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Lay Representative for Temple of Lono

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

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

MOTION FOR REFUND OF FILING FEE

Pursuant to Hawai'i Administrative Ruled (HAR) §13-1-34, the Temple of Lono (hereinafter "Intervenor") files its Motion seeking a refund of the filing fee accompanying Intervenor's Motion to Intervene.

On June 9, 2016, "Intervenor" filed its "Notice: Fee Paid Under Protest." DOC-72.¹

This Notice argued that the rules governing this proceeding did not authorize the imposition of a fee for filing a request to intervene. Id.

Having now been admitted as an Intervenor, Intervenor herein files its motion for a refund of the filing fee paid.

The Motion is made on the following grounds:

¹. At that time, Intervenor had not yet been granted intervenor status in this proceeding.

-- There is no statutory or other authority for the agency to impose a fee to file a request to intervene.

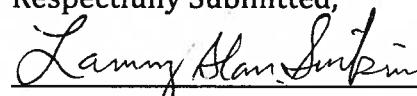
-- The rules adopted by the agency regarding imposition of fees do not include a filing fee for a request to intervene.

-- The rule cited by the agency for requiring the payment of a filing fee for a request to intervene does not include a request to intervene.

-- The imposition of a fee to file a request to intervene is contrary to public policy.

Intervenor supports this motion with the accompanying Memorandum in Support of Motion for Refund of Filing Fee.

Respectfully Submitted,



Lanny Alan Sinkin
Lanny Alan Sinkin
Lay Representative for Temple of Lono

Dated: June 20, 2016

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A Contested Case Hearing Re Conservation) **MEMORANDUM IN SUPPORT OF**
District Use Permit (CDUP) (HA-3568 for) **MOTION FOR REFUND OF**
The Thirty Meter Telescope at the Mauna) **FILING FEE**
Kea Science Reserve, Kaohe Mauka,)
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TMK (3) 4-4-015:009)

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MEMORANDUM IN SUPPORT OF MOTION FOR REFUND OF FILING FEE

I. INTRODUCTION

The Board of Land and Natural Resources (BLNR) has the statutory authority to impose fees on persons seeking to initiate a BLNR proceeding. Hawai'i Revised Statutes ("HRS") §§ 91-2(a)(2), 183C-3.¹ The fees are to cover the cost of

¹ HRS §91-2 Public information.

(a) In addition to other rulemaking requirements imposed by law, each agency shall:
(2) Adopt rules of practice, setting forth the nature and requirements of all formal and informal procedures available, and including a description of all forms and instructions used by the agency.

HRS §183C-3 Powers and duties of the board and department

(4) set, charge, and collect reasonable fees in an amount sufficient to defray the cost of processing applications for zoning, use, and subdivision of conservation lands.

(emphasis added)

processing “applications for zoning, use, and subdivision of conservation lands.”

HRS §183C-3(4).

HAR §§13-5-32 through 34 address the fees for processing such applications.²

HAR §13-5-32 states that fees for applications are “specified in this Chapter,” i.e. Chapter 5. See Note 2, infra.

HAR §13-5-33 sets fees for Departmental Permits. Id.

² §13-5-32 Fees. Each application shall be accompanied by the filing fees specified in this chapter. All fees shall be in the form of certified or cashier's check, and payable to the State of Hawaii. The application fee for state projects shall be waived. [Eff 12/12/94; am and comp] (Auth: HRS §183C-3) (Imp: HRS §183C-3) (emphasis added)

§13-5-33 Departmental permits. (a) Applications for departmental permits shall be submitted to the department in accordance with section 13-5-31.

(b) In those applications whose identified land uses require a combination of board permit(s) and departmental permit(s), a board permit shall be required covering all of the proposed uses.

(c) The application for a departmental permit shall be accompanied by:
(1) An application fee of \$250; and
(2) A public hearing fee of \$250, plus publication costs, if applicable.

... [Eff 12/12/94; am and comp]
(Auth: HRS §183C-3) (Imp: HRS §§183C-3, 183C-6)
(emphasis added)

§13-5-34 Board permits. (a) Applications for board permits shall be submitted to the department in accordance with section 13-5-31.

(b) A public hearing, if applicable, shall be held in accordance with section 13-5-40.

(c) The application for a board permit shall be accompanied by:
(1) The application fee which is equal to 2.5 per cent of the total project cost, but no less than \$250, up to a maximum of \$2,500; and
(2) A public hearing fee of \$250 plus publication costs, if applicable.

(d) Contested case hearings, if applicable, and as required by law, shall be held as provided in chapter 13-1. The aggrieved appellant or person who has demonstrated standing to contest the board action may request a contested case hearing pursuant to chapter 13-1. [Eff 12/12/94; am and comp] (Auth: HRS §183C-3) (Imp: HRS §183C-6) (emphasis added).

HAR §13-5-34 sets fees for Board Permits. Id.

HAR §13-5-34(d) mentions the process for requesting a contested case and refers to chapter 13-1. Id. There is no fee associated with that request.

A request for intervention is not mentioned in HAR §§13-5-32 through 34, so there is no fee associated with that request either.

In this case, the agency is attempting to collect a fee for filing a request for intervention pursuant to HAR §13-1-30. In the current agency rules, when the proceeding involves a conservation district use permit, HAR §13-1-30 requires a \$100 filing fee accompany a “request for a contested case hearing.”³ See infra. p. 4.

II. ARGUMENT

A. The Authorities and Rules do not support imposing a fee for filing a request to intervene.

1. The Hearing Officer characterized this proceeding as having reached the stage where requests to intervene are appropriate.

On May 25, the Hearing Officer issued Minute Order No. 7, which

“set the following schedule with respect to future applications/motions to intervene as a party.

- Deadline for intervention applications, motions, or request is May 31, 2016.

DOC-44, Minute Order No. 7 at 2 (emphasis added); see also DOC-49, Minute Order No. 8 (“deadline for intervention applications”).

On May 28, the Temple of Lono filed a Motion to Intervene in this case. DOC-50.

³ This contested case is the result of a Hawai’i Supreme Court order, not the result of a petition submitted pursuant to HAR Rule §13-1-30. Mauna Kea Ainahou v. Board of Land and Natural Resources, 136 Hawai’i 376, 363 P.3d 224 (2015) (remanding the case for a new contested case hearing or other new proceeding). No one filed or paid to file a request for a contested case in the current proceeding.

On June 2, 2016, the Department of Land and Natural Resources (DLNR) Custodian of the Records sent a letter to the Temple representative that stated in relevant part:

Filing Fee

Pursuant to Hawai'i Administrative Rules §13-1-30 RULES OF PRACTICE AND PROCEDURE, Filing Fee: *When an application involves a conservation district use permit (including a request for a permit, modification of a permit, violation of a permit, or revocation of a permit), the request for a contested case hearing shall be accompanied with a \$100.00 non-refundable filing fee or a request for waiver of this fee. The chairperson may waive the filing fee for any person upon a showing of financial hardship.*

You have not paid the filing fee. The filing fee, or any request for a waiver which must include evidence sufficient to show a financial hardship, must be received by the Department of Land and Natural Resources, Office of Conservation and Coastal Lands, by Monday, June 13, 2016 at 4:00 p.m. Note that failure to pay the filing fee is sufficient grounds for denying your request to intervene.

DOC-62. (emphasis added)

HAR §13-1-30 cites HRS §183C-3 as authorization for imposing the challenged filing fee. HRS §183C-3 says nothing about petitions for contested cases or requests to intervene. See Note 1, infra.

In this case, BLNR is attempting to impose a fee on those who seek to intervene in an existing contested case, as opposed to initiate a proceeding.⁴ Neither HRS §183C-3 nor HAR §13-1-30 apply to requests to intervene.

The Temple responded to this letter with an email accompanied by an

⁴ While the issue raised herein is the imposition of a fee on a request to intervene, arguably there is no authority for the required payment of a fee in order to file a petition for a contested case. If such a petition does not fall within HRS §183C-3 or the fees specified in Chapter 5, there is no other authority for the fee. A petition for a contested case is not an application and does not seek zoning, use, or subdivision of conservation lands. HRS §183C-3. The rule imposing the fee is found in Chapter 13, not Chapter 5. HAR §13-5-32.

attached letter objecting to the imposition of a filing fee. DOC-72, Exhibit 1.

The Temple did not receive any response to the objection. Ibid. Exhibit 2 ¶5.

The Temple paid the fee under protest. DOC-72, Notice: Fee Paid Under Protest.

Assuming for the sake of argument that the Hawai'i Administrative Rules would allow BLNR to impose a fee on filing a request for a contested case, see note 4 infra, HAR §13-1-30 states that the fee is applicable only to a "request for a contested case hearing." A fee for a request to intervene is nowhere mentioned in the rule.

For the fee to possibly apply also to a request to intervene, the petition for a contested case hearing and the request to intervene would have to be demonstrably identical. That is clearly not the case.

**2. A petition for a contested case is not identical to
a request to intervene.**

The procedural requirements for a request for a contested case are found in HAR §13-1-29 Request for a hearing.

(a) On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition.

Thus, the first request for a contested case must be made before the close of the board meeting at which the matter is scheduled for board decision. Id. The rule requires that both an initial request be made at the Board meeting and that a

subsequent petition be filed or mailed. Id. Both steps are required for an effective filing of a request for a contested case. Id.

A request to intervene is a request to be a party in an existing proceeding, i.e. after a Board decision to grant the request for a contested case. HAR § 13-1-31(b)(2). The potential intervenor is not required to take two separate steps to request intervention.

If the same rules governing the timing for an initial request for a contested case were applied to an intervention request, the intervention request coming after the Board decision to initiate a contested case would be untimely.

The intervention request is, therefore, procedurally an action distinct from a request for a contested hearing.

Aside from the procedural differences between the two requests, there are substantive distinctions as well. A petitioner and an intervenor are characteristically different. Other rules of the agency acknowledge the distinction. See e.g. HAR 13-1-27(h)(2) ("Any petitioner or person admitted as an intervenor")

The distinction of petitioners as initiating a proceeding – as opposed to an intervenor seeking participation in an existing proceeding – is also acknowledged by other agencies. See e.g. HAR §16-201-2 (Definition of "Petitioner").⁵

The requirements to secure a contested case hearing are also distinct from the requirements for intervention.

⁵ "Petitioner" means a party who initiates a proceeding and includes, but is not limited to, the authority in cases where the authority has issued a summary order against a licensee or an order to cease and desist." (emphasis added)

§13-1-29 Request for a hearing [Contested Case]

- (b) Except as otherwise provided in section 13-1-31.1, the formal written petition for a contested case hearing shall contain concise statements of:
- (1) The nature and extent of the requestor's interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case;
 - (2) The disagreement, if any, the requestor has with an application before the board;
 - (3) The relief the requestor seeks or to which the requestor deems itself entitled;
 - (4) How the requestor's participation would serve the public interest; and
 - (5) Any other information that may assist the board in determining whether the requestor meets the criteria to be a party pursuant to section 13-1-31.

§13-1-31(b)(2) Parties [Intervention]

The following persons or agencies shall be admitted as parties:

- ...
- (2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.
 - (c) Other persons who can show a substantial interest in the matter may be admitted as parties. The board may approve such requests if it finds that the requestor's participation will substantially assist the board in its decision making. The board may deny any request to be a party when it appears that:
 - (1) The position of the requestor is substantially the same as the position of a party already admitted to the proceedings;and
 - (2) The admission of additional parties will not add substantially new relevant information or the addition will make the proceedings inefficient and unmanageable.

The tests for granting a contested case found in HAR §13-1-29 are substantially different than the tests that must be met for the granting of a request to intervene found in HAR §13-1-31(b)(2), (c).

The mere fact that there are two different tests for granting a petition for a contested case and granting a request for intervention signifies that the two constitute very different pursuits.

As noted above, the two filings are required to take place at different points in the process. The initial request for a contested case must be made before the Board makes a decision. The request to intervene can only be made after the Board has decided to grant the petition for a contested case.

In addition, the petition for a contested case must include “disagreement, if any, the requestor has with an application before the board.” HAR §1-31.1(2).

A request to intervene does not require the potential intervenor to include with the request information about whether the intervenor disagrees with the application before the Board. HAR 13-1-31(b)(2).

The petition for a contested case must include “[t]he relief the requestor seeks or to which the requestor deems itself entitled.” HAR §1-31.1(4).

The request for intervenor status does not require identifying any relief sought or to which the requestor is entitled. HAR 13-1-31(b)(2).

The petition for a contested case must include “[h]ow the requestor’s participation would serve the public interest.” 1-31.1(5) (emphasis added).

The request for intervenor status must demonstrate how the intervenor’s “interest in the proceeding is clearly distinguishable from that of the general public.” §13-1-31(b)(2) (emphasis added).

The request for intervenor status can be denied, if the intervenor's position "is substantially the same as the position of a party already admitted to the proceedings." 13-1-31(c)(1).

Procedurally, this exclusionary test cannot apply to the petition for a contested case because there are no "admitted" parties at the time the petition is filed, other than the agency and the applicant. i.e. there is no other party with whom the petitioner's position could be compared.

Substantively, the exclusionary rule cannot apply to the request for a contested case. If a petition for a contested case is granted, the petitioner becomes a party. Applying the exclusionary rule of §13-1-31(c)(1) would mean that, after the first person seeking a contested case is admitted as a party, all subsequent requests for a contested case that duplicated the interests of the already admitted party could be denied and the later petitioners could be excluded from being a party. This "first come" admission criteria is clearly not what the rules intend and would violate the Due Process rights of the excluded petitioners. All petitioners for a contested case satisfying the requirements created by §13-1-29 will be admitted as parties, even if their interest duplicates that of another petitioner.⁶

Assume for the sake of argument that a petition for a contested case was granted, that the issues to be heard were clarified, and that, at that point, the potential for impacting the interest of a non-party became clear. If the petition for a contested case and the request for intervention were identical, the impacted non-

⁶ Possible consolidation is a matter for the Hearing Officer and the parties to decide.

party would not have the option of seeking intervention because all petitions for a contested case and/or request to intervene would have already been dealt with and that part of the process closed.

Summarizing the differences:

Petition for Contested Case vs. Request for Intervention

Petitioner for Contested Case	Intervenor in Contested Case
§13-1-27(h)(2) Petitioner and Intervenor specifically recognized as separate entities	§13-1-27(h)(2) Petitioner and Intervenor specifically recognized as separate entities
§13-1-29 Petition for Contested Case: Process = 2 steps Request at public hearing and by subsequent petition	§13-1-31(b)(2) Request to Intervene: Process = 1 step Filing request to intervene
First request made before decision on whether to grant a contested case	Filed after decision made to grant a contested case
Petition for Contested Case initiates a Proceeding	Request to Intervene submitted to Proceeding already underway
Required to identify any disagreements Petitioner has with Applicant	Not required to identify requestor's disagreements with Applicant
Required to identify relief sought	Nor required to identify relief sought
Identify how participation will serve the public interest	Required to demonstrate how interest is clearly distinguishable from that of the general public
Can be granted even if interest already represented	Can be denied if interest already represented
HAR §13-1-30 Fee required to file petition for contested case	No rule requires fee to file request for Intervention

3. There is no authority to support nor applicable rule allowing the imposition of a fee for filing a request to intervene.

As the authority for imposing fees does not include a fee to file a request to intervene, HRS §183C-3(4), HAR §§13-5-32 through 34, and as a petition for a contested case is not identical to a request to intervene, HAR §13-1-30, there is no

authority to support nor applicable rule allowing imposition of a filing fee on an intervention request.⁷

4. There are substantive public policy reasons not to impose a fee on a person requesting intervention.

A person may receive intervenor status because the Hearing Officer makes a finding that “the requestor’s participation will substantially assist the board in its decision making.” §13-1-31(c). Imposing a fee on such an intervenor is contrary to good public policy. To the extent the fee discourages someone from even requesting intervention status, the fee is detrimental to the agency’s decision-making.⁸

The idea of charging someone for being willing to make a positive contribution also makes no sense.

Similarly, a request to intervene is appropriate for someone that can demonstrate that “their interest in the proceeding is clearly distinguishable from that of the general public” HAR §13-1-31(b)(2) and that their position is not “substantially the same as the position of a party already admitted to the proceedings.” HAR §13-1-31(c)(1). In other words, such intervenors would provide the Hearing Officer with a unique perspective and/or unique evidence, thereby improving the decision-making process. Charging a fee to someone offering that benefit makes no sense and is bad public policy.

The party seeking to intervene to protect the party’s interest did not request

⁷ Certainly, the fact that the agency imposes a fee on a request for a contested case does not authorize also imposing a fee on a request to intervene.

⁸ The fee in this instance is \$100. HAR §13-1-30. While not high, the fee is certainly not *de minimus*. Nor is there any limit on how high the fee could go. The legality of imposing a fee is the issue, not the amount of the fee.

the contested case. That the contested case may nonetheless affect the interests of the party seeking intervention means that the party is compelled to intervene to protect those interests.

The imposition of a fee is not based on the intervenor receiving some benefit from the agency. Applying to intervene and becoming a party are a burden to the party seeking intervention; the party seeking intervention is required to spend time and money pursuing the intervention to avoid impacts imposed by others. The person seeking to intervene is merely responding to the burden placed on that person by others.

Someone seeking to intervene because the ultimate agency decision could have an adverse impact on her or him is positioned much like a defendant in a civil case. The person sued has to respond or default. The person potentially facing an adverse impact from an agency action has to participate as an intervenor or default on challenging any adverse impacts the agency action may have.

Under these circumstances, the requirement to pay a fee to intervene may well raise due process questions. Such questions do not need to be addressed in this proceeding because the filing fee in this case is clearly illegal under the rules governing the agency's actions. HAR §§183C-3, HAR §§ 13-5-32 through 34, and 13-1-30.

III. CONCLUSION

The definition of an intervenor is "one who intervenes as a third party in a legal proceeding." <http://www.merriam-webster.com/dictionary/intervenor>. In this case, there is the agency, the applicant for the permit, the parties successfully

petitioning for a contested case in the initial proceeding, and the persons or entities that requested intervention now. These are distinct entities in the context of this case and in the applicable rules.

Had there been no initially successful petition for a contested case, there would be no proceeding now offering the opportunity to intervene.

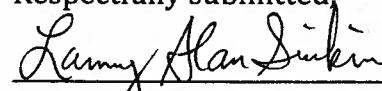
The request to intervene herein could not be made until the contested case was initiated.

Given the distinctions between a petition for a contested case and a request for intervenor status, the fact that the agency rules supposedly permit imposing a fee on contested case petitions is not a basis for the agency to then extend those fees to requests to intervene. The absence of any rule either authorizing or imposing a fee on a request for intervention makes the imposition of such a fee illegal.

For the above and foregoing reasons, the Hearing Officer should order the refund of the filing fee paid by Intervenor.

There is also the question of the possible chilling effect the imposition of the fee had on potential intervenors. Should the Hearing Officer find that the imposition of the fee was illegal, Intervenor would consider it appropriate for the Hearing Officer to extend the opportunity for intervention by at least a short period to allow anyone who might have been discouraged by the fee from requesting intervenor status to make such a request absent the fee.

Respectfully submitted,


Lanny Alan Sinkin

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Lay Representative for Temple of Lono

Dated: June 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the Motion for Refund of Filing Fee was served on the following parties by first class mail:

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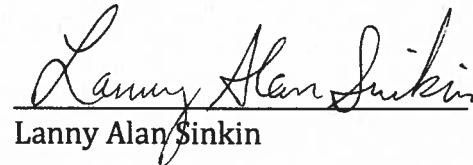
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Dated: June 20, 2016



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