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DEPT. OF LAND &
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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'ohē Mauka, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

UNIVERSITY OF HAWAI'I AT HILO'S
**OPPOSITION TO TEMPLE OF LONO'S
MOTION TO RECUSE HEARING
OFFICER**, FILED SEPTEMBER 17, 2016
[DOC. 262]; CERTIFICATE OF SERVICE

**UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO
TEMPLE OF LONO'S MOTION TO RECUSE HEARING OFFICER
FILED SEPTEMBER 17, 2016 [DOC. 262]**

Applicant UNIVERSITY OF HAWAI'I AT HILO AT HILO ("University"), by and through its undersigned counsel, submits its *Opposition* to the *Motion to Recuse Hearing Officer* filed by the Temple of Lono ("Temple") on September 17, 2016 [Doc. 262] ("Motion"). The University opposes the Motion on the grounds that it is simply another attempt to renew previously unsuccessful efforts to disqualify the Hearing Officer and plainly fails to provide any

evidence to substantiate its allegation of bias on the part of the Hearing Officer .¹

As a preliminary matter, the University objects to the Motion as yet another unfounded attempt to seek disqualification of the Hearing Officer on the basis of purported bias. All such prior efforts have been rejected; and the Temple does not provide any viable, much less admissible, evidence to support this new Motion. Indeed, the Temple's arguments fail as a matter of established law.

The Temple argues that the Hearing Officer should recuse herself because the Hearing Officer's denial of the Temple's *Motion to File Motion Out of Time*, filed August 8, 2016 [Doc. 179] ("**Motion for Leave**") "is clear evidence of bias" and that her conduct demonstrates her "true proclivities and her role in this charade of a proceeding[.]" Motion at 4, 11. The Temple claims that based on the prior adverse ruling, the Hearing Officer cannot deny her bias and must now recuse herself from the proceedings. *Id.* at 4, 7-8 Such argument is as illogical as it is unsupported.

It is well established that claims of bias cannot be supported merely by unfavorable rulings—even if erroneous. *See State v. Ross*, 974 P.2d 11, 18, 89 Hawai'i 371, 378 (1998) ("We have long recognized, however, that petitioners *may not predicate their claims of disqualifying bias on adverse rulings, even if the rulings are erroneous.*") (emphasis added); *see also Peters v. Jamieson*, 397 P.2d 575, 583, 48 Hawai'i 247, 257 (1964) ("It is the generally recognized rule as petitioner concedes that *errors in rulings by the trial judge in the course of a judicial proceeding cannot be made the basis upon which bias or prejudice is predicable.*") (emphasis added). Consistent with this established precedent, the Board has ruled that adverse

¹ To the extent that the Motion raises and attempts to argue issues also raised in the Temple's Motion for Summary Judgment (Disqualification), filed September 17, 2016 [Doc. 263], the University incorporates by reference the arguments raised in its concurrently filed opposition thereto ("**Opposition to Disqualification MSJ**").

rulings cannot form the basis for a claim of bias because the Hearing Officer is authorized to “rule on motions and ‘dispose of... matters that normally properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.’” Minute Order 39 [Doc. 406] at 5 (quoting Haw. Admin. R. § 13-1-32(c)).

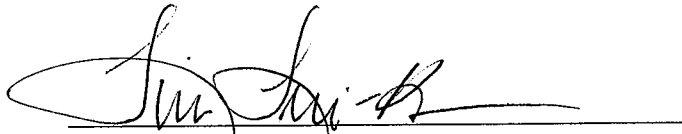
Furthermore, contrary to the Temple’s conclusory assertion, the denial of the Motion for Leave does not amount to a “gross violation” —or any violation—of due process. *See* Motion at 6-7. The Temple cannot show that legal arguments made by the University in the context of this proceeding somehow amount to actionable libel or defamation that provide grounds for disqualifying the University’s conservation district use permit. *See* University Opposition to Disqualification MSJ at 3-6. There simply is no authority for this. *Id.* Nor can that argument stand in the face of the well established principle of litigation privilege. *See id.* at 6-7.

Moreover, the Temple’s claim that it has somehow been deprived of due process is further belied by the fact that it is a party to the ongoing contested case proceedings and has the ability to not only cross-examine witnesses, but to also put on its own witnesses, and to then submit post-hearing proposed findings of fact and conclusions of law and briefing. The Temple has been, and continues to be, afforded meaningful opportunity to be heard in these proceedings.

Finally, the Temple’s claim that the Hearing Officer’s “characterizing the Temple faith as opinion is further indication of bias” is also nothing more than unsupported argument. *See* Motion at 8. That the Hearing Officer did not accept as fact, prior to the contested case hearing and in the absence of admissible evidence, the nature and/or characterization of the Temple’s claimed faith is consistent with her duties, not evidence of an abdication of those duties or any bias whatsoever.

As the Temple offers nothing by way of appropriate admissible evidence to substantiate its claims of bias by the Hearing Officer, the University respectfully submits that the Motion should be denied.

DATED: Honolulu, Hawai'i, December 30, 2016.

A handwritten signature in black ink, appearing to read "Ian L. Sandison", written over a horizontal line.

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CERTIFICATE OF SERVICE

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The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

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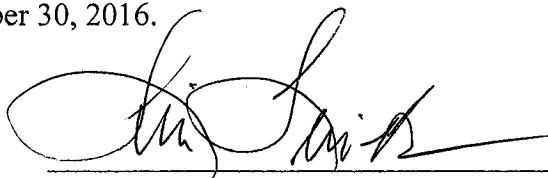
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