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BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S **STATEMENT OF POSITION REGARDING PETITIONERS' RENEWED MOTION TO DISQUALIFY HEARING OFFICER [DOC. 340] AND NOTICE OF WITHDRAWAL OF COUNSEL [DOC. 341]**; DECLARATION OF COUNSEL; EXHIBITS 1-7; CERTIFICATE OF SERVICE CONTESTED CASE HEARING DATE: OCTOBER 18, 2016 TIME: 10:00 A.M. JUDGE: HON. RIKI MAY AMANO (RET.) HEARING OFFICER

APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S STATEMENT OF POSITION REGARDING PETITIONERS' RENEWED MOTION TO DISQUALIFY HEARING OFFICER [DOC. 340] AND NOTICE OF WITHDRAWAL OF COUNSEL [DOC. 341]

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**") submits this Statement of Position Regarding Petitioners Mauna Kea Anaina Hou, *et al.*'s Renewed Motion to Disqualify Hearing Officer, filed October 10, 2016 [Doc. 340] ("**Renewed Motion**") and Notice of Withdrawal of Counsel, filed October 10, 2016 [Doc. 341] ("**Notice**") to the Board of Land and Natural Resources ("**Board**") and the Hearing Officer.

I. INTRODUCTION

Petitioners Mauna Kea Anaina Hou, *et al.*[1] and their counsel Richard Wurdeman have been consistent and persistent in their efforts throughout these remanded contested case proceedings to disrupt and delay the orderly progression of proceedings while literally drowning the record with gratuitous charges of "unfairness." The obvious goal is to attempt to taint these proceedings, tarnish the reputation of the hearing officer, and prevent the Board of Land and Natural Resources ("**Board**") and any higher courts on appeal from actually judging the subject Conservation District Use Application ("**CDUA**") on its merits. This most recent series of filings by Petitioners and Mr. Wurdeman, *i.e.*, the Renewed Motion and Notice, are more examples of the pattern of disruption that is prejudicing the ability of all other parties to have an orderly and fair process.

Though the University supports schedule changes to accommodate legitimate conflicts or issues, it does not support attempts to game the system, as Mr. Wurdeman attempts to do here. The Hearing Officer has given sufficient notice and accommodated Mr. Wurdeman's scheduling demands, to the extent practicable. What Mr. Wurdeman wants—and rightly, did not get—is special treatment from the Hearing Officer to the detriment of the other parties. Since at least the July 21, 2016 minute order, the parties have known that the evidentiary hearing would take

[1] Mauna Kea Anaina Hou (through Kealoha Pisciotta), Clarence Kukauakahi Ching, the Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance are collectively referred to herein as "**Petitioners**."

place in October. *See* Minute Order No. 13 at 8 [Doc. 115]. The hearing officer reiterated the October timing during two separate hearings in August 2016, at which Mr. Wurdeman, Counsel for Petitioners, was present. However, not once in July or August did Mr. Wurdeman seek a continuance in this case, despite having done so in at least one other proceeding. Instead, he waited until September 8, 2016 to request a postponement of the October hearing date, stating only that he has "scheduling conflicts" without providing any details as to what those alleged conflicts entail. Even after it was revealed that Mr. Wurdeman's conflict was to attend a conference in Las Vegas, the Hearing Officer postponed the hearing for one week so that Mr. Wurdeman could accompany his clients to Las Vegas.

Despite the Hearing Officer's efforts, it appears that Mr. Wurdeman still did not intend to participate in the hearing. As an apparent final act of protest and to try to induce further delay, Mr. Wurdeman filed the Renewed Motion and Notice of Withdrawal—the day before the deadline for the parties to submit their pretrial materials and just eight days before the hearing is set to begin. That Mr. Wurdeman would accept the extra time granted to accommodate him personally and then wait out that extra time to withdraw anyway is further evidence of Mr. Wurdeman's intentions to delay these proceedings and manufacture grounds for appeal.

Of particular concern is the Notice's notable silence as to whether Mr. Wurdeman obtained his clients' consent before withdrawing. From subsequent filings and statements made by the Petitioners, it appears that Mr. Wurdeman withdrew against his clients' wishes. Clearly, a withdrawal at this late stage without his clients' consent would be a violation of the Hawai'i Rules of Professional Conduct ("**HRPC**"). Furthermore, it is unclear whether Mr. Wurdeman still represents the Petitioners in this matter, but is simply refusing to attend the hearing. Therefore, to determine whether Mr. Wurdeman's withdrawal is permitted under the HRPC and

done in good faith, the Hearing Officer must know whether Mr. Wurdeman's clients consented to his absence, and whether Mr. Wurdeman still advises and/or represents them in this matter.

Notwithstanding Mr. Wurdeman's questionable behavior, his clients submitted pretrial materials in compliance with the Hearing Officer's deadlines, albeit without Mr. Wurdeman's name in the caption. Those timely submittals demonstrate that either (1) Mr. Wurdeman or other counsel had assisted in drafting those materials notwithstanding repeated claims of insufficient time, and/or (2) Petitioners are more than capable of proceeding without counsel.

Nonetheless, the University is concerned about the propriety of Mr. Wurdeman's actions. For all these reasons, the University submits this Statement of Position to present its concerns as to Mr. Wurdeman's Notice and Renewed Motion.

II. DISCUSSION

A. THE REPEATED MOTIONS TO DISQUALIFY ARE INTENDED TO HARASS AND INTIMIDATE THE HEARING OFFICER

All parties are entitled to a fair and orderly process, not just Petitioners. The University wholeheartedly objects to the continued efforts of Petitioners to raise specious arguments in support of disqualification of the Hearing Officer, in efforts to delay the hearing from ever happening. To the extent that the conduct can be construed as attempting to "harass" or "embarrass" the Hearing Officer, with all due respect, past and present counsel for Petitioners should be reminded of HRPC Rule 3.5(b) and (c), stating that:

> (b) **Harassing or Embarrassing Decision Maker.** A lawyer shall not harass a judge, juror . . . or other decision maker or embarrass such person in such capacity.
>
> (c) **Disruption of Tribunal.** A lawyer shall not engage in conduct intended or reasonably likely to disrupt a tribunal.

Due to more than 50 motions and requests filed by the Petitioners and opponents to the University's CDUA, including the Renewed Motion, the workload of this Hearing Officer is

immense.[2] To the extent that the Hearing Officer has not been able to issue orders in a timely manner, that same delay has affected all parties to this proceeding, not just Petitioners. The applicant, the University, bears the burden here of showing that it is entitled to a permit, and any prejudice felt by all, falls disproportionately on the shoulders of the University. All parties are entitled to a fair and orderly process, not just Petitioners. If Petitioners feel that the Board's decision to deny their prior motion to disqualify the Hearing Officer was in error and—as Mr. Wurdeman argues—contrary to the Supreme Court's holding, the proper recourse might be to seek from the Third Circuit or the Supreme Court appointment of a master or monitor pursuant to Act 48 (2016). *See* [Doc. 340 at 1-2, 5] (citing *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Haw. 376, 363 P.3d 224 (2015)). The proper recourse is surely not to keep filing the same motion over and over and then claim bias when they get an unfavorable result. The University wholeheartedly objects to the repeated efforts of Petitioners to harass the Hearing Officer by calling her "biased" and "unfair" for the patent and improper purpose of getting those words into the record as many times as they can.

It should be noted that the Supreme Court in *Mauna Kea Anaina Hou* found the prior contested case process (no longer followed by the Board) to be "unfair," and used that finding as a shield to prevent what it felt to be an improper result. Petitioners and Mr. Wurdeman have used that same decision, through incessant recitation of the phrases "due process," "bias," and "unfair," as a weapon intended to obstruct the CDUA process, with no regard to the due process rights of TMT International Observatory, LLC, Perpetuating Unique Educational Opportunities, and the University. All parties are entitled to a fair and orderly process, not just those opposed to the CDUA.

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[2] This figure does not include the numerous joinders to motions filed by Petitioners and CDUA opponents.

B. NONETHELESS, PETITIONERS' RENEWED MOTION FAILS ON THE MERITS

Even if the Board considered the merits, the Board should reject the Renewed Motion. Petitioners' Renewed Motion seeks disqualification of the Hearing Officer based on arguments previously raised and subsequently rejected by the Board. Petitioners attempt to bolster their argument with recent events not previously considered by the Board. However, these events, even when considered in combination with Petitioners' prior assertions, fall well short of the appearance of impropriety standard required for disqualification here. *See Sussell v. City and County of Honolulu Civil Service Comm'n*, 71 Haw. 101, 107, 784 P.2d 867, 870 (1989); *Sifagaloa v. Bd. of Trs. of Emps.' Ret. Sys.*, 74 Haw. 181, 189, 840 P.2d 367, 371 (1992) ("justice can perform its high function in the best way only if it satisfies the appearance of justice"). The unfounded assertions in Mr. Wurdeman's last ditch effort are insufficient to warrant disqualification of the Hearing Officer here. Therefore, Petitioners' Renewed Motion should be denied.

1. Petitioners Raise Arguments Previously Rejected by the Board

Petitioners' Renewed Motion purports to incorporate and reassert the arguments set forth in:

1) Petitioners' Objections to the Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016, filed on April 15, 2016 [Doc. 5] ("**April Objections**");

2) 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, filed on May 2, 2016 [Doc. 13] ("**May Objections**");

3) Petitioners' Motion for Reconsideration of Minute Order No. 4, Filed on May 6, 2016 and/or Motion to Strike Selection Process and to Disqualify Various Members and Hearing Officer, Filed on May 13, 2016 [Doc. 31] ("**Motion for Reconsideration**"); and

4) Petitioners'(1) Renewal of Objections to Hearing Officer Selection Process and

Hearing Officer Appointment, and (2) Supplemental Arguments on Renewed Motion to Disqualify BLNR's and Hearing Officer's Counsel, Filed on July 18, 2016, filed on July 26, 2016 [Doc. 130] ("**Renewal of Objections**").

[Doc. 340 at 2-3]. As demonstrated below, the Board has already rejected the arguments raised in each of these documents.

In its April Objections, Petitioners objected to the Hearing Officer selection process implemented by the Board in this matter. [Doc. 5 at 6-9]. Petitioners also sought to disqualify the Hearing Officer based on her membership with the 'Imiloa Astronomy Center of Hawai'i, arguing that this membership, as well as the Hearing Officer's failure to disclose this membership, created an appearance of, if not actual, impropriety/bias in favor of the University. [Doc. 5 at 12-14]. The Hearing Officer disclosed her membership with the 'Imiloa Astronomy Center of Hawai'i in her Second Supplemental Disclosure dated April 19, 2016 [Doc. 9]. In response, Petitioners filed their May Objections, asserting that the supplemental disclosure did not cure the initial failure because the disclosure came only after Petitioners had raised the issue. [Doc. 13 at 2-6]. Petitioners also took this opportunity to rehash their prior argument regarding the Hearing Officer selection process, albeit with no new facts or arguments. *Id.* at 6-9. The Board expressly rejected Petitioners' April and May Objections in Minute Order No. 4 [Doc. 14].

Petitioners subsequently filed their Motion for Reconsideration of Minute Order No. 4 [Doc. 14], essentially rearguing what was already raised in their April and May Objections. In Minute Order No. 9 [Doc. 63], the Board denied Petitioners' Motion for Reconsideration and reiterated its view that the Board followed the correct process in selecting a Hearing Officer, and that there is "no reason for disqualifying Judge Amano just because she and her husband paid $85 per year so that they could view exhibits and displays at a museum that showcases – among

other issues of interest to the community – astronomy, Mauna Kea and Hawaiian Culture."

Nonetheless, Petitioners remained undeterred and submitted their Renewal of Objections, which again reasserted the arguments previously rejected by the Board on two separate occasions. Despite having previously disposed of these issues, the Board issued Minute Order No. 17 [Doc. 245], which, yet again, rejected Petitioners' recycled arguments.

In short, the Board has already addressed and rejected the arguments raised in Petitioners' aforementioned motion/objections. Those past arguments are being reasserted and incorporated by Petitioners with no new facts. A mere belief that their prior motions should have been granted is inadequate support for reconsideration. Therefore, the Board should—for a third time—reject Petitioners arguments.

2. The Events Occurring After July 26, 2016 Do Not Establish Grounds for Disqualifying the Hearing Officer

Petitioners also attempt to supplement their argument with events occurring after their prior attempt to disqualify the Hearing Officer. Petitioners argue that, subsequent to their Renewal of Objections filed on July 26, 2016, certain events occurred that, when considered together with the previous allegations, demonstrate an appearance of impropriety or actual bias that justifies disqualification of the Hearing Officer. As demonstrated below, those alleged occurrences do not demonstrate any bias on the part of the Hearing Officer, whether considered alone or in the aggregate.

a. Delays in Rulings Do Not Establish Bias

Petitioners argue that the Hearing Officer created an appearance of impropriety or bias by not yet ruling on Petitioners' Renewed Motion to Disqualify BLNR's and Hearing Officer's Counsel, filed on July 18, 2016 [Doc. 95] and Petitioners' Motion to Strike Conservation District Use Application, HA-2568, Dated September 2, 2010 and/or Motion for Summary Judgment,

filed on July 18, 2016 [Doc. 94]. Petitioners fail to cite any authority supporting this argument. Petitioners' baseless assertions cannot establish bias on the part of the Hearing Officer.

b. Minute Order No. 18 (Site Visit Designations)

Petitioners argue that Minute Order No. 18 "disregarded cultural protocol in accessing [Mauna Kea] for the Petitioners and for other objectionable matters and issues" raised in Petitioners' Objections to Site Visit, filed on September 26, 2016 [Doc. 288]. The essence of Petitioners' argument is that the Hearing Officer did not follow Petitioners' proposed route of travel to the Mauna Kea summit—*i.e.*, the Hearing Officer did not do what Petitioners told her to do. Adverse rulings, without more, are not sufficient to establish bias of an administrative officer. *See Peters v. Jamieson*, 48 Hawai'i 247, 264, 397 P.2d 575, 586 (1964) ("We adhere to the rule that mere erroneous or adverse rulings by the trial judge do not spell bias or prejudice and cannot be made the basis for disqualification."). Otherwise, no tribunal would be able to render any decision without being disqualified for bias.

c. Presence of DOCARE Officers

Petitioners next argue that the presence of Department of Land and Natural Resources, Division of Conservation and Resources Enforcement ("DOCARE") Officers somehow demonstrates the appearance of impropriety or actual bias on the part of the Hearing Officer. Indeed, DOCARE Officers have been present at pre-hearing conferences, and have on occasion escorted the Hearing Officer to the restroom. However, Petitioners do not offer an explanation of why the presence of DOCARE Officers in any way demonstrates bias on the part of the Hearing Officer. Petitioners simply state that there is no good cause for having the officers present. It is presumed that Petitioners' argument is that the Hearing Officer must have ordered DOCARE Officers to be present to ensure her personal safety, demonstrating her fear or bias towards Petitioners. This argument is completely without basis.

There is no evidence that the presence of DOCARE or other security targeted a specific party. Petitioners assume that the DOCARE Officers were there to protect only the Hearing Officer, and fails to consider that the officers were present to protect the welfare and safety of all individuals present, including the Petitioners. Finally, even if the Hearing Officer did request the DOCARE Officers to be present for her personal safety, there is no evidence that she feared one party versus another. That the Petitioners assume that safety concerns—if any—arise solely from parties opposed to the project is merely evidence of the Petitioners' preconceived biases, not the Hearing Officer's. Accordingly, any argument based on the presence of DOCARE Officers at the site visit fails.

d. OMKM's Presence at the Site Visit

Petitioners argue that the Hearing Officer created an appearance of impropriety during the September 26, 2016 site visit when she rode in a vehicle with a Mr. Paiva, an employee of the Office of Mauna Kea Management ("OMKM"). Petitioners further assert that the Hearing Officer "followed a vehicle guided for visit and directed by UH Hilo Employees and Office of Mauna Kea Management officials, Stephanie Nagata and Wallace Ishibashi," both of whom are anticipated witnesses in the upcoming contested case.

As an initial matter, Petitioners misrepresentation of the record is egregious. As Petitioners are well aware, the record was clarified to note that Mr. Paiva did *not* ride in the same vehicle as the Hearing Officer during the site visit. Ex. 1 at 116. The Hearing Officer's driver was a DOCARE officer, not Mr. Paiva. Mr. Paiva, Ms. Nagata, and Mr. Ishibashi did not ride in the same vehicle as the Hearing Officer, but they were present at the site visit to guide the group to the designated sites. *Id.* at 98. The Petitioners did not object to the presence of OMKM employees during the site visit. And they do not now allege that the Hearing Officer had any improper communications with the OMKM employees. The Petitioners appear to argue that

merely directing the Hearing Officer to various sites is improper. Petitioner' arguments are belied by their own site visit proposal suggesting that the Petitioners lead the Hearing Officer and other parties on "the traditional route to the summit." [Doc. 218]. Moreover, if the argument is that anticipated witnesses should not have been present at the site visit, then that ban would also apply to the Petitioners and the many of the other parties who were present. The Petitioners' selective application of their own bias rules is further evidence that their arguments lack merit.

e. Disclosure Regarding Attorney General Harvey Henderson

Petitioners next argue that the Hearing Officer created an appearance of impropriety or bias by way of personal ties to Attorney General Harvey Henderson, who has been involved in this proceeding to some limited extent. In her disclosure on October 4, 2016, the Hearing Officer noted that her and Mr. Henderson's wife, Suzanne Terada went to the same law school contemporaneously with each other, and also, that Ms. Terada is member of the Board of Governors of Maximum Legal Services Corporation, of which the Hearing Officer is the Executive Director. [Doc. 307]. Petitioners fail to demonstrate any evidence that this attenuated link would somehow bias the Hearing Officer's judgment in this proceeding.

f. Refusal to Require the University to Submit its Hearing Brief Witness Lists, Exhibit Lists, and Written Direct Testimony Before All Other Parties

Finally, Petitioners argue that the Hearing Officer created an appearance of impropriety by refusing to require that the University submit its hearing brief, witness lists, exhibit lists, and written direct testimony prior to the global deadline set for all other parties to this proceeding. Somehow, Petitioners' argue that they will be prejudiced if the University is allowed the same deadline as the remaining party. Petitioners once again fail to cite any authority to support its argument. Pursuant to Hawai'i Administrative Rules § 13-1-32(c), the Hearing Officer has

broad discretion to set the time for submitting briefs and other documents as "necessary for the orderly and just conduct of a hearing." Therefore, Petitioners' argument fails as a matter of law.

C. IT IS UNCLEAR WHETHER MR. WURDEMAN'S CLIENTS CONSENTED TO HIS WITHDRAWAL

To the extent that Mr. Wurdeman's Notice is a pretext for Petitioners to seek an lengthy postponement of these proceedings, we would respectfully request that the Hearing Officer not tolerate such gamesmanship or allow Petitioners to compromise the rights of other parties. Facially, Mr. Wurdeman's Notice is improper. HRPC Rule 1.6(b) states:

> Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (3) the lawyer reasonably believes that the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.

Under HRPC Rule 1.16(a), absent some wrongful actions by the clients or financial hardship to Mr. Wurdeman, he may withdraw from his representation only if it "can be accomplished without material adverse effect."

Furthermore, Rule 1.16(c) states: "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so

by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." By allowing a tribunal—such as a Hearing Officer—to reject the attorney's attempt to withdraw and order the representation to continue, Rule 1.16(c) implicitly recognizes that in proceedings before a tribunal, the tribunal must give its approval before the attorney can formally withdraw.

HRPC Rules 1.16(b)(1) and (c) are designed to protect the clients' interests by preventing an attorney from abandoning his representation and leaving his clients in the lurch. The Board's rules do not provide for a mechanism for withdrawal. In such cases, in Hawai'i Rules of Civil Procedure ("**HRCP**") are instructive. In civil practice, the principles of HRPC Rule 1.16 are embodied in HRCP Rule 25.1(b):

> A withdrawal and substitution of counsel shall:
>
> (1) Cite the relevant authority for the withdrawal and substitution;
>
> (2) Include the signatures of the withdrawing party and the substituting attorney;
>
> (3) Include the words "APPROVED AND SO ORDERED" and a line below such words ***for the signature of the judge***;
>
> (4) Indicate the trial date, if any; and
>
> (5) ***Include the signature of the represented party indicating the represented party's consent to the withdrawal and substitution***.

(emphasis added).

Thus, Mr. Wurdeman should have sought leave from the Hearing Officer to withdraw from this case. Moreover, such a request to withdraw must be accompanied by the signatures of the Petitioners indicating their consent to Mr. Wurdeman's withdrawal. Because the Notice lacks any evidence of consent, it is facially defective.

Statements made by the Petitioners and their new counsel raise concerns as to whether

Mr. Wurdeman did, in fact, have his client's consent to withdraw. In Petitioners' Collective Prehearing Statement, filed October 11, 2016 ("**Prehearing Statement**"), Petitioners state that they are "proceeding in the absence of their chosen legal counsel for this portion of the contested case." Prehearing Statement at 1. Additionally, in the Honolulu Star-Advertiser article published the day after Mr. Wurdeman filed his Notice, Petitioner Kealoha Pisciotta is quoted as saying that Mr. Wurdeman's withdrawal "[is] making it very hard. We'll just do our best and hope everything is OK." Ex. 7. The Petitioners' complaints concerning Mr. Wurdeman's absence combined with the unilateral nature of the Notice raises obvious ethical concerns regarding Mr. Wurdeman's withdrawal.

Despite Mr. Wurdeman's abrupt departure, one of the Petitioners, KAHEA: The Environmental Alliance ("**KAHEA**"), obtained new counsel, and the Petitioners succeeded in meeting the October 11, 2016 filing deadline. KAHEA's new attorneys have the same amount of time as the other parties to review the hearing materials submitted on October 11, 2016. Because KAHEA and the other Petitioners previously shared counsel (*i.e.*, Mr. Wurdeman), their interests will continue to be adequately represented by the new counsel, thus mitigating the disruption to the Petitioners.

Curiously, the Notice of Appearance filed by KAHEA's new attorneys state that they are "serving as co-counsel, along with Richard Naiwieha Wurdeman." [Doc. 362]. As mentioned above, the Petitioners' Collective Prehearing Statement mentions that they are "proceeding in the absence of their chosen legal counsel ***for this portion of the contested case***." Prehearing Statement at 1 (emphasis added). Therefore, it seems that Mr. Wurdeman's withdrawal was simply an attempt to disrupt and delay these proceedings.

At this juncture, the University is concerned with ensuring that Petitioners are made

aware that they have the right to object to their counsel's withdrawal. Therefore, the University suggests that, at the next prehearing conference, the Hearing Officer should make affirmative findings as to: (1) whether the Petitioners consented to Mr. Wurdeman's withdrawal; and (2) whether Mr. Wurdeman continues to represent and advise Petitioners (or any new counsel) in this matter even after the Notice. The University suggests that such inquiry be done on the record and that each Petitioner be asked individually whether or not he or she consents to Mr. Wurdeman's withdrawal and whether he still represents or advises him or her in this case in absentia.

The Hearing Officer may also want to conduct further inquiry to determine that such consent, or lack thereof, is informed. Based on the statements made by some of the Petitioners, it appears that Mr. Wurdeman has led his clients to believe that Mr. Wurdeman can dictate the schedule to the Hearing Officer, and that her refusal to abide by Mr. Wurdeman's scheduling demands justifies his last-minute withdrawal. The University is concerned that Mr. Wurdeman has represented to his clients that the Hearing Officer is legally obligated to work around his schedule, when the reality is that he and he alone is responsible for managing his workload and calendar. However, the truth is that Mr. Wurdeman has prioritized his other matters—including accompanying clients to a conference in Las Vegas—over the Petitioners' interests in this case. Yet he blames everyone but himself for those choices, and now wants to withdraw in protest because the Hearing Officer did not clear her—and everyone else's—schedule to accommodate his.[3]

Mr. Wurdeman's brazen show of disrespect for the Hearing Officer's authority risks compromising his clients' interests. Therefore, it is critical to determine whether Mr.

[3] As the Hearing Officer stated at the October 3, 2016 hearing, the Hearing Officer, like the other parties, cleared her schedule for October in anticipation of the hearing. Ex. 1 at 11, 14.

Wurdeman's actions are solely his or with the informed consent of his clients. If the Petitioners do consent to Mr. Wurdeman's withdrawal, they should also be informed that they run the risk of either proceeding *pro se* or retaining counsel with less familiarity with the proceeding.[4] The University requests that if Petitioners consent to the withdrawal that a clear record is made that they understand the risks involved, namely that new counsel will likely be less familiar with the subject-matter and/or the current record, that delays in proceedings may result in witness unavailability.

If after the formal inquiry the Hearing Officer is satisfied that the Notice meets the requirements of HRPC 1.16, then she should approve Mr. Wurdeman's withdrawal.

D. LONGSTANDING SCHEDULING CONFLICTS THAT WERE NOT PREVIOUSLY DISCLOSED DO NOT GIVE RISE TO GOOD CAUSE

It is unclear if Mr. Wurdeman is alleging that his scheduling conflicts fall under the "good cause" exception of HRPC 1.16(b)(7); nonetheless, that argument is unavailing. The University would note that the Hearing Officer has already delayed the contested case hearing specifically to accommodate Mr. Wurdeman's trip to Las Vegas. See Ex. 1, Oct. 3, 2016, Hrg. Trans. at 21-24. Notwithstanding that delay, Mr. Wurdeman has now claimed he is too busy to prepare for or attend the hearing at all. For Mr. Wurdeman to withdraw at the 11th hour despite the Hearing Officer's effort to accommodate his travel plans is evidence of a failure to respect the established process and the authority of the Hearing Officer to administer the deadlines under the governing rules.

It is evident from Mr. Wurdeman's last minute Notice and his congested October schedule that the needs of Petitioners have taken a backseat to the needs of his other clients. *See*

[4] Despite Mr. Wurdeman's obvious distraction from the instant proceedings, as the counsel who participated in the appeal of the previous case, Mr. Wurdeman is at an advantage when it comes to familiarity with the subject-matter and record.

Ex. 1 at 24-27, and 94-111; *see also* Notice at 2. Mr. Wurdeman has been aware of potential scheduling issues since at least June 17, 2016. Ex. 2, June 17, 2016 Hr'g Tr. at 36:4-5 (Mr. Wurdeman stating, "I have trial and arbitration schedules throughout the fall.") As previously briefed, the parties were first informed via the July 21, 2016 minute order that the evidentiary hearings would be scheduled in October. [Doc. 294, University's Objection to Petitioners' Request for Further Status Conference and/or Consideration of Proposed Scheduling at 4; *see also* Doc. 115, Minute Order 13]. At separate prehearing conferences on August 5, 2016 and August 12, 2016, the Hearing Officer reminded the parties who were present—including Mr. Wurdeman—that the evidentiary hearings would take place in October. Ex. 3, Aug. 5, 2016 Hr'g Tr. at 117; Ex. 4, Aug. 12, 2016 Hr'g Tr. at 116. Mr. Wurdeman had ample opportunity to object to an October hearing date or withdraw.

In fact, Mr. Wurdeman did just that in another matter pending before the City and County of Honolulu Planning Commission ("**Commission**"). There, Mr. Wurdeman informed the Commission on August 17, 2016 that he would be unavailable for a hearing on October 12, 2016 (presumably for the same Las Vegas conference). Ex. 5 at 2. The Hearing Officer in this case did not receive the same courtesy. Instead, Mr. Wurdeman waited until September 8, 2016 to request a continuance of the October 11, 2016 hearing date at the risk of materially prejudicing his clients. [Doc. 254].

Any complaint by Mr. Wurdeman that he was unable to file his request for a continuance or withdraw until the Hearing Officer had scheduled specific dates in October is unavailing. Mr. Wurdeman claimed that he has multiple hearings and deadlines that cause him to be unavailable for the *entire month* of October.

> [C]ounsel is unable to proceed in his representation during the scheduled contested case hearing . . . on October 18, 2016, nor is he able to appear for a

> status conference scheduled for October 17, 2016. Just for further information, Counsel is also expected to return from his out-of-state matter for his client on October 12, 2016 in trying to address the already existing conflicts, including, but not limited to responding to four (4) answering briefs that were filed, on October 6, 2016, in one of the appellate cases by four (4) different parties who are appellees, and for numerous other matters.

Notice at 2; *see also* Ex. 1, Oct. 3, 2016, Hrg. Trans. at 24-27; [Doc. 254 at 2]. In other words, Mr. Wurdeman's alleged scheduling issues would have been the same no matter what dates in October the Hearing Office selected. Therefore, he should have sought a continuance (as he did in the Commission proceeding) or requested withdrawal as soon as the Hearing Officer informed the parties that the hearing would take place in October—*i.e.*, July 21, 2016.

Indeed, the Hearing Officer specifically cautioned against waiting until after specific dates were set to begin hearing preparations. At the August 29, 2016 hearing, Mr. Joseph Camara expressed concern that he and other *pro se* parties would not have sufficient time to prepare their prehearing statements. The Hearing Officer instructed Mr. Camara and those present at the hearing (including Mr. Wurdeman)—

> Today is August 29th. If I was in your shoes, I would start to draft the prehearing statement and learn what it entails, learn what should be in it. Then once you get the order, you still have five business days to finalize it, consistent with the issues.
>
> So you can't wait until that order comes out and then begin drafting your prehearing statement, unless you're one of these lawyers who do it all the time. . . . Your prehearing statement should already begin to be drafted.

Ex. 6, Aug. 29, 2016 Hr'g Tr. at 101-102. Though Mr. Wurdeman complains of scheduling conflicts in October, there is no evidence he had any conflicts in July, August, or September that prevented him from also preparing for the hearing or at the very least, requesting withdrawal earlier to leave his clients more time to prepare and/or find substitute counsel.

In his request for a continuance, Mr. Wurdeman stated that he was unavailable in October

and for select dates in November without stating any reason as to why he is unavailable.[5] [Doc. 254 at 2-3]. Consistent with her prior order, on September 20, 2016, the Hearing Officer scheduled the evidentiary hearing to begin on October 11, 2016. [Doc. 276]. Due to Mr. Wurdeman's subsequent request for clarification, the Hearing Officer set status conference for October 3, 2016.

At the October 3, 2016 hearing, even after Mr. Wurdeman conceded that one of the supposed "conflicts" was to attend a conference in Las Vegas. *See* Ex. 1, Oct. 3, 2016, Hrg. Trans. at 18-22, 95. Mr. Wurdeman demanded that the hearing be postponed until at least November. *Id.* at 69, 112-16. Even after the Hearing Officer agreed to reschedule the hearing for October 18, 2016, Mr. Wurdeman attempted to bully the Hearing Officer with accusations of bias when she would not capitulate to his demands for a longer postponement. *Id.* at 94-116.

Rather than use the extra week to prepare for the hearing or clear his workload, Mr. Wurdeman filed yet another Renewed Motion to disqualify the Hearing Officer and the present Notice. In other words, he demanded and received a postponement of a hearing, and then effectively tried to quit in protest to the detriment of his clients. It appears that Mr. Wurdeman's last-minute withdrawal was contrived and intended to strong-arm the Hearing Officer into postponing the hearing by manufacturing procedural hardship and prejudice to his clients where it does not otherwise exist.

These tactics cannot be condoned and definitely should not be rewarded.

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[5] Mr. Wurdeman's hypocrisy in this respect is noteworthy. On multiple occasions, Mr. Wurdeman refused to reveal the nature of his alleged conflicts. [Doc. 254]; Ex. 1, Oct. 3, Hr'g Tr. at 12-13. Only after the University asked directly did Mr. Wurdeman finally admit that he was attending a conference in Las Vegas. *Id.* at 18. Yet, when the Hearing Officer stated that she was unavailable the week of November 14, Mr. Wurdeman angrily demanded, "Why not?" *Id.* at 105. As noted by the Hearing Officer, she "set October, like everybody else did. [She] cleared October." *Id.* Contrary to Mr. Wurdeman's suggestion, his schedule does not take precedence over everyone else's, including the Hearing Officer's.

III. CONCLUSION

For the foregoing reasons, the University provides this statement in opposition to Petitioner's Renewed Motion to Disqualify Hearing Officer, and to express its concerns with Mr. Wurdeman's Notice of Withdrawal.

DATED: Honolulu, Hawai'i, October 13, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 For the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hamakua, Hawai'i, TMK (3) 4-4-015:009	CASE NO. BLNR-CC-16-002 DECLARATION OF COUNSEL; EXHIBITS "1" – "7"

DECLARATION OF COUNSEL

I, IAN L. SANDISON, declare:

1. I am a partner at the law firm of Carlsmith Ball LLP, counsel for UNIVERSITY OF HAWAI'I AT HILO, in the above-caption matter.

2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon my personal knowledge

3. Attached hereto as Exhibit 1 is a true an correct copy of an excerpt of the transcript prepared by Jean Marie McManus of the October 3, 2016 prehearing conference in the above captioned matter, presided over by the Honorable Riki May Amano.

4. Attached hereto as Exhibit 2 is a true an correct copy of an excerpt of the transcript prepared by Jean Marie McManus of the June 17, 2016 prehearing conference in the above captioned matter, presided over by the Honorable Riki May Amano

5. Attached hereto as Exhibit 3 is a true and correct copy of an excerpt of the transcript prepared by Jean Marie McManus of the August 5, 2016 prehearing conference in the above-captioned matter, presided over by Judge Riki May Amano.

6. Attached hereto as Exhibit 4 is a true and correct copy of an excerpt of the transcript prepared by Jean Marie McManus of the August 12, 2016 prehearing conference in the above-captioned matter, presided over by Judge Riki May Amano.

7. Attached hereto as Exhibit 5 is a true and correct copy of *Intervenor Colleen Hanabusa's: (1) Position Statement on Intervenors Ko'olina Community Association and Maile Shimabukuro's Motion to Reopen the Contested Case Hearing to Admit Limited Additional Documentary Evidence to Correct an Error that was Discovered After the Hearing Closed, Filed on April 27, 2012; and (2) Statement of Non-Appearance at the Hearing on the Said Motion*, filed with the City and County of Honolulu Planning Commission on September 22, 2016, in File No. 2008/SUP2.

8. Attached hereto as Exhibit 6 is a true and correct copy of an exerpt of the transcript prepared by Jean Marie McManus of the August 29, 2016 prehearing conference in the above-captioned matter, presided over by Judge Riki May Amano.

9. Attached hereto as Exhibit 7 is a true and correct copy of Timothy Hurley's article entitled "Telescope protesters' attorney quits due to scheduling," which was published in the Star-Advertiser on October 12, 2016, available at http://www.staradvertiser.com/2016/10/12/hawaii-news/telescope-protesters-attorney-quits-due-to-scheduling/ (accessed on October 12, 2016).

This declaration is made upon personal knowledge and is filed pursuant to Rule 7(b) of the Rules of the Circuit Courts of the State of Hawai'i. I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, October 13, 2016.

IAN L. SANDISON

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that an unfiled courtesy copy of the above-referenced document was provided to parties by email on October 13, 2016; and that a filed copy will be served upon the following parties by email unless indicated otherwise on October 14, 2016:

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