMENT AUTHORIZATION, SPECIAL COUNSEL AUTHORIZATION, AND STATUS: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM BMK) (CC 15-6)**

CHAIR GUZMAN: Members, pursuant to our discussion in executive session I will be calling agenda item, Hawaii Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM BMK, COW-1(3). The Chair will entertain a motion to recommend adoption of the proposed resolution entitled "AUTHORIZING AN INCREASE IN FUNDING RELATED TO THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON & WILLIAMS LLP, IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET NO. 15-17447, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT."

COUNCILMEMBER COUCH: So moved.

CHAIR GUZMAN: Moved by Mr. Couch.

COUNCILMEMBER HOKAMA: Second.

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CHAIR GUZMAN: Seconded by Mr. Hokama. Any further discussion? Seeing none, all those in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR GUZMAN: We have...all those opposed say no. We have six ayes, and three excused. Motion carries. Thank you.

**VOTE:       AYES:   Chair Guzman, and Councilmembers Baisa, Cochran, Couch, Hokama, and White.**

**NOES:       None.**

**ABSTAIN:   None.**

**ABSENT:    None.**

**EXC.:       Vice-Chair Crivello, and Councilmembers Carroll and Victorino.**

**MOTION CARRIED.**

**ACTION:     Recommending ADOPTION of resolution.**

CHAIR GUZMAN: Members, moving on to the next agenda item.

**COW-1(27):   LITIGATION   MATTERS       (SETTLEMENT   AUTHORIZATION:  
FARMERS INSURANCE HAWAII, INC., ON BEHALF OF ITS INSURED,  
VERONICA GRAY, CLAIM 30153984350-0001) (CC 15-6)**

CHAIR GUZMAN: Farmers Insurance Hawaii, Inc., on Behalf of Its Insured Veronica Gray, Claim 30153984350-0001, COW-1(27). Pursuant to our discussion in executive session, the Chair will entertain a motion to recommend filing of the correspondence dated October 23, 2015 from the Department of the Corporation Counsel transmitting the proposed resolution entitled "AUTHORIZING SETTLEMENT OF CLAIM NO. 30153984350-0001 OF FARMERS INSURANCE HAWAII, INC., ON BEHALF OF ITS INSURED, VERONICA GRAY."

COUNCILMEMBER COUCH: Mr. Chair, I move to file the correspondence dated October 23, 2015 transmitting the proposed resolution.

CHAIR GUZMAN: Motion by Mr. Couch.

COUNCILMEMBER WHITE: Second.

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CHAIR GUZMAN: Seconded by Mr. White. Any further discussion? Seeing none, all those in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR GUZMAN: All those opposed say no. We have six ayes, three excused. Motion carries. Thank you, Members.

**VOTE:       AYES:     Chair Guzman, and Councilmembers Baisa, Cochran, Couch, Hokama, and White.**

**NOES:       None.**

**ABSTAIN:   None.**

**ABSENT:     None.**

**EXC.:       Vice-Chair Crivello, and Councilmembers Carroll and Victorino.**

**MOTION CARRIED.**

**ACTION:     Recommending FILING of October 23, 2015 correspondence.**

CHAIR GUZMAN: Moving on to the agenda item that was deferred to the end of the calendar.

**COW-1(26):   LITIGATION   MATTERS                    (STATUS   AND   SETTLEMENT  
AUTHORIZATION: DUKIE J. RACADIO V. COUNTY OF MAUI, ET AL.;  
CIVIL 14-1-0451(2)) (CC 15-6)**

CHAIR GUZMAN: We have Litigation Matters, Dukie J. Racadio v. County of Maui, et al., Civil No. 14-1-0451(2), COW-1(26). And for our opening statement I believe this is Mr. Brian Bilberry's case. The floor is yours.

MR. BILBERRY: Good morning, Council. This case is a litigated matter. . .

COUNCILMEMBER COUCH: Mr. Bilberry.

CHAIR GUZMAN: Mr. Bilberry, can you grab the mic? Thank you.

MR. BILBERRY: Good morning, Council. This is a litigated matter involving an employment discrimination claim. And the claim is brought by a former Maui police officer who alleges that he has been terminated based on his disability and was refused accommodation for his disability. We've received a settlement offer from the Plaintiff. The offer is expired. They gave us ten days to respond to it, but nevertheless we would like to take it up for discussion because we have a settlement conference with Second

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Circuit Court Judge Peter Cahill next week and so we're here to discuss possible settlement authority with you for the settlement conference. So I would like to go into executive session to discuss the settlement proposal. I have copies here to show you in executive session. We'll be asking for some limited authority and discuss the merits of the case.

CHAIR GUZMAN: Okay. Members, do you have any questions in open session? Seeing none, there has been a request to go into executive session. The Chair will entertain a motion to convene an executive meeting pursuant to Section 92-5(a)(4), of the HRS, to consult with legal counsel on questions of liability, immunities, and privileges concerning the Council, this Committee, and the County.

COUNCILMEMBER COUCH: Mr. Chair, I move to go into executive session referenced to HRS 92-5(a)(4) and HRS 92-5(a)(8).

CHAIR GUZMAN: That is correct. Thank you. I will also amend that motion to include 92-5(a)(8), excuse me. Motion by Mr. Couch, seconded by --

COUNCILMEMBER BAISA: Second.

CHAIR GUZMAN: --Ms. Baisa. Any further discussion? Seeing none, all those in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR GUZMAN: We have...all those opposed say no. We have six ayes, three excused. Motion carries. Thank you, Members.

**VOTE:           AYES:   Chair Guzman, and Councilmembers Baisa, Cochran, Couch, Hokama, and White.**

**NOES:          None.**

**ABSTAIN:       None.**

**ABSENT:        None.**

**EXC.:          Vice-Chair Crivello, and Councilmembers Carroll, and Victorino.**

**MOTION CARRIED.**

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

CHAIR GUZMAN: We're going to take a brief recess to reset the Chamber for executive session. Thank you. . . .(gavel). . .

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**RECESS: 10:14 a.m.**

**RECONVENE: 10:52 a.m.**

CHAIR GUZMAN: . . . *(gavel)*. . . Committee of the Whole will convene in open session. Members, pursuant to our executive session for Item COW-1(26), the Chair will entertain a motion to recommend adoption of the proposed resolution entitled "AUTHORIZING SETTLEMENT OF DUKIE RACADIO v. COUNTY OF MAUI, ET AL., CIVIL NO. 14-1-0451(2)."

COUNCILMEMBER COUCH: So moved.

COUNCILMEMBER WHITE: So moved.

CHAIR GUZMAN: Moved by Mr. Couch, seconded by Mr. White. Any further discussion? Seeing none, all those in favor say aye.

COUNCIL MEMBERS: Aye.

CHAIR GUZMAN: All those opposed say no. We have six ayes, no noes, and three excused. Motion carries.

**VOTE: AYES: Chair Guzman, and Councilmembers Baisa, Cochran, Couch, Hokama, and White.**

**NOES: None.**

**ABSTAIN: None.**

**ABSENT: None.**

**EXC.: Vice-Chair Crivello, and Councilmembers Carroll and Victorino.**

**MOTION CARRIED.**

**ACTION: Recommending ADOPTION of resolution.**

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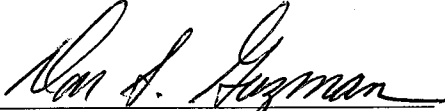
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CHAIR GUZMAN: This will conclude today's meeting. The Committee of the Whole is now adjourned. . . .(gavel). . .

**ADJOURN:** 10:53 a.m.

APPROVED:



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DON S. GUZMAN, CHAIR  
Committee of the Whole

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Transcribed by: Clarita Balala