

HAWAI‘I COUNTY BOARD OF ETHICS

MINUTES – REGULAR SESSION¹

Wednesday, October 14, 2009

10:00 a.m. - 11:51 a.m.

101 Aupuni Street, Suite 230

Hilo, Hawai‘i 96720

Present: John E. K. Dill, Chair
Ann Lum, Vice Chair
Marilyn Nicholson, Member
Diane Gentry, Member
Arthur Martin, Member
Renee N. C. Schoen, Deputy Corporation Counsel
Mary E. Crosson, Secretary for the Board

Also present: Joyce Folena, Gregory Smith, Emily Naeole, Michael Udovic, Mayor William Kenoi, Brian DeLima, Kevin Dayton, Jason Armstrong, Nancy Cook-Lauer, and various others.

1. CALL TO ORDER

10:00 a.m. The Chair called the meeting to order.

2. STATEMENTS FROM THE PUBLIC ON AGENDA ITEMS

CHAIR: I have Mr. Brian DeLima to speak about proposed amendments to the Ethics Code.

DELIMA: I think I have enough copies for everyone. May I approach the—

CHAIR: --Yes, please, please.

DELIMA: Mr. Chairman, members of the Board. I'm Brian DeLima, and I'm representing Kama'aina Pumping, Inc. Kama'aina Pumping, Inc., is a corporation with a shareholder that is employed with the County of Hawai'i. On behalf of my client, we are opposed to the first proposal. The transmittal by Mayor Kenoi acknowledges there's a long history of enterprising County workers having a long history of providing goods and services to the County through their private companies. In addition, it should be noted the County employs every day special-duty police officers that perform an important service for a myriad of individuals and businesses that would be illegal under

¹ Minutes in italics are verbatim. Blanks indicate inaudible or indecipherable speech.

the terms of the proposed amendment. All police officers are County employees. If you are a business and you want to hire a special-duty police officer, you call up the County of Hawai'i Police Department and ask for a special-duty police officer. The County then contracts with individual police officers to perform the special-duty service. You actually pay the County of Hawai'i. The County then cuts a check to the special-duty police officer. I don't believe that was the intended impact of this proposed amendment, but that's the reality of the impact. Recently in the newspaper, Chairman Yoshimoto indicated that was one of the reasons why they stopped hiring special-duty police officers at the council meetings, so I think that's something that was probably unintended but that's probably one of the results of the proposed amendments. Now the proposed amendment seeks to prohibit any County employee from having—the existing Code specifically prohibits any officer and employee from seeking employment or contract for services for oneself by the use or attempted use of the officer or employee's office or position. This is the conduct that is prohibited, and it should be prohibited. No one is suggesting that they should be awarding any conflict of interest or any self-dealing. That is conduct that should be specifically prohibited and is presently prohibited under the existing County law. The proposed amendment seeks to prohibit any County employee from having any business relationship with the County unless that employee is less than a majority owner of a business. Such an exception I suggest would make the proposal meaningless, for private businesses would merely incorporate and provide the employee less than a majority interest in the corporation. So what I'm suggesting here is that say you're a sole proprietorship, or you're a corporation and your employee, the County employee, has say 51%. All you would need to do in order to comply with the proposed amendment is to incorporate and give yourself less than 50% ownership. It's a simple process to do. All it takes is a meeting of the board of directors, and it would be something that would comply with the proposed amendment. But in reality, it's really—what conduct you're talking about is still yet the self-dealing conflict of interest, which is already illegal. Now proposal number 2 demonstrates why this proposal has little merit. Existing law requires that the only time that a contract may be awarded to a private business that is controlled by a County employee is through the competitive sealed bidding pursuant to State Public Procurement Code. Existing law presently prohibits any contract being awarded where the employee or officer had anything to do with the contract. Quite frankly, what should be done is to strengthen that provision, not to eliminate it. The proposal eliminates that provision. Now what do I mean by strengthening that provision? Look at the logic of what's occurring here. If you're a majority owned corporation or business—okay, if the employee's in charge of the business by a majority controlling interest, we have to do it by sealed bid. Okay? So what they're doing is deleting that whole—that whole section is being deleted. So if you are a 49% owner of that business, do you have to do it by sealed competitive bid? No. Not under the present proposal. You wouldn't have to. You wouldn't have to go through the sealed competitive bid. You'd still have to comply with the State Procurement Code, but the language of the proposed amendment would permit a 49% business to procure a contract without the sealed bidding process. I would suggest to you that strengthening of that provision would provide any business that has an employee interest, rather than being a majority or minority, should go through the sealed bidding process. So that would be the suggestion—to strengthen it. But again, it goes right back to the fundamental issue. What is the conduct that you're trying to prohibit? You're trying to

prohibit self-dealing conflicts of interest. That is already the law. What we need to do is enforce the law, not have an artificial statement that if you're a minority-owned interest and you're a County employee, you don't—you're not entitled to provide services to the County.

CHAIR: Okay, and excuse me, if you could just wrap it up—statements from the public we typically limit to three minutes per issue, but—

DELIMA: --Okay, I'll just end this way. I have three charts that's attached to the process, and I just wanted to demonstrate real quickly that the three charts essentially point out that through the competitive bidding process, Kama'aina, Inc.—and you saw part of your proposal, so you can see that they substantially are the lowest bidder—not by a little bit, but substantially the lowest bidder in every single year that they've bid. So you got the charts, and I can make them available. But every single year that they bid, from 1996 when Kama'aina Pumping, Inc., first got the first sealed contract—in other words, Kama'aina Pumping, Inc., they've been in the press, but the bottom line is every time they got a contract with the County, it's been through the sealed bidding process. It's been through the sealed bidding process. And that's the basic point. I'd be happy to answer any questions.

CHAIR: Questions from the Board?

DELIMA: Thank you for your time.

CHAIR: Thank you.

LUM: Thank you.

CHAIR: Before we move on, I see that the Mayor has come to discuss his proposed changes to the Ethics Code, and I know he has a very busy schedule, so I'd like to allow this time for them to come up and discuss—Mr. Dayton, you as well, you and the Mayor?

DAYTON: If necessary, Mr. Chairman.

CHAIR: If you guys come up, we'll move you guys up, because I know you have a full schedule. I just want to clarify that I'm looking at today's meeting as an information gathering session from the Mayor and his team regarding these proposed changes. We don't necessarily want to make any decisions on it today, but rather hear their side and what their motivations are behind this, and then look at ways we can get more information from the public in the future. So thank you for coming today, Mayor, and Mr. Dayton. You guys have the floor.

MAYOR: Thank you very much, Mr. Chairman, and distinguished members of our community who serve on the County Board of Ethics. Thank you all for your service. All of you perform a critical role in the administration of the County of Hawai'i. You and your colleagues help the public confidence in government. We submit to all of you proposed amendments to the County Code of Ethics. To further your efforts, we hope

these proposals encourage a meaningful debate in our community about both ethics and accountability. Our current Code has served all of us well, but we understand that it's a living and breathing document, and it evolves with the times. As community expectations change, so must our codes to keep up. Behavior that was commonplace and thought to be meritorious a generation ago may no longer be considered acceptable. And after carefully considering all of the amendments to the Ethics Code, we are asking you today to look at and begin the process of looking at our amendments that we've submitted—look at both the cost and benefits, some of the positives and negatives of proposed changes, and that you then forward your suggestions and recommendations to the County Council. We appreciate your input. I look forward to a healthy discussion on these proposed changes. I'd like to go over a short summary of our proposals. The first proposal would amend the Hawai'i County Code of Ethics, Fair Treatment, Section 2-83, to prohibit County employees and companies in which County employees or their spouses or dependent children own a controlling interest from engaging in business arrangements with any County agency. While I am aware that enterprising County workers have a long history of providing goods and services to the County through their private companies, I believe the larger community no longer considers this practice to be acceptable. This proposal is not meant as a commentary on any past arrangement. It is simply an acknowledgment that today, our community expects that we will either be County employees or County contractors, but not both. The second proposal is a technical change deleting Hawai'i County Code of Ethics, Contracts, Section 2-85(a), because the conduct described and specifically authorized in Section 2-85(a) would be prohibited under our first proposal above. The existing section 2-85(b) would be renumbered as 2-85(a), and this proposal makes a technical correction by including the word "is" in a new section where the word was apparently excluded in error. Our third proposal adopts the Hawai'i County Code of Ethics Conflicts of Interest section language, prohibiting any elected—myself, practicing law—or any appointed officer or employee from appearing on behalf of any private interest before any County agency except as specifically provided for by law. The narrow exceptions to this prohibition assure that employees will continue to enjoy the right to appear before County agencies to petition for redress of grievances. This proposed language is virtually identical to language already in place in the Honolulu City Charter and Honolulu Code of Ethics. Again, this proposal is acknowledgment that today, the public believes our roles as County employees make it inappropriate that we engage in certain outside activities. The public expects, again, that we'll be County employees, or we will be representatives of private interests before County agencies, but not both. The fourth proposal redefines the use of the term "agency" in the Ethics Code to make it more encompassing and to make the use of the term more clear. Finally, we hope to join forces with the Board of Ethics in supporting changes to State law that would empower the Board of Ethics to levy administrative fines for infractions of the County Ethics Code. As all of you well know, the County Council in 2008 adopted Ordinance No.08-57, authorizing the Board to impose administrative fines, but the intent of this language has been stymied by two provisions in State law. The first problem is that HRS, Hawai'i Revised Statutes, Section 46-1.5, subsection 24(A), has been interpreted by some to mean that a County agency may impose a civil fine only when a violator has been found in violation, two, when the violator continues this violation without modifying their offending conduct. We agree with Honolulu Board of Ethics Executive Director Charles Totto that this interpretation

renders the power to fine useless, because violators can simply terminate the offending conduct in order to avoid any fine. The legislature has had proposals before it in 2007, 2008, and 2009 to clarify this language to apply fines to be imposed when violations are first discovered, but the bills stalled. We understand the Board of Ethics—Honolulu Board of Ethics, and all of us, will be going to the legislature in 2010 to finally give the Board of Ethics the powers that the Hawai‘i County Council intended. A related issue is that state law requires when an offender is fined administratively, that offender must have an avenue by which he or she can appeal that fine. Under existing law, the County may be required to create what amounts to an appeals board for the Board of Ethics to hear appeals of administrative fines of this Board. This would be a cumbersome and little used process. As an alternative, we would like to collaborate with the Hawai‘i County Board of Ethics and the Honolulu Board of Ethics to lobby our legislature to amend state law to explicitly state that appeals of administrative fines for ethics violations are made directly to Circuit Court. This will fulfill the requirement for a fair appeals process and will avoid the need to create an entirely new County board to hear appeals cases. Our Ethics Code that all of you enforce serves as a guide for both employees and the public to encourage proper conduct, and it helps define our community’s expectations for public employees. I believe these proposals will advance the Ethics Code in a way that promotes public confidence in County government and fosters accountability. We welcome your suggestions and comments and look forward to working closely with all of you as we move forward to strengthen our Code of Ethics here in the County of Hawai‘i. Thank you all very much.

CHAIR: Thank you. Okay, do we have any questions for the Mayor, perhaps right now?

NICHOLSON: I do have a question.

MAYOR: Yes, Marilyn.

NICHOLSON: Thank you for bringing this to us, because we realize you could have taken this directly to the Council for discussion and adoption, so I’m glad that you’re giving us an opportunity to discuss this with the public and among ourselves. What exactly are you looking for us to do? Because we can’t actually make—we can make recommendations, but we don’t make the decisions. The County Council makes the decisions. So what are you hoping to gain by bringing this to our Board?

MAYOR: A couple things. One, all of you are community-committed volunteers who serve our County and know best the County Board of Ethics. We believe that your review and your willingness to take meaningful input from the community during open hearings such as these, your recommendations and suggestions that will then be forwarded to the County Council, we believe is invaluable. So we thank you for your willingness to review these proposals, utilizing your expertise and experience, utilizing your ability to reach out to the public and get meaningful input, and then utilizing all of that to come up with recommendations and suggestions, I think is invaluable to the process of one, strengthening our Code of Ethics, and then moving it forward to the County Council with the most possible input.

CHAIR: Okay, so basically we'll be using your proposals as a guideline and a template to gather information from the community and to discuss proposed changes amongst ourselves, and then make a recommendation to the County Council for changes that we find are needed?

MAYOR: Correct, Mr. Chairman. I just think this is the beginning of the process. We're not representing that as the only proposal that should be considered, but that we welcome your suggestions and recommendations, your review, and exactly as you've discussed and enumerated the process—that is exactly what we're looking for.

CHAIR: And just to clarify, you had requested we hold some public hearings to gather some input from the public. Would it be acceptable if we hold that in this forum, with our monthly meetings, and then advertise that we will be discussing and gathering information from the public on these proposed changes?

MAYOR: Yes, Mr. Chairman, that would be acceptable. We're not asking our community volunteers to give up additional time—just to post notice, adequate notice, before each of your next hearings to gather input from a wide cross-section of our community.

CHAIR: Okay.

MAYOR: Okay.

CHAIR: Thank you.

MAYOR: Thank you, Mr. Chairman, and thank you to all of you who agree to serve our community and the County of Hawai'i. Aloha.

CHAIR: Thank you. Aloha. Okay, moving on with public testimony, I have Joyce Folena. Good morning.

FOLENA: Good morning, Mr. Chairman and members of the Ethics Board. I'd like to comment on Mayor Billy Kenoi's most recent statements, and I am absolutely in favor of what he said, with a caveat—in addition, that if in this coming legislative session, which I believe begins in January of 2010, the new legislative—okay, if the legislators choose not to repeal that law that confines the County to create an appeals agency instead of using the Third Circuit Court, that I want the County to, at that point, if necessary, do create the County appeals agency. I want to take his statements one step further and open the door for both of the contingencies. If—I repeat—if the state legislature decides not to repeal that law and the County then is at the same point it's at today in 2010, then the County, please, does create the appeals agency so that Resolution 08-57 will be adopted into the Ethics Board's rules of procedure, therefore making that particular Resolution 08-57 effective, and giving the Ethics Board the power to fine—impose and collect fines—from County officials found in violation of the Code of Ethics. And I do understand that there is a contingency attached to the fining—that the County official then would have had to have gone through a formal opinion, not an informal opinion,

and the informal opinion according to Mrs. Schoen would be given upon the first time that the County official is found in violation, a specific type of violation, and if the County official then violates the second time in that specific type of violation, then a formal opinion would be in order. And if I'm incorrect, please correct me. I'm correct, all right, so I—

LUM: --I—

FOLENA: --You don't understand this—

LUM: --No, no, I think there are other avenues that we can, on a first offense, in certain circumstances, we could decide to have a formal without an informal. There are occasions—I don't think we've ever had one—

FOLENA: --There are—

LUM: --There are—it is a provision—

FOLENA: --Oh, okay, thank you—

LUM: --so we could have a formal without previously having an informal.

FOLENA: Thank you, Mrs. Lum. So hopefully the state legislature will repeal that particular provision, and we can go—the County can go straight to the Third Circuit Court. It'd be a lot less burdensome and cumbersome to the County. However, the burden to the people would be great if this Resolution 08-57 was held in limbo any longer than the end of the next state legislative session. Thank you.

CHAIR: Okay. Gregory Smith.

SMITH: Good morning, and thank you. I am in favor of Mayor Kenoi's proposals and also, again, just to follow up on if the State fails to repeal or change its law, possibly—we do have an appeals agency, and I think it's attached to the Building Department or Planning, I forget, and possibly just expand that power off just to take care of this issue. And other than that, I'm very much in favor of all this. Thank you.

CHAIR: Thank you. Okay, moving on to approval of minutes.

3. APPROVAL OF MINUTES

Minutes of the September 23, 2009, Regular Session.

Motion and vote: Ms. Nicholson found two typographical errors. On page 8, half-way down, “haole” was misspelled. On page 9, under Mr. Beason’s testimony, it should say “races” rather than “racists.” She moved to approve the minutes with those corrections. Ms. Gentry seconded the motion, and all members voted aye.

4. COMMUNICATIONS

- a. **Communication No. 2009-64: Hawai'i Police Department Annual Report Fiscal Year 2007-2008.**

Motion and vote: Ms. Nicholson moved to accept and file the communication, Ms. Gentry seconded the motion, and all members voted aye.

- b. **Communication No. 2009-71: OpenLine publication of the Office of Information Practices, August 2008.**

Motion and vote: Ms. Nicholson moved to accept and file the communication, Ms. Gentry seconded the motion, and all members voted aye.

- c. **Draft Informal Advisory Opinion for Petition No. 2009-6, heard at the Board's September 23, 2009, meeting.**

Motion and vote: Ms. Gentry moved to adopt the informal advisory opinion, Ms. Nicholson seconded the motion, and all members voted aye.

- d. **Draft Informal Advisory Opinion for Petition No. 2009-7, heard at the Board's September 23, 2009, meeting.**

Motion and vote: Ms. Gentry moved to adopt the informal advisory opinion, Ms. Nicholson seconded the motion, and all members voted aye.

- e. **Draft Informal Advisory Opinion for Petition No. 2009-8, heard at the Board's September 23, 2009, meeting.**

Motion and vote: Ms. Gentry moved to adopt the informal advisory opinion, Ms. Lum seconded the motion, and all members voted aye.

- f. **Draft communication from the Board to the legislature in support of Senate Bills 531 and 128 and House Bill 626, regarding the imposition of administrative fines.**

Ms. Schoen explained that the Board decided at a prior meeting to send a letter in support of these bills. If these bills pass, the Board would be able to impose fines without first having to request violators to cease and correct their behavior. In addition, appeals of the fines would be made to Circuit Court rather than to an appeals agency that the County would need to create.

Motion and vote: Ms. Gentry moved to approve the draft communication, Ms. Lum seconded the motion, and all members voted aye.

5. NEW BUSINESS

- a. **Petition No. 2009-9: Petitioners allege that a County officer or employee violated Section 2-83(a)(3) of the Code of Ethics (regarding fair treatment) by throwing a pen at the June 2, 2008, County Council meeting.**

CHAIR: Again, how we'll do this today is allow the petitioners to give their statements for about ten minutes or so, allow the respondents to provide a response, the Board will ask questions if necessary, and then if we have enough information we'll deliberate and decide on that. So, Ms. Folena.

FOLENA: Mr. Chairman and members of the Board of Ethics, I have with me—and I asked permission of Mrs. Schoen through Mary Crosson—to deliver to you photographs that I took of the CD, CD number one, of the June 2nd, 2008, meeting, with captions. And I took these photographs with my digital camera, using my portable DVD player—not CD, sorry—DVDs—at my home, and I had them developed at Long's Drug Store. I also have with me my portable DVD player and the DVD that shows Mrs. Naeole's, in my mind, in my opinion, violation of the Code of Ethics wherein Mrs. Naeole threw the pen across the Hilo County Council room. And I would like to quote from these photographs, which I will surrender to the Board of Ethics for your viewing and for filing. "I remember, you know back when, I don't know when, it was 2007 when I, I, I remember having a meeting about the civic center. I really got pissed and what I did, I was pissed off, I threw my pen like that, and I was upset and you," etcetera. And at that point, Mrs. Naeole has the pen in her hand and throws the pen with enough force so that the pen actually hit the main entrance door of the room, bounced to the floor. It narrowly missed the reporters' seating area, where Mr. Jason Armstrong, sitting behind us here, was at that point monitoring the events of the meeting as a reporter for the Tribune-Herald. The pen was then retrieved by a male County employee. The employee, male employee, walked around the back of the seated representatives, gave the pen back to Mrs. Naeole. Mrs. Naeole said "oh, I'm sorry, I'm sorry, I went threw my—I'm sorry, I went throw my pen, but I was just trying to illustrate what I did the last time." And so Mrs. Naeole at that point admits that she threw the pen the first time at a meeting in 2007 when she first heard about the civic center. And to quote Mrs. Naeole, Mrs. Naeole said she was "pissed," end quote, about the west side civic center being a proposed reality at that time. So Mrs. Naeole definitely conducted a willful action. This was not an automatic reaction like a shrug of shoulders or a nod of a head. It was to illustrate what she, quote, "did the last time." And so in Mrs. Naeole's mind it was okay to throw the pen the first time, because she illustrated it the second time. Although Mrs. Naeole apologized for throwing the pen, immediately after apologizing—and I quote again, "oh, I'm sorry, I'm sorry, I went throw my pen, but I was just trying to illustrate what I did the last time." So I think that's enough said to show you that this was a willful act. And throwing a pen across the room is something you'd expect in nursery school or maybe first or second grade, but after that time, the child's taught this is not acceptable behavior, and certainly not in the part—on the part—of a person in a leadership capacity sitting in a county representative's chair in the County Council of the County of Hawai'i. So I will now surrender these photographs to the secretary. I have something else to say about it. When you see the photographs, you're going to see a little, a little addition that

my DVD player superimposes to the left hand bottom corner of the photograph. When you hit pause, that little caption comes up, DVD, and the word “illustrate” is not clear in the photograph. However, it is clear in the DVD disc number one, which, if you wish, I will surrender to you also. Would you like to have that?

CHAIR: Board members, do you feel like we need it?

FOLENA: To prove the verbiage of what I’m quoting.

NICHOLSON: Probably not _____.

CHAIR: That’s okay.

FOLENA: It’s not necessary? All right. Oh, I’ll stay seated. Sorry, go ahead.

SMITH: The reason, as stated in our petition, why we find this egregious, is that number one, we’re establishing a habit pattern of Mrs. Naeole’s misbehavior. And the fact that because this was a premeditated act, because apparently she is using this type of action—anger, displays of anger, pen-throwing—to intimidate her opponents, particularly people who are testifiers, and we know that. I find it personally very egregious that Mrs. Naeole had no real—and the reason this is premeditated and used as a tool by Mrs. Naeole is because Mrs. Naeole, in her opposition to the civic center, that’s fine, that’s her opinion—but the problem is that she was insulting people, not only testifiers, and trying to intimidate people. But the fact is that Mrs. Naeole to that date had not written in over—nearly eighteen months in office—one capital improvement bill for the district of Puna, which could have been used to take advantage of what was then a bond float. That was the funding mechanism. So in my opinion, Mrs. Naeole was not only grandstanding, but she had no basis for anger. Now if she had come up with propositions, say 20 or 30 million, and it was turned down by Council, I could maybe see her being angry. But this is totally grandstanding, and this is egregious because her behavior of tossing objects—note, Board, no other council member in my memory, and I’ve been coming to council nearly twenty years, have ever thrown objects across the room. Now one council person I can recall—again, Jim Rath—was verbally abusive to people, but he was put down by either the public or by the chair. This time—I mean, again, is this the type of behavior—intimidation by a council person toward the public—again, this harks back to the bad old days of Steve Yamashiro, Jimmy Arakaki, that actually employed these tactics against us the public, because they didn’t want public opinion. And I mean—we could stupidly bring this into another little arms race for instance. How would she feel, sitting up front there at council, and somebody doesn’t like what she says, hurls an object toward her face? I mean, one of my greatest fantasies of being involved in politics for forty-something years as a citizen is taking a nice—nice cow pie, bringing it in to council, right, and if somebody says something I don’t like I’ll hurl a cow pie toward their head. Come on, this is not proper behavior, much less for a council member, but for an adult human being. And sadly, we have to come up, go through this process, to get Mrs. Naeole to behave like an adult council member, not a child. And that’s about it. And the budget—the budget discussion, again, she had no basis for the anger. So this is pre-

meditated. Again, what are we going to do, put up chicken wire at the council so we don't—anyway, that's enough. Thank you so much.

CHAIR: All right. Thank you very much. Yes?

FOLENA: During the act of throwing the pen—sorry, I did not mention—the County budget was being discussed. I was sitting right about in the middle of department heads, because you know what happens during the budget. All the department heads get in there and they want what they want, to be able to run their respective departments correctly. They all need a piece of the pie. And so the point we're making, I'll concise it, is that Mrs. Naeole's failure to write a capital improvements bill before the budget came up, before the bond float came up—it made it doubly unexcusable for her to throw the pen and say she thought Kona was getting too much money. Well, she didn't ask for any money for Puna. That's our point. Thank you.

CHAIR: Okay, thank you. Mr. Udovic, Ms. Naeole, you guys can come up and respond.

SCHOEN: Mr. Chair—

CHAIR: --Yes—

SCHOEN: --while they're coming up, I believe Ms. Gentry has a disclosure—

CHAIR: --Oh, I'm sorry—

GENTRY: --Thank you, we forgot to say that—

SCHOEN: --which she has made before, but just so the record is clear, she'll make it again.

GENTRY: I'll repeat my disclosure that I did work in a temporary position for Ms. Naeole, but that was more than a year ago, and I feel I can sit on this particular petition based on the merits of the case.

CHAIR: Any Board members have any problem with that? Petitioners, any problem with that?

SMITH: No.

FOLENA: It's okay.

CHAIR: Okay, thank you. Go ahead.

UDOVIC: We have very little to say about this incident. It was an incident which allegedly occurred some sixteen months ago. It was a different council entirely. Different council members were present. Different employees were present at this location. The biggest complaint by the petitioner seems to be that Ms. Naeole didn't

make a capital improvement bill, and so therefore her throwing of the pen wasn't justified. I just don't think that this petition rises to the level of the section which is quoted, quite frankly, and Ms. Naeole is not going to make any statement about this. If they're alleging any criminal conduct on behalf of Ms. Naeole, the statute of limitations hasn't run, and she's not making any statement and will not waive her Fifth Amendment privilege. Period. That's it.

CHAIR: Okay. Board members, any questions for either side? Discussion?

NICHOLSON: I have a question, and I think it's actually for Ms. Folena and Mr. Smith.

CHAIR: Okay.

NICHOLSON: Since you witnessed this, and because Mr. Smith talked about this throwing of a cow pie—the pen wasn't aimed at anyone, it was just thrown at the floor?

FOLENA: The pen was thrown across the room and it hit the back door, and we're stating that it violates, what is it, (a)(3)—

CHAIR: --83?

FOLENA: a dash 3, because that says all persons shall be treated in a courteous, fair and impartial manner, or fair and courteous and impartial manner, and were any person to be coming through that door—and Mr. Smith can verify my statement here—I before stated, and I second this statement, I confirm it, that I was sitting at the time and I saw the action. Mr. Smith was just outside the door. He was about to enter the door, and he saw a commotion in the room, so he waited a few seconds until the commotion quieted down, and then he entered the door. If Mr. Smith had not stopped, he would have been probably hit by that pen. I think that whether or not Mr. Udovic's point of our main point is that Mrs. Naeole had no right to throw the pen because she hadn't written a capital improvements bill—that's a caveat. Our main point is that Mrs. Naeole had absolutely no right to endanger or intimidate—and intimidate, because that was intimidating to the public, having a pen thrown across the room. You know, you're going to think twice before you talk against what Mrs. Naeole wants? I was intimidated by it. I was angered by it. I think there is no excuse for any council member or any member of the public, over which you have no jurisdiction, but you do have jurisdiction over council officials, to throw objects across the county council room when they don't like what's going on and they receive opposition to what they want. That's our main point.

SMITH: Just further, again, the idea of bringing up the financial thing was the fact that again, there is no reason for anger there, and why would anybody—a council person really does have to have a thick skin. They have to be able to take criticism and not react in a violent or negative way. And I take my hats off to anybody that can do the job of a councilman well. I know I couldn't. I'm too reactionary. That's the point. But the point is that I don't want to walk in there saying well, if I'm going to get my point across I'm going to take a bucket of 'ili 'ili stones and bang them off the back wall of the council chambers. I mean, that's stupid. And I don't want to see this behavior at all in council,

because I want to go in there, discuss business, and go home. Period. That's all I want to do. I don't want to go through theatrics. Thanks.

CHAIR: Other Board members have any questions? So the main reason why you were waiting for over a year to bring this up is to illustrate a pattern of behavior?

SMITH: Yes, sir. Absolutely. And that is—that's the problem here. Apparently, sadly, none of the council members or the chair has actually corrected Mrs. Naeole. I mean, it had to be us from the public coming over—hey, we don't like this. And that's kind of sad in its own right. But again, I think that about two or three months in that council chamber would have informed Mrs. Naeole what the proper behavior is. Again, I haven't seen anybody—we've had spirited discussions in council, both between the council members and the public, absolutely. But nobody threw objects. Nobody tried to intimidate anybody. The only person that used verbal abuse to intimidate the public that I can remember is Jim Rath, and I don't know if that was before the Ethics Board was in existence. But Jim was actually called out by the public—you know, you want to back up your words, we'll do it in the parking lot. I mean, that's stupid. But that's what had to happen before Jim finally got his behavior in line—to at least outwardly treat the public with respect. So that's it, thank you.

CHAIR: Yes, Ms. Folena.

FOLENA: May I? Thanks, Mr. Chair. We waited these many months, over a year, to present this to you for a number of reasons. One reason was we shared many of the public's dismay that there are no penalties. All you do is give your opinions. So we were dismayed by that. A second reason was I was intimidated by it. And I finally got over that intimidation by Mrs. Naeole's more recent—I'll have to say violation, because you found only one—and our presentations of our feelings of further violations, which you did not honor, but that's—we have to honor your decisions there. And we also—I echo Mr. Smith's statements—that we are proving a habit pattern on the part of Mrs. Naeole—disrespect of the Code of Ethics and immature behavior, especially of a County official in a supposed leadership capacity. We refuse to be intimidated any longer. We got our courage up.

CHAIR: Unfortunately, our Board cannot impose fines, as you said—

FOLENA: --That's all right—

CHAIR: --but at the same time, we're not here to police immaturity or childish behavior, or a pattern of behavior for that matter. We have to look at each petition and each incident separately. And that's the way it is. And believe me, I agree with you that—nobody wishes we would have to deal with these issues more than the Board members. Obviously, the County Council has some issues to work out, and the chairman—he does the job the way he does it, and we respond and react to petitioners from the public coming to us. We cannot police, like I said, immaturity or what you're calling childish behavior. We have to stick directly to what the Ethics Code says—

FOLENA: --That's why we're _____--

CHAIR: --and sometimes it's a struggle to find where we can apply the Code to certain behaviors. And this is a classic case. Yes, I think there was something that went wrong. I think we can all agree that it's not behavior that behooves council members, but it's difficult for me to find exactly how it applies to the Code and where in the Code it applies to. And maybe that's why we're trying to look at these proposed changes and look at maybe ways that we can make the Code a little bit more user friendly for the folks of the public. Yes, Ms. Gentry, you want to say something?

GENTRY: Well, the behavior falls under the section—the section under (3)—

CHAIR: --2-83—

GENTRY: --yeah, all persons shall be treated in a courteous, fair, and impartial manner.

CHAIR: But Ms. Naeole wasn't throwing the pen at anybody. Correct, Ms. Naeole? Yeah.

GENTRY: That may be so—

CHAIR: --Yeah—

GENTRY: --That may be so, but courteous people don't go around flinging pens. So –

CHAIR: True.

GENTRY: Whether it be at one person or any particular thing. So that could be viewed, regardless if it was directed at one person or no one in particular—that's not courteous behavior. And also—are we in general discussion, or are you still taking questions?

CHAIR: We can do either one, whatever you want. You can just discuss.

GENTRY: Okay. Also, in review of our Code, I see no mention to the word of timely, that petitions need to be filed within a time period. It can be filed at any time.

CHAIR: I think our rules state something about six years or something?

SCHOEN: That's correct, Mr. Chair. 2-86, subsection (b), when it's conduct of someone other than—a third party's asking about the conduct of another person, they can bring that claim within six years.

GENTRY: So untimely doesn't qualify here. It is timely. It is within the six years.

CHAIR: That's a long time.

LUM: It does seem that the Council themselves—I mean from our outside point of view—the Council themselves perhaps should be doing a better job taking care of their actions, but then I’m an outlander from West Hawai‘i, so I’m not real pleased with the Council right now anyway.

CHAIR: _____, you have anything? Ms. Gentry?

GENTRY: No.

CHAIR: Do you think—does the Board think we have enough to make a decision today, or do you want to postpone this?

LUM: No, we should finish it.

NICHOLSON: I think that this is definitely an example of immature behavior, but I just don’t see that it’s really an ethical violation, so I would move that we have no finding for Petition No. 2009-9.

LUM: No finding. What does that mean?

NICHOLSON: Well, I don’t know—no violations of the Code of Ethics.

CHAIR: One thing that does bug me is what Mr. Smith said. If the roles were reversed and members of the public started throwing pens at the Council, I’m sure something would happen.

LUM: You’d be removed--

GENTRY: _____ security.

SMITH: You’d be arrested right away for assault.

GENTRY: Well, I would move that—

LUM: --Wait, we have a motion on the floor.

GENTRY: No we don’t, it was never seconded.

LUM: Oh that’s right, okay.

GENTRY: I would move that—oh, I didn’t even write it down—that there is a finding of violation in that Ms. Naeole did, as in the previous case, did not treat all persons in a courteous, fair, and impartial manner. Mostly courteous. I think it’s just dangerous with that kind of behavior, and I find—yeah, I find that there is a violation.

LUM: I’ll second it.

CHAIR: Okay. All right, so we have a motion and a second on the table. I just have some additional discussion. One thing that concerns me is the time frame here and the fact that it's taken almost a year and a half to come in front of us. I understand you're trying to establish a pattern of behavior here and show the type of behavior you're witnessing in Council. However, if it really was that offensive and discourteous to everybody there, I think this might have ended up in front of us a lot sooner. That's my main concern, and—not that I agree with the behavior at all or anything. While we're in discussion right now, Board members, do you have any other discussion here? Ms. Folena, you want to say something real quick?

FOLENA: Yes, I do.

CHAIR: Okay.

FOLENA: I made the point, sir, in addition to that habit pattern which you don't want to consider, and I understand that—I was intimidated. I was afraid of Mrs. Naeole. And it took until this year for me to get over that fear of her. So please take that into consideration—that that was an intimidating gesture and motion and action on the part of Mrs. Naeole to quell opposition to what she wanted. I take it as an intimidation of the public of opposition to what Mrs. Naeole wanted, and it took me quite awhile to get over it.

UDOVIC: Ms. Naeole wishes—we haven't responded, I could argue with you back and forth about this—but she has a statement she wants to make against my recommendation.

CHAIR: Okay. Yes, Ms. Naeole?

NAEOLE: I just wanted to say, when I threw that pen, my bad. It wasn't when the testifiers was testifying. It was when we were discussing it, nine council members. That's when that happened. It wasn't when any testifiers was on. I know that for a fact. We were discussing. And one of the reason why I felt very upset at that time was in my mind, I can see mothers sleeping in cars because they don't have no place to live. So my mind and my heart always think of the poor people. And I'm thinking 55 million to build this fancy building when mothers sleeping in cars 'cause no more house. That's the only reason why I felt upset—not I was trying intimidate anybody. So it wasn't somebody testifying and I did that. We nine council members was speaking. And in my heart—and that's why I threw it the first time, 'cause I could see the mama sleeping in the car with her little baby. I need to put that out, 'cause I need you to know the truth why I felt upset. Thank you.

CHAIR: All right, thank you. We have a motion on the floor with a second, that Ms. Naeole was in violation of Ethics Code 2-83, subsection (a)(3). Any further discussion, Board members?

GENTRY: Well, I'm looking at the Code itself. Six years is not—we're just abiding by that. So whether they file it like the day after an incident happens or five years, eleven months, and 29 days later, it's still within the rules, okay?

CHAIR: Okay.

GENTRY: And then the other thing is, our Code says all persons shall be treated in a courteous, fair, and impartial manner, regardless of whether people are testifying. If I sat here and flung a pen because I'm upset at something, I have just discourteously everyone in the room, okay? So I'm looking at it from that point of view, including those who are viewing it from afar on the DVD or on TV, however they view it. It's a matter about all persons. And that's why I see that there is a violation here, including the fellow council members who were present at the time. It's a good thing she missed your head.

FOLENA: I'm thankful.

CHAIR: Okay. Arthur, anything?

MARTIN: No.

CHAIR: Okay. Then all in favor of the motion on the table say aye.

GENTRY, LUM, MARTIN, CHAIR (simultaneously): Aye.

CHAIR: Opposed?

NICHOLSON: Aye.

CHAIR: Okay. Motion carried. Thank you.

FOLENA: Thank you.

LUM: How did the Chair vote?

CHAIR: Aye. I voted in favor.

NAEOLE: Thank you, Marilyn. Mahalo.

NICHOLSON: Thank you.

CHAIR: Okay, moving on. Discussion on Mayor William Kenoi's proposed amendments to the Ethics Code, reference Communication No. 2009-66.

b. Discussion on Mayor William Kenoi's proposed amendments to the Ethics Code (reference Communication No. 2009-66 from the Board's 9/23/09 agenda).

The Board members discussed when and how to hold the meeting on the Mayor's proposals and decided upon the following:

- They wanted as much public testimony as possible, since the proposals are important and somewhat controversial.
- To hold the meeting in the Hilo Council Chambers and to arrange, if possible, for videoconferencing with West Hawai'i.
- To advertise the meeting in the newspapers and to encourage people who cannot attend to submit written testimony. The notice of meeting should state that the Board will accept written and oral testimony.
- To emphasize that there is a short timeline on this, as the terms of two of the Board members will be expiring.
- That they will be receiving and reviewing input on the proposals and will not necessarily be making recommendations to the Council, unless they feel strongly about a proposal.

Ms. Lum said she is concerned about Proposal 1, as it was far-reaching and could be tromping on individual rights. It also bothered her if police officers could not be hired for special duty. Ms. Schoen explained that contracts for special duty police officers are with the Police Department and not the individual police officers, so the proposal should not affect that situation.

Ms. Nicholson said that the County of Hawai'i is small and that it seemed the Mayor was trying to parallel the code of the City and County of Honolulu, which is large and has very different demographics. The Code should not set artificial limitations, and she wanted to hear public testimony from people as to how the proposed changes would personally impact them. The testimony and statistics presented earlier by Mr. DeLima were troubling. It was not a good situation to have only two bidders for a project with one bidder being awarded by default because the other had a connection with the County. Big city regulations just may not work for a small county.

The Chair pointed out that the proposal would also limit the pool of people eligible to serve on boards and commissions and to work for the County. For example, if he owned a company and it had a contract with the County, he would have to choose between working with the County or being on the Board, even though there would be no relationship between his board duty and the contract.

Ms. Nicholson said she had also had real concerns about the third proposal, if she were reading it correctly. It appeared to propose that anyone who is a County employee could not appear before the council or a board or commission to testify regarding his own private interests. Ms. Schoen said private interest usually refers to a business or economic interest, but agreed that Proposal 3 could be construed as just plain interest.

The Chair said the members should take the next few weeks to review the proposals again and jot down their thoughts, so as to be prepared for the public meeting. The Mayor is looking for the Board to give him guidance. What the Board eventually provides or recommends

to the Council will not be set in stone, but they need to do their homework and be thorough in whatever action they end up taking.

6. UNFINISHED BUSINESS

There was no Unfinished Business for this meeting.

Motion and vote: Ms. Gentry moved to go into Executive Session, Ms. Nicholson seconded the motion, and all members voted aye.

11:28 a.m.: The Board left Regular Session.

* * * * *

11:48 a.m.: The Board returned to Regular Session.

7. EXECUTIVE SESSION (voting)

a. Approval of the minutes of the September 23, 2009, Executive Session.

Motion and vote: Ms. Nicholson moved to accept and file the minutes, Ms. Gentry seconded the motion, and all members voted aye.

b. Communication No. 2009-72: Email to the Board’s secretary dated 9/15/09, regarding “More willful Violations of Hawai‘i Sunshine Law,” and Communication No. 2009-73: Deputy Corporation Counsel Renee Schoen’s 10/2/09 response to Communication 2009-72.

Motion and vote: Ms. Nicholson moved to accept and file both communications, Ms. Gentry seconded the motion, and all members voted aye.

c. Communication No. 2009-69: Letter from the Office of Information Practices to the Board dated 9/23/09, requesting explanation as to whether the Board’s agenda for its 9/23/09 meeting violated Chapter 92 of the Hawai‘i Revised Statutes, and Communication No. 2009-74: letter from Deputy Corporation Counsel Renee Schoen to the Office of Information Practices regarding Communication No. 2009-69.

Motion and vote: Ms. Lum moved to accept and file both communications, Ms. Nicholson seconded the motion, and all members voted aye.

d. Draft letter from the Board to Zendo Kern regarding his confidential financial disclosure.

Motion and vote: Ms. Lum moved to approve the draft letter, Ms. Gentry seconded the motion, and all members voted aye.

- e. **Review of *Confidential Financial Disclosure Forms* filed pursuant to Section 2-91.1(d), Hawai'i County Code, by County board and commission members and designated County employees, where personal matters will be reviewed.**

Motion and vote: Ms. Nicholson moved to accept the two disclosures, Ms. Gentry seconded the motion, and all members voted aye.

8. ANNOUNCEMENTS

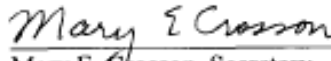
The Chair announced that the next monthly meeting was tentatively scheduled for November 18, 2009, at the Hilo Council Chambers.

9. ADJOURNMENT

Motion and vote: Ms. Gentry moved to adjourn, Ms. Lum seconded the motion, and all members voted aye.

11:51 a.m.: The meeting adjourned.

Respectfully submitted:



Mary E. Crosson, Secretary