

POLICY COMMITTEE

Council of the County of Maui

MINUTES

June 3, 2008

Council Chamber, 8th Floor

CONVENE: 1:37 p.m.

PRESENT: Councilmember Danny A. Mateo, Chair
Councilmember G. Riki Hokama, Vice-Chair
Councilmember Michelle Anderson, Member
Councilmember Gladys C. Baisa, Member
Councilmember Jo Anne Johnson, Member (Out 2:29 p.m.)
Councilmember Bill Kauakea Medeiros, Member
Councilmember Michael J. Molina, Member
Councilmember Joseph Pontanilla, Member
Councilmember Michael P. Victorino, Member

STAFF: Kirstin Hamman, Legislative Attorney
Camille Sakamoto, Committee Secretary
Jock Yamaguchi, Executive Assistant to Councilmember Michelle Anderson

ADMIN.: Brian T. Moto, Corporation Counsel, Department of the Corporation Counsel
Mary Blaine Johnston, Deputy Corporation Counsel, Department of the Corporation Counsel
Jane E. Lovell, Chief, Litigation Section, Department of the Corporation Counsel

OTHERS: Charlie Jencks, Owner's Representative, Wailea 670 Associates
a.k.a. Honua'ula Partners, LLC
Lucienne deNaie
B. Martin Luna, Attorney for Honua'ula Partners, LLC
Lance Collins, Attorney for Plaintiffs
Eight (8) additional unidentified attendees

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

CHAIR MATEO: ...*(gavel)*... Policy Committee meeting for June 3rd, 2008, will come to order. The Members present this afternoon with us, the Vice-Chair of the Committee, Chairman Hokama; also with us, the Committee Members, Ms. Anderson, Ms. Baisa, Ms. Johnson, Mr. Medeiros, Mr. Molina, Mr. Pontanilla, and Mr. Victorino. Also present with us this afternoon, we have from the Administration, the Department of the Corporation Counsel, Mr. Moto; as well as Deputy Corporation Counsels Johnson *[sic]*

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and Lovell, as well. And the Committee Staff with us this afternoon is both Ms. Hamman and Ms. Sakamoto. Members, as you have noticed. . .in our agenda, we have just one item on today's agenda. The Chair does anticipate much discussion on this one item, and therefore we will be allowing an ample amount of time for us to. . .to have that discussion. Before going into Policy Item Number 1(20), we will start off with the public testimony portion of our meeting.

**ITEM NO. 1(20): SETTLEMENT AUTHORIZATION OF CLAIMS AND LAWSUITS
(DANIEL K. KANAHELE, ET AL. V. MAUI COUNTY COUNCIL, ET AL.,
CIVIL NO. 08-1-0115(3)) (C.C. No. 07-11)**

CHAIR MATEO: We have three individuals that have signed up to testify this afternoon. The first individual is Charlie Jencks, and he will be followed by Lucienne deNaie.

. . . And just for housekeeping purposes as Mr. Jencks proceeds to the podium, if you have any cell phones or pagers, this would be a real good time to turn them off. And. . .Mr. Jencks and the rest of those who have signed up to testify, you will be allowed three minutes to testify with a minute to conclude. Having said that, Mr. Jencks, good afternoon.

. . .BEGIN PUBLIC TESTIMONY. . .

MR. JENCKS: Good afternoon. Thank you, Members. Good afternoon to all of you. It's good seeing you again. It's been awhile since I've been in the Chambers.

COUNCILMEMBER BAISA: . . .*(laughter)*. . .

MR. JENCKS: March 20th, I think, was the last time. But it's good seeing you again. I just had a few words with regard to the, to Item 20. Uh. . .Judge Cardoza issued a ruling on. . .on--and I'm not an attorney, so I may get some of this wrong--injunctive relief with regard to Honua'ula and the County's processing of permits for the project. We have been waiting since that ruling for the, the Judge's order, his formal order with regard to his ruling and we haven't received that yet. At least we didn't have it today. And I would ask you before you go too far with this item. . .and discuss it, that you first of all get the Judge's order that will clearly spell out his intention and his thoughts on the issue. Spending too much time without having that, you could go down the wrong track and then find yourself in a. . .in a discussion that leads you nowhere. So I think getting the facts from the Judge, getting his order, I think is the proper way to fully assess the issue, how it impacts the Council, how it impacts anyone else that's involved in, in the issue. So I would just ask you to do that. Have some discussion, but wait for any formal decision on the issue until that order is formally issued by the court.

. . . Thank you, Mr. Chair.

CHAIR MATEO: Thank you, Mr. Jencks. Members, questions for the testifier?

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. . . Seeing none--uh, Mr. Medeiros? I'm sorry, Mr. Jencks? Go ahead.

COUNCILMEMBER MEDEIROS: Mahalo. . .mahalo, Mr. Chairman. Mr. Jencks, is there any prediction or anticipation when this order or decision will be received from the court?

MR. JENCKS: I ask every day.

COUNCILMEMBER MEDEIROS: . . .*(laughter)*. . . Oh.

MR. JENCKS: And, I--

COUNCILMEMBER MEDEIROS: So--

MR. JENCKS: I have, I have none.

COUNCILMEMBER MEDEIROS: None. Okay, thank you, Mr. Jencks.

CHAIR MATEO: Thank you, Mr. Medeiros. Members, additional questions?

. . . Thank you, Mr. Jencks.

MR. JENCKS: Thank you.

CHAIR MATEO: The next individual is Lucienne deNaie. And Lucienne will be, will be followed by Mr. Martin Luna.

NOTE: *Pause while Ms. deNaie approached the podium.*

MS. deNAIE: . . . Thank you, Chair. . .Mateo and Members of the Committee. Nice to see you all again. My name is Lucienne deNaie, and I'm here testifying as a private citizen. . .who. . .attended a number of the meetings that. . .are, you know, the subject of this suit. I just wanna make a couple of points in general about the whole intention of the Sunshine Law. Like you, I sit on a public body that is. . .subject to the Sunshine Law. And probably at least once a meeting somebody goes, what a pain in the okole this Sunshine Law is, you know, oh, logically we'd like to do this, but we can't because the Sunshine Law, we have to wait, we have. . .we have put it on the agenda, we have to let the public know, so forth and so on. However. . .as a citizen who's testified in this Chamber many times over the last 15 years, I have to say that I've attended some historic meetings here where the Sunshine Law really. . .allowed this Council to get the information it needed. And I'll take you back ten years when the Waena power plant was being planned. And I believe only Mr. Hokama is still on the Council from that era. . .*(laughter)*. . . and he was a, a shining star in allowing the public to participate. In fact, a small investigative committee was set up to get information from the public. There were **many, many**, many meetings rather than just continuing one meeting and so forth

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and so on. There were many opportunities provided for public testimony. And this was good because the public brought in *so* much useful information. No, we were not, you know, the industry. We did not know, you know, everything about their business plan, but we knew a lot about the world situation. For instance, in this very Chamber, it was stated by a citizen that oil was likely, within the next decade, to soar from 20 dollars a barrel, when it was there. . .to perhaps as high as 100 dollars a barrel. Well, now this citizen did not have a crystal ball. This citizen just did their research. And you have many citizens coming in front of you that do their research. It is really not *fair* in this process to be discussing things that affect all of us later on in these complicated projects like Honuaula, Wailea 670, and not have that knowledge here to be called upon and only hear from one side. And I just tell you, as a citizen, it hurts to only have your policy makers hear from one side of the issue when you've invested a lot of time and sincere effort in doing your research. So please give yourself every advantage and give the public a chance to share with you as often as possible. Thank you.

CHAIR MATEO: Thank you, Ms. deNaie. Members, questions for the testifier?

. . . Seeing none, thank you very much.

. . . Martin Luna. . .who will be followed by Lance Collins.

MR. LUNA: . . . Good afternoon, Mr. Chairman. . .Members of the Committee. My name is Martin Luna, and I'm the attorney for Honua'ula Partners.

. . . My only point today is. . .to determine whether or not the Council is fully aware that their procedures have been. . .that you, that you followed in holding these meetings were. . .were supported by the Office of Information Practices. Um . . .

. . . that's the main question. Because the OIP is the one that. . .that interprets the Sunshine Law. . .and so they should be the ones consulted by your Corp. Counsel and by you to determine whether your procedures have been followed. I mean, have. . .are in compliance with the Sunshine Law. I believe it was in 1997 that Kelly Cairns wrote a memo to the Council. . .which was, I thought at that time, supported by the OIP as to what the procedure would be. And, and, and that, I thought, was what you followed during the proceedings for Honua'ula. So the OIP has to be a vital part of your. . .deliberations in determining whether or not there should be a settlement of this. . .of this matter.

. . . And we ask, and I just wanna point out as, as Charlie did--that we don't, still don't have the written opinion of the Judge. And it may be that the. . .there will be some information that's been obtained from the written opinion. If not, then we can proceed further in determining whether or not the Council did in fact violate any of the. . .provisions of the Sunshine Law.

. . . *We*. . .don't think you did. But . . .

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. . . obviously there's a difference of opinion. And your Corp. Counsel would be ready to provide you with that information. . .during your executive session. Thank you.

CHAIR MATEO: Thank you, Mr. Luna. Members. . .questions? Ms. Anderson? Mr. Luna?

COUNCILMEMBER ANDERSON: Thank you, Mr. Chair. Thank you for being here, Mr. Luna. Um. . .it seems that you're saying that. . .we should get an opinion from OIP. And . . .

. . . I'm confused by that because what we have in front of us is. . .a request for settlement of a court case. So it's already before the courts. So it, it's a little late for an OIP opinion isn't it?

MR. LUNA: You haven't made a decision yet.

COUNCILMEMBER ANDERSON: No, but--

MR. LUNA: So it's not *late*.

COUNCILMEMBER ANDERSON: But it's. . .the *court's* decision now.

MR. LUNA: The court is only a preliminary injunction. That's all it has. It does, it has not gone through the entire merits of the case.

COUNCILMEMBER ANDERSON: But--

MR. LUNA: So it's a--

COUNCILMEMBER ANDERSON: --isn't that the next step, that it's in front of the courts . . .

MR. LUNA: The--

COUNCILMEMBER ANDERSON: . . . if we don't settle it?

MR. LUNA: The, the, the. . .*dispute* is in front of the court. But--

COUNCILMEMBER ANDERSON: Okay.

MR. LUNA: --the final *decision* of the court is, hasn't been made yet.

COUNCILMEMBER ANDERSON: Yeah, I realize that. Okay, thank you.

CHAIR MATEO: . . . Members, additional questions? Ms. Johnson?

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COUNCILMEMBER JOHNSON: Yes, and I know, Martin. . .I, I am not sure if you're aware of, but we had asked on a *separate* issue entirely for, we had been given a verbal opinion on another issue by OIP. And to this *day*, I don't believe we've ever gotten anything in writing, so I, I know you're kind of, you know . . .*(laughter)*. . . implying that. . .you know we should, I guess, wait for OIP, but they sure took a long time. And I guess we finally did get, did we get something in writing, Michelle? Yeah.

COUNCILMEMBER ANDERSON: Yes.

COUNCILMEMBER JOHNSON: Yeah, and. . .we just got that, but it took *forever* . . .*(laughter)*. . . So--

MR. LUNA: I--

COUNCILMEMBER JOHNSON: --I, I don't know if, if I have a lot of *confidence* . . .*(laughter)*. . . in OIP.

MR. LUNA: Well, they're the ones that interpret the Sunshine Act, so. . .they should have some. . .credibility as to what the Sunshine Act. . .is, how it's interpreted. And, and I'm not sure why there was a delay. . .but certainly from one government to the other, I, I would think you guys would have more . . .

. . . could encourage the. . .the Office, OIP better than us individuals could.

ALL: . . .*(laughter)*. . .

COUNCILMEMBER JOHNSON: . . .*(laughter)*. . . Thank you, Mr. Luna.

CHAIR MATEO: Members, additional questions?

. . . Seeing none, thank you, Mr. Luna. Mr. Collins?

NOTE: *Pause while Mr. Collins approached the podium.*

MR. COLLINS: . . . Good afternoon, Chairman and Members of the Policy Committee. My name is Lance Collins and I'm the attorney that represents the Plaintiffs. . .in the matter before you. I simply testify today to inform you that I am present and I do represent the Plaintiffs and are available to answer any questions that you would have for them. Thank you.

CHAIR MATEO: Thank you. Members, any questions for the testifier? Thank you very much.

. . . Uh, Mr. Collins, if you could return? Ms. Anderson?

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COUNCILMEMBER ANDERSON: Thank you, Chairman, just a clarification on Mr. Luna's testimony regarding OIP.

. . . As this is a case in front of the court. . .the. . .the jurisdiction is, therefore, in front of the court. . .and. . .whether we make a settlement today or not--well, let's just say, if we make a settlement, then the issue is, is closed. And correct me if I'm wrong on that. And if we don't, then. . .the case would proceed before the court to a decision?

MR. COLLINS: Well, as, as an attorney that. . .practices in the area of Sunshine and open. . .government law. . .not specifically to this case 'cause you'd have to ask your attorney, but in *general* to answer your questions. . .yes, the court does have, essentially, supremacy over whatever OIP would have to say. Their. . .their opinions are persuasive and obviously should be followed by the government. And whatever a court says supersedes whatever the OIP has to say on matters--

COUNCILMEMBER ANDERSON: Okay.

MR. COLLINS: --having to do with the Sunshine Act.

COUNCILMEMBER ANDERSON: Thank you, Mr. Collins.

MR. COLLINS: Uh-huh.

CHAIR MATEO: Thank you, Ms. Anderson. Members, additional questions? Thank you, Mr. Collins.

. . . Members, Mr. Collins was the last individual signed up to provide testimony this afternoon. If there's anyone in the gallery wanting to testify, now is the time to do so. Please advance to the podium so we could recognize you.

NOTE: Silence.

CHAIR MATEO: . . . Members, no one approaches. With no objections, the Chair would like to close public testimony at this time.

COUNCIL MEMBERS: No objections.

CHAIR MATEO: Thank you.

...END OF PUBLIC TESTIMONY...

CHAIR MATEO: Members, we're gonna start with our only item on the agenda, it's POL-1(20), settlement authorization of claims and lawsuits, Daniel K. Kanahale, et al. versus Maui County Council, et al., Civil Number 08-1-0115(3). On May 16, 2008, Corporation Counsel forwarded to this Committee for our consideration a proposed

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resolution that would authorize settlement of the case. The complaint alleges the Maui County Council violated the State's Sunshine Law, Chapter 92, Part I, Hawaii Revised Statutes. Members, the County has received an offer to settle this case, and that offer expires on June 30th, 2008. This afternoon, Deputy Corporation Counsel Johnson *[sic]* will be providing general information and responding to Committee questions. Please be aware that Corporation Counsel will be able to respond to general questions only. And should specifics regarding this case be requested, executive meeting will be required. At this time, the Chair will turn this portion over to Ms. Johnson *[sic]* and . . . assisted by Mr. Moto. . . as well. Ms. Johnson *[sic]*?

MS. JOHNSTON: Thank you, Chair. . . Mateo. Just briefly, let me describe the, the case. The complaint was filed by five Plaintiffs in March this year, alleging a variety of violations by the Land Use Committee and the County Council of the Sunshine Law. A motion for preliminary injunction was filed by the Plaintiffs. And on April 23rd, Judge Cardoza heard argument and ruled on that motion, granting it--stating that he did so in the interest of preserving the status quo. . . until some of the issues could be resolved.

. . . The order, the written order. . . both the Corporation Counsel and Mr. Collins have submitted proposed orders granting the motion for the preliminary injunction. To date, the court has not--as far as I know--signed off on an order. So we don't have that in front of us, and I have no indication of when, when that might come. . . be coming out. Basically, what the court has stated is that the, the County can do nothing further in regard to the Wailea 670. . . 670 project at this time. There. . . appears to be not a whole lot pending immediately for the County to do. But that is what the injunction requires. Last week, the court granted the motion of Wailea 670 to intervene as a party Defendant in the lawsuit. So they are now a party to the lawsuit. Previously, I think in April. . . I received, Corp., Corporation Counsel received a settlement proposal from the attorney for the Plaintiffs. And it was amended. And that is the proposal that I would want to present to you in executive session and discuss, discuss that proposal with you. That's about all of the general information. If you have any questions, general questions, I'll be happy to try to answer them.

CHAIR MATEO: Thank you, Ms. Johnston. Members, questions for Corporation Counsel? Mr. Medeiros?

COUNCILMEMBER MEDEIROS: Mahalo, Mr. Chairman. Yeah, I just wanted to follow-up on the. . . the notion that. . . did we. . . as the County and as Corp. Counsel inquire with OIP if they had an opinion on this prior to getting to this point of the case?

MS. JOHNSTON: My understanding is, well. . . two things. And I realize I've only been with Corp. Counsel six months now, but. . . that, one, it takes a very long time to get the OIP to give a decision on written request for an opinion. And second, I've also heard that they. . . generally if a case is in litigation, they won't render an opinion on that case. And, see, I have talked to the. . . OIP, and they're aware of this lawsuit. But I don't think at this point that we're gonna be getting any kind of opinion from them. And as Mr. Collins

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pointed out. . .the court can trump the OIP. In fact, there was a case that came down earlier this year where the OIP was the Defendant. And. . .the Supreme Court decided their opinion wasn't correct. So they are persuasive, there're. . .opinion letters that are directly on point to some of the issues that are being raised in this case, they have been pointed out to the court. They will be continued to be pointed out to the court if we don't settle. . .at least on some of the issues. And some of the issues raised, there. . .isn't any, any OIP opinion to help us out. So it may very well be left totally in the hands of the court to determine how the. . .Sunshine Law should be interpreted and applied. And it is, as Judge Cardoza pointed out, a very developing area of the law. There's not very much legal authority--that is, court decisions. . .to guide the court and to guide, you know, the rest of us in this.

COUNCILMEMBER MEDEIROS: Okay.

. . . I don't know if you answered my question. Uh. . .my question was when the County received this complaint. . .did, is it part of the Corp. Counsel's procedures to have inquired with OIP prior to where we are now, when the County first got the complaint?

MS. JOHNSTON: The OIP was provided with a copy of the complaint.

COUNCILMEMBER MEDEIROS: Okay, and did we as a County ask them for an opinion on it?

MS. JOHNSTON: I didn't ask for a *formal* opinion, but I discussed the case with them and they. . .I was informed that they would probably not be taking any direct role in this case.

COUNCILMEMBER MEDEIROS: And that's just orally they told you that. That wasn't supported by anything--

MS. JOHNSTON: Right. No, I didn't put anything--

COUNCILMEMBER MEDEIROS: --written documents.

MS. JOHNSTON: No. I didn't write them back . . .*(inaudible due to interruption)*--

COUNCILMEMBER MEDEIROS: Or written correspondence?

MS. JOHNSTON: No. Didn't--

COUNCILMEMBER MEDEIROS: I see.

MS. JOHNSTON: --do that.

COUNCILMEMBER MEDEIROS: Okay. Thank you . . .*(inaudible)*. . .

