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June 9, 2016

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2016 JUN 13 P 12:18

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Michael Cain
Custodian of Documents
Office of Conservation and Coastal Lands
1151 Punchbowl, Room 131
Honolulu, Hawai'i 96813

Re: Filing Fee – Case No. BLNR-CC-16-002

Dear Mr. Cain:

On May 28, I filed the Temple of Lono request to intervene in Case No. BLNR-CC-16-002.

On June 2nd, you sent me a letter stating that pursuant to Hawai'i Administrative Rule 13-1-30, the Temple is required to pay a filing fee in order to submit a "request for a contested case."

On June 3rd, by email with attached letter, I responded that the Temple had not filed a "request for a contested case." The Temple had filed a request for intervention status in an existing case. I argued that the fee was not applicable to an intervention request. I invited you to share any analysis you might have as to why my analysis was incorrect.

I have heard nothing from you since sending my June 3rd email.

In order to avoid possibly being barred from intervening based on a refusal to pay the filing fee, I am today sending you the fee and filing a Notice: Fee Paid Under Protest, objecting to the requirement to pay the fee.

Mahalo.

For the Temple of Lono,



Lanny Alan Sinkin
Lay representative

Enc.: Money Order for \$100.00.

Lanny Alan Sinkin
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Hilo, Hawai'i 96721
(808) 936-4428
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Lay representative for Temple of Lono

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2016 JUN 13 P 3:38

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

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); NOTICE:
District Use Permit (CDUP) (HA-3568 for) FEE PAID UNDER PROTEST
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

NOTICE: FEE PAID UNDER PROTEST

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 processing "applications for zoning, use, and subdivision of conservation lands." Id.

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)

(emphasis added). HAR §§13-5-33 and 34 specify the fees for processing such applications.

When the proceeding involves a conservation district use permit, Hawaii Administrative Rules (HAR) Rule 13-1-30 requires a \$100 filing fee accompany a “request for a contested case hearing.”² Rule 13-1-30 cites HRS §183C-3 as authorization for imposing this fee. HRS §183C-3 says nothing about petitions for contested cases. 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.³ Neither HAR §183C-3 nor HAR 13-1-30 apply to requests to intervene.

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

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*

² 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, SCAP-14-0000873 (December 2, 2015) at 6 (remanding the case for a new contested case hearing).

³ While the issue raised herein is the imposition of a fee on a request to intervene, there would appear to be a question whether the fee to file a petition for a contested case falls within HRS §183C-3 because such a petition for a contested case is not an application and does not seek zoning, use, or subdivision of conservation lands.

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.

The Temple responded to this letter with an email accompanied by an attached letter objecting to the imposition of a filing fee. Exhibit 1.

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

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 3 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 request for a contested case hearing and the request to intervene would have to be demonstrably identical. That is clearly not the case.

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, a 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)

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 would be untimely.

Nor is the potential intervenor required to take two separate steps to request intervention.

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 agencies specifically recognize petitioners and intervenors as separate entities. See e.g. HAR 16-201-2 (Definition of “Party”).⁴

⁴ HAR §16-201-2 Definitions

“Party” means the department if named, permitted or entitled as of right to participate in a proceeding, each person named in a proceeding, or any interested or aggrieved person permitted or entitled as of right to participate in a proceeding

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. *Ibid.* (Definition of “Petitioner”).⁵

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

§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

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

before the authority in the capacity of a petitioner, claimant, respondent, intervenor, or in a capacity other than that of a witness.” (emphasis added).

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)

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).

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. 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).

This exclusionary power does not 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.

Nor would a petition for a contested case be denied because another petitioner took the same position.

The requirements for a contested case petition and for a request to intervene are clearly distinguished, such that the two filings cannot be treated as identical for purposes of imposing fees on a request to intervene, absent authority in the rules. Here, there is no such authority for imposing fees on an intervention request. 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.

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.⁶

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 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

⁶ 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.

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 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 fee is clearly illegal under the rules governing the agency's actions. HAR §§183C-3 and 13-1-31.

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 parties now requesting intervention. 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 could not be made until the contested case was granted, or, in this most recent proceeding in this case, ordered by the Hawai'i Supreme Court.

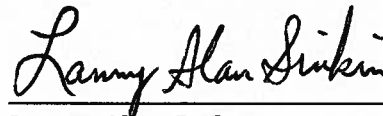
Given the distinctions between a petition for a contested case and a request for intervenor status, the fact that the agency rules supposedly permit imposing a fee on contested case petitions is not a basis for the agency to then extend those fees to requests to intervene. The absence of any rule either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

In order to avoid the risk of having the Temple's request to intervene denied based on a failure to pay the illegal fee, the Temple is paying the fee under protest.

If the Temple is granted intervenor status, the Temple will make a formal request to the Hearing Officer that she order the fees paid by the Temple and all other persons or entities seeking intervention in this proceeding since the beginning be refunded.

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, the Temple 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.

Respectfully submitted,



Lanny Alan Sinkin

Lay Representative for Temple of Lono

Dated: June 9, 2016

From: Lanny Sinkin <lanny.sinkin@gmail.com>

Subject: Filing Fee

Date: June 3, 2016 8:05:23 AM HST

To: michael.cain@hawaii.gov

Aloha Michael,

Please see attached letter.

Mahalo,

Lanny

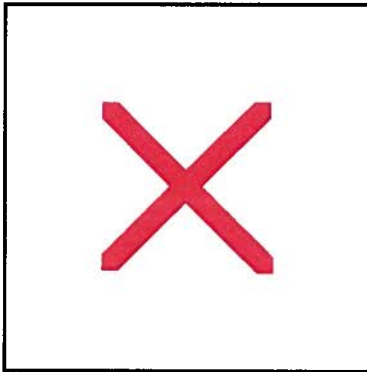


Exhibit 1
Page 1

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721-0944
(808) 936-4428
June 3, 2016

Michael Cain, Custodian of Records
Office of Conservation and Coastal Lands
1151 Punchbowl, Room 131
Honolulu, Hawai'i 96813
Michael.cain@hawaii.gov

Subject: Contested Case Filing Fees

Aloha Mr. Cain:

I believe that you have made a mistake and wanted to discuss the matter with you before I take any further action.

In a letter you sent to me by email on June 2, you included the following:

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 nonrefundable 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 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.

As you have correctly cited, HAR §13-1-30 requires the payment of a "filing fee" for a "request for a contested case hearing."

I did not file a "request for a contested case hearing." On behalf of the Temple of Lono, I filed a request to intervene in a contested case that is already docketed before the Board of Land and Natural Resources and assigned to a Hearing Officer appointed by the Board.

As I assume you are aware, the case at issue is based on a ruling by the Hawai'i Supreme Court that the Board of Land and Natural Resources conducted the initial contested case in this matter in a manner that violated the Due Process Rights of those opposing the permit. The Supreme

Exhibit 1
Page 2

Court remanded the matter back to the Circuit Court, which then remanded the matter back to the agency to conduct a new contested case. There was no need for anyone to file a request for a contested case because the Supreme Court essentially ordered such a case to be held.

I, therefore, do not consider the administrative rules to require the payment of a fee to file a request for intervention in the above-referenced case.

If you disagree with this analysis, please let me know at your earliest convenience so that I can decide whether to pursue the matter further prior to the hearing scheduled on June 17.

Mahalo.

For the Temple of Lono



Lanny Alan Sinkin
Lay Representative

Exhibit 1
Page 3

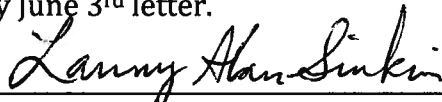
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Lay representative for Temple of Lono

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); DECLARATION
) OF LANNY ALAN SINKIN
District Use Permit (CDUP) (HA-3568 for)
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

DECLARATION OF LANNY ALAN SINKIN

1. I, Lanny Alan Sinkin, do declare the following to be true and correct:
2. On May 28, 2016, I served as lay representative for the Temple of Lono in the filing of a request to intervene in the above-captioned proceeding. DOC-50.
2. On June 2, 2016, I received a letter from Michael Cain, Custodian of the Records, Office of Conservation and Coastal Lands, Department of Land and Natural Resources, which *inter alia* demanded a fee be paid for the filing.
3. The contents of Mr. Cain's letter are identical to the contents of the letter posted by Mr. Cain as DOC-62 in this proceeding.
4. On June 3, 2016, I replied to Mr. Cain's letter by email with a letter attached that is incorporated as Exhibit 1 in the Temple's Notice: Fee Paid Under Protest.
5. To date, I have not received a reply to my June 3rd letter.



Lanny Alan Sinkin
Lay Representative
Temple of Lono

Dated: June 9, 2016

Exhibit 2

Lanny Alan Sinkin
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(808) 936-4428
lanny.sinkin@gmail.com
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) **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 June 9, 2016 letter to Michael Cain, Custodian of Records, DLNR and Notice: Fee Paid Under Protest with Exhibits 1 and 2 was served on the following parties by first class mail or email:

Julie H. China
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Attorney for Mauna Kea 'Aina Hou; Clarence Kukauakahi Ching; Flores-Case
'Ohana; Deborah J. Ward; Paul K. Neves; and KAHEA: The Hawaiian
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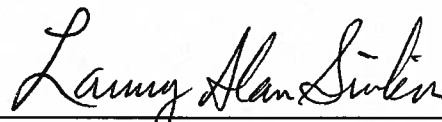
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Stephanie-Malia: Tabbada
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Tiffnie Kakalia
549 E. Kahaopea Street
Hilo, Hawai'i 96720

Dated: June 9, 2016, Kurtistown, Hawai'i



Lanny Alan Sinkin