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DEPT. OF LAND &  
 NATURAL RESOURCES  
 STATE OF HAWAII

Special Deputy Attorneys General Appearing Specially  
 for Attorney General Douglas S. Chin, the Department  
 of the Attorney General, and Deputy Attorneys General  
 in their capacity as COUNSEL for the BOARD OF LAND AND NATURAL  
 RESOURCES and HEARING OFFICER

## BOARD OF LAND AND NATURAL RESOURCES

## STATE OF HAWAII

|                                             |   |                                    |
|---------------------------------------------|---|------------------------------------|
| IN THE MATTER OF                            | ) | Case No. BLNR-CC-16-002            |
|                                             | ) |                                    |
| A Contested Case Hearing Re Conservation    | ) |                                    |
| District Use Application (CDUA) HA-3568     | ) | ATTORNEY GENERAL DOUGLAS S. CHIN,  |
| for the Thirty Meter Telescope at the Mauna | ) | THE DEPARTMENT OF THE ATTORNEY     |
| Kea Science Reserve, Kaohe Mauka,           | ) | GENERAL, AND DEPUTY ATTORNEYS      |
| Hamakua District, Island of Hawaii,         | ) | GENERAL, IN THEIR CAPACITY AS      |
| TMK (3) 4-4-015:99                          | ) | COUNSEL FOR THE BOARD OF LAND      |
|                                             | ) | AND NATURAL RESOURCES AND          |
|                                             | ) | HEARING OFFICER'S, MEMORANDUM IN   |
|                                             | ) | OPPOSITION TO PETITIONERS MAUNA    |
|                                             | ) | KEA ANAINA HOU; KEAHOLA            |
|                                             | ) | PISCIOTTA; CLARENCE KUKAUAKAHI     |
|                                             | ) | CHING; FLORES-CASE OHANA; DEBORAH  |
|                                             | ) | J. WARD; PAUL K. NEVES and KAHEA:  |
|                                             | ) | THE HAWAIIAN ENVIRONMENTAL         |
|                                             | ) | ALLIANCE'S MOTION TO DISQUALIFY    |
|                                             | ) | BLNR'S AND HEARING OFFICER'S       |
|                                             | ) | COUNSEL; DECLARATION OF DOUGLAS    |
|                                             | ) | S. CHIN; DECLARATION OF WILLIAM J. |
|                                             | ) | WYNHOFF; DECLARATION OF JULIE H.   |
|                                             | ) | CHINA; CERTIFICATE OF SERVICE      |

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) Hearing Date: August 5, 2016  
) Hearing Time: 10:00 a.m.  
) Hearing Officer: Judge Riki May Amano (Ret.)

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ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY  
GENERAL, AND DEPUTY ATTORNEYS GENERAL, IN THEIR CAPACITY AS  
COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES AND HEARING  
OFFICER'S, MEMORANDUM IN OPPOSITION TO MOTION TO DISQUALIFY BLNR'S  
AND HEARING OFFICER'S COUNSEL

I. **INTRODUCTION**

COME NOW Attorney General Douglas S. Chin ("Attorney General"), the Department of the Attorney General and Deputy Attorneys General (collectively the "Department"), COUNSEL FOR BOARD OF LAND AND NATURAL RESOURCES AND HEARING OFFICER ("Counsel"), by and through their attorneys Kobayashi Sugita & Goda, LLP, Special Deputy Attorneys General, making a Special Appearance, and hereby submit their Memorandum in Opposition to Petitioners' Motion to Disqualify Counsel (the "Motion").

Petitioners have ignored and are unable to meet the legal standard for disqualification of Counsel for the Board of Land and Natural Resources ("BLNR") and HEARING OFFICER in this proceeding.

The Attorney General and the Department are required by statute to represent the BLNR and HEARING OFFICER in this matter. The Attorney General is obligated to provide counsel to state agencies, while contested case hearings before the BLNR require the presence of a Deputy Attorney General. While individual Deputy Attorneys General may be excused or replaced by the Hearing Officer if they have appeared as an advocate on behalf of the agency they are now advising in the same matter, the Attorney General, Deputy Attorney General

William J. Wynhoff (“Wynhoff”), Julie H. China (“China”), and the Department have at no point assumed an advocacy role before the BLNR with respect to the University of Hawai‘i’s Conservation District Use Permit (“CDUP”) application. Because the Supreme Court of Hawai‘i has held that the Attorney General’s “affirmative duty” to represent public officers outweighs speculative notions of bias, Petitioners’ Motion must be denied so that the Department may perform its statutory duties. Petitioners apply the wrong legal standard and attempt to use a disqualification standard applicable to judges, in spite of the fact that the Department’s role in this matter is to serve as counsel to the BLNR and the Hearing Officer, and not to act in an adjudicatory capacity. Even if the general attorney disqualification analysis framework of the Hawai‘i Rules of Professional Conduct (“HRPC”) was to be applied, Petitioners have failed to establish a conflict under the HRPC and have further failed to prove that they have standing to bring this Motion.

## II. LEGAL STANDARD

Motions to disqualify counsel are disfavored and “are ‘subjected to particularly strict judicial scrutiny.’” White v. Time Warner Cable, No. CIV. 12-00406 JMS, 2013 WL 772848, at \*1 (D. Haw. Feb. 27, 2013) (quoting Optyl Eyewear Fashion Int’l Corp. v. Style Cos., Ltd., 760 F.2d 1045, 1050 (9th Cir. 1985)). “Because disqualification is a drastic measure, it is generally disfavored and should only be imposed when absolutely necessary.” M’Guinness v. Johnson, 196 Cal. Rptr. 3d 662, 672 (Cal. Ct. App. 2015); see also Tylena M. v. Heartshare Human Servs., No. 02CIV.8401 (VM)(THK), 2004 WL 1252945, at \*2 (S.D.N.Y. June 7, 2004) (“Motions to disqualify counsel are particularly disfavored . . .”).

**“The party seeking disqualification carries a heavy burden and must satisfy a high standard of proof because of the potential for abuse. A motion for disqualification should not be decided on the basis of general and conclusory allegations.** A court’s factual findings

for disqualification must be supported by substantial evidence.” White, 2013 WL 772848, at \*1 (emphases added) (citations and internal quotation marks omitted); see also Hilton Hawaiian Vill., LLC v. Nakasone, No. SCPW-14-0001323, 2015 WL 276500, at \*1 (Haw. Jan. 21, 2015) (“[T]he issue of whether counsel should be disqualified or allowed to continue representation ‘should not be decided on the basis of general and conclusory allegations.’” (quoting Chuck v. St. Paul Fire & Marine Ins. Co., 61 Haw. 552, 559, 606 P.2d 1320, 1325 (1980))); In re Marvel, 251 B.R. 869, 871-72 (Bankr. N.D. Cal. 2000) (“To be justified, a motion to disqualify must be based on present concerns and not concerns which are merely anticipatory and speculative.” (citation omitted)).

The legal standard for a motion to disqualify counsel is conspicuously absent from Petitioners’ Motion. Instead, Petitioners cite a litany of cases dealing with bias on the part of the decision-maker, which is not the correct legal standard and is irrelevant to a motion seeking disqualification of a government agency’s legal counsel.

### III. ARGUMENT

#### A. The Attorney General and the Department Have An “Affirmative Duty” to Represent the BLNR and the Hearing Officer

Under HRS § 28-4, the “Attorney General shall . . . give advice and counsel to the heads of departments, district judges, and other public officers, in all matters connected with their public duties . . . .” Id. (emphases added). HRS § 28-8 further authorizes the Attorney General to “appoint and at [his] pleasure remove, a first deputy and other deputies . . . as the exigencies of the public service may require . . . [who] **shall act under [his] direction** and shall **perform such duties as [he] may require.**” Id. (emphasis added). In addition, HRS § 28-1 states that the “attorney general shall appear for the State” in all cases in which the State is interested or a party. Id. (emphases added).

In Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, 87 Hawai'i 152, 952 P.2d 1215 (1998), the Supreme Court of Hawai'i recognized that the Attorney General is required by statute to provide counsel to state agencies. Id. at 174, 952 P.2d at 1237 ("The Attorney General is required to exercise h[er] independent professional judgment on behalf of a state officer [or instrumentality] for whom [s]he is bound to provide legal counsel. In this regard[,] h[er] duty is to analyze and advise h[er] clients as to the permissible alternative approaches to the conduct of the litigation." (quoting and adopting Manchin v. Browning, 296 S.E.2d 909, 920 (W. Va. 1982) (brackets in original))). Therefore, the Attorney General's obligation to provide legal counsel to state agencies is not permissive or discretionary, but rather, mandatory. See id.

The Administrative Rules governing the BLNR also mandate the presence of a Deputy Attorney General at contested case hearings.

A deputy attorney general, as assigned by the department of the attorney general, will serve as counsel to the board during its proceedings. In contested cases concerning alleged violations of law, there will be at least two deputy attorneys general assigned by and from different divisions of the department of the attorney general, one to represent the department of land and natural resources in enforcement of the law and one to serve as counsel for the board.

Hawai'i Administrative Rules (HAR) § 13-1-18.

Deputy Attorneys General are therefore required to represent the BLNR at contested case hearings. Petitioners have failed to identify any authority that authorizes the Hearing Officer to dismiss the Department of the Attorney General from a contested case hearing, which is consistent with the fact that the presence of a Deputy is required by law.

Petitioners would have the Hearing Officer believe that in carrying out their duties to represent the BLNR in court in defending decisions made by the BLNR, the Attorney General

and the Department are somehow precluded from continuing to advise the BLNR and the Hearing Officer in further proceedings. To the contrary, if the Department were to refuse to serve as BLNR counsel, they would be abrogating their duties and violating their statutory responsibilities.

B. **The Normal Rules of Conflicts of Interest Applicable to Attorney Disqualification Do Not Apply to the Department of the Attorney General**

Setting aside the fact that Petitioners have failed to allege an actual conflict of interest, the Hawai'i Supreme Court has held on multiple occasions that the traditional rules governing conflicts of interest are not to be strictly applied to the Attorney General. In In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000), the Supreme Court of Hawai'i explained that the Attorney General's responsibility to represent each state agency empowers the Attorney General to undertake multiple representations, even where there are conflicts of interest. Id. at 125, 9 P.3d at 437.

In other words, "separate units of a governmental agency, such as the office of attorney general, may undertake concurrent representation that would otherwise offend [the provisions of the Hawai'i Rules of Professional Conduct (HRPC) governing conflicts of interest, including HRPC 1.7 (1995) ], ... *so long as no prejudice is suffered by any of the clients.*" Comment [4] to HRPC 1.10 (1995) (emphasis added).

Id. (quoting Chun, 87 Hawai'i at 173–74, 952 P.2d at 1236–37 (emphasis added by court)). The court further held that that an Attorney General's personal participation in an agency hearing is not enough to violate due process. Id. at 125, 9 P.3d at 437.

The In re Water Use Applications court cited State v. Klattenhoff, 71 Haw. 598, 801 P.2d 548 (1990) for the proposition that the Department of the Attorney General may undertake multiple representations even when doing so would ordinarily constitute a conflict of interest. Id. In Klattenhoff, the Supreme Court of Hawai'i held the Attorney General

may represent a state employee in civil matters while investigating and prosecuting him in criminal matters, so long as the staff of the [department of the attorney general] can be assigned in such a manner as to afford independent legal counsel and representation in the civil matter, and so long as such representation does not result in prejudice in the criminal matter to the person represented.

Id. (quoting Klattenhoff, 71 Hawai‘i at 605, 801 P.2d at 552) (brackets in original). The situation is even more clear-cut here as the Department of the Attorney General’s sole role with respect to the CDUP application has to been to serve as counsel to the BLNR and its Hearing Officer, acting in a decision-making capacity as a tribunal.

C. **Petitioners Fail to Meet the Standard for Excusing or Replacing An Individual Deputy Attorney General**

The only instance in which an individual Deputy Attorney General will be excused from serving as counsel to a tribunal is when that same Deputy previously represented the same agency in the same matter, in an adversarial role. White v. Bd. of Education, 54 Haw. 10, 16, 501 P.2d 358, 363 (1972). In White, Deputy Attorney General Roy Miyamoto represented the Superintendent and advocated for a teacher’s termination in front of a hearing officer, and subsequently served as counsel to the Board of Education when the Board later reviewed the hearing officer’s decision. Id. at 11-12; 501 P.2d at 360-61. The court held that where a specific Deputy Attorney General represents an agency at an adversary hearing, that same Deputy Attorney General should not advise the agency when it later reviews the outcome of that same hearing. Id. at 16, 501 P.2d at 363. The court concluded that “where the Board requires legal advice in its decision-making function, it should call in another deputy attorney general who had no part in the adversary hearing.” Id. at 16 n.7, 501 P.2d at 363 n.7.

Further, the White court held that when a specific Deputy appeared as an advocate at a contested case hearing, a different Deputy should advise the tribunal. Id. at 16 n.7, 501 P.2d at 363 n.7. A Deputy’s appearance as an advocate therefore does not disqualify either the Attorney

General himself or the Department of the Attorney General from advising the tribunal. See id. The White court did not hold that disqualification was mandatory in such cases; the court instead held that the hearing officer may excuse an individual Deputy who had appeared in an adversarial role in the same matter, and be advised by a different Deputy Attorney General. See generally id.

Petitioners argue that the Department's previous defense of the BLNR's decision on appeal somehow precludes the Attorney General or the Department from advising the tribunal on remand. However, Petitioners have failed to meet the standard for replacement or individual disqualification under White. Here, neither Attorney General Douglas S. Chin nor Deputy Attorneys General Wynhoff and China assumed an advocacy role at the contested case hearing regarding the University of Hawai'i at Hilo's Conservation District Use Permit ("CDUP") application.<sup>1</sup> In fact, neither the Department of the Attorney General nor the BLNR were party-adversaries at the contested case hearing, unlike in White, in which a Deputy Attorney General advocated for a teacher's termination before a hearing officer. Id. at 11, 501 P.2d at 360. Not only have Petitioners failed to establish grounds for the Hearing Officer to excuse any of the Deputy Attorneys General under the standard articulated in White, but the BLNR's Counsel has affirmatively established that such an excuse is not warranted in this matter.

In Kilakila 'O Haleakala v. Board of Land & Natural Resources, No. CAAP-13-0003065, 2014 WL 5326757 (Haw. Ct. App. Oct. 17, 2014), cert. granted, No. SCWC-13-0003065, 2015 WL 114807 (Haw. Jan. 7, 2015), a case extremely similar to this one, the ICA considered a

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<sup>1</sup> While Deputy Attorney General China defended the BLNR's denial of a contested case hearing regarding the University of Hawai'i's Mauna Kea sublease at the Circuit Court, Deputy China did not assume an advocacy role in front of the BLNR in that manner. Further, unlike in White, which dealt with a Deputy's advocacy for a teacher's termination in front of a hearing officer and subsequent appearance as Board counsel in that same matter, the University of Hawai'i sublease and the University of Hawai'i's CDUP application are separate matters. See Declaration of Julie H. China ¶ 13; White, 54 Haw. at 11, 501 P.2d at 360.



challenge to the Department's representation of the BLNR. In Kilakila, Kilakila 'O Haleakala ("Kilakila") claimed that Deputy Attorney General Linda Chow ("Chow") "could not serve as Counsel for the Tribunal without casting suspicion on the hearing's integrity because Chow previously represented the Board in a related circuit court proceeding involving Kilakila." Id. at \*2. The ICA rejected Kilakila's argument, concluding that Chow's representation of the BLNR was proper because she "did not represent a party and has only represented the Board." Id. at \*25. Likewise, the Department in this matter has only represented the BLNR and has never represented the parties seeking a CDUP permit. Kilakila is indistinguishable from the present matter as both involve attempts to disqualify the Department from serving as BLNR counsel because of the Department's legal defense of BLNR actions. In Kilakila, the court held that under White, disqualification is only warranted where a Deputy Attorney General represents a party. Id. In both Kilakila and the instant case, the Department advised only the tribunal, and at no point appeared on behalf of a party adversary. The Hearing Officer should follow Kilakila and deny the Motion.

In Morongo Band of Mission Indians v. State Water Res. Control Bd., 199 P.3d 1142 (Cal. 2009), the California Supreme Court reversed the Court of Appeal and held that no due process violation occurred when a government attorney prosecuted an administrative violation before an adjudicator that she advised in unrelated cases. Id. at 1145-46. The court concluded that "any tendency for the agency adjudicator to favor an agency attorney acting as prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance." Id. at 1146. The court noted that it was unable to find a single state or federal case that held that "it [would be] a violation of the license holder's constitutional right to due process of law for the agency attorney acting as prosecutor to

concurrently advise the administrative decision maker in an entirely unrelated proceeding.” Id. at 1147. The Hearing Officer should therefore follow the overwhelming weight of authority and deny the Motion.

Contrary to Petitioners’ unsupported allegations in the Motion, the Department has never advocated on behalf of the issuance of the CDUP or for the Thirty Meter Telescope more generally. Its role has been strictly limited to serving as the BLNR’s counsel. The Department has at no point represented any of the parties in this matter or taken an advocacy position with respect to the issuance of the CDUP. None of the emails in Exhibit “D” of the Motion show any improper conduct on behalf of the Department. Petitioners are unable to identify a single email that shows any bias on the part of the Department with respect to the CDUP. The emails simply reflect the fact that as chief law enforcement officer, the Attorney General and the Department are responsible for enforcing laws to protect the health, safety, and welfare of the public. Because illegal road blockades and camping posed a danger to public safety and welfare, the Deputy Attorneys General communicated with the University of Hawai‘i at Hilo (the Mauna Kea lessee) and TMT International Observatory, LLC (the party engaged in construction) to the extent that cooperation with such parties was necessary to enforce the emergency rule and maintain public order. See generally Declaration of Douglas S. Chin; Declaration of William J. Wynhoff; Declaration of Julie H. China, attached hereto. Petitioners have failed to produce any evidence of advocacy efforts by the Department with respect to the CDUP.

**D. Petitioner’s Discussion of the “Appearance of Impropriety” Is Inapplicable**

Petitioners’ Motion should also be denied because Petitioners conflate the law regarding disqualification of counsel with the law governing judicial recusal, which is inapplicable here as the Department does not serve in an adjudicatory capacity at the BLNR. Petitioners’ sole argument is that the Attorney General’s or the Department’s involvement in the contested case

hearing creates the “appearance of impropriety.” The appearance of impropriety standard applies to judicial recusals, and not to the disqualification of counsel. See, e.g., DCH Health Servs. Corp. v. Waite, 115 Cal. Rptr. 2d 847, 850 (Ct. App. 2002) (“As distinguished from judicial recusals, which may be required on the basis of a mere ‘appearance of impropriety’, such an appearance of impropriety by itself does not support a lawyer’s disqualification.” (internal citations omitted)); Miller v. Superior Court, No. D046449, 2006 WL 302408, at \*3 (Cal. Ct. App. Feb. 9, 2006) (“An appearance of impropriety justifies a judge’s recusal, **but not an attorney’s disqualification.**” (emphasis added)). Petitioners are moving for the disqualification of counsel, not the recusal of the decision-maker. Therefore, their arguments with respect to the appearance of impropriety are inapplicable.

In Sapienza v. Heen, 57 Haw. 284, 554 P.2d 1128 (1976), the Prosecuting Attorney sought a writ of prohibition against a Circuit Court Judge for issuing a temporary restraining order enjoining the Prosecuting Attorney from indicting a defense attorney for bribery until the conclusion of a trial, and argued that the Attorney General should be disqualified from representing the Judge because the Attorney General had previously advanced a similar position. Id. at 285-87, 554 P.2d at 1129-30. In response to the Prosecuting Attorney’s argument that the Attorney General’s previous position gave “an appearance of impropriety,” the court held that the Attorney General was nevertheless required to represent the Judge:

The Prosecutor's alternative ground for disqualification, that representation by the Attorney General under the particular facts of this case gives an appearance of impropriety, is unsupported by statutory or case authority. The Prosecutor makes much of the fact that in a separate case (which had briefly been before Judge Heen until his recusal), the Attorney General there argued that, under the exceptional circumstances of that case, the Prosecutor should be enjoined from taking certain evidence before the grand jury. The fact that Judge Heen in the instant case has adopted a point of view somewhat similar to a point of view advocated by the

**Attorney General in another case should not prevent the Attorney General from representing Judge Heen Now [sic].** The allegation of an appearance of impropriety is especially weak here because the Attorney General's office was in no way involved in the instant case prior to the Prosecutor's application for prohibition. **Although it is conceivable, as the Prosecutor suggests, that the representation of a judge by the Attorney General might seem, in the eyes of some, to illustrate 'buddyism' between the Attorney General's office and State judges, such speculation is outweighed by HRS's 28-4, supra, which imposes on the Attorney General the affirmative duty to provide counsel for judges being sued in their official capacities.** Speculation as to 'buddyism' would appear equally well founded where any private attorney represents a judge in court. **We find no substantial appearance of impropriety.**

*Id.* at 286–87, 554 P.2d at 1130 (emphasis added). Just as the Attorney General had an “affirmative duty” to represent Judge Heen, the Department in this case has an affirmative duty to provide counsel to BLNR and its Hearing Officer.<sup>2</sup> The Department’s previous defense of the BLNR’s issuance of the CDUP in front of the Circuit Court and the Supreme Court does not impair its present obligation to represent the BLNR and the Hearing Officer. The Department’s mandatory defense of the CDUP therefore does not create a legally meaningful “appearance of impropriety.” *Id.*

E. **Petitioners Have Failed to Establish a Conflict of Interest Requiring Disqualification Under Traditional Conflict of Interest Rules**

Even if Petitioners had standing to bring this Motion (they do not), the Motion should be denied because Petitioners have failed to allege any cognizable “conflict of interest.”

Under the Hawai‘i Rules of Professional Conduct (“HRPC”), there are two situations where disqualification of an attorney may be proper: first, when there is a conflict of interest between existing clients, HRPC Rule 1.7; and second, when there is a conflict of interest between an existing client and a former client, HRPC Rule 1.9. See also White, 2013 WL

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<sup>2</sup> The BLNR is the executive head of the Department of Land and Natural Resources. Haw. Rev. Stat. §§ 26-15(a); 171-3(a).

772848, at \*1 (analyzing a motion to disqualify counsel under HRPC Rules 1.7 and 1.9); Pullman v. Alpha Media Pub., Inc., No. 12 CIV. 1924 PAC JCF, 2012 WL 3114939, at \*4 (S.D.N.Y. July 31, 2012) (“[T]he only two readily identifiable situations where the risk of taint stemming from an attorney’s conduct merits disqualification are when the challenged attorney is concurrently representing adverse interests or when the attorney’s successive representation of adverse interests raises the possibility that in the present matter he will improperly use confidences gained in the prior representation to the detriment of his former client.” (internal quotation marks and ellipsis omitted)).

Disqualification of the Department in this case is unwarranted and improper because no legally cognizable conflict of interest exists. The Attorney General is the chief law enforcement officer of the State of Hawai‘i, and therefore he and the Department represent the state and its agencies. Petitioners have not and cannot claim that the Department’s role as counsel to the BLNR and the Hearing Officer is “directly adverse” to another client. Accordingly, there is no concurrent conflict of interest under HRPC Rule 1.7. Petitioners are similarly unable to claim that the Department’s role as counsel to the BLNR and the Hearing Officer is “materially adverse” to a former client. Therefore, no conflict of interest exists under HRPC Rule 1.9.

Because no conflict of interest exists under HRPC Rules 1.7 or 1.9, Petitioners cannot even argue that there is a basis for disqualification under the normal rules applicable to attorneys (but not the Attorney General or the Department). Therefore, this Motion should be denied. White, 2013 WL 772848 at \*1 (“The Hawai‘i Rules of Professional Conduct govern Plaintiff’s conflict of interest arguments, but they do not support disqualification because no conflict of interest exists. *See* HRCF Rules 1.7 & 1.9 . . . . Because Plaintiff fails to meet his ‘heavy burden

and high standard of proof' to show that disqualification is proper, Plaintiff's request to disqualify Cades Schutte is DENIED." (ellipsis omitted)).

Additionally, Petitioners are neither present nor former clients of the Attorney General or the Department, and therefore lack standing to even bring a Motion to Disqualify Counsel under the normal rules applicable to attorneys (but not the Attorney General or the Department). With few exceptions (none of which apply here), only a client or former client has standing to bring a motion to disqualify an attorney. *See, e.g., Lau v. Valu-Bilt Homes, Ltd*, 59 Haw. 283, 294, 582 P.2d 195, 202 (1978) (client or former client); *Straub Clinic & Hosp. v. Kochi*, 81 Hawai'i 410, 918 P.2d 1284 (1996) (former client); *Davis v. Wholesale Motors, Inc.*, 86 Hawai'i 405, 949 P.2d 1026 (App. 1997) (former client); *cf. Otaka, Inc. v. Klein*, 71 Haw. 376, 382, 791 P.2d 713, 717 (1990) ("Canon 4 of the Code of Professional Responsibility presupposes the existence of a **prior attorney-client relationship between the challenged attorney and the party who is disputing the attorney's representation of an adversarial party in the current litigation.**" (emphasis added)). The Ninth Circuit also adheres to the rule that only a client or former client has standing to disqualify an attorney. *See, e.g., Blacktail Mountain Ranch Co., LLC v. Jonas*, 611 Fed. App'x 430 (9th Cir. 2015) ("Plaintiffs lacked standing to move for disqualification because they were not clients or former clients of Defendants' counsel.").

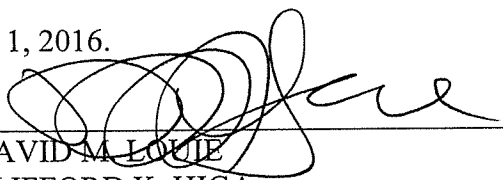
None of the Petitioners are current or former clients of Attorney General Douglas S. Chin, Deputy Attorneys General Wynhoff or China, or the Department. Accordingly, Petitioners lack standing to move for their disqualification, even if the normal rules governing disqualification of attorneys were to apply here. Since such rules do not apply to the Attorney General or the Department, Petitioners have absolutely no basis to even raise the issue of disqualification.

#### IV. CONCLUSION

As the party seeking the Attorney General's and his Department's disqualification, Petitioners have the heavy burden of proving a basis to warrant disqualification. Instead, Petitioners rely on the inapplicable appearance of impropriety standard, which governs the recusal of decision-makers, not their counsel. Petitioners ignore the fact that the Legislature has mandated that the Attorney General both provide legal counsel to the BLNR and represent the BLNR in legal proceedings. Because no specific Deputy Attorney General has acted as an advocate before the BLNR or a hearing officer in this matter, there are no grounds for disqualification under White. Petitioners further ignore Kilakila, in which the ICA refused to disqualify a Deputy Attorney General in a case with virtually identical facts. Petitioners have further failed to identify any personal involvement on the part of the Attorney General or the Department with respect to the CDUP application.

Simply stated, Petitioners have provided absolutely no grounds to disqualify the Attorney General or the Department in this case. Therefore, the Motion should be denied.

DATED: Honolulu, Hawai'i, August 1, 2016.



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DAVID M. LOUIE  
CLIFFORD K. HIGA  
NICHOLAS R. MONLUX

Special Deputy Attorneys General Appearing  
Specially for Attorney General Douglas S. Chin, the  
Department of the Attorney General, and Deputy  
Attorneys General in their capacity as COUNSEL  
for the BOARD OF LAND AND NATURAL  
RESOURCES and HEARING OFFICER

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

|                                             |   |                                |
|---------------------------------------------|---|--------------------------------|
| IN THE MATTER OF                            | ) | Case No. BLNR-CC-16-002        |
|                                             | ) |                                |
| A Contested Case Hearing Re Conservation    | ) |                                |
| District Use Application (CDUA) HA-3568     | ) | DECLARATION OF DOUGLAS S. CHIN |
| for the Thirty Meter Telescope at the Mauna | ) |                                |
| Kea Science Reserve, Kaohe Mauka,           | ) |                                |
| Hamakua District, Island of Hawaii,         | ) |                                |
| TMK (3) 4-4-015:99                          | ) |                                |
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DECLARATION OF DOUGLAS S. CHIN

I, DOUGLAS S. CHIN, declare as follows:

1. I am the Attorney General of the State of Hawai'i. I have been the Attorney General since March 15, 2015. I am authorized to make this declaration and I do so based on my personal knowledge.
2. Before becoming Attorney General, I was a partner at the Carlsmith Ball law firm from January 2, 2013 until March 16, 2015.
3. While at Carlsmith Ball, I did not participate in the representation of the University of Hawai'i, including the Thirty Meter Telescope proposed for Mauna Kea.
4. The Thirty Meter Telescope is an important issue in the State of Hawai'i that has directly engaged the attention of the Governor and engaged my attention as the Governor's chief legal advisor. The Governor has repeatedly stated that he supports a fair and expeditious hearing process without a preconceived result, as do I. Neither the Governor nor I are involved at any stage of the adjudication or decision-making process for the Thirty Meter



Telescope. We recognize that the decision will be made by the Board of Land and Natural Resources and is subject to judicial review.

5. To the best of my knowledge, I have never advocated publicly for or against the issuance of the Conservation District Use Permit ("CDUP").

6. To the best of my knowledge, I have never advocated publicly for or against the Thirty Meter Telescope.

7. To the best of my knowledge, I have never been a member of any organization that has advocated for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

8. To the best of my knowledge, I do not have a financial interest in any organization that is advocating for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

9. To the best of my knowledge, I have never advised the University of Hawai'i or any group promoting the Thirty Meter Telescope with respect to the issuance of the CDUP.

10. To the best of my knowledge, I have never publicly advocated the University of Hawaii's position with respect to the issuance of the CDUP.

11. To the best of my knowledge, I have never solicited donations for any person or group advocating for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

12. My major involvement with Mauna Kea and the Thirty Meter Telescope has been in connection with maintaining and ensuring lawful access to the summit of Mauna Kea via the access road. I am required by Section 28-2 of the Hawai'i Revised Statutes to "be

diligent in prosecuting all persons who may obstruct any street, channel, wharf, or other highway, or any stream or public watercourse, or commit any trespass, or waste on any portion of the public domain, or other public property,” and by extension, so are my Deputies.

13. As the chief law enforcement officer for the State of Hawai‘i, I could not allow a public roadway in the state to be unlawfully blocked by individuals.

14. It was my judgment that passage of an Emergency Rule with respect to Mauna Kea was necessary to maintain public order, and to protect the public’s health, safety, and welfare.

15. When the Board of Land and Natural Resources passed the Emergency Rule, I took the lead in planning and preparing to implement the Rule and otherwise maintain access to the summit of Mauna Kea. I directed my Deputies to assist in this task.

16. My actions with respect to the Emergency Rule and subsequent enforcement actions on Mauna Kea while the Emergency Rule was in effect were wholly derived from my duty as the chief law enforcement officer for the State of Hawai‘i, and were completely separate from the merits of the proposed Thirty Meter Telescope project.

17. I have never recommended, requested, advised, or directed the BLNR or the Hearing Officer to grant or deny the CDUP application.

18. My advocacy role is limited to defending the actions of state agencies and the State of Hawai‘i; I do not advocate for specific policy preferences except for those pertaining to my role as the chief law enforcement officer for the State of Hawai‘i.

19. I communicated with other parties and their attorneys regarding Mauna Kea for the purposes of discussing the Emergency Rule, not allowing a public roadway to be blocked by individuals, and protecting public order on Mauna Kea.

DATED: Honolulu, Hawai'i, August 1, 2016.

  
DOUGLAS S. CHIN

## BOARD OF LAND AND NATURAL RESOURCES

## STATE OF HAWAI'I

|                                             |   |                                   |
|---------------------------------------------|---|-----------------------------------|
| IN THE MATTER OF                            | ) | Case No. BLNR-CC-16-002           |
|                                             | ) |                                   |
| A Contested Case Hearing Re Conservation    | ) |                                   |
| District Use Application (CDUA) HA-3568     | ) | DECLARATION OF WILLIAM J. WYNHOFF |
| for the Thirty Meter Telescope at the Mauna | ) |                                   |
| Kea Science Reserve, Kaohe Mauka,           | ) |                                   |
| Hamakua District, Island of Hawaii,         | ) |                                   |
| TMK (3) 4-4-015:99                          | ) |                                   |
|                                             | ) |                                   |
|                                             | ) |                                   |
|                                             | ) |                                   |

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DECLARATION OF WILLIAM J. WYNHOFF

I, WILLIAM J. WYNHOFF, declare as follows:

1. I am a Deputy Attorney General with the State of Hawai'i. I am authorized to make this declaration and do so on the basis of personal knowledge.
2. To the best of my recollection, my first involvement with Mauna Kea and the Thirty Meter Telescope was during the briefing on appeals. As supervisor of the Land / Transportation division, I had input as to the briefing and oral arguments supporting the Board's decision and order with respect to the Conservation District Use Permit (CDUP).
3. I advised the Department with respect to drafting the proposed emergency rule relating to Mauna Kea. I staffed the sunshine meeting at which the Board considered the proposed rule. My role as counsel for the Board did not involve taking a position as to whether the Board should adopt the proposed emergency rule.
4. The Board voted to adopt the rule. I represented the Board in five separate lawsuits challenging the emergency rule.

5. I have never advocated for or against issuance or re-issuance of the CDUP.

6. I have never advocated for or against the Thirty Meter Telescope.

7. I have never encouraged any organization or person to advocate for or against the Thirty Meter Telescope and/or for or against the issuance of the CDUP.

8. To the best of my knowledge, no organization of which I am a member has advocated for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

9. To the best of my knowledge, no organization to which I have donated money and/or time has advocated for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

10. To the best of my knowledge, no organization in which I have a financial interest has advocated for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

11. I have never advised the University of Hawai'i or any group promoting the Thirty Meter Telescope with respect to the Thirty Meter Telescope and/or issuance of the CDUP.

12. I have never advocated the University of Hawai'i's position with respect to the Thirty Meter Telescope.

13. I have never advocated any individual's or group's position supporting or opposing the Thirty Meter Telescope.

14. I have never solicited donations for any person or group advocating for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

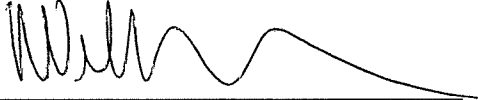
15. Throughout this case I have only tried my best to carry out my statutory duties to represent the tribunal (including the Hearing Officer and Board) as its legal counsel. I have no preconceived notion as to whether the CDUP should be granted or not. In any event, my role as counsel for the tribunal (including the Hearing officer and Board) does not involve taking a position as to the merits of the matter before the tribunal.

16. I communicated with other parties and their attorneys regarding Mauna Kea for the purpose of discussing the Emergency Rule, not allowing a public roadway to be blocked by individuals, and protecting public order on Mauna Kea.

17. My role is limited to defending the actions of the BLNR; I do not advocate for specific policy preferences.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, August 1, 2016.



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WILLIAM J. WYNHOFF

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

|                                             |   |                               |
|---------------------------------------------|---|-------------------------------|
| IN THE MATTER OF                            | ) | Case No. BLNR-CC-16-002       |
|                                             | ) |                               |
| A Contested Case Hearing Re Conservation    | ) |                               |
| District Use Application (CDUA) HA-3568     | ) | DECLARATION OF JULIE H. CHINA |
| for the Thirty Meter Telescope at the Mauna | ) |                               |
| Kea Science Reserve, Kaohe Mauka,           | ) |                               |
| Hamakua District, Island of Hawaii,         | ) |                               |
| TMK (3) 4-4-015:99                          | ) |                               |
|                                             | ) |                               |
|                                             | ) |                               |
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DECLARATION OF JULIE H. CHINA

I, JULIE H. CHINA, declare as follows:

1. I am a Deputy Attorney General with the State of Hawai'i. I am authorized to make this declaration and I do so based on my personal knowledge.
2. My first involvement with the Thirty Meter Telescope ("TMT") conservation district use permit application ("CDUA") was on February 25, 2011, when I staffed a sunshine meeting, held pursuant to chapter 92, Hawai'i Revised Statutes, at which the Board of Land and Natural Resources ("Board") first considered the TMT CDUA.
3. Subsequently, I advised the tribunal (including the hearing officer and the Board) during the first TMT contested case hearing. The contested case hearing resulted in the Board's Decision and Order, filed on April 12, 2013. At no time did I take a position as to the merits of the matter before the tribunal.
4. I have never recommended, advised, requested, or directed that BLNR or the Hearing Officer grant or deny the CDUP application.

5. I advised the Board with respect to the agency appeal filed in the Third Circuit Court. There, I drafted briefs and presented oral arguments before the Honorable Greg K. Nakamura, in support of the Board's decision to approve the TMT CDUA. I also advised the Board with respect to the secondary agency appeal to the Hawai'i Supreme Court, where I drafted a brief and presented oral argument again supporting the Board's decision. In both instances, I advocated that the Board's decision was proper and properly made.

6. My advocacy role is limited to defending the actions of the BLNR; I do not advocate for specific policy preferences.

7. I have never advocated for or against issuance or re-issuance of the conservation district use permit ("CDUP").

8. To the best of my knowledge, I have never advocated publicly for or against the Thirty Meter Telescope.

9. To the best of my knowledge, I have never encouraged any organization or person to advocate for or against the Thirty Meter Telescope and/or for or against the issuance of the CDUP.

10. To the best of my knowledge, I have never been a member of any organization that has advocated for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

11. To the best of my knowledge, I have never donated any money and/or time to any organizations advocating for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.



12. To the best of my knowledge, I do not have a financial interest in any organization that is advocating for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

13. As a Deputy Attorney General, I was assigned to brief and argue the case defending the Board's denial of E. Kalani Flores's request for a contested case hearing challenging the sublease of land from the University of Hawai'i to the Thirty Meter Telescope. I argued that case before Judge Greg Nakamura (the "Sublease case"). Following the Supreme Court's decision in Mauna Kea Anaina Hou v. Board of Land & Natural Resources, the Sublease case was remanded to the Board, which has not yet made a decision on the matter.

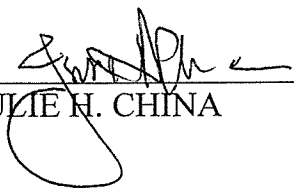
14. To the best of my knowledge, I have never solicited donations for any person or group advocating for or against the Thirty Meter Telescope and/or for or against issuance of the CDUP.

15. Throughout this case I have only tried my best to carry out my statutory duties to represent the tribunal (including the Hearing Officer and Board) as its legal counsel. I have no preconceived notion as to whether the CDUP should be granted or not. In any event, my role as counsel for the tribunal (including the Hearing officer and Board) does not involve taking a position as to the merits of the matter before the tribunal.

16. I communicated with other parties and their attorneys regarding Mauna Kea for the purpose of maintaining public order on Mauna Kea.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, August 1, 2016.

  
\_\_\_\_\_  
JULIE H. CHINA

## BOARD OF LAND AND NATURAL RESOURCES

## STATE OF HAWAI'I

|                                             |   |                         |
|---------------------------------------------|---|-------------------------|
| IN THE MATTER OF                            | ) | Case No. BLNR-CC-16-002 |
|                                             | ) |                         |
| A Contested Case Hearing Re Conservation    | ) |                         |
| District Use Application (CDUA) HA-3568     | ) | CERTIFICATE OF SERVICE  |
| for the Thirty Meter Telescope at the Mauna | ) |                         |
| Kea Science Reserve, Kaohe Mauka,           | ) |                         |
| Hamakua District, Island of Hawaii,         | ) |                         |
| TMK (3) 4-4-015:99                          | ) |                         |
|                                             | ) |                         |
|                                             | ) |                         |
|                                             | ) |                         |

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY GENERAL, AND DEPUTY ATTORNEYS GENERAL, IN THEIR CAPACITY AS COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES AND HEARING OFFICER'S, MEMORANDUM IN OPPOSITION TO PETITIONERS MAUNA KEA ANAINA HOU; KEAHOLA PISCIOTTA; CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD; PAUL K. NEVES and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE'S MOTION TO DISQUALIFY BLNR'S AND HEARING OFFICER'S COUNSEL, was duly served upon the following parties and counsel of record by hand delivery or electronic mail (as indicated below):

|                                                                                                                                                                                                        | <u>HAND<br/>DELIVERED</u> | <u>VIA E-MAIL</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------|-------------------|
| Michael Cain<br>DLNR Office of Conservation and Coastal Lands<br>1151 Punchbowl Street, Room 131<br>Honolulu, Hawai'i 96813<br><a href="mailto:michael.cain@hawaii.gov">michael.cain@hawaii.gov</a>    | X                         | X                 |
| Custodian of the Records                                                                                                                                                                               |                           |                   |
| <i>Original and one digital copy</i>                                                                                                                                                                   |                           |                   |
| Judge Riki May Amano (Ret.)<br><a href="mailto:rma3cc@yahoo.com">rma3cc@yahoo.com</a>                                                                                                                  |                           | X                 |
| Hearing Officer                                                                                                                                                                                        |                           |                   |
| William J. Wynhoff, Esq.<br>Julie H. China, Esq.<br><a href="mailto:julie.h.china@hawaii.gov">julie.h.china@hawaii.gov</a><br><a href="mailto:bill.j.wynhoff@hawaii.gov">bill.j.wynhoff@hawaii.gov</a> |                           | X                 |
| Counsel for Board of Land and Natural<br>Resources                                                                                                                                                     |                           |                   |
| Ian Sandison, Esq.<br>Timothy Lui-Kwan, Esq.<br><a href="mailto:isandison@carlsmith.com">isandison@carlsmith.com</a><br><a href="mailto:tluikwan@carlsmith.com">tluikwan@carlsmith.com</a>             |                           | X                 |
| Counsel for applicant<br>University of Hawai'i at Hilo                                                                                                                                                 |                           |                   |
| J. Douglas Ing, Esq.<br>Ross T. Shinyama, Esq.<br><a href="mailto:douging@wik.com">douging@wik.com</a><br><a href="mailto:rshinyama@wik.com">rshinyama@wik.com</a>                                     |                           | X                 |
| Counsel for TMT International<br>Observatory, LLC                                                                                                                                                      |                           |                   |

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**VIA E-MAIL**

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Representative for The Temple of Lono

Kalikolehua Kanaele  
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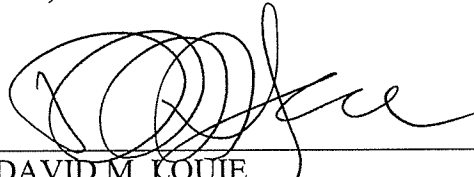
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Via U.S. Mail  
Postage prepaid

DATED: Honolulu, Hawai'i, August 1, 2016.



DAVID M. LOUIE  
CLIFFORD K. HIGA  
NICHOLAS R. MONLUX

Special Deputy Attorneys General Appearing  
Specially for Attorney General Douglas S. Chin, the  
Department of the Attorney General, and Deputy  
Attorneys General in their capacity as COUNSEL  
for the BOARD OF LAND AND NATURAL  
RESOURCES and HEARING OFFICER