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Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) (HA-3568 for) **TEMPLE OF LONO MOTION FOR**
The Thirty Meter Telescope at the Mauna) **SUMMARY JUDGMENT**
Kea Science Reserve, Kaohe Mauka,) **(DISQUALIFICATION)**
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION)

Now comes the Temple of Lono, pursuant to Rule 56(a) of the Hawaii Rules of Civil Procedure, to move this Hearing Officer to grant a summary judgment on the Temple's claim that the Applicant's bigoted and libelous attack on the Temple disqualifies the Applicant from being given a permit by the State..

The Temple of Lono Memorandum in Support of this motion identifies material facts about which there is no genuine issue and which entitle the Temple of Lono to the summary judgments sought as a matter of law.

Respectfully Submitted,

_____/s/_____
Lanny Alan Sinkin
Lay Representative
Temple of Lono

Dated: September 17, 2016

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Office of Conservation and Coastal Lands
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State of Hawaii

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IN THE MATTER OF) Case No. BLNR-CC-16-002
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A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) (HA-3568 for) **TEMPLE OF LONO MEMORANDUM IN**
The Thirty Meter Telescope at the Mauna) **SUPPORT OF MOTION FOR**
Kea Science Reserve, Kaohe Mauka,) **SUMMARY JUDGMENT**
Hamakua District, Island of Hawai'i,) **(DISQUALIFICATION)**
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION)**

I. INTRODUCTION

Herein the Temple of Lono argues that facts not in dispute support granting a summary judgment, which compels the dismissal of this case.

II. STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fujimoto v. Au, 95 Hawai'i 116, 136, 19 P.3d 699, 719 (2001)(citing *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Hawai'i 85, 104, 839 P.2d 10, 22, reconsideration denied, 74 Hawai'i 650,843 P.2d 144 (1992)).

III. ARGUMENT

A. Native Hawaiian Religious Practices are protected by the Hawaiian Constitution.

The Native Hawaiian traditional faith is protected by the Constitution of Hawai'i. Article XII, § 7:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.)

(emphasis added).

As the Hawaii Supreme Court observed in this case:

Thus, the Board was informed of multiple traditional Hawaiian cultural practices exercised in the project area and was aware of the project's potential adverse impact on the "spiritual nature of Mauna Kea" and the "cultural beliefs and practices of many."

Mauna Kea Anaina Hou v. Board of Land and Natural Resources (hereinafter "Anaina Hou"), 136 Hawai'i 376, 363 P.3d 224, 251 (2015) (Justice Pollack concurring).

Justice Pollack provided an extensive discussion of the requirement to protect Native Hawaiian religious rights, noting the constitutional mandate. *Ibid.* at 248-251.

That presentation included the following:

In 1978, protection of traditional and customary Hawaiian rights was preserved within the Hawai'i Constitution. Article XII, Section 7 embodies the resolute promise by the State to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a [footnote omitted] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right . . . to regulate such rights." Haw. Const. art. XII, § 7; *see In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications ('Iao)*, 128 Haw. 228, 247, 287 P.3d 129, 148 (2012). So robust is this promise that even though Article XII, Section 7 carves out for the State the

power to regulate the exercise of customary and traditional Hawaiian rights, this court underscored that "the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." *PASH*, 79 Hawai'i at 450 n. 43, 903 P.2d at 1271 n. 43.

Ibid. at 248 (emphases added).

The University seeks a permit to conduct an activity with "a potential adverse impact on the 'spiritual nature of Mauna Kea.'" *Ainaina Hou* at 376, 251.

The presence of that potentially adverse impact means that the Applicant must be committed to implementing whatever steps are necessary to meet the "resolute promise" that the State makes in its Constitution to protect the traditional faith.

B. The Applicant's attack on the Temple of Lono documents a disrespect for and hostility towards the Traditional Hawaiian Faith.

As the Temple brought to the attention of the Hearing Officer, the attack on the Temple by the Applicant is bigoted and libelous. DOC-176. The description of the Temple by the Applicant attempts to portray the Temple as equivalent to Isis, an extremist organization attempting to impose its religious views on the rest of the world without concern for any harm caused. *Id.*

The University attack includes the following:

The Temple, by its papers and actions, rejects the sharing of Mauna Kea. The Temple is fundamentally adversarial (and ardently absolutist), by using this proceeding as a platform to advance its own religious agenda.

DO-135 at 14.

The Temple's "challenge" is not primarily about whether the State should issue the University a permit for the TMT at the TMT site; instead the "challenge" is about the Temple's "right ... to be respected and practiced in [Hawai'i]." The problem with fundamentalism in religion – **any religion** – is its intolerance and inability to compromise. Fundamentalist religion when

confronted with a conflict between cooperation and conformity to doctrine invariably chooses the latter regardless of the harm it bring to the society of which it is a part. The Temple wants a religious servitude over all of Mauna Kea, for the purpose of advancing its own religious agenda.

Ibid. at 14-15 (emphasis in original).

In short, the Temple cannot use this proceeding to obtain a religious servitude over Mauna Kea, as part of advancing the Temple's fundamentalist agenda.

Ibid. at 15.

The Temple will try to use this proceeding to galvanize a religious movement. ... The Hearing Officer should not allow this proceeding to become a platform for the Temple to advance its religious agenda.

Id.

The Applicant's attack on the Temple did not provide any evidentiary basis for the charges Applicant made against the Temple. DOC-135. The only basis offered for the attack is the Temple's objection to the location chosen by the proponents of the Thirty Meter Telescope. Id. An *ad hominem* attack does not create an issue of fact.¹

C. The Applicant never availed themselves of opportunities to explain or defend the attack, so the Temple's characterization of the attack as bigotry and libel remains uncontested.

The Applicant had opportunities to offer any evidentiary support for its attack or to otherwise defend or explain the attack.

¹ Documents in the record provide a directly contrary presentation of the Temple's faith supported by a declaration and additional evidence. DOC-50. That presentation illuminates the Temple's fundamental reverence for the Earth as the central tenet of the faith. Ibid. Lono is the God that sustains life. Ibid., Exhibit A. The characterization of the Temple by the Applicant is simply false and hence libelous.

The attack took place in the midst of the litigation concerning the Temple's Motion for Partial Summary Judgment. When the Hearing Officer took up that motion on August 5, the Hearing Officer invited the Applicant to address the motion.

Rather than defend its opposition pleading and its bigotry and libel, the Applicant simply stood on the papers already filed.

When the Temple filed its motion to file motion out of time, DOC-179, the Applicant could have supported that motion and a full airing of the attack and its possible implications for the application at issue.

Instead, the Applicant opposed the motion on timeliness grounds and otherwise remained silent.

The Temple's characterization of the Applicant's attack as libel and bigotry stands uncontested because the Applicant has chosen not to offer any defense or explanation. That default satisfies the summary judgment test for determining facts not in dispute.

**D. Based on the Applicant's attack on the Temple,
the Board of Land and Natural Resources,
by and through its Hearing Officer,
must dismiss the permit application.**

A federal case illuminates the obligation of governmental agencies to consider evidence of bad faith in considering permit applications. In *N.M. Ranchers Ass'n v. ICC*, 702 F.2d 227 (D.C. Cir. 1983) (per curiam), the court remanded an Interstate Commerce Commission (ICC) decision to grant a permit for a railroad line. The court found that the ICC erred in failing to consider evidence of bad faith tending to show that the rail line developer would not fulfill its promises to preserve sacred and historical Native American sites along the right-of-way. *Id.* at 232-33.

The Hearing Officer's denial of the Temple's motion to file motion out of time prevented consideration of the implications of the Applicant's attack for the permit application.

The Temple moves past that decision to call out the attack by the Applicant as *prima facie* evidence of bias and bigotry, which are appropriately dealt with in a motion for summary judgment and are disqualifying.

This case is analogous to the ICC case because the attack on the Traditional Hawaiian Faith by the Applicant is also evidence of their bad faith in seeking a permit that would require them to respect and protect that faith.

The Hearing Officer having earlier precluded the agency considering that evidence of bad faith by not permitting the Temple to file a motion to dismiss cannot be a reason to deny this motion for summary judgment. The contents of the Applicant's attack are not in dispute and cannot be in dispute as they are already filed in the record. The undisputed content of Applicant's attack entitles the Temple to a summary judgment on the issue of disqualification as a matter of law.

IV. CONCLUSION

The only appropriate response at this point is to dismiss the case based on the Applicant having demonstrated a disqualifying absence of the constitutionally-required respect for the Traditional Hawaiian Faith that the granting of the requested permit would require.

Dated: September 17, 2016

Respectfully submitted,

_____/s/_____
Lanny Alan Sinkin
Lay Representative for Temple of Lono

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FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) HA-3568 for) **CERTIFICATE OF SERVICE**
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the **Temple of Lono Motion for Summary Judgment (Disqualification)** was served on the following parties by eMail:

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Dated: September 17, 2016

_____/s/_____
Lanny Alan Sinkin