

**PETITIONERS' RESPONSE TO UNIVERSITY'S STATEMENT OF POSITION RE
DOCUMENT 369**

Petitioners MAUNA KEA ANAINA HOU (“MKAH”), KEALOHA PISCIOTTA (“PISCIOTTA”), DEBORAH J. WARD (WARD), CLARENCE KUKAUKAHI CHIING (“CHING”) and PAUL K. NEVES (“NEVES”) (hereafter referred to as “Petitioners”) submit this Response to the University’s Statement of Position (Document 369)

INTRODUCTION

The University has stated, “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.”

DISCUSSION

First, the Petitioners were remanded back to conduct a new Contested Case Hearing (“CCH”) because of the State’s due process failures, not our failure as Parties or Petitioners. We object to the mischaracterization in Document 369 that somehow we and our then-attorney, acting on our behalf, were seeking to delay, frustrate or to ‘game’ the system and the remanded CCH process. The irony of this mischaracterization is that the most recently filed document of the University, Doc 370, is to call for a continuance or extension of time - further delaying the Hearing .

To be clear, the University set the schedule, the timing of all submissions such as Motions etc. for the Hearing Officer (HO) having no consultation with all other parties as required by HRS Chapter 91. We were accused of delaying the proceedings, and now the University is asking for a continuance. This is unbelievable and unreasonable. All of the pro se parties that could actually make the October 3, 2016 pre-hearing conference (that was announced with little notice) also had expressed their concern over the announcement of the October 10, 2016 start of the Evidentiary Hearing phase. All of the Pro Se Parties objected and asked for more time - as we did through our Attorney Mr. Wurdeman. The HO gave no consideration or quarter to our concerns or requests and now the University is asking for accommodations and to delay this hearing. The Irony here is the University is asking exactly the same accommodation that Mr. Wurdeman had previously requested. This is surreal and we object to these kinds of litigious tactics.

Second, the purpose of the Renewed Motions and Notice are due to the failure of the Hearings Officer and/or the Board to actually rule on the pending substantive Motions. Motions and Notice must be ruled upon, a written order issued, time allotted for filing reconsiderations and subsequent rulings must occur before we can move into the Evidentiary Hearing phase of the CCH. Contrary to the University’s allegation that Mr.

Wurdeman and the Petitioners were gaming the system, Mr. Wurdeman provided ample time for the Hearing Office to consider his scheduling conflicts since he sent his schedule to her on September 8, 2016. The HO did not schedule the Hearing until September 22, 2016 and when she did and the HO also never consulted with any of the Petitioners or other Pro se parties regarding their availability and any scheduling dates they may have. The HO cannot operate in isolation and/or a vacuum with no consultation with the parties. According to HRS Chapter 91-9(d); “Any procedure in a contested case may be modified or waived by stipulation of the parties, and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or by default”. The HO made no reasonable attempts to work with all parties regarding scheduling.

A Contested Case Hearing (CCH) is a people's process. It is a quasi-judicial proceeding and is specifically meant to relieve regular citizens from shouldering the heavy burdens and cost of a court hearing. Its quasi-judicial nature means it is a legal proceeding without the strict rules normally required in a court. For example, rules of evidence that normally apply to a court of law are not applicable in a CCH.

A CCH is where parties who have an interest and whose rights may be affected by a Board action, (such as approving the TMT construction on Mauna Kea) are allowed to present information and evidence to show how said project will affect their rights. Put simply, the CCH process is meant inform decision makers so that they can make informed decisions meant to protect the rights and resources of the Hawai'i for the betterment and benefit of the land and people of Hawai'i.

Furthermore, the University relies heavily upon the Rules of Evidence to object and direct this hearing. However, Chapter 91 requires, for example, the admission of any and all evidence limited only by considerations of relevancy, materiality and repetition. *Cazimero v. Kohala Sugar Co.*, 54 Haw. 479, 510 P.2d 89 (1973).

By their very terms, the Hawai'i Rules of Evidence (HRE) only “govern proceedings in the courts of the State of Hawaii.” HRE Rule 101. Thus, the rules of evidence do not apply in a contested case proceeding. This means, for example, that hearsay evidence is admissible in administrative hearings. *Price v. Zoning Bd. of App. of Honolulu*, 77 Hawai'i 168, 176, 883 P.2d 629, 637 (1994). This also means that witnesses are not categorized as expert or lay.

CONCLUSION

We wish the record to reflect that we object to the overly litigious nature of this CCH and the University attempts to place blame upon Mr. Wurdeman for the very actions they are asking this hearing to accept. The University's document is filled with unfounded, hostile, defamatory allegations lacking basic decorum and civility. Therefore, in light of the above information we wish the record to reflect our objections and exceptions, and request the hearing officer the HO to comply with the spirit and intent of HRS 91.

DATED: October 16, 2016

/s/ Kealoha Pisciotta individually as President, Mauna Kea Anaina Hou

/s/ Clarence Kukauakhi Ching

/s/ Deborah J. Ward

/s/ Paul K. Neves

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of:) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re:) **CERTIFICATE OF SERVICE**
Conservation District Use Permit)
(COUP) 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)
_____)

CERTIFICATE OF SERVICE

We hereby certify that on October 16, 2016, a copy of the foregoing was served on the following via email unless otherwise specified below:

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