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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Attorney for Petitioners

MAUNA KEA ANAINA HOU and KEALOHA
PISCIOTTA; CLARENCE KUKAUAKAHI CHING;
FLORES-CASE OHANA; DEBORAH J. WARD;
PAUL K. NEVES; and KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic non-profit
Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
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)
) PETITIONERS' RESPONSVE AND
A Contested Case Hearing Re) SUPPLEMENTAL OBJECTIONS
Conservation District Use Permit) TO SELECTION PROCESS AND
(CDUP) HA-3568 for the Thirty Meter) TO APPOINTMENT OF HEARING
Telescope at the Mauna Kea Science) OFFICER MADE PURSUANT TO
Reserve, Kaohe Mauka, Hamakua) MINUTE ORDER NO. 1, DATED
District, Island of Hawaii,) MARCH 31, 2016; and CERTIFICATE
TMK (3) 4-4-015:009) OF SERVICE
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PETITIONERS' RESPONSIVE AND SUPPLEMENTAL OBJECTIONS TO SELECTION
PROCESS AND TO APPOINTMENT OF HEARING OFFICER MADE PURSUANT TO
MINUTE ORDER NO. 1, DATED MARCH 31, 2016

Petitioners MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA, CLARENCE
KUKAUAKAHI CHING, FLORES-CASE OHANA, DEBORAH J. WARD, PAUL K.
NEVES, and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic

non-profit corporation (also referred to herein collectively as “Mauna Kea Anaina Hou” or “Petitioners”), by and through their counsel undersigned, and hereby submit their responsive and supplemental objections to the selection process and to the appointment of Hearing Officer made pursuant to Minute Order No. 1, dated March 31, 2016.¹

The Petitioners incorporate herein and reassert their Objections to Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016, filed on April 15, 2016, in response to the various pleadings and supplemental disclosures and raise additional objections and responses as set forth below.

A. HEARING OFFICER'S SECOND SUPPLEMENTAL DISCLOSURE

Without waiving the Petitioners' Objections to the process that has been followed to date (or the lack thereof of any process), and the fact that the Petitioners have still not been provided a hearing of any kind to date even though a multitude of issues and objections have been raised to date, and they submit that they continue to be deprived of due process and the meaningful opportunity to be heard at a meaningful time, legal principles that were discussed in depth by the Hawaii Supreme Court in its December 2, 2015 Opinion that resulted in the vacating of the CDUP and the remanding of the case back to the BLNR that the Petitioners submit are once again being violated, the Petitioners raise the additional comments and objections to the Hearing Officer's Second Supplemental Disclosure, dated April 19, 2016, and attached to the Chair's

¹ The filing of the instant responsive and supplemental objections is done without waiving any positions and objections as to hearing requirements and the overall selection process or that the application is not in compliance with law and other related issues.

Notice of Filing of Hearing Officer's Second Supplemental Disclosure, dated April 25, 2016.

As was set forth in the Petitioners' Objections of April 15, 2016, "justice can perform its high function in the best way only if it satisfies the appearance of justice." Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224, 237 *citing* Sifagaloa v. Bd. of Trs. of Emps.' Ret. Sys., 74 Haw 181, 189, 840 P.2d 367, 371 (1992)(*quoting* Offut v. United States, 348 U.S. 11, 14, 75 S.ct. 11, 99 L.Ed. 11 (1954)(Emphasis added). The manner in which the justice system operated must be fair and must also appear to be fair. 363 P.3d at 237 *citing* Sifagaloa 74 Haw. at 190, 840 P.2d at 371("[J]ustice must not only be done but must manifestly be seen to be done[.]")(Emphasis added). Indeed, this stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties." 363 P.3d at 237 *quoting* Murchison, 349 U.S. at 136, 75 S.Ct. at 623.

Further, "[t]here can be little question that use of a truly independent adjudicator is essential to attainment of this goal." Sussell v. City and County of Honolulu Civil Service Commission, 71 Haw. 101, 107, 784 P.2d 867, 870 (1989). Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice. M. Redish & L. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483-84(1986). Since the fundamentals of just procedure impose a requirement of impartiality on "administrative agencies which adjudicate as well as [on] courts[.]" Sussell, *supra*, *quoting* Withrow v.

Larkin, 421 U.S. at 46, 95 S.Ct. at 1463, the Court found no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality. Sussell, supra.

In the instant case, the Hearing Officer's second supplementary disclosure was not made until after the Petitioners raised objections about the Hearing Officer's Imiloa Astronomy Center membership. In the Hearing Officer's second supplemental disclosure, the Hearing Officer concedes that she has been a dues paying member (with her husband in a family membership that costs \$85 per year) since April of 2008 and is still a member, although she states that she will not be renewing the family membership once it expires on May 24, 2016. She describes the frequency of her visits to the Center. She also states that she was unaware of the Imiloa Astronomy Center's connection to the University of Hawaii and that it had never crossed her mind that 'Imiloa was or could be connected to this case. She concluded, in her second supplementary disclosure, that, "[o]n balance, I do not believe any reasonable person would consider my passive family membership of 'Imiloa likely to affect my impartiality as a hearings officer in this case."

The Petitioners submit that regardless of the Hearing Officer's subjective characterization of her membership as being passive, that the Hearing Officer's multi-year and still current dues paying membership is a direct connection to and with one of the parties that will be appearing before the Hearing Officer, the University at Hawaii at Hilo, in the contested case. The University of Hawaii at Hilo is both the applicant and the litigant, at this point. The Petitioners submit that the Hearing Officer's membership

also reflects her personal (and financial) support of the astronomy mission of the party-litigant University of Hawaii at Hilo, which includes the development of the TMT Observatory project, the issue of which and the obtaining of the Conservation District Use Permit for which, is currently before the BLNR and this Hearing Officer if she is to preside over the Contested Case hearing process.

A conflict of interest exists and, at a minimum, an appearance of a conflict or an appearance of impropriety exists, which, similarly, also requires disqualification of the Hearing Officer from presiding over the contested case process.

Furthermore, the Petitioners object, once again, to the Hearing Officer's failure to disclose her membership with the University of Hawaii at Hilo's Imiloa Astronomy Center membership following a quite extensive disclosure made in the Hearing Officer's initial disclosures. The disclosures about the Imiloa Astronomy Center were only made after the Petitioners raised the objections about the Hearing Officer's membership with the Imiloa Astronomy Center. Without commenting on the reasonableness of the Hearing Officer's disclosure that she was previously unaware of the connection between the Imiloa Astronomy Center and the party-litigant UH Hilo, for purposes of argument, and with all due respect, a retired Judge from Hilo, who is from Hilo and who was an undergraduate student at UH Hilo, and an eight year dues paying and current member of UH Hilo's Imiloa Astornomy Center, who was selected to serve as a hearing officer in a very highly publicized case, involving UH Hilo's application for a conservation district use permit for development of the TMT Observatory project, the Hearing Officer at least should have known or certainly had reason to know of the connection and should have made reasonable inquiries if she was unaware of the connection before making her

disclosures. The Petitioners respectfully submit that the earlier failure to disclose, under the circumstances of this case, rises to the level of evident partiality and disqualification is the only remedy.

B. FURTHER COMMENTS AND OBJECTIONS TO ISSUES INVOLVING THE PROCESS.

The Petitioners rely on the authorities and arguments raised in their Objections, filed on April 15, 2016. If any party did not raise legal authority as contended by UH Hilo in its April 21, 2016 submission, it is the UH Hilo, which just made unfounded assertions. The authority to start the process of conducting a contested case hearing is clear and unambiguous under the rules. Hawaii Administrative Rules Section 13-1-32(b), provides in pertinent part: “The board may conduct the hearing or, the board in its discretion may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer...” (Emphasis added). The Chair has no authority to do anything with respect to the selection process of a hearing officer until the Board decides whether it is going to first conduct the hearing itself or delegate the conduct of the hearing to a hearing officer and then and only then may the Chair proceed with selecting a hearing officer once the board makes the delegation of its authority to a hearing officer to conduct the contested case. As with the “cart before the horse” phrase used by the Hawaii Supreme Court in its discussion of due process violations previously committed by the BLNR, the Petitioners respectfully submit that the Chair is once again putting the “cart before the horse,” and commencing the hearing officer selection process even before the delegation by the Board had been made and before she had the authority to do so. Such actions were being done arbitrarily and capricious and without authority and any process, and, further, without

proper rules promulgated to conduct such actions, such actions are contrary to HRS Chapter 91 and the rule making requirements. Starting the process all over again is the only remedy and only upon the proper delegation by the Board as discussed by the Petitioners in their April 15, 2016 filing and herein.

Second, an OIP opinion is not binding precedent and the OIP opinion cited by UH Hilo is not even on point, nonetheless. However, what is clearly required is the observance of the clear mandates of the statutes and the legislature as set forth in Hawaii Revised Statutes Section 92-1 that provides, in pertinent part: “(1) It is the intent of this part to protect the people’s right to know; (2) [t]he provisions requiring open meetings shall be liberally construed; and (3) [t]he provisions providing for exceptions to the open meeting requirement shall be strictly construed against closed meetings.” (Emphasis added). Short of any clear binding precedent to the contrary, all interpretations, under the statute, must be strictly construed against closed meetings and a public hearing is required. The definitions of “adjudicatory hearing” and “adjudicatory process” were discussed in the Petitioners’ April 15, 2016 filing, in any event, and the inapplicability of the process at this point to be considered an “adjudicatory hearing” was discussed therein

Also, and even before the contested case hearing is conducted as described under HAR Section 13-1-32, Hawaii Administrative Rules Section 13-1-31.2 states, in pertinent part, that: “[a]fter a determination is made that a contested case hearing is required and the parties have been determined, a written notice of hearing shall be served on parties by registered or certified mail in accordance with section 91-9.5(a),

HRS, and shall be served on all persons or agencies admitted as party at their last recorded addresses at least fifteen days before the hearing date.”

The contested case hearing was required as ordered by the Hawaii Supreme Court in its December 2, 2015 decision. The second part of the required determination to be made under HAR Section 13-1-31.2 and under the administrative rules is the determination of the parties before the notice goes out, pursuant to HAR Section 13-1-31.2, and before the subsequent determination of whether the Board will conduct the contested case hearing or whether it will delegate it to a Hearing Officer at which point the Chair can start the process in selecting the Hearing Officer, under the next section HAR Section 13-1-32.

The TMT International Observatory, LLC submitted, before the Board, its Motion to Have TMT International Observatory, LLC Admitted as a Party in the Contested Case Hearing, filed on April 8, 2016. Under HAR Section 13-1-31.2 and under the progression arguably being followed by the BLNR, the parties have already been determined, in which case the TMT International Observatory, LLC’s Motion would be untimely and should be denied, *sua sponte*, by the Board. If not (and the Petitioners will certainly brief it in more detail once a briefing schedule is established) and if the process for determination of parties is still open, under HARn Section 13-1-31.2, than a public hearing is required and needs to be held to determine whether this party should also be a party and whether any other parties, including, but not limited to, other cultural practitioners, lineal descendants, and others with any interest should also be admitted as parties, as well. Justice Pollack, in his concurring opinion in Mauna Kea Anaina Hou,

discussed the affirmative duty of administrative boards and, certainly for this Board as well, to ensure that all such further parties should be determined.

Once again, the Petitioners respectfully submit that the hearing officer be disqualified and that the process be started all over again and that the law and administrative rules and due process be strictly followed and observed. Petitioners also reserve the right to raise any further objections to the process and to the involvement of certain individuals in the process, in which case such objections could also require the starting over again of the entire process, once all Chapter 92F requests that have been made to date by the Petitioners for records, documents and information, have been disclosed and served on the Petitioners.

DATED: Honolulu, Hawaii, May 2, 2016.



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_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following party(ies) by leaving the same at the addresses set forth below:

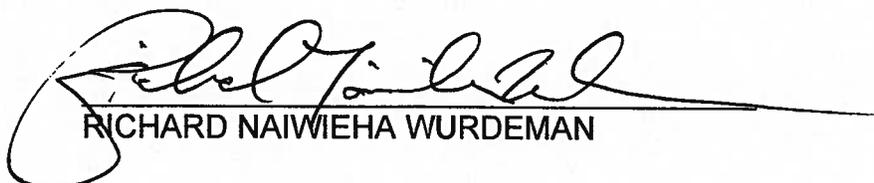
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