

COMMITTEE OF THE WHOLE
Council of the County of Maui

MINUTES

April 15, 2016

Council Chamber, 8th Floor

CONVENE: 1:35 p.m.

PRESENT: Councilmember Don S. Guzman, Chair
Councilmember Stacy Crivello, Vice-Chair (in 1:40 p.m.)
Councilmember Gladys C. Baisa
Councilmember Robert Carroll
Councilmember Elle Cochran
Councilmember Don Couch (in 1:37 p.m.)
Councilmember Riki Hokama (in 2:38 p.m.)
Councilmember Michael P. Victorino (in 1:37 p.m.)
Councilmember Mike White

STAFF: Carla Nakata, 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.: Edward S. Kushi, First Deputy Corporation Counsel, Department of the Corporation Counsel
Caleb P. Rowe, 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
Tivoli Faaumu, Chief of Police, Department of Police

OTHERS: Richard DeLeon (COW-1(3))
John Gelert (COW-1(3))
Rosemary Robbins (COW-1(3))
Albert Perez, Executive Director, Maui Tomorrow Foundation
(1) additional attendees

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

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CHAIR GUZMAN: . . .*(gavel)*. . . Good afternoon. Welcome to Committee of the Whole. My name is Don Guzman, the Chair of the Committee. I'd like to advise everyone to please turn off your cell phones or put it in silence mode. Let me introduce our Members for today's meeting. We have Bob Carroll.

COUNCILMEMBER CARROLL: Good afternoon, Chair.

CHAIR GUZMAN: Good afternoon. Gladys Baisa.

COUNCILMEMBER BAISA: Good afternoon, Chair.

CHAIR GUZMAN: Elle Cochran.

COUNCILMEMBER COCHRAN: Aloha, Chair.

CHAIR GUZMAN: And Chair Mike White.

COUNCILMEMBER WHITE: Aloha, Chair.

CHAIR GUZMAN: Thank you. For Staff we have Clarita Balala, as well as Carla Nakata. And we have for our Corporation Counsel, First Deputy Ed Kushi and Caleb Rowe. We also have our Chief of Police here. We're gonna go ahead and check in with our district offices. In Hana Office, are you there?

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

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

MS. LONO: There's no one waiting to testify.

CHAIR GUZMAN: Thank you. And Lanai Office, are you there?

MS. FERNANDEZ: Good afternoon, Chair. This is Denise Fernandez on Lanai and there is no one waiting to testify.

CHAIR GUZMAN: Thank you. And on Molokai Office, is there anyone wishing to testify? Molokai, are you present? We'll try to get connection. Moving on. For anyone in the Chambers that's wishing to testify, please come to the podium, state your name, and/or organization in which you represent. You'll have three minutes to testify and upon seeing the red light blink you'll have about half a second *[sic]* to conclude. So we'll go ahead and start with the Chambers to see if we have anybody that's wishing to testify. I'd also like to recognize the presence of Councilmember Don Couch, as well as Councilmember Mike Victorino.

COUNCILMEMBER VICTORINO: Good afternoon, Chair.

CHAIR GUZMAN: Good afternoon.

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COUNCILMEMBER COUCH: Good afternoon, Chair.

MS. NAKATA: Mr. Chair, the first person signed up to testify is Richard DeLeon. He'll be testifying on COW-1(3), and will be followed by John Gelert, also testifying on COW-1(3).

. . .BEGIN PUBLIC TESTIMONY. . .

MR. DELEON: Aloha, ka kou. Councilmembers, aloha. Mahalo for allowing me to speak. And my question is based on practicalities. It's not so much of legalities, but you guys allowing or trying to allow \$350,000 more. Am I correct?

COUNCILMEMBER VICTORINO: Mr. Chair, can we have his name?

MR. DELEON: Oh, my name is Richard.

COUNCILMEMBER VICTORINO: Richard?

MR. DELEON: Maele DeLeon.

COUNCILMEMBER VICTORINO: Okay. Thank you, Richard.

CHAIR GUZMAN: Mr. DeLeon, your purpose is just to testify, not to. . .

MR. DELEON: Testify as a citizen --

CHAIR GUZMAN: Yeah.

MR. DELEON: --as a Maui County resident?

CHAIR GUZMAN: Yeah, but in terms of asking us questions --

MR. DELEON: Oh, there's no question and answers.

CHAIR GUZMAN: --there's no engaging.

MR. DELEON: Oh, okay. Well, thank you for the clarification.

CHAIR GUZMAN: Thank you.

MR. DELEON: Now from my understanding from social media or any other media this constitutes what's happening on the legal part of Maui County violating on the Clean Water Air [sic] Act. And now that...it's already the findings already was there so asking for allowing \$350,000 more to fight the lawsuit which has already found that is in violation. My thing is why are we going that path instead of the legalities way instead of fighting what's happening. And I like Councilwoman Elle Cochran. It

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makes more sense to use that money to solve the problem, not to fight the issue. This needs to be resolved because it's about our water. Ninety-eight percent of our business is tourism. If this gets out, it's gonna affect us very, very crucially. We need the water. It's for our fishing. The reefs is the filter that filters around our islands. It's all part of the very fragile ecosystem. Injection wells already has proven that either it's not working or is not sustaining what it was meant to design. So there's flaws in...at the way it's made. So I say to release \$350,000 more just to fight the issue instead of resolving the solution and coming to an end. So that's my take on it as a community, as a citizen of this island. I rather use the money where it's well spent and that's finding a solution, not finding that there already was a fact that we're in violation. Thank you very much, Councilmembers. Thank you.

CHAIR GUZMAN: Thank you. Hold on, Mr. DeLeon. Is there anyone wishing to ask questions or clarify? Seeing none, thank you very much for your testimony.

MR. DELEON: Thank you.

CHAIR GUZMAN: I'd like to recognize the presence of our Vice-Chair of the Committee, Ms. Stacy Crivello.

VICE-CHAIR CRIVELLO: Aloha, Chair. Thank you.

CHAIR GUZMAN: Thank you.

MS. NAKATA: Mr. Chair, the next testifier is John Gelert. He'll be testifying on COW-1(3). He'll be followed by Rosemary Robbins.

MR. GELERT: Hello, Chair and County Council. My name is John Gelert. I'm a resident of Kihei. I am also against spending more money for legal challenge and I have two references for facts on this issue. One is the Maui Time issue. It looks like this. This is the same thing I found online. And it says a new study published in the journal of marine pollution bulletin shows that the South Maui waste plume dwarfs anything found in West Maui. The study results are indeed staggering. According to the study, the water just off Cove Park, Kalama Park beach, and South Kihei all show massive spikes in levels of nitrogen phosphorus, turbidity, and chlorophyll in far excess of those measured at Kahekili Beach. In fact, the marine pollution bulletin study showed that Cove Park's level of inorganic nitrogen which kills coral is more than 100 times the Environmental Protection Agency standard. So I don't think you can fight this. There are...there's lots of evidence for the people that did these studies. This other reference is from Our Green Maui and this is about MRSA. More than half of all staph infections in Hawaii are a strain of methicillin-resistant staphylococcus aureus, more commonly known as MRSA, and the number of people hospitalized in Hawaii because of MRSA infections is twice the national average. In real terms, approximately 200 people in Hawaii die from MRSA every year. Hospital stays for MRSA cases were the highest on Maui where there were 188 hospitalizations within a resident population of 100,000. Dr. Alan Tice, a professor of the University of Hawaii specializing in infectious diseases has identified ocean water as a potential source of

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MRSA. I think ocean water is definitely a potential source of MRSA. We have found in Hawaii as many as 100 MRSA colonies per liter of sea water. It is suspected that this bacteria comes from wastewater treatment systems. Water-borne pharmaceutical by-products also promote antibiotic-resistant germs, especially when as in the process of wastewater treatment they are mixed with bacteria in human sewage. The final treatment of wastewater reclamation disinfection, folks, is on removal of these disease causing organisms from wastewater. Treated wastewater can be disinfected by adding chlorine or by using ultraviolet lights. The cheaper alternative disinfectant of fluid chlorine has proven environmentally damaging as high, you know, can't use that. However, because ultraviolet lights are expensive and require substantial amount of energy to run, the County of Maui does not disinfect all wastewater that is injected into the ground.

MS. NAKATA: Three minutes.

MR. GELERT: And it's...therefore, they become the...underground injection wells become the perfect breeding ground for this bacteria. Thank you.

CHAIR GUZMAN: Thank you. Members, have any questions or clarifications? Seeing none, thank you very much for your testimony, Mr. Gelert.

MR. GELERT: Thank you.

MS. NAKATA: The next testifier is Rosemary Robbins. She'll be testifying on COW-1(3). She'll be followed by Albert Perez.

MS. ROBBINS: Good afternoon, everybody. It's unanimous. Those injection wells never should have happened. That Clean Water Act went into effect in 1973 so we're talking about the last millennium, '73 to '83 to '93 to '03 to '13, to where we are now. How long is it going to take before the people who are dealing with the decision making in the water in this County face up to the fact that they can't continue to do what's going to be convenient or less expensive, if indeed it's not to the well-being of the community. In fact, it's contrary to it and the Federal courts found that to be a fact. And when I read through this item on today's agenda starting on page 1 and going over to page 2, I'm reminded of something that somebody asked me recently 'cause they knew I had been on that Upcountry Oversight Advisory Committee that the EPA required in the early 2000's when people were getting sick Upcountry from contaminated infrastructure. Somebody asked me how many acres are there to this same old tune? Couple of lyrics in there when these beyond the County of Maui's budget attorneys come in it's going to be forgiven cost. It's ratted out at \$250,000 and in every one of the increases since it has said not to exceed whatever that number is. Well, it has exceeded that number. Today is either the 5th or the 6th time that this has been brought up at this lectern. I mean it's...we're running out of fingers to count this. It's crazy! And when it talks about the increase, somebody mentioned before not too sure about what it started, it started at \$250,000 and the request today brings us up to \$3,400,000. We having violated this law that's been on the books since 1973. It needs to not continue to happen. So that and the fact that many of these decisions

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are made where the community kind of watch what's happening because they're made in consecutive...in executive Committee meetings. There is a real trust issue in here and sad to say it's just been jeopardized so often we've got a population out there that's furious about this and the only talk we see about it is about how much it's costing. There's nowhere near that amount of attention paid to the threat to the health and well-being of both the folks who live here and the people who come here under tourism.

MS. NAKATA: Three minutes.

MS. ROBBINS: Thank you. We saw that visual that was in here about people saying in the *Maui Time*—scary.

CHAIR GUZMAN: Thank you.

MS. ROBBINS: Thank you.

CHAIR GUZMAN: Members, have any questions or clarifications for the testifier? Seeing none, thank you very much for --

MS. ROBBINS: You're welcome.

CHAIR GUZMAN: --your testimony, Ms. Robbins.

MS. NAKATA: Mr. Chair, the next testifier is Albert Perez. He'll be testifying on COW-1(3). There's no one else who has signed up to testify in the Chamber.

MR. PEREZ: Mr. Chair and Councilmembers, I'm Albert Perez, Executive Director of Maui Tomorrow. I'm testifying on the same item, COW-1(3), and you know, I think that our previous testifier had a really good point. I know that the County has to look at its budget and what it can afford and my understanding is that the fines that we're facing on this are potentially budget busting. But we also have to consider all of the other...what's the value of health? You know, there are rumors out there, I'm not sure, but I've heard that a woman almost lost her eyes from swimming at the Cove from an infection. I think we need to consider that. And what I would just like to say is that the fact that this has been going on so long. I remember this was going on in 1990. At that point it wasn't proven. Administration back then was fighting it. But we have clearly exceeded the capacity of our wastewater infrastructure and it's not just in West Maui. It's in South Maui and there are a lot of other places. But in this particular case we're talking about something that when the word gets out, it's gonna be affecting our most...our biggest industry which, you know, right now we have people talking about, well, now that HC&S is going down we should put all our eggs into tourism. Well, it's a very vulnerable industry. It's vulnerable to economic swings and it's also vulnerable to news like this that can get out. When I got called by Maui Time and they said, you know, did you know about this story and I looked at it and they said, you know, the Cove, it's got upwellings that are 60 percent effluent. It's disgusting! And so I was kind of shocked by that. But I would just like to suggest

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that the County approach the EPA and tell them that they're serious and stop fighting this. Take the money that you're putting towards fighting and negotiate a lower fine in good faith. Once they see that you're operating in good faith maybe they'll be willing to lower it. So anyway, I urge you to not put any more money towards fighting this issue and start putting the money...our money towards solving the issues. Thank you very much.

CHAIR GUZMAN: Thank you. Members, do you have any questions or clarifications for the testifier? Seeing none, thank you very much for your testimony, Mr. Perez. Is there any other testifiers? Okay, we'll go ahead and check in with Molokai District Office. Are you present?

MS. ALCON: Good afternoon, Chair. This is Ella Alcon on Molokai and there is no one here waiting to testify.

CHAIR GUZMAN: Very good. Thank you very much, Ms. Alcon. Without any objections, Members, I'd like to close public testimony.

COUNCILMEMBERS: No objections.

CHAIR GUZMAN: Thank you.

...END OF PUBLIC TESTIMONY...

COW-1(28) LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: LISA L. HAUPU V. COUNTY OF MAUI; DISABILITY COMPENSATION DIVISION CASE 7-09-00326) (CC 15-6)

CHAIR GUZMAN: Members, turning on to the first item on today's agenda. This is COW-1(28). This is the Lisa L. Haupu v. County of Maui, Disability Compensation Division Case 7-09-00326. The Department of Corporation Counsel is requesting consideration of the proposed resolution to authorize settlement in this case. The workers' compensation case alleges a work-related injury sustained in January 21, 2009. The Committee...this Committee met twice, February 5, 2016 and March 18th to consider this matter. We have here today our Deputy Corporation Counsel Caleb Rowe to continue the presentation and for the matter of consideration. So Mr. Rowe the floor is yours.

MR. ROWE: Thank you, Chair. As the Chair mentioned, we've presented this settlement to you before. The last time that it was scheduled we actually ran overtime and we didn't get to it. Prior to that you all had asked for a little bit more information which I am now prepared to give to you guys. As a quick summary, Ms. Haupu was a Police Officer I and was 39 years of age when she injured her right knee while participating in a training program. She ended up needing surgery and has been recovering for a long time. Presently, we have reached a potential settlement, not only on the issue of permanent partial disability, but also waivers of future indemnity benefits, future

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vocational rehabilitation, and future medical benefits. The amount of the settlement is outside of the Corporation Counsel's authority which is why we're bringing it to you. For any further questions, I would ask that we cover it in executive session because this deals with ongoing litigation as well as medical issues.

CHAIR GUZMAN: Thank you, Mr. Rowe. Chief, do you have any comments to state in open session?

MR. FAAUMU: Thank you, Mr. Chair. Good afternoon. At this time I have no comments.

CHAIR GUZMAN: Thank you. Members, do you have any questions that you would like to pose in open session? Seeing none, I believe that there is a request to enter 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 and issues pertaining to the powers, duties, privileges, immunities, and liabilities of this County, this Council, and this Committee; and also Section 92-5(a)(8) of the HRS to deliberate or make decisions upon matters that require confidentiality as well as Federal law or a court order.

COUNCILMEMBER COUCH: So moved, Mr. Chair.

COUNCILMEMBER VICTORINO: Second, Mr. Chair.

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

COUNCILMEMBERS: Aye.

CHAIR GUZMAN: All those opposed say no. We have eight ayes, no noes, one excused. Motion carries.

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

NOES: **None.**

ABSTAIN: **None.**

ABSENT: **None.**

EXC.: **Councilmember Hokama.**

MOTION CARRIED.

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

CHAIR GUZMAN: Thank you, Members.

COW-1(3) LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, CIVIL 12-00198 SOM-BMK; SPECIAL COUNSEL AUTHORIZATION: HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET 15-17447, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT) (CC 15-6)

CHAIR GUZMAN: Moving on to the next item on today's agenda. We have COW-1(3). This is the Hawaii Wildlife Fund, et al. v. County of Maui, Civil No. 12-00198 SOM-BMK. This is regarding special counsel authorization of the additional identified court case Docket 15-17447 in the United States County of Appeals for the Ninth Circuit. The Department of Corporation Counsel's request and consideration of a proposed resolution to authorize 350,000 in additional compensation for special counsel, Hunton and Williams LLP for the appeal in this case, for a total compensation not to exceed 3.4 million. The Chair would note that the Department has also transmitted copies of the County's opening brief and two amicus briefs filed in the appeal. We have here today Deputy Corporation Counsel Thomson who is going to present somewhat of a background to get everyone up to speed, as well as the justification for the authorization of the additional compensation amount. So Ms. Thomson the floor is yours. Thank you.

MS. THOMSON: Thank you, Chair. Since this case has been active for more than four years now I'd like to provide some background and context for the public and also the Committee Members.

In the 1970's, the Lahaina Wastewater Reclamation Facility was constructed using Federal Clean Water Act funding. Prior to construction of the facility, there was an ocean outfall in Lahaina used to discharge untreated wastewater. The Lahaina facility

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was first developed with several goals, cease using the outfalls, treat the wastewater, and then start to develop land-based uses for the treated recycled water.

CHAIR GUZMAN: Ms. Thomson, can you get --

COUNCILMEMBER VICTORINO: Yeah, a little louder.

COUNCILMEMBER COUCH: Could you speak up to the mic?

CHAIR GUZMAN: --closer to the mic?

MS. THOMSON: Sorry. Thank you.

CHAIR GUZMAN: There you go.

MS. THOMSON: How's that? Thanks a lot. And the remaining goal is to dispose of any remaining recycled water in an environmentally sound manner.

So in the 80's and 90's, as you are aware, sugar cane and pineapple were still viable crops on the West Side and the intent was that this recycled water would be potentially used to replace some of the ditch water and other potable water being used by the industries. When cultivation of those crops ceased in the 1990's, that avenue for large scale land use reuse of the water vanished.

Resorts started to proliferate along the coast of West Maui and today the resorts and the Kaanapali Golf Course are the primary customers for the recycled water. Their need for the recycled water is seasonal and dependent on the weather. When it's raining, they don't need the water. When it's dry, they do need the water. Under either scenario though, the injection wells are a mandatory backup under our permits for disposal of any unneeded recycled water.

All of the water at the Lahaina facility is treated to the R-1 level and this is the highest recycled water quality in the State. It's just below what would be acceptable for drinking water called R-0. The Lahaina facility operates under UIC permits and these are issued both by the State of Hawaii Department of Health and the U.S. Environmental Protection Agency. The authority for these permits is under the Safe Drinking Water Act which regulates groundwater.

One of the issues that the Council and the Department must consider is how and when to develop new distribution lines and the cost both in terms of capital cost and operations cost in terms of the energy consumption used to pump water to distant locations and then the benefits of adding that infrastructure. At some point the benefits of using recycled water at distant points may be outweighed by the environmental and financial cost associated with constructing the lines and the storage tanks and using fossil fuel to pump the water to service those distant locations. That's, of course, this Council's priority and an ongoing budget concern.

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So my understanding is that there has been frustration with some members of the public with the pace of development of the infrastructure and the land-based uses for the recycled water and that this frustration was one of the motivations for the lawsuit. Four years ago in April 2012, four groups joined together to sue the County alleging that the County needed a National Pollutant Discharge Elimination Permit, we refer to those as NPDES permits, to dispose of the unused recycled water into the Lahaina facility's disposal wells and they claimed that this recycled water harmed the coastal water and marine life.

In 2012, UH and other organizations conducted some testing at the facility using fluorescent dye put into the wells. Some of that dye was detected offshore three months later. That was the first detection and the researchers continued looking for the dye and concluded that the majority showed up approximately eight months after it was put into the wells and the entire travel time was upward of four years. Hydrogeologic modeling of the recycled water flow shows that after it goes into the wells of the Lahaina facility, it mixes with the groundwater and gradually makes its way, as does all water on the island, to the ocean over approximately a two-mile stretch of coastline. Part of what this research showed is that the wells were operating as they were designed to do using the earth's natural processes to further filter the recycled water.

In an effort to address the Plaintiffs' concerns, in 2012 the Department of Environmental Management applied for an NPDES permit for the Lahaina facility's operation of the wells with the State of Hawaii Department of Health. That permit application remains under consideration almost four years later.

From the County's point of view, the Clean Water Act does not apply to disposal of treated recycled water into groundwater that eventually makes its way to the ocean over the course of months or years. This isn't what the Clean Water Act was designed to regulate. You can consider...think of the ocean outfall scenario. These are called point-sources under the Clean Water Act. It's relatively straightforward for both the municipality being regulated and the regulator drafting the permit to know what exits at the end of the pipe into the ocean and to draft a permit limitation on what's allowed. It's also relatively straightforward to determine if a permit holder is meeting that permit's requirements.

The wastewater outfalls on Oahu have NPDES permits. DOH has never required a permit for the Lahaina facility or any similar well in the State. Just one of the issues is how and where you'd measure compliance and then a primary issue is that the Clean Water Act is not designed to regulate groundwater. That's the territory of the Safe Drinking Water Act and those permits are held by the Lahaina facility both with EPA and DOH.

So getting to the case. As this lawsuit made its way through the Hawaii District Court Judge Mollway developed a new theory of legal liability under the Clean Water Act. She called this theory a conduit theory. She has never ruled that the recycled water harms the ocean water quality or ocean life. Her decisions were based on the fact that

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the groundwater itself may be a conduit for the recycled water to reach the ocean. Under this reasoning, recycled water could be sprayed on a crop and some of it could have become airborne and reached the ocean. The air, like the groundwater, would be the conduit for transporting the recycled water.

The County believes the Judge's conduit theory is an impermissible extension of the Clean Water Act the territory was never intended to regulate. So in November 2015, the County and the Plaintiff groups settled the penalty phase of the lawsuit. The basis for the settlement was to allow the County to appeal the District Court's liability rulings as well as the Judge's ruling on...that the County had fair notice that the Federal Clean Water Act applied to the disposal of recycled water into groundwater despite never having been told by State or Federal regulators that this was so.

If the County's unsuccessful in its appeal, under the settlement terms it will need to construct \$2.5 million worth of project or projects aimed at increasing recycled water use in West Maui. The importance of the appeal to the Hawaii District Court's decision is critical, both to the County and to others in the State that are in similar situations.

I'd like to list the organizations that have joined together to file amicus briefs and that you have been provided in your binders: the Association of California Clean Water Agencies, the California Association of Sanitation Agencies, the California Association of Counties, the International Municipal Lawyers Association, the League of California Cities, the National Association of Clean Water Agencies, the National Association of Counties, the National League of Cities, the National Water Resources Association, the Association for American...of American Railroads, the American Farm Bureau Federation, American Iron and Steel Institute, American Petroleum Institute, National Association of Manufacturers, National Mining Association, and the Water Utility Act Group.

I can assure you that our Department and the staff of Environmental Management have literally spent hundreds of hours responding to this lawsuit, as well as how to address its impacts from an ongoing operation standpoint. However, it is also our duty to advise you when special counsel is needed and in the County's best interest and in this case it continues to be required due to the specialized and very complicated nature of this lawsuit. The suit and its legal theory...and the legal theory trying to be advanced through it are of national importance, not only will the outcome directly affect Maui County, but it could affect many other municipalities and industries, especially in the West Coast which is in the Ninth Circuit where this is being appealed.

So in conclusion, I ask for your continued support in approving the requested fee increase. Providing that there are no unexpected issues, this fee increase should take us through oral arguments in the appeal, which we anticipate will be set sometime in early 2017.

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And Chair, I have no further open session remarks, and unless the Members wish to discuss any confidential issues, I don't have anything requiring executive session at this time.

CHAIR GUZMAN: Thank you very much, Ms. Thomson. Very well presented in terms of the background and bringing us up to speed. Just for the general public, the settlement agreement is online on our website. So if you'd like to take a look at that, that is what we've most recently completed was the settlement agreement, which then places in black and white the remedies of both parties. It was our understanding when we entered into the settlement agreement that based off of the cost of going to trial, the Plaintiffs offered a settlement which we then proceeded to negotiate. And it's part of the settlement, it was agreed that we would then bring the case to the higher court and within that settlement, whether we lose or we win, the terms of remedy are placed in that settlement agreement. So this is just one step further in trying to resolve the entire issue and also to get a higher court's opinion or judgment on an issue that is basically a national concern. And so this question...these legal questions are very pertinent to what will happen nationally. So that is one of the other reasons we bring it to the appellate court. So just to let people know this is not a fight that we're saying we're gonna fight and ignore. We've already placed in terms and conditions how to resolve it and it's all there in the settlement agreement which you can find online on our Council web page. So is there any questions that we have for our Members?

COUNCILMEMBER VICTORINO: No. Chair?

CHAIR GUZMAN: Mr. Victorino.

COUNCILMEMBER VICTORINO: Not so much a question. I think you've done an excellent job in your explanation so that the public has a better understanding we're just not fighting a lost battle. We are actually in a battle for not only ourselves, but the future of this State and other municipalities throughout the United States. And it is sad that more cannot be discussed on what we've been told and what has happened so the public could have a better understanding. It's not we're not following and listening to what's out there. We see there is a reasonable chance that we are not the entire factor for some of the things that was said by testifiers. Okay. I've swummed [sic] these waters more years than I can count and I have yet to have a problem. Oh, I get red eyes because I stay underwater too long. I can tell you what happens and as you get older a lot of things happen. But I can tell you, I can tell these people I know when the waters were even worse off than they are today. We have done a yeoman's job cleaning up. If there were to come here 50 years ago when the plantations used to dump bagasse into the ocean and all the other stuff, boy, would they have been a fit. We've done cleanup time in and time out, Mr. Chair. Some were before you were born, some of 'em since you've been born and I don't mean to be funny. It's just timetable...time lapse. But bottom line is I think this needs to be vented out so that we have an accurate total picture on what's going on and then once the public sees that they'll understand that we weren't trying to waste money, we were really trying to protect the interest of this County financially as well as environmentally. It's a total package. Thank you, Mr. Chair.

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CHAIR GUZMAN: The cost of going to trial would have placed a great burden on both parties, the Plaintiffs and the County. And for the settlement to agree that we move this to the higher court is basically a reasonable, I guess more efficient way to proceed. Like I said, the remedies are already placed in the settlement agreement. If the Judge goes with the Plaintiffs' side, then we build the project based off of a 2.5 million dollar amount and there are deadlines in which we have to start those...start that project at. On the side, if we do win, then the issue is going to be decided by the Judge and the bigger issue of whether we can get a permit. In fact, it still would be under the Judge's discretion and then at that point we'd have to deal with the State and see whether they'll issue us a permit at that point. But this is all, like I said, steps to resolve the bigger issue. This is not about wasting money for a court battle. This is all about getting to the end and resolving, or you know, making sure that this doesn't happen again in the future. So any other questions, Members? Ms. Cochran.

COUNCILMEMBER WHITE: Chair?

COUNCILMEMBER COCHRAN: Thank you, Chair. Oh, sorry, Mr. White.

CHAIR GUZMAN: Oh, and then followed by Mr. White.

COUNCILMEMBER WHITE: No, go ahead.

COUNCILMEMBER COCHRAN: And thank you. Excellent job in recapping to the point where we are today, Ms. Thomson, and thank you for that opportunity for Department to just explain where we're at and why we're here. And I hear the sentiments of the community, but it's true, if you listen to the comments by Ms. Thomson that one point that sort of started all this with the NPDES permit. We're sitting here very, very frustrated ourselves that we haven't received an answer. And I think because of the sheer precedent setting repercussions that can occur to the rest of Region 9 and beyond with that call that they're going to one day hopefully make. It's gonna have some impact and I think no one wants to be around to figure that one out one way or another, but we need that in order to get this solved and settled. But thank you for pointing out that the settlement is in place and that is about protecting and taking care of our resources. And I gotta hand it to this body for making the efforts during all the past Budgets, you know, to upgrade and to expand and all that in West Maui. You know, as the Infrastructure Chair I have been spearheading, yes, but it's taken all of us to decide to push forward the budgetary funds to make it happen and it has been. And we're doing the best we can, I believe in our...on our behalf with the funds we can get in order to move forward in a very positive manner. We have many, many options and viable solutions. We're studying and trying to figure out what is the best route here because it's a very expensive choice, but it's gonna happen, it's gotta happen, and we are. So I just want to rest assure this community that we are doing the best we can with what we got and this isn't something that we're fighting a losing battle or anything. It's something that we have. There is a plan. Trust us and it will work out for the best in the end for the environment and for the future of our generations, too. So thank you, Chair, for this opportunity.

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CHAIR GUZMAN: Thank you. Thank you, Ms. Cochran, well said. Mr. White.

COUNCILMEMBER WHITE: Thank you, Chair. I think one of the frustrations for me, and I know probably other Members of the Committee through this process, is that the Federal government and State government are the permitting agencies. They are the regulating agencies. So for over 40 years they have been supporting, permitting, allowing, and actually helping fund the various things that we have done to establish the injection well process. One of the concerns that I have through this process is that immediately upon being sued, they step back and say, you're on your own County. This is not a simple Maui County issue and part of the reason that we have moved forward in the manner that we have is that there are 5,400 injection wells throughout the State of Hawaii. They're not of the same size as the ones that we are using, but there's 5,400 just in the State of Hawaii. There's 400,000 throughout the country in coastal communities and probably in many others. So this is...this is not a simple issue. It's not an issue that we can simply turn our backs on because quite frankly there's a very high cost to some of the...what can be seen as some of the solutions, but I wanted to take my hat off to Ms. Cochran because she has been leading us down the right path for quite a while. And we've come to understand that some of these solutions are not in fact solutions. They may not...they may not really fix the issue and they may not have the intended outcome of as significant a reduction of the use of the injection wells as people might think. So I, you know, I agree with Ms. Cochran that we're moving in a very positive direction but part of our responsibility is to make sure that we do...we make the best decisions on the way we spend money. To put it in perspective, you know, we've had our own studies done that show that there's not significant impact on the reefs adjacent to the West Maui outfalls, and yet, we have a decision to make. Do we focus our monies on redirecting R-1 water or do we focus our funding on capturing all of the water...all the waste in Wahikuli, which is not a part of the system now? So we have...we have choices to make and none of them are inexpensive, none of them are simple. But Ms. Cochran has been very good about helping guide us through the process of trying to identify where we need to go next. So it's been uncomfortable not being able to say much, but I think it's quite easy to say that Maui County has been on its own. That's why we're picking up the tab because we feel there's a lot more to the story than we've been able to share, and I think, you know, we're heading in the right direction and I really appreciate the work that Corp. Counsel has done to help guide us through this process. Thank you, Chair.

CHAIR GUZMAN: Thank you. Mr. Couch.

COUNCILMEMBER COUCH: Thank you, Mr. Chair, and I want to echo the sentiments of my colleagues as well, and also thank Ms. Cochran for getting...moving us in the right direction here. You know, it's unfortunate that people see soundbites and comment on just the soundbites. If you look at our budget for the last four years, we've put in multi-millions of dollars into this problem. Multi-millions! The 350,000 as Mr. White said is to, you know, we're left out on our own. It's an extra 350,000 though \$3.4 million is still a drop in the bucket to what we're putting in to remedy the situation in

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all the treatment plants. So for some people to come up and say, you know, put on their website and whatnot, that we're not doing anything, we're wasting \$350,000, is just wrong. We've got it. If you look at the Budget, we're doing a ton of work to fix this. You know, and this is something that's happening, as Mr. White said, throughout the country. This is an unprecedented case and that's why we have all these people saying, whoa, we'll back you up Maui County. Unfortunately, they're not backing us up with money, but they are backing us up with their thoughts. So thank you, Ms. Cochran, for keeping us...getting the right things through your Committee, and Mr. Hokama and everybody for passing it in the Budget. It's not...we're not sitting on our rear ends doing nothing. We're out in the front of this, so thanks.

CHAIR GUZMAN: Ms. Baisa.

COUNCILMEMBER BAISA: Yes. Thank you very much, Chair. I think that whatever needs to be said has already been said by my colleagues and I think that our Chair has...Chair White, has expressed it very well. You know, this Committee has been struggling with this and doing the best we can and we certainly appreciate all the help that we've gotten from Corp. Counsel. I keep telling people that you guys are an awesome bunch of people, and I, for one, really, really appreciate the work that you do. And I think that we again are gonna have to do what we have to do to keep this momentum going. It isn't a one-time thing. I've been sitting here for quite a while now seeing these request come and we take care of it and then we get another one, we take care of it. I think we got to stay the course. We have to stay the course. We have to see the end of it. Otherwise, it would be a waste of money because we need to have the result. We need to settle this. We need this put to bed and I think we have to stay with it. So I'm in support of what is before us. Thank you, Chair.

CHAIR GUZMAN: Thank you. Mr. White, followed by Mr. Victorino.

COUNCILMEMBER WHITE: Thank you. You know, I just have to...in case anyone missed it during Ms. Thomson's discussion. We used to have an outfall. We no longer do. Oahu has an outfall. We don't. So that was one of the solutions that was brought to us by the Department...not Corp. Counsel, but by the Environmental Department. This Committee said there's no way we're going in that direction. We have a whale sanctuary that we all love and I don't think any of us can even consider, even come close to considering an outfall. So we've been focused on reuse. But...and another thing that I have to mention is that another item that was brought to us by the Department was to provide for part of the additional reuse to be done by building a tank above the facility and putting in the infrastructure to bring this R-1 water to all the hotels. Well, I happen to know what the drainage rate at my hotel is and it's 11 feet per second. So if this R-1 water is so bad to put into an injection well over a quarter of a mile from the ocean, how is it good to instead take that R-1 water, ship it down to my grounds, and put it on...put it in a place where it's going to take one minute to travel the 11 feet from my grass through the all sand to the water table which is about 100 feet back from the ocean. I don't get it, but that's what we're dealing with. Ms. Cochran and all of us have said that doesn't make sense. We need to make sure that the reuse is more mauka. So this is part of the challenge—the push

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and pull that we've been going through. And it's been very enlightening for me, but it's also been horribly, horribly frustrating to feel like after permitting and working with us for 40 years, the State Department of Health and the EPA, are basically saying, hey, you're on your own and we're not even going to give you an NPDES permit that you have applied for four years ago. I don't get it! But the community's got to understand that we're not sitting on our hands here. Ms. Cochran, and as Mr. Couch said, we've put significant monies towards the reuse process, but it's just not that easy and you can't just wave a wand and make things go away. I wish we could but no one...none of us want to have any issues with the cleanliness of our water. We've got to have, you know, a solid solution and solid understanding of where best to put our money to make the biggest impact.

CHAIR GUZMAN: Thank you, Mr. White. Yeah, and just a follow-up with that, I remember that discussion where the State would allow us to do a fallout. You know, --

COUNCILMEMBER WHITE: Right.

CHAIR GUZMAN: --they take that water and put it in the middle of the ocean. Are you kidding me? I mean that's what...that's what this entire Council...this Committee was like, that's crazy! We're not gonna do that to our island or to our oceans. So we have been struggling with a lot of issues to resolve this and I think it's because of this hard work of this Committee we've gotten this far. I believe we...we've accomplished a lot by entering into this settlement agreement with the terms that we have. There are remedial terms placed in the agreement that, you know, says that there's a project to be built. You know, 2.5 million will be put into it upon the final judgment. So I think that we have a lot of terms placed in there that we can rely on that have it not be...if we didn't go through this process, we wouldn't be as far as we are right now. I think this is...we are exactly where we should be in trying to resolve this issue. And on the national level, it is very important that it be decided at a higher court. You know, it's dependent on how national policy is conducted. And unfortunately, we are the single, you know, county, and the single party in the whole United States that has to deal with this and be the case on point. That's the unfortunate part about it.

COUNCILMEMBER WHITE: And I think it needs to be restated that the highest level of exposure that we have here is the \$2.5 million. If we win, we don't pay anything. Then we can then spend all of our money continuing the work that Ms. Cochran's been doing. If we lose, we're gonna continue to spend money through Ms. Cochran's Committee through, you know, the recommendations that she and her staff have been working on. But if we win, we don't spend the money on that project, we'll be able to spend it on whatever we feel is next. Thank you.

CHAIR GUZMAN: But regardless, we're still moving forward in our Budget --

COUNCILMEMBER WHITE: Right.

CHAIR GUZMAN: --to find solutions.

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COUNCILMEMBER BAISA: Right.

CHAIR GUZMAN: And as Mr. Couch has mentioned, we've put in millions and we are continuing to put millions in to improve the system. So I think that's enough said from me. Mr. Victorino.

COUNCILMEMBER VICTORINO: Well, that was three, three, you know, three go arounds so no problem as far as that, and you know, most of what I wanted to say was said by others so that's not a problem. In the ten years that I've been here we've been through this so many more...so many times and come up with almost the same end result. We need to continue to fight. Fight for the people and fight for the rights. And so, yeah, outfalls we used to have 'em and we did away with because it was a bad thing to have 'cause sometimes some of that stuff would float back ashore. That what I was talking about the old days. It would come back ashore. You'd find it on the beach. So you know, you're laughing about it but it was a true fact. So we've done a yeoman's job trying to do what is right and then we get sued because of it. It is the way it is. Because some people think...look at things in a different perspective. So I'm willing to support this also. I think we got to continue moving forward and no matter what happens, let right be right, and let the court decide what is right. Thank you, Chair.

CHAIR GUZMAN: I'm going to call the question. Mr. Couch.

COUNCILMEMBER COUCH: I have an actual question for Ms. Thomson.

COUNCILMEMBER VICTORINO: That's a change.

COUNCILMEMBER COUCH: Yeah. You said this 350 will take us through oral arguments. Is there anticipation for more or do we need to go to executive session for how that next strategy is?

MS. THOMSON: Chair, if I may? The 350 in the current request should take us through oral arguments...that should take us through the end of the appeal process, provided that there aren't any unforeseen circumstances. And I just want to stress that caveat so we don't know what's going to be filed by the other groups in opposition. There could be some curveballs that we would have to address, but right now I think this will take us through the appeal.

COUNCILMEMBER COUCH: Thank you. Thank you, Chair.

CHAIR GUZMAN: Okay. Thank you. So the Chair will entertain a motion to recommend the 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."

VICE-CHAIR CRIVELLO: So moved, Chair.

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CHAIR GUZMAN: Moved by Ms. Crivello.

COUNCILMEMBER VICTORINO: Second.

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

COUNCILMEMBERS: Aye.

CHAIR GUZMAN: All those opposed say no. We have eight ayes, no noes, one excused. Motion carries.

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

NOES: None.

ABSTAIN: None.

ABSENT: None.

EXC.: Councilmember Hokama.

MOTION CARRIED.

ACTION: Recommending ADOPTION of resolution.

CHAIR GUZMAN: Thank you, Members.

COW-6 PROPOSED NAHIKU COMMUNITY CENTER LITIGATION
(COUNTY OF MAUI V. MAUI KUPONO BUILDERS LLC, ET AL., CIVIL
15-1-0421(1)) (MISC)

CHAIR GUZMAN: Moving to the next item on the agenda. We have COW-6, the proposed Nahiku Community Center litigation, County of Maui v. Maui Kupono Builders LLC, et al., Civil No. 15-1-0421(1). This is Brian Bilberry's case. Mr. Bilberry, I believe this is, yeah, you may present. I think this is an update as to what the case was...the Members have...previously we've discussed this case as we had filed against the general contractor. So if you could go ahead and update the Committee.

MR. BILBERRY: Thank you, Chair, and good afternoon. Good afternoon, Members. Yeah, I just wanted to come today to talk about our strategy going forward. I have had an opportunity to speak with opposing counsel for Maui Kupono Builders. Very brief conversation required by procedural rules to talk about how we think discovery is going to go, possibilities for settlement, and just generally the direction of the case. And so having had that conversation with her, I thought it might be prudent to come

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here and have a discussion with you about where we see the case going and so I would request at the appropriate time that we be permitted to go into executive session to have that discussion.

CHAIR GUZMAN: Let me also brief the Members that...or at least the general public that we did file a case against the general contractor, Maui Kuponu Builders LLC, for breach in the contract No. 5149 relating to the construction of the proposed Nahiku Community Center. We allege that they had failed to submit the construction schedule, also they had failed to commence work on the site, and they had failed to provide a performance bond as required by the contract. The complaint also alleges that the contractor's bonding agent breached its obligations pursuant to the performance and payment bond and contract. So I believe Mr. Bilberry's requesting executive session at this time. The Chair will entertain a motion to enter into executive meeting pursuant to Section 92-5(a)(4) of HRS to consult with legal counsel on questions and issues pertaining to liabilities, duties, privileges, and immunities concerning this County, this Council, and the Committee.

VICE-CHAIR CRIVELLO: So moved, Chair.

COUNCILMEMBER VICTORINO: Second, Mr. Chair.

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

COUNCILMEMBERS: Aye.

CHAIR GUZMAN: All those opposed say no. We have eight ayes, no noes, one excused. Motion carries.

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

NOES: None.

ABSTAIN: None.

ABSENT: None.

EXC.: Councilmember Hokama.

MOTION CARRIED.

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

CHAIR GUZMAN: Thank you, Members, we will. . .

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COUNCILMEMBER COCHRAN: Chair?

CHAIR GUZMAN: Yes?

COUNCILMEMBER COCHRAN: Chair, real quickly. I have a question and I don't think this needs to be said in executive --

CHAIR GUZMAN: Oh sure, proceed.

COUNCILMEMBER COCHRAN: --but if I can just ask and you just let me know.

CHAIR GUZMAN: Sure, sure, proceed.

COUNCILMEMBER COCHRAN: It's in relation to the company and I did bring...pose this question previously at a full Council meeting because we have the pages of contracts and services that we have to go through and Mr. Hokama always says if there's any contracts you want to pull, please let me know now. Anyways, I had counted I believe six or seven of the same company's contracts very recently so how is it that we have something like this pending, yet we're closing out contracts with the company for other...I mean other jobs or what have you, but still it is the same company.

MR. BILBERRY: Well, we can't preclude them from bidding on projects and the procurement process the way I understand it works is lowest bidder gets the contract.

CHAIR GUZMAN: What. . .

COUNCILMEMBER COCHRAN: But...sorry, Chair.

CHAIR GUZMAN: Proceed.

COUNCILMEMBER COCHRAN: And I mean I --

MR. BILBERRY: Beyond that I would...I'm sorry, go ahead.

COUNCILMEMBER COCHRAN: --personally see it like a risk management perhaps almost situation here. 'Cause if we already have an outstanding litigation with this company, yes, it hasn't been closed out or anything, but there's just something pending and it's not a good thing. So now they're applying perhaps this situation could occur with those other contracts? I don't know. I'm not saying it is, but I just thought for me that's a risk.

CHAIR GUZMAN: Mr. Bilberry.

MR. BILBERRY: Well, I'm just litigating this particular case. I don't know what's going on with these other contracts. I think I can address a component of your question because there are things that will occur in the context of this litigation to address that

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concern going forward, but again, that would be something that would need to be discussed in executive session as part of our general strategy.

COUNCILMEMBER COCHRAN: Oh, okay. Very good.

CHAIR GUZMAN: Okay.

COUNCILMEMBER COCHRAN: That's all, Chair.

CHAIR GUZMAN: So I believe you may get your answer in executive session.

COUNCILMEMBER COCHRAN: Okay. Very good. Thank you.

CHAIR GUZMAN: So that being said, I'm going to recess so that we can set the Chamber's for executive session. We are now in recess. . . .(gavel). . .

RECESS: 2:34 p.m.

RECONVENE: 3:14 p.m.

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

COW-1(28) LITIGATION MATTERS (SETTLEMENT AUTHORIZATION: LISA L. HAUPU V. COUNTY OF MAUI; DISABILITY COMPENSATION DIVISION CASE 7-09-00326) (CC 15-6)

CHAIR GUZMAN: Calling up pursuant to, excuse me, pursuant to our executive session...executive meeting, I'm going to call up COW-1(28), Lisa L. Haupu v. County of Maui, Disability Compensation Division Case No. 7-09-00326. The Chair will entertain a motion to recommend adoption of the proposed resolution entitled "AUTHORIZING SETTLEMENT OF LISA L. HAUPU V. COUNTY OF MAUI, DISABILITY COMPENSATION DIVISION CASE NO. 7-09-00326."

VICE-CHAIR CRIVELLO: So moved, Chair.

COUNCILMEMBER VICTORINO: Second, Mr. Chair.

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

COUNCILMEMBERS: Aye.

CHAIR GUZMAN: All those opposed say no. We have nine ayes, zero noes. Motion carries.

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CHAIR GUZMAN: Yeah, actually I got a little cringy when I heard that. . . .*(laughter)*. . .

COUNCILMEMBER VICTORINO: Yeah, you saw everybody cringe.

CHAIR GUZMAN: Okay, so Members that will conclude today's agenda. Thank you very much for the healthy discussion and all the input. Meeting adjourned. . . .*(gavel)*. . .

ADJOURN: 3:16 p.m.

APPROVED:



DON S. GUZMAN, CHAIR
Committee of the Whole

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Transcribed by: Clarita Balala