

County of Maui Water
Supply

BOARD OF WATER SUPPLY
COUNTY OF MAUI
SPECIAL MEETING

Taken at the David Trask Building, Conference Room 207,
Wailuku, Maui, Hawaii, commencing at 9:03 a.m. on April 18,
2001.

REPORTED BY: GLORIA T. TAVARES, RPR/CSR #262

ATTENDANCE - Board of Water Supply Special Meeting,
April 18, 2001

Members present:

Elmer Cravalho, Chair
Clark Hashimoto
Mike Nobriga
Jonathan Starr
Orlando Tagorda
Adolf Helm
Howard Nakamura
Kent Hiranaga

Staff present:

David Craddick, Director
George Tengan, Deputy Director
Fran Nago, Board Secretary

Corporation Counsel:

Howard Fukushima, Esq.
James Takayesu, Esq.

Others present:

Sally Raisbeck
Peter Stolle
Stephanie Ahina
Ron Richmond
Jock Yamaguchi

Glenn Kosaka, Esq.
Tom Pierce, Esq.
James Takayesu, Esq.
Richard Minatoya, Esq.
Mike Tanoue, Esq.

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TRANSCRIPT OF PROCEEDINGS

CHAIRMAN CRAVALHO: The meeting will please come to order. The special meeting of the Board of Water Supply called at this time in this place for a limited consideration of the items listed on the agenda, which has been made available to members of the board and public. Mr. Starr?

MR. STARR: Point of order. I would like to raise a question with corporation counsel, whether we're procedurally correct to have a continuation of the officers or whether we should have temporary officers. I have no problem with the present slate serving as temporarily; I just want to be sure that we're procedurally correct, since the term seems to have expired.

MR. FUKUSHIMA: If I may, Mr. Chairman. We believe that the existing officer -- the existing chair and vice-chair should carry on until this board elects replacements for them. It would be appropriate for the present chair to conduct this meeting.

CHAIRMAN CRAVALHO: Any questions? If not, we'll proceed. The chair has absolutely no reluctance of having someone else come here. I would be very pleased with that. Shall we then proceed with the business before this party. Call the roll, Ms. Nago.

MS. NAGO: We have Chairman Elmer Cravalho. Board members Clark Hashimoto, Michael Nobriga, Peter Rice, Jonathan Starr, Orlando Tagorda, Adolf Helm, Kent Hiranaga, and Howard Nakamura. The staff is David Craddick, the director; deputy director George Tengan.

From corporation counsel is James Takayesu, Howard Fukushima. We have Richard Minatoya, we have Sally Raisbeck, Tom Pierce, Mr. and Mrs. Peter Stolle, we have Glenn Kosaka,

Ron Richmond, we have Jock Yamaguchi and we have Michael Tanoue.

CHAIRMAN CRAVALHO: Mr. Craddick, do you want to introduce our new board member?

MR. CRADDICK: Kent Hiranaga is our new board member. I think he has introduced himself to everybody except you, our board chair, Elmer Cravalho.

CHAIRMAN CRAVALHO: We have met before.

MR. HIRANAGA: Yes.

CHAIRMAN CRAVALHO: Shall we then proceed with the consideration on the agenda. Item 3, discussion and possible actions on the variety of issues in question. It's the position of the chair that we shall approach and take action on each item separately. A decision being made. First matter before this body deals with the approval of outside counsel in Thomas Craig vs. County of Maui case. Mr. Starr?

MR. STARR: Mr. Chair, I would like to beg your forbearance on one item regarding the order of the agenda. I know that we have members of the public here and I know some of these items will probably be discussed in executive session, and I would like to request, if possible, if we could put the executive session items, if all of them are not going to be executive session, after anything that will be in open session so the public would be able to participate and not waste their time.

CHAIRMAN CRAVALHO: Point well taken. However, whether a question goes to the executive session status or not is dependent upon the decision of this board. We have that question before this board right now with respect to this question. And if we do go into executive session based on the decision of the board, then that question is moot. It goes to executive session.

And if we move it accordingly and as expeditiously as possible, we can make haste very rapidly. What's the pleasure -- perhaps we should make reference to corp counsel with respect to this matter. Okay -- hold on one moment --

Ms. Raisbeck?

SALLY RAISBECK: May the public testify on any or all matters?

CHAIRMAN CRAVALHO: The agenda does not provide at this particular stage for participation by the public. If the decision is made to go into executive session, it's moot. The position of the chair is if it doesn't go into executive session, you can go ahead. You'll be allowed to testify; I have no problem with that. Do you wish to testify on the first item?

SALLY RAISBECK: No, on the third.

CHAIRMAN CRAVALHO: On the third, fine. Shall we then return to the consideration of the first item on the agenda. Mr. Takayesu?

MR. TAKAYESU: The first agenda on the item is discussion of approval of a request for outside counsel in a federal civil rights action filed by Thomas Craig vs. County of Maui. We're requesting to meet with the board in executive session. I don't believe any member of the public here is here who has an interest in this particular item.

The other two items we are also going to be requesting executive sessions, but I believe there are people here who are interested in those two items.

CHAIRMAN CRAVALHO: What's your request?

MR. TAKAYESU: In terms of not having the public wait unnecessarily, item 1 is something that you could probably handle later on in the meeting. Because I see the people here are interested in both the Stolle and the Maui Tomorrow civil actions.

CHAIRMAN CRAVALHO: Is it your recommendation, then, Mr. Counsel, that this is going to be discussed in open session and doesn't have to go into executive session?

MR. TAKAYESU: In the Thomas Craig matter?

CHAIRMAN CRAVALHO: Yes.

MR. TAKAYESU: I believe it should be in executive session. This is a lawsuit that has been pending for some time. We have never had an opportunity to discuss the nature and status of this case with the board members.

CHAIRMAN CRAVALHO: Mr. Starr?

MR. STARR: I move that we table item 3A until after we have dealt with items 3B and 3C.

CHAIRMAN CRAVALHO: The motion is premature and slightly out of order. If we can dispose of this question right away, the first item. Right away. It is the request of the corp counsel that we proceed to authorize an executive session. Is that not correct?

MR. TAKAYESU: That's correct, for Thomas Craig.

CHAIRMAN CRAVALHO: Is there a motion that this body goes into executive session? Hearing none, the motion has failed. This matter to go into executive session has not been approved.

Item No. 2, discussion and possible action regarding the Stolle case. Mr. Starr?

MR. STARR: Mr. Chair, I don't believe we have finished item 3A. Can we see if we can at least have some background discussion on it?

CHAIRMAN CRAVALHO: We'll get into it at the appropriate time, and it's very shortly. It's not taken out of order. Do it in an orderly basis and we're going to get things done very, very rapidly.

Item No. 2, then, with respect to the Stolle case. What's the recommendation and the request of the corp counsel?

MR. TAKAYESU: In this item, we have received a settlement proposal or demand from the Stollers. We would like to go ahead and discuss the settlement proposal in executive session.

In addition, there's an issue as to the retention of outside counsel based on this ODC, Office of Disciplinary Counsel, that we could not go ahead and represent parties in

this case without violating ethical code. Again, because of the nature of our discussions, we are requesting that this matter be discussed in executive session.

CHAIRMAN CRAVALHO: We heard the request of corp counsel. Any discussion on this particular question?

MR. PIERCE: Mr. Chair, I would like an opportunity, before you go into executive session, to just briefly present our case to the board.

CHAIRMAN CRAVALHO: We'll be getting into a substantive discussion.

MR. PIERCE: It won't go within --

CHAIRMAN CRAVALHO: Excuse me, not a substantive discussion but a discussion of the substantive provisions, because the discussion itself may not be substantive at all.

MR. PIERCE: Let me put it this way. I want to make sure that the board understands what has transpired over the last year in this case. I think it sets a good backdrop for the discussion that the board will be entering into in executive session.

CHAIRMAN CRAVALHO: Mr. Starr?

MR. STARR: I would like to request that we be allowed to hear the testimony from counsel.

CHAIRMAN CRAVALHO: Is there a second?

MR. NOBRIGA: Second.

CHAIRMAN CRAVALHO: You heard the motion duly made and seconded that counsel -- the motion has not been put to a vote yet. Don't be too precipitous. The question -- one moment, let's finish the motion. The motion is to allow the discussion prior to the decision of going into executive session or not. Any discussion? Mr. Starr?

MR. STARR: I think that no matter what the outcome

of our vote on executive session, it is our obligation and the public's right to be allowed to make presentations to us and that it is our duty to be receptive to those presentations.

CHAIRMAN CRAVALHO: The chair wishes to commend Mr. Starr for his position. The chair is also very hopeful that this will be a consistent position all the way through. With respect to the right of the public to know and with respect to not going into executive sessions unless and until they are imperatively demonstrated to be necessary in the public's interest.

So the chair has no objection. The chair is very supportive of public discussion and public review of all matters at all times. Are you ready for the question?

MR. STARR: Can you restate the motion?

CHAIRMAN CRAVALHO: The motion is to allow the gentleman to make his presentation prior to a decision on the executive session. That's the motion. Any further discussion? If not, ready for the question? All in favor say "aye."

(A chorus of ayes.)

Opposed?

(No response.)

Carried. It's all yours, my friend.

MR. PIERCE: Thank you. Mr. Chair, members of the board, my name is Tom Pierce and I'm here on behalf of Peter Stolle, who is present along with his wife Stephanie Ahina. We have one new board member present, but I think that what I'm going to do is not spend a lot of time on the substance of the case except to mention just the most brief details that all of you, I think, are very familiar with.

Mr. Stolle came to the board in October of 1999 and was granted a water meter, and subsequent to that he filled out an application at the Department of Water Supply and never received that water meter. And when it became impossible for him to get further with it, he was forced to file a lawsuit,

and he filed a civil rights action claiming that the Department of Water Supply, as well as the director of the Department of Water Supply, had violated his constitutional rights by taking away something that had been given to him by the board.

And we feel that this is a very strong case because the board clearly has the power to make a decision on something like this, such as the issuance of a water meter. So the bottom line is we have got a good case and we're prepared to go forward if that's what it takes.

However, today, and as we have been for over a year now, we have been in a posture where we are very amenable to talking to the board and to the Department of Water Supply about settling this case. And we have presented as of last year a settlement proposal and you are seeing an amended version of that today, and I think that it is something for the board to consider.

Number one, as I mentioned, we do have a very good case. The second issue is just what the cost of this case is going to be to the board and the county if they continue to go forward. And the issue, which the corporation counsel will be discussing, is the fact that at a minimum there's going to be the need for outside counsel to represent the Department of Water Supply and the director. That's at a minimum. However, there's also the possibility that --

CHAIRMAN CRAVALHO: You are getting into a discussion of the merits and arguments being presented; therefore, separate and distinct from a review of the overall.

MR. PIERCE: Mr. Chair, I respectfully disagree with you --

CHAIRMAN CRAVALHO: One moment --

MR. PIERCE: The outside counsel has nothing to do with the merits of the case.

CHAIRMAN CRAVALHO: One moment. You are not before the judge right now. The question with respect to the hiring of outside counsel is not as simple as you have presented it to be, because then it will automatically lead into a discussion of the merits of the situation. The chair alluded to this in the past.

Since you have opened up the subject, the chair

feels at liberty to repeat what the chair has said in the past in open session. Number one, the Board of Water Supply made a decision on a unanimous basis for a meter for Mr. Stolle. The director refused to honor the decision, which in the chair's opinion is legally sound of the board's capacity to make this decision.

In the light of this refusal, Mr. Stolle has, in my judgment, just about no alternative but to seek legal remedy caused by the director's refusal to implement the decision of the board. Those are the facts.

Now we are being asked or we may be being asked to hire independent counsel to defend the director in his defiance of a legitimate order of the board. And that's the bottom line. That really is the bottom line. We're going to authorize legal counsel to represent the director in his defiance of an appropriate action of the board. Change your role.

MR. PIERCE: Sorry?

CHAIRMAN CRAVALHO: Change your role.

MR. PIERCE: Role?

CHAIRMAN CRAVALHO: R-O-L-E. With respect to this question of independent counsel, yeah, separate and distinct from the justification in the chair's judgment of Mr. Stolle's request. And I think we come up with a different conclusion as to the most expeditious manner.

If a request is coming before this board to discuss a settlement, it is a settlement that's being proposed by Mr. Stolle through you and on this board to make a decision of approval or disapproval. It will have no bearing whatsoever with respect to the activities of the director. It is a settlement, if approved, between this body and Mr. Stolle and you. The hiring of separate counsel, it can be done by the vote, the majority of this body. I acknowledge that.

But for whatever it is worth, that will be legally challenged, as to the -- whether this is an expeditious and proper expenditure of public funds. If you want to have a can of worms, my friend, you will have it. In the opinion of the chair, all unnecessary. If we focus our attention on the basic question: Was the board acting within its authority authorizing a meter? Which I believe is correct. Was this

done? No. And this refusal has precipitated this lawsuit.

And we're going to authorize the expenditure of public money to defend the director in his defiance of the board or in his defiance of a legitimate function of the board. Let's face the facts for what they are and let's face the conditions for what they are, and let's go and resolve this matter once and for all. It's legitimate. Very legitimate. It should be done. Agreed?

MR. STARR: Mr. Chair, while I share many of your feelings about the facts of the matter, I would like to allow the courtesy to allow --

CHAIRMAN CRAVALHO: I have no problem. Stay away, that's the request of the chair, stay away from the question of separate counsel because that's a red flag.

MR. PIERCE: Mr. Chair --

CHAIRMAN CRAVALHO: And it goes beyond the explanation of the background. You are getting into an area where you are talking of possible conclusions and resolutions, which is not the purpose for which you were recognized. So let's stick to the facts.

MR. PIERCE: Mr. Chair, I think that you've presented the case very well, and I appreciate that. We would agree totally with -- that's exactly what's before the board in terms of the issue.

The only thing about the outside counsel is that you are here to decide, like as you mentioned, what is the most expeditious manner to proceed. And I think you are correct also in stating that if, in fact, settlement does not occur, there will be an opening of a can of worms, because the issues regarding outside counsel will be complex.

It won't just involve the director, whether there's representation needed for the director, but also the possibility of representation for the board itself because of the corporation counsel's conflicts. And because of the way that you presented it, I will leave it at that unless any of the members of the board have questions for us.

CHAIRMAN CRAVALHO: I think that's long overdue.

MR. TAGORDA: May I ask a question? Mr. Pierce, when was this lawsuit brought up against Mr. Craddick? I don't see the motion. How can we make action regarding this case? Have any of my colleagues seen that lawsuit brought against Mr. Craddick? None of you?

MR. PIERCE: Mr. Tagorda, the only way that we can present this information to the board is through your counsel, corporation counsel. And if corporation counsel has been receiving all of the complaints and all of the settlement offers, there have been, I believe, three different settlement offers that have been presented to corp counsel.

The most recent one was March 27, 2001. So it -- if needed, I can make sure that copies are provided to the board members so they have an opportunity to see --

MR. TAGORDA: I would like to see those proposals.

MR. STARR: Has this been --

CHAIRMAN CRAVALHO: Let's not start having individual conversations. Yes, Mr. Starr?

MR. STARR: Question for the chair. Has the lawsuit been brought through -- has the chair seen the files?

CHAIRMAN CRAVALHO: The chair has not seen -- the chair's recollection -- the actual files. The chair is aware of discussions that have been going on. The chair is of the understanding that the reason for this particular request for executive session is to review the entire matter officially, to bring to the attention of the entire board officially.

MR. STARR: I feel it's been -- as board members, we should have seen the file and set an earlier date. I, for one, like to review this stuff.

CHAIRMAN CRAVALHO: So noted. Shall we proceed? Mr. Pierce, any additional matters to come before the board?

MR. PIERCE: Nothing further, Mr. Chair.

CHAIRMAN CRAVALHO: The question before this body is whether we go into executive session on this matter or not. Mr. Takayesu?

MR. TAKAYESU: In the Stolle matter, we have received a letter from Mr. Pierce that contains his settlement offer or demand. And again, we would like to have the opportunity to discuss this matter fully with the board in executive session in terms of our view of the merits of his case and make recommendation as to whether or not the settlement demand should be accepted or modified.

CHAIRMAN CRAVALHO: What's the pleasure of the board?

MR. STARR: Could I ask a question?

CHAIRMAN CRAVALHO: Yes.

MR. STARR: What would be the harm in having this discussion in open session?

MR. TAKAYESU: Well, I think -- you know, this matter is in litigation and part of our responsibility of being legal counsel to the board and commission is to be able to deal with you as attorney/client in confidence. If we can't do that, then we really can't do our job. I mean, this is about the only board that I know of that they don't want to meet with us in executive session so we can be very candid on the merits or demerits of this lawsuit.

MR. STARR: I very much want to hear what you have to say and I want to hear it candidly; but what I wonder is if it really creates harm to our case if it's done in open session or not? To me, that's the question. Is there a compelling reason? I need to see compelling reason before I would like to go into executive session.

MR. TAKAYESU: Well, this particular matter is very unique in a sense that we already received instructions from the Office of Disciplinary Counsel that we cannot represent either the board or Mr. Craddick because you folks have taken opposite positions and you are both our clients. And that's

one reason I do not want to -- I feel it's necessary to discuss this case in executive session.

When you have this type of conflict, we can't continue to be advisors to a certain extent, but the litigation is a different type of function. And again, because the ODC has already given us instructions -- well, I don't want to get in trouble with the disciplinary board. That's a big issue.

CHAIRMAN CRAVALHO: The chair would request the consideration of the members of the board for the chair to -- I don't want to use the word "respond" -- but to amplify or clarify since the chair has been one of the primary opponents of executive sessions. Because what the record has demonstrated is that what is said in a regular board meeting and what is said in the executive session are two different things. Material coming from your office, Mr. Corp Counsel.

The chair also wishes to clarify that when the chair tried in previous meetings to discuss and/or introduce into a discussion the contents of the executive session, which to point out to members of this board, if you recall, all copies of those so-called minutes had to be collected back, and we could not be referring to the contents of those executive sessions. That's the record.

So if there is a reluctance on the part of the chair to go into executive session, where the office of corp counsel as personified by you, it is clear why there is that hesitancy. That there has been a consistent differing pattern of operations over a period of years.

The chair would also want to emphasize or to make public, which a chair would be, I believe, at a loss if we went into executive session, that while the director has precipitated this case and this appeal through the legal processes, a meter has been granted to Mr. Stolle. Whether it is a temporary or permanent, the fact is a meter has been granted to Mr. Stolle. That's my understanding. And it is also my understanding that this has been done with the approval of your office.

And when a question was raised by the chair of you, sir, on what authority was this being done, your answer to me was, The authority of the decision of the board was originally to give Mr. Stolle that meter. Emphasizing the legality of the actions of this board.

Now, if we wish to make public a discussion of the

issues, let's do so. And if us in our wisdom or lack of wisdom are in error, let it so be pointed out clearly and concisely. And if this does require a court decision, so be it. We have been led many times inappropriately, to put it politely. I think you know that.

MR. TAGORDA: Mr. Chairman, if I may.

CHAIRMAN CRAVALHO: Yes, Mr. Tagorda.

MR. TAGORDA: While I respect your views very much on opposing into going into executive session, but here we have corporation counsel that is representing the board. I myself is part of that decision made on the Stolle case --

CHAIRMAN CRAVALHO: Mr. Tagorda, the chair is wide open for you to make a motion for us to go into executive session.

MR. TAGORDA: Just to make sure that I understand fully well, all the settlement proposals that corporation counsel has discussed with the Stolle lawyer --

CHAIRMAN CRAVALHO: The chair would recognize the motion.

MR. TAGORDA: I move that we go into -- that this board convene in executive session pursuant to Hawaii Revised Statute 92-5(a) in order to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities.

CHAIRMAN CRAVALHO: You heard the motion, that this board approve going into executive session for that particular purpose. Is there a second to the motion?

MR. STARR: I would second it.

CHAIRMAN CRAVALHO: Yes, Mr. Starr, you've heard the motion duly made and seconded that this board moves to go into executive session for review of this particular question and this particular matter. All those in favor of going into executive session will respond by saying "aye" and those opposed will say "no." All in favor say "aye."

(A chorus of ayes.)

Those opposed? The chair opposes. And as the chair advised corp counsel, the chair will not be attending the executive session. The chair will be seeking opportunities to have whatever discussed become public. Shall we go on to item No. 3.

MR. STARR: Mr. Chair, just to clarify. We did have a motion, but we'll proceed with that matter after item 3; is that correct?

CHAIRMAN CRAVALHO: No, the motion was that we go into executive session and we will implement executive session after we get through discussing item No. 3.

MR. STARR: Okay.

CHAIRMAN CRAVALHO: We're up to item No. 3.

MR. NAKAMURA: Mr. Chairman, I'd recuse myself on discussion of item No. C.

CHAIRMAN CRAVALHO: So noted. Any other requests for recusing?

(At which time Mr. Nakamura leaves the room.)
Mr. Tagorda?

MR. TAGORDA: I will not recuse myself.

CHAIRMAN CRAVALHO: Okay, fine. Item No. 3. What's the pleasure of the board?

MR. STARR: To hear testimony first.

CHAIRMAN CRAVALHO: We'll be able to hear testimony first, if that's the decision of the board. Any discussion on the item? if not, the chair would respect and receive a motion to go into executive session, if that's the desire of the board.

SALLY RAISBECK: Mr. Chair, I would like to give public testimony if that's acceptable.

CHAIRMAN CRAVALHO: Absolutely. Yes.

MS. NAGO: Sally, you need to come up here so she can hear you.

SALLY RAISBECK: My name is Sally Raisbeck. I live in Wailuku. And I have a question, a factual question as to whether the negotiating committee is still in existence or whether it was dissolved when the board received the report of the negotiating committee last month. Is there still in existence the negotiating committee that existed prior to receiving the report?

CHAIRMAN CRAVALHO: The chair will respond to that. That becomes a legal question. If there's no objection, we'll refer to corp counsel's office for a response back to us hopefully by the next board meeting which will be the 26th of this month.

SALLY RAISBECK: I would also like to make a comment on the suit by Maui Tomorrow. I will not go into the issues because I'm sure these will be very thoroughly threshed out. But I would like to repeat what I said on the 20th, that I found the report of the negotiating committee very surprising. Because I have such respect for Bob Takitani, and I know he is a very honest person, and yet the report made a number of statements that were factually incorrect about what the proposed settlement agreement included, and it simply was not in the settlement agreement.

I just wanted to have on record the perception of mine that I cannot understand how Mr. Takitani set his signature on a document that contained so many inaccuracies. Thank you.

CHAIRMAN CRAVALHO: For the record, the chair -- thank you very much. No comments with respect to you. The report was a transmittal to this board to be acted upon by this board one way or the other. That's with respect to the report. If that report is voted down at any time, then the question is moot. Then there is nothing before the board. As the chair has indicated in the past, the chair would have some difficulty as it relates to the proposed

agreement. Great difficulty separate and distinct from everything else.

MR. STARR: Perhaps it might be proper to file at some point in the future, but that's not on the agenda today. Before we go into the question of whether we want to have executive session, I would like again to understand if, and if so, what are the compelling reasons why we should discuss this matter in executive session and what harm will come to either us or the public, especially the public, if we discussed it in open session.

CHAIRMAN CRAVALHO: It is the suggestion of the chair that inasmuch as we're going to be having a regular board meeting in the next several days, that this particular question be placed before the board and thereby eliminating any need at this date at this time to going into executive session.

And if at the time that this particular matter is presented to the board, it is voted down, that's the end, or it's filed indefinitely, that is the end. Corp counsel's office -- that's one of the reasons why I retained my own independent counsel on this particular question.

I have been advised by corp counsel this is precisely the reason why we want to go into executive session. The chair continues to oppose executive sessions. Mr. Starr?

MR. STARR: I would like to have a report from corp counsel on this matter; but I personally don't feel a compelling need, or certainly as has been presented, going into executive session.

CHAIRMAN CRAVALHO: What's the pleasure of corp counsel?

MR. TAKAYESU: First of all, what the agenda item C is not -- we're not here to discuss whether or not the proposed settlement agreement is the agreement or not. What's on the agenda is the lawsuit. That's something that's there irrespective of what the board may do.

We were able to obtain an extension to April 30th from Mr. Hall so we could go ahead and file appropriate answers to the complaint. We asked him to give us that extension so we would have an opportunity to meet with the board, and you are our client, so we can discuss this before answering.

If you don't want to discuss it, then we'll just go ahead and answer it with the understanding that you don't really want to meet with us.

Again, this is an attorney/client relationship, we would like to go ahead and discuss with you the lawsuit in private as authorized by the Sunshine Law, and also as recognized by the Hui Malama Aina decision of the courts.

CHAIRMAN CRAVALHO: Mr. Corp Counsel, what violence, if any, will be committed if the decision of going into executive session on this date is delayed until the next board meeting?

MR. TAKAYESU: It will probably give us less time. We can go ahead and prepare, if you want, we can start to prepare an answer and then present it to you at the next meeting. Again, the next meeting is on the 26th; the answer is not due until the 30th.

CHAIRMAN CRAVALHO: What is there to preclude you from preparing a response and presenting it to the board at the next meeting?

MR. TAKAYESU: I was suggesting that as another option if you don't want to deal with this issue or item C at this meeting.

CHAIRMAN CRAVALHO: Wouldn't it possibly be more appropriate and staying within the time limitations on the 30th for response to the court?

MR. TAKAYESU: We can do it either way. But because we had this meeting today, we wanted to be able to go ahead and do it in this matter, meet with you first, then prepare the draft, and then be able to file it within the time frame.

MR. STARR: Mr. Chair, I'm fine with preparing some paperwork, but I would like to get as much of a presentation as possible in open session today. I would like to understand what the ramifications of this are. I don't think by having a briefing about this we're really giving anything away or harming our position. I would just like to have an understanding of what this means.

MR. TAKAYESU: Harming your position, I don't know what your position is. It doesn't seem like the --

MR. STARR: Well, without having taken a position, we're looking -- I'm looking at counts to explain about what this lawsuit means and what the ramifications of it are. I don't understand it myself.

MR. TAKAYESU: In generalized terms?

MR. STARR: Yes.

MR. TAKAYESU: I can do that. In terms of the complaint, they are alleging violations of the Sunshine Law. This is Chapter 92 which governs and is the basic law as to how administrative boards and commissions are to operate in the State of Hawaii.

The general rule is that all matters shall be held in open session, the public has a right to participate, have meaningful participation prior to the decisions being made. There are exceptions to the open meeting requirements which includes committee set up to conduct negotiations.

Again, because of the nature of negotiations the lawsuits made, the statutes recognize that certain things are appropriately done in executive sessions or without public participation. Of course, the final decisions have to be in an open setting. The complaint indicates or alleges that the Sunshine Law is violated and it was done willfully.

What remedies they can seek is to have anyone who has willfully violated the Sunshine Law to be removed from office. And also to avoid any actions that were taken in violation of the Sunshine Law. The complaint also cites to the Public Trust Doctrine that has been recognized by the court recently in the Waiahole ditch case as it applies to water resources. I believe it's about a 168-page decision; it's a very comprehensive Supreme Court decision.

But my understanding that the thrust of the lawsuit is focused on the Sunshine Law violation issues or allegations. In general, that's what the lawsuit is and that's pretty much a part of the public record, because the complaint is filed with the court.

MR. STARR: I have a question.

CHAIRMAN CRAVALHO: Yes, Mr. Starr.

MR. STARR: What's the criteria for willful violation? Is there a legal criteria for that?

MR. TAKAYESU: To me, that state of mind is one of the oddball state of minds. You usually deal with negligent recklessness, intentional and every once in a while they throw in these statutes, or for case law something short of that like willful. But I think the closest type of state of mind would be intentional.

So if you are simply reckless in how you acted, that would not be willful. And that's the type of issue that might be a jury-type question, where you give them a definition of willful, and based on the facts the jury will decide whether or not an officer of the county or state had willfully disregarded the law.

When you have these terms, they are not something where you can apply with mathematical precision. You look at evidence, and then the jury draws inferences from the evidence presented to find a fact.

CHAIRMAN CRAVALHO: Any further discussion?

MR. TAKAYESU: Again, we can go ahead and prepare what we believe is to be an appropriate answer and discuss it with you on the 26th. Again, we did request the 30th, an extension to the 30th, knowing that you would be meeting on the 26th; but we wanted to meet with you earlier to give us more time to be sure we can answer in a way that would be consistent with your position.

CHAIRMAN CRAVALHO: We'll face that problem if and when it reaches us. It appears it might behoove us to look into the wisdom and justification for initiating preparation and handling it accordingly.

We have a chance on the 26th -- they are about to review it to see whether we agree or disagree and take whatever action at that time with the board, and then go into executive session and they can do so at that time, but there would be something positive in terms of a response before us.

MR. STARR: What would be the mechanism for us saying that? I assume we can see that response in open session.

CHAIRMAN CRAVALHO: You stick with me and I will stick with you, yeah, most of the time we may have open session.

MR. STARR: Doesn't sound like that.

CHAIRMAN CRAVALHO: There's nothing wrong with going into executive session as long as the participants do not try to hide behind it afterwards. And this has happened, it really has happened. And it has really happened with respect to Mr. Stolle. And this has been going on over a period of years. Hey, let's come out in the open; let's see what the facts are. But there's nothing inimically wrong with executive session.

There is something inimically wrong with executive sessions when those sessions are used to circumvent and to offer tidbits of knowledge which we are precluded from using at a subsequent time. It's not fair to the public. I may feel differently about things when I sit over here, damn it, I got to represent the best interest of the public. If I cannot do that fairly, I get out. Make sense?

So would it be all right, Mr. Corp Counsel, if you prepare a response and get it in the hands of the members of the board in sufficient time; and if necessary, at that time we'll exam the necessity for going into executive session at that time on this particular matter?

MR. TAKAYESU: We'll try to go ahead and draft up an answer, and I'll assume that you received materials before the next meeting. We'll stamp it confidential so that you understand that it's not something I want to see on TV, and we'll have a chance to talk about it.

CHAIRMAN CRAVALHO: No further discussion on the matter, so be it. It remains in that matter we do not go into executive session. You'll prepare the proper responses being brought to the members of the board in sufficient time before our next meeting. Reserving the rights of the board at that time to go into executive session if it so desires. No

objection? So ordered.

We're back to item No. B. You want to have a discussion on item A? I have no problem with that. I think Mr. Starr raised a question on item A. The presentation. What the facts are with respect to that particular question, you'll handle it, Mr. Corp Counsel?

MR. HIRANAGA: Mr. Chair, may I request a short recess?

CHAIRMAN CRAVALHO: Recess has been asked for. No objections? So ordered.

(A recess was taken.)

CHAIRMAN CRAVALHO: Are we all back? The meeting will come to order. The question before this body at this time was the discussion of the Thomas Craig situation. Are there any further questions?

MR. RICE: Mr. Chair, we had a meeting quite a while ago with regard to Thomas Craig, and I thought it was being settled in favor. Is that a good recollection?

CHAIRMAN CRAVALHO: Mr. Craddick?

MR. CRADDICK: If you remember on the very bottom of that presentation that I gave to the board, I said that he possibly will appeal that action and he may file another action. What he has done is filed another action, a federal action. The other one was in state court.

MR. STARR: Can we have a briefing on that action and see the filing and presentation on it?

CHAIRMAN CRAVALHO: Mr. Corp Counsel?

MR. TAKAYESU: The federal case is different from the state court. The state court, the county prevailed Mr. Craig and his counsel have appealed that case, so it's before the Supreme Court. In terms of the timing, it will take several years before the Supreme Court will come down with a decision either affirming or reversing the trial court's decision.

We do have a motion pending in federal court stating the federal court proceeding pending resolution of the state appeal. That's going to be heard next week. At this point if the motion is granted, the federal case will be placed on hold for the next several years.

The federal case dealt with the termination of Mr. Craig. The state court action did not cover his termination. He is alleging that his civil rights were violated; that he was perceived as somebody who was entitled to protection under the Americans With Disabilities Act; and that his constitutional rights were violated.

In this type of case, we have generally retained outside counsel to represent the individual county officer, our office represents the county agencies as part of the municipal employer. And the reason for that is the claims are separate. The officer can be found liable, municipal liability might not be proved.

In this case, there's also a prayer for punitive damages. Under the 1983 actions, municipal corporations are not liable for those type of damages, that would be something personal to the individual named officer. In this case it would be Mr. Craddick. The Office of Disciplinary Counsel has indicated that separate counsel is required unless the municipal government is willing to indemnify the officer for that type of damages.

And so again, because of the complex nature of these type of cases and potential conflict of interest that could arise in the future, we had generally tried these civil rights cases with the associated counsel, special counsel who represents the interest of the individual.

CHAIRMAN CRAVALHO: Any further questions? Mr. Rice?

MR. RICE: The action you filed will be ruled on when?

MR. TAKAYESU: I believe it's Monday.

MR. RICE: Monday.

MR. TAKAYESU: It will be argued on Monday and the state courts are fairly quick. So within two weeks we would get a written order.

MR. RICE: If we prevail in that action, then what is the effect of that on this suit?

MR. TAKAYESU: This case would remain in limbo for some time. My feeling is that the court may -- because there is a pending related state action, rather than set a trial date for this case, might put that off and permit the parties to continue certain discovery activity in the near future. It's generally best for the parties to conduct discovery when the information is still fresh.

You might also -- the big cost of these type of cases comes when you start to hire experts and depose experts. So that portion of discovery might be held in abeyance for a while. So we can go ahead and do a lot of work in terms of working up the cases without starting to expend a lot of money.

CHAIRMAN CRAVALHO: Any other questions?
Mr. Tagorda?

MR. TAGORDA: Yes, sir, thank you. So the reason why you are requesting this board for an outside counsel, Mr. Counsel, is that you have -- because of the change in venue of this case, or you don't have -- your department has no ability to try this case?

MR. TAKAYESU: We could. If the board is willing to indemnify Mr. Craddick so that whatever the judgment or the verdict comes out, the county is willing to cover the punitive damages, any potential punitive damages at this point, then we could go ahead and try the case ourselves.

MR. TAGORDA: Because if I remember right, there was one lawyer from your office who handled this case, Thomas Rack.

MR. TAKAYESU: Thomas Rack.

MR. TAGORDA: Did he quit or resigned?

MR. TAKAYESU: He is no longer with the office.

MR. TAGORDA: So no one in your office can handle this case and continue on?

MR. TAKAYESU: No, I said we can. But there's a conflict of interest unless the board is willing to, at this point, agree to indemnify and hold Mr. Craddick harmless for any type of damages that could be awarded in this case. It's more an issue of conflict of interest in this case.

CHAIRMAN CRAVALHO: Mr. Starr?

MR. STARR: There are other cases where I would not be in favor of doing that; but in this case, which I see this is a fairly straightforward matter, more complicated by the fact that he just keeps going on and on with this thing, I really think that the director was acting just as the director.

I don't think there are -- are there any allegations that are personal allegations, other than the termination of someone, that would create a real reason for us not to be willing to indemnify the director and defend him? Because I think this is the type of case where usually we would defend the director because he was acting -- doing his duty.

MR. TAKAYESU: The term they use is working -- operating within the scope of their employment.

MR. RICE: Mr. Chairman.

CHAIRMAN CRAVALHO: Mr. Rice?

MR. RICE: Let me ask the question differently. Are there any facts that have been presented in this particular suit that are different or new from facts that have been presented by Thomas Craig in the past that would lead us to want to consider a different course of action?

MR. TAKAYESU: Again, the other case did not deal with the termination. The terminations tend to -- the potential liability is much higher.

MR. RICE: In terms of the facts that he is going to raise, the case, I think, would be judged on the merits of the termination; right?

MR. TAKAYESU: Right.

MR. RICE: And that would go back to the actions of the director in dealing with his employee; correct?

MR. TAKAYESU: Yeah. So what you'll have is --

MR. RICE: In laymen's sense.

MR. TAKAYESU: This is a different cause of action; the main component of the case is the termination. The state court actions focus on prior actions and incidents; but under these type of cases, even though your cause of action may be related to this, you can go back into the past to develop patterns to show that there may have been some type of misconduct, and the federal courts are very liberal in terms of what they permit in, in this type of case.

MR. RICE: Right. And I guess what we're saying is that unless something has been presented that would create liability for the director personally, then we should go ahead and indemnify him and not create a second --

MR. STARR: I would like to correct a motion to that effect. I move that --

CHAIRMAN CRAVALHO: Wait, wait, wait --

MR. TAKAYESU: I'd rather, you know, in terms --

CHAIRMAN CRAVALHO: Wait, wait, let's take things in an orderly manner. Mr. Corp Counsel, what's your recommendation?

MR. TAKAYESU: Again, in terms of discussing specific facts, I would think it would be more appropriate to have it discussed in executive session.

MR. STARR: Are there things that will come out in executive session that you don't feel confident in -- that might strengthen the other side's case?

MR. TAKAYESU: Certain things should be discussed

between attorney and client in private.

CHAIRMAN CRAVALHO: Shall we defer this until we make a decision in going into executive session?

MR. STARR: Would it hurt to defer for a few weeks?

CHAIRMAN CRAVALHO: Not even a few weeks.

MR. STARR: It might be better to defer until we see what the state --

MR. TAGORDA: Why don't we go into executive session and deal some more with it?

CHAIRMAN CRAVALHO: The merits are different.

MR. TAGORDA: I know it's a different --

CHAIRMAN CRAVALHO: The questions are different.

MR. TAKAYESU: One of my concerns is that I have a feeling that the next board meeting on the 26th might be a marathon meeting depending on what is on the agenda. I would prefer if we could go ahead and deal with it now.

We do have Mr. Tanoue here who we would be recommending if the pleasure of the board was to go ahead and authorize hiring of outside counsel. He is here, he practices on Oahu and he is here for this item.

MR. STARR: Mr. Chair, I move that we go into executive session for the sole purpose of hearing the presentation by our counsel and not for discussion or any decision to be made.

CHAIRMAN CRAVALHO: Does the motion anticipate that there will be new presentations and new facts and not just a rehash of everything we've heard already?

MR. STARR: Yes. I want to hear what he has to say that he has not been able to tell us so far.

CHAIRMAN CRAVALHO: Is there a second?

MR. TAGORDA: Second.

CHAIRMAN CRAVALHO: You heard the motion duly made and seconded. We'll go into executive session on this particular matter to receive additional new information from corp counsel's office. Ready for the question? All in favor say "aye."

(A chorus of ayes.)

Contrary?

MR. NOBRIGA: Nay.

CHAIRMAN CRAVALHO: Nay. Two nays. The board has decided that we go into executive session.

MS. NAGO: I'm sorry, Mr. Cravalho, who was the second nay?

CHAIRMAN CRAVALHO: Mr. Nobriga and me. It's indicated in the past that consistency is the mark of small minds. I plead guilty.

Any other matter to come before this board before we go into executive session? One matter that is coming up in executive session, there's the Stolle case. The chair would like to have the vice-chair preside in that. The chair will be stepping aside on this particular question.

The chair has indicated in the past it has no problem with respect to the validity of the claim of Mr. Stolle. The chair has indicated in the past that this board has taken positions more than once in recognition of the legitimacy of the request and the reaffirmation that attention needs to be given him. The settlement is entirely in order.

So it doesn't blanket Catholic right of reconciliation on all parties concerned in this particular question. There needs to be some absolution somewhere along the line, even if it's solely mea culpa. We'll recess and go into executive session.

(A recess was taken.)

(Whereupon the board went into executive session.)

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