

# COMMITTEE OF THE WHOLE

Council of the County of Maui

## MINUTES

August 5, 2016

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

**CONVENE:** 1:39 p.m.

**PRESENT:** Councilmember Don S. Guzman, Chair  
Councilmember Stacy Crivello, Vice-Chair  
Councilmember Robert Carroll  
Councilmember Elle Cochran  
Councilmember Mike White

**EXCUSED:** Councilmember Gladys C. Baisa  
Councilmember Don Couch  
Councilmember Riki Hokama  
Councilmember Michael P. Victorino

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

Tina Thompson, Executive Assistant, 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.:** Brian A. Bilberry, Deputy Corporation Counsel, Department of the Corporation Counsel

**OTHERS:** Eric Poulsen (COW-5)  
Christopher Salem  
(10) additional attendees

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

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CHAIR GUZMAN: . . .(*gavel*). . . The Committee of the Whole shall now come to order. I'm Don Guzman, the Chair of the Committee. Before we begin I'd like to introduce the Members of the Committee starting with our Vice-Chair of the Committee Stacy Crivello. Good afternoon.

VICE-CHAIR CRIVELLO: Aloha and good afternoon, Chair.

CHAIR GUZMAN: We have Bob Carroll.

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COUNCILMEMBER CARROLL: Good afternoon, Chair.

CHAIR GUZMAN: Elle Cochran.

COUNCILMEMBER COCHRAN: Aloha, Chair.

CHAIR GUZMAN: And Mike White.

COUNCILMEMBER WHITE: Aloha, Chair.

CHAIR GUZMAN: Thank you. For our Corporation Counsel, we have Deputy Corporation Counsel, Brian Bilberry, as well as our Staff attorney, Carla Nakata, and Pauline Martins...oops, sorry, Ms. Balala. And then for our items for today we have two items, COW-1(41), which is the Donenfeld v. County of Maui, et al., and COW-5, Christopher Salem v. Alan Arakawa, et al. Anyone wishing to testify please register at the lobby area...at the desk area. If you come down to the podium, you'll have three minutes to testify only on the items that are on today's agenda. Before we begin I'm gonna go check in with our District Offices. In Hana Office, are you there?

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

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

MS. THOMPSON: Good afternoon. This is Tina Thompson at the Molokai Office and there is no one waiting to testify.

CHAIR GUZMAN: Good afternoon, Tina. And on...let's see, Lanai Office?

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

CHAIR GUZMAN: Thank you, Ms. Fernandez. Turning back to our Chamber, please call the first testifier.

MS. NAKATA: Mr. Chair, the first person who is signed up to testify is Eric Poulsen. He'll be testifying on COW-1(41).

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

MR. POULSEN: Good afternoon, elected Members of the Maui County Council. I am here today to testify on the agenda item relating to litigation between former employees and the County of Maui, one of which is a former Executive Assistant to this body of government. My testimony folks is on the power of this Council to establish in our Charter to prevent costly litigation. Allow me to provide the public with this specific example, let's use Olowalu. We've all seen a large amount of infrastructure and drainage mitigations that were installed recently near the Olowalu Store. What the

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public may not realize is that those improvements were caused by a private citizen demanding compliance on an expired SMA permit that was issued to the developer nine years prior. The Public Works Director signed off on this subdivision with an incomplete SMA permit. Let's fast forward to today. This litigation involves the very same violation of law by former Public Works Director Milton Arakawa. An oceanfront subdivision signed off with an incomplete and expired SMA permit. Moreover, Corp. Counsel will not explain why they are defending former Planning Director Jeff Hunt's refusal to enforce the SMA permit. Deputy Corporation Counsel, will you please disclose to the public that this developer who walked away from his obligations after making millions of dollars on an oceanfront subdivision is a client of an attorney previously employed by Corp. Counsel and Milton Arakawa. More so, would you please acknowledge to the public that you have received a written declaration from an attorney who is now a per diem judge in Maui County stating that the developer's environmental studies were concealed from this branch of government and from the public by appointed public officials for over a decade. Why is Corp. Counsel protecting the private developers at public expense? They are even going so far as to protect Milton Arakawa. Does everyone here realize how much money Milton Arakawa cost this County in a prior litigation along Palama Drive? I personally object to Mr. Bilberry advising this body in private executive sessions. The Corporation Counsel is a named Defendant in this lawsuit. This Department and Pat Wong gamble with our money to defend highly questionable, if not unlawful, decisions by the Directors. I have complete confidence in Mr. Guzman to lead the litigation committee. I trust in the Council's knowledge and the background of this lawsuit, which also includes Corp. Counsel's unaccounted and previously concealed agreements with private developers that have shifted tens of millions of dollars in subdivision improvements to the citizens of Maui County over the last four decades. On that point I have brought today three file boxes of 21 notebooks including thousands of pages of developer agreements executed by Corp. Counsel over the last four decades which have never been accounted for or collected upon. Deputy Corporation Counsel, please explain to the public today, why these contracts signed by developers involving tens of millions of dollars have never been accounted for in the Budget as revenue back to the taxpayers, and why your Department blocked the legislation to establish a fair system of collection. Also, please confirm that you have performed a conflict of interest check on each and every one of these contracts within your Department and the Administration and made a written disclosure. Oh behalf of my fellow citizens, I demand due process according of laws...to laws and professional ethics. And trusted Members of the Maui County Council, please restore our trust in this government and separate yourself from the Corporation Counsel until they fully disclose all conflicts of interest and professional relationships with the parties named in this lawsuit. The citizens of Maui County are the ones who are paying their continuous litigious rolling of the dice. That's enough already. I believe this Council has an obligation to protect the public by launching an investigation in open public forum with citizen testimony before you allow Corp. Counsel to litigate away our hard earned tax dollars which usually turns out to be a lot of phony posturing in order to protect the guilty. My name is Eric Poulsen. I live on West Maui. Thank you, Mr. Guzman.

CHAIR GUZMAN: Thank you, Mr. Poulsen.

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MR. POULSEN: Thank you, Council.

CHAIR GUZMAN: Is there any other questions that you'd like to pose to the testifier?  
Mr. Carroll.

COUNCILMEMBER CARROLL: Thank you, Chair. Would you be able to submit copies of  
what you have before you?

MR. POULSEN: I certainly could. As you can see, it's going to require quite a few copies, but  
this is google maps of every one of those agreements that were made throughout our  
County in the last four decades.

CHAIR GUZMAN: Mr. Poulsen, you indicated in the beginning of your testimony that you  
were testifying on Item 1(41), but that is the Donenfeld case. Did you want to correct  
yourself?

MR. POULSEN: I would. Yes, sir. I'm sorry.

CHAIR GUZMAN: It's COW --

MR. POULSEN: Yeah, I didn't know the numbers.

CHAIR GUZMAN: --COW-5 --

MR. POULSEN: Yeah, that's it.

CHAIR GUZMAN: --is the Salem case.

MR. POULSEN: Thank you, Mr. Guzman. Correct.

CHAIR GUZMAN: For the record, let it reflect the correction, please.

MR. POULSEN: So, yes, sir. Yeah, we can make copies for you no doubt.

COUNCILMEMBER CARROLL: At the appropriate time.

MR. POULSEN: Thank you, sir.

CHAIR GUZMAN: Thank you. Any other follow up questions that we have? Seeing none,  
thank you very much for your testimony.

MR. POULSEN: Thank you, sir.

CHAIR GUZMAN: Next, please.

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

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CHAIR GUZMAN: Okay. We'll go ahead and ask anyone in the Chambers if you'd like to come down and testify. This is your opportunity to do so. Seeing none, at this time I will close public testimony without objections.

COUNCILMEMBERS: No objections.

CHAIR GUZMAN: Thank you, Members. Public testimony is now closed.

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

**COW-1(41)      LITIGATION MATTERS (SPECIAL COUNSEL AUTHORIZATION:  
                  HARRY DONENFELD V. COUNTY OF MAUI, ET AL., CIVIL 16-00381  
                  DKW-KJM)**

CHAIR GUZMAN: Moving on to the first...thank you, District Offices. Moving on to the first item on today's agenda, COW-1(41), Litigation Matters, Special Counsel Authorization of Donenfeld v. County of Maui, et al. The Committee is in receipt of the correspondence dated July 19, 2016, from the Department of the Corporation Counsel, transmitting a proposed resolution, entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL IN HARRY DONENFELD v. COUNTY OF MAUI, ET AL., USDC CIVIL NO. 16-00381-DKW-KJM," and attaching a copy of the Complaint. The Complaint was filed on July 8, 2016 alleging that Donenfeld was terminated as a Maui County Film Commissioner in violation of his due process rights under the United States and Hawaii Constitutions, breach of contract, defamation, and violations of statutory privacy interests, among other things. The purpose of the proposed resolution is to authorize employment of Kobayashi Sugita & Goda, LLP as special counsel for Alan Arakawa, in his individual capacity, who is named as a Defendant in the Harry Donenfeld v. County of Maui, et al. case for a total compensation not to exceed 75,000. The Committee is also in receipt of a revised proposed resolution transmitted by the correspondence dated August 3, 2016 incorporating nonsubstantive revisions. The Committee may consider to recommend adoption of the proposed resolution, with or without revisions. The Committee also may consider other related action. We have here today with us is Deputy Corporation Counsel, Mr. Brian Bilberry, and he will state an opening statement for the Committee on this matter. You may proceed, Mr. Bilberry. If there's anything that you cannot share in open session, please indicate so and request an executive session at that point. The floor is yours, Mr. Bilberry.

MR. BILBERRY: Thank you, Chair. As the Chair has noted, this is a complaint in Federal Court for wrongful termination, makes ten counts, and names the County of Maui as a Defendant, as well as Mayor Alan Arakawa in his official and personal capacity. And because the Mayor has been named in that dual capacity we are required to either indemnify the Mayor in his personal capacity or obtain special counsel for him arising out of a potential conflict of interest. Again, there are ten counts in the complaint. They range from wrongful termination to defamation, privacy violations, constitutional rights violations, breach of contract, interference with contract relations, breach of the

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implied covenant of good faith and fair dealing, promissory estoppel, negligence, and there's a punitive damages claim. And as you are aware, the case involves former Maui County Film Director Harry Donenfeld. Matter has received quite a bit of media attention. Mr. Donenfeld and his attorneys concurrent with filing the complaint generated more media attention including discussions with a couple of Hollywood gossip magazines and apparently intend to litigate this complaint in a public forum.

CHAIR GUZMAN: Mr. Bilberry, you indicated that you're seeking special counsel for Mr. Alan Arakawa as an individual. Who will be representing Mr. Alan Arakawa as the Mayor in his official capacity? Is that your office?

MR. BILBERRY: That would be our...the Department of Corporation Counsel.

CHAIR GUZMAN: Okay. And can you tell us a little bit about the special counsel that you've recommended for Mr. Alan Arakawa?

MR. BILBERRY: I can. It's the law firm of Kobayashi Sugita & Goda who is one of our panel counsel and is currently representing the Mayor in his individual capacity and a number of other Department Directors and the other matter on the agenda for today, the Salem case. They were extremely helpful in getting the complaint in that case dismissed and they have done an exemplary job in that action and in our view will also provide us with valued assistance in this case.

CHAIR GUZMAN: And all of the I believe the fees are indicated within the resolution?

MR. BILBERRY: They are and Mr. Louie has given us a 10 percent discount on his normal fee.

CHAIR GUZMAN: So, Members. . .

MR. BILBERRY: And if I may just quickly? I will be prepared to discuss just briefly our initial strategy for this case in executive session if you want to have that conversation.

CHAIR GUZMAN: And that would be for the strategy to defend on the official capacity side?

MR. BILBERRY: Correct.

CHAIR GUZMAN: Okay. As the Mayor's representation, not the individual capacity?

MR. BILBERRY: Well, yes.

CHAIR GUZMAN: Okay.

MR. BILBERRY: Essentially, yes.

CHAIR GUZMAN: Okay. Members, do you have any questions that you would like to pose in open session? Seeing none, there's been a request to enter into executive session by



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settlement offer. Mr. Bilberry is the Deputy Corporation Counsel that will advise this Committee and he will present in open session. As advised earlier, Mr. Bilberry, if there's anything that you cannot disclose in open session, please indicate and we will receive your request to enter into executive session.

MR. BILBERRY: Yeah. Thank you again, Chair. Just a quick recap on this case for the Members. The complaint in this matter was dismissed by Judge Kobayashi, Federal District Court Judge. In dismissing the complaint, Judge Kobayashi specifically found that the complaint was in large part incomprehensible, meandering, and that it was what she coined a shotgun pleading. She found that the complaint was intended to overwhelm and basically make it impossible to be able to respond to in an amenable way for purposes of defense. Notwithstanding, Judge Kobayashi gave Plaintiff, Christopher Salem, an opportunity to amend his complaint and to file a motion to seek leave to file that amended complaint. That motion was heard by Magistrate Kenneth Mansfield who found that the proposed amended complaint did not differ in substance and in form from the originally filed complaint and he denied that motion and did not allow Mr. Salem and his attorney to file that amended complaint on the same bases that the original complaint was dismissed. Mr. Salem's been given one more opportunity to try to file an intelligible complaint that the court will accept, and the court has indicated that if he is not able to accomplish that, that the court may very well dismiss his case with prejudice in which case he will not be able to bring those claims again. Pending all this we've received the demand from Mr. Salem and his attorney which I understand is essentially asking for the County to pay him \$2 million and to deed to him two properties, unidentified at this point, from the Sand Hills area. I'm prepared to discuss Corp. Counsel's recommendation on this settlement in executive session and I would request an executive session to do so.

CHAIR GUZMAN: Okay. Members, any questions that you may have in open session? Seeing none, there has been a request to enter into executive session by our Corporation Counsel. The Chair will entertain a motion to convene executive session pursuant to Section 92-5(a)(4) of the HRS to consult with our legal counsel on questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of this County, the Council, and this Committee.

VICE-CHAIR CRIVELLO: I so move, Chair.

COUNCILMEMBER WHITE: Second.

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

COUNCILMEMBERS: Aye.

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



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

**NOES: None.**

**ABSTAIN: None.**

**ABSENT: None.**

**EXC.: Councilmembers Baisa, Couch, Hokama, and Victorino.**

**MOTION CARRIED.**

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

CHAIR GUZMAN: Thank you, Members. We will recess at this point to set up the Chamber for executive session. . . .(gavel). . .

**RECESS: 1:56 p.m.**

**RECONVENE: 2:46 p.m.**

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

**COW-1(41) LITIGATION MATTERS (SPECIAL COUNSEL AUTHORIZATION: HARRY DONENFELD V. COUNTY OF MAUI, ET AL., CIVIL 16-00381 DKW-KJM)**

CHAIR GUZMAN: Pursuant to our executive session and the recommendations of Corporation Counsel regarding COW-1(41), the matter of special counsel authorization of Harry Donenfeld v. County of Maui, et al., Civil No. 16-00381 DKW-KJM, the Chair will entertain a motion to recommend adoption of the revised proposed resolution entitled "AUTHORIZING THE EMPLOYMENT OF SPECIAL COUNSEL KOBAYASHI SUGITA & GODA, LLP IN HARRY DONENFELD V. COUNTY OF MAUI, ET AL., USDC CIVIL NO. 16-00381 DKW-KJM."

VICE-CHAIR CRIVELLO: So moved, Mr. Chair.

COUNCILMEMBER WHITE: Second.

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

COUNCILMEMBERS: Aye.

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

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

**NOES: None.**

**ABSTAIN: None.**

**ABSENT: None.**

**EXC.: Councilmembers Baisa, Couch, Hokama, and Victorino.**

**MOTION CARRIED.**

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

CHAIR GUZMAN: Thank you, Members.

**COW-5 STATUS: CHRISTOPHER SALEM V. ALAN ARAKAWA, ET AL., CIVIL 15-00384 LEK-KSC**

CHAIR GUZMAN: Moving on to the next item, COW-5, Christopher Salem v. Alan Arakawa, et al., Civil No. 15-00384 LEK-KSC, pursuant to our executive session and the recommendations of Corporation Counsel, without objections, the Chair shall defer this matter.

**COUNCILMEMBERS VOICED NO OBJECTIONS.** (Excused: GCB, DC, RH, and MPV)

**ACTION: DEFER PENDING FURTHER DISCUSSION.**

CHAIR GUZMAN: Thank you. The item is therefore deferred. Members, this will conclude our items on today's agenda. Thank you very much and have a great weekend. . . .(gavel). . .

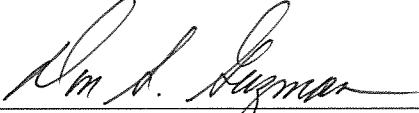
**ADJOURN: 2:48 p.m.**

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APPROVED:



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DON S. GUZMAN, CHAIR  
Committee of the Whole

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Transcribed by: Clarita Balala