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Lay representative for Temple of Lono

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) **TEMPLE OF LONO MOTION TO**
) **DISMISS TIO AS INTERVENOR OR,**
) **ALTERNATIVELY, STAY THIS**
) **PROCEEDING ; MEMORANDUM**
The Thirty Meter Telescope at the Mauna) **IN SUPPORT, EXHIBITS 1 AND 2; COS**
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO MOTION TO DISMISS TIO AS AN INTERVENOR OR,
ALTERNATIVELY, STAY THIS PROCEEDING

On Thursday, December 15, 2016, the Third Circuit Court ruled that the Board of Land and Natural Resources should have held a contested case hearing prior to consenting to the sublease of land by the University of Hawai'i to the Thirty Meter Telescope.

That ruling perforce means that the sublease is void.

TIO relied on the existence of the sublease as the primary basis for its right to intervene in this proceeding.

As the sublease is no longer in effect or will shortly be abrogated, TIO's basis for intervention is no longer valid.

The parties should not have to bear the burden of cross-examining witnesses presented by a non-party.

The Temple of Lono herein moves the Hearing Officer to revoke TIO's intervenor status or, alternatively, if the Hearing Officer deems that more information is required, stay this proceeding until the matter of TIO's right to intervene and present witnesses is resolved.

DATED: December 15, 2016

_____/s/_____
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Lay Representative for Temple of Lono

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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) **TEMPLE OF LONO MEMORANDUM**
The Thirty Meter Telescope at the Mauna) **IN SUPPORT OF MOTION TO**
) **DISMISS TIO AS INTERVENOR OR,**
Kea Science Reserve, Kaohe Mauka,) **ALTERNATIVELY STAY THIS**
Hamakua District, Island of Hawai'i,) **PROCEEDING**
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO MEMORANDUM IN SUPPORT OF MOTION TO DISMISS TIO AS INTERVENOR OR, ALTERNATIVELY STAY THIS PROCEEDING

I. INTRODUCTION

On April 12, 2013, the Board of Land and Natural Resources (BLNR) issued a CDUP for the construction of the TMT project.

On May 5, 2014, the Third Circuit Court of the State of Hawai'i entered its order affirming the issuance of the CDUP.

On July 28, 2014, the University and TIO entered into a Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and the University of Hawai'i.

On December 2, 2015, Hawai'i Supreme Court issued its opinion vacating the Third Circuit's ruling and the CDUP. *Mauna Kea Anaina Hou v. Board of Land and*

Natural Resources, 363 P.3d 224 (Haw. 2015). The Supreme Court remanded the case.

On December 29, 2015, the Supreme Court entered its judgment and remanded the case to the Third Circuit Court with instructions to further remand the case to the BLNR.

On February 22, 2016, the Third Circuit remanded the case to BLNR for further proceedings.

On October 14, 2016, BLNR voided the permit. Doc. 376 [Minute Order No. 36 (Order Voiding Permit)].

BLNR has yet to withdraw its consent to the sublease.

On December 15, 2016, the Third Circuit Court ruled that BLNR should have conducted a contested case prior to giving consent to the sublease. Exhibits 1 and 2.

II. ARGUMENT

A. The Sublease is void.

The ruling of the Third Circuit that due process required a contested case hearing be held prior to BLNR giving consent to the sublease and that fact that BLNR did not hold such a contested case unavoidably invalidates the sublease.

B. TIO relied on the existence of the sublease as a basis for being given intervenor status in this proceeding.

TIO relied on the existence of that sublease as a basis for being granted intervenor status in this proceeding. DOC-002 (Motion to have TMT International

Observatory, LLC Admitted as a Party in the Contested Case Hearing; Memorandum in Support of Motion) (TIO Intervention Pet.).

TIO argued:

On July 28, 2014, the University and TIO entered into the Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and The University of Hawaii (“Sublease”). ... TIO as a result has a contractual right under the Sublease to construct and operate the TMT Project on Mauna Kea.

TIO Intervention Pet., Mem. at 4 (emphasis added).

TIO also argued that TIO

clearly has “some property interest in the land” as the Sublessee under the Sublease. Under the sublease, the University subleased a portion of the Mauna Kea Science Reserve to TIO to construct and operate the TMT Project. TIO as a result has a contractual right under the Sublease and/or responsibility to design, construct, and operate the TMT Project on Mauna Kea. TIO’s contractual right is a “property interest in the land.”

Ibid. at 5 *quoting* HAR §31-1-31(b)(2).

TIO further argued:

TIO will also be “so directly and immediately affected by the [contested case hearing] that [its] interest in the proceeding is clearly distinguishable from that of the general public.” ... There is no question that the contested case hearing directly and immediately affects TIO’s contractual rights and obligations to construct and operate the TMT Project on Mauna Kea. Indeed, the contested case hearing squarely challenges TIO’s ability to exercise its contractual right and fulfill its obligations. This contractual right and/or obligation is unique to TIO and is not shared by the general public.

TIO Intervention Pet. At 6 *quoting* HAR §31-1-31(b)(2).

If there is now no sublease, then all the claims regarding a property interest in land are no longer applicable.

With no sublease and no property interest, TIO no longer has any contractual rights or obligations regarding the construction and operation of the TMT. In fact, TIO has no rights or obligations that distinguish TIO from the general public.

Such rights and obligations are no longer directly and immediately affected by the contested case hearing.¹

The vacating of the sublease removes the TIO's argument that its intervention request satisfied HAR §31-1-31(b)(2).

TIO should, therefore, be dismissed as an intervenor.

Alternatively, if the Hearing Officer decides more information is needed to resolve the issue raised by the voiding of the sublease, then the Temple moves to stay this proceeding. The witnesses now being presented are from TIO. If TIO is not legitimately an intervenor, the remaining parties should not be burdened with preparing and conducting cross-examination of witnesses presented by a non-party.

DATED: December 15, 2016

_____/s/_____
Lanny Alan Sinkin
Lay Representative for Temple of Lono

¹ Other bases for intervention offered by TIO are peripheral and/or irrelevant. That TIO "has been designing and building the component parts for the TMT Project," TIO Intervention Pet., Mem. at 4, is work done at TIO's risk. That TIO "stands to lose time and money expended for permitting, approvals and efforts to construct the TMT Project in Hawaii," *ibid.* at 6, does not vest in TIO a right that supports being granted intervenor status because those activities were also undertaken at TIO's risk. The sublease is by far the major reason TIO argued for being granted intervenor status. With that basis gone, TIO has no substantive basis for being an intervenor.

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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)
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 **TEMPLE OF LONO MOTION TO DISMISS TIO AS INTERVENOR OR, ALTERNATIVELY STAY THIS PROCEEDING** was served on the following parties by email on December 15, 2016:

Michael Cain <michael.cain@hawaii.gov>, Kealoha Pisciotto-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiintel.net>, Pua Case <puacase@hawaiiintel.net>, cordylinicolor@gmail.com, kealiikea@yahoo.com, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, tluikwan@carlsmith.com, John P. (Pete) Manaut <jpm@carlsmith.com>, Lindsay N. McAneeley <lmcaaneeley@carlsmith.com>, T. Shinyama' <RShinyama@wik.com>, douging@wik.com <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, lsa@torkildson.com <lsa@torkildson.com>, njc@torkildson.com <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, akulele@yahoo.com <akulele@yahoo.com>, s.tabbada@hawaiiintel.net <s.tabbada@hawaiiintel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, hanahanai@hawaii.rr.com <hanahanai@hawaii.rr.com>, pohaku7@yahoo.com <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, Kealamakia Jr. <mkealama@yahoo.com>, Patricia Ikeda

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and will be served by first class mail or hand delivery on December 15, 2016 to:

1. Dwight J. Vicente
2608 Ainaola Drive
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2. Harry Fergerstrom
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Kurtistown, HI 96760

3. Michael Cain, Custodian of Records
Conservation and Coastal Lands
1151 Punchbowl, Room 131
Honolulu, Hawai'i 96813

Dated: December 15, 2016

_____/s/_____
Lanny Alan Sinkin