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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**
The Thirty Meter Telescope at the Mauna) **STRIKE UNIVERSITY OF HAWAI'I AT**
) **HILO'S OPPOSITION TO TEMPLE OF**
) **LONO'S MOTION TO RECUSE**
) **HEARING OFFICER, FILED**
) **SEPTEMBER 17, 2016 [DOC-262];**
) **MEMORANDUM; COS**

Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

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

On September 17, 2016, the Temple of Lono filed its Motion to Recuse
Hearing Officer [DOC-263].

On December 30, 2016, the University of Hawai'i at Hilo filed its opposition
to the Temple's motion.

The Temple herein moves to strike the University's opposition.

DATED: Kurtistown, Hawai'i, December 30, 2016

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

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2016 Dec 31, 2016 12:21 am

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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) **TEMPLE OF LONO MEMORANDUM**
District Use Permit (CDUP) (HA-3568 for) **IN SUPPORT OF MOTION TO**
The Thirty Meter Telescope at the Mauna) **STRIKE UNIVERSITY OF HAWAI'I AT**
Kea Science Reserve, Kaohe Mauka,) **HILO'S OPPOSITION TO TEMPLE OF**
Hamakua District, Island of Hawai'i) **LONO'S MOTION TO RECUSE**
TMK (3) 4-4-015:009) **HEARING OFFICER, FILED**
) **SEPTEMBER 17, 2016 [DOC-262];**
) **COS**

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

I. INTRODUCTION

On September 17, 2016, the Temple of Lono filed its Motion to Recuse Hearing Officer [DOC-262].

On December 30, 2016, the University of Hawai'i at Hilo filed its opposition to the Temple's motion ("Opp.")

The Temple herein moves to strike the University's opposition.

II. ARGUMENT

A. The University Motion is filed in violation of the administrative rules.

Hawaii Administrative Rules ¶13-1-34 Motions states:

(a) ... The presiding officer shall set the time for filing all motions **and opposing memorandum.**"

(emphasis added)

At no time since the filing of the Temple's motion for summary judgment, DOC-263, has the presiding officer ever set a time for the filing of a memorandum in opposition to that motion.¹

With no time set for the filing of an opposition, the University's opposition is filed without proper leave and, therefore, premature. The opposition should be struck.

B. Alternatively, the University delay in filing its opposition is tantamount to a default

If there is somehow the presumption that an opposition could be filed without permission of the hearing officer, then surely waiting more than three months to file such an opposition is tantamount to defaulting. Hawaii

Administrative Rules ¶13-1-34 Motions. states:

(c) Failure to serve or file ... [a] **memorandum in opposition to a motion** ... shall be deemed a **waiver of objection** to the granting or denial of the motion.

(emphasis added)

C. As the opposition motion is improperly before the Hearing Officer, the arguments presented unfairly prejudice the Temple, requiring response.

In filing an opposition in violation of the administrative rules, the University has placed various arguments before the Hearing Officer without authorization.

The Temple herein responds to those arguments.²

¹ This failure on the part of the presiding officer is replicated numerous times. See e.g. DOC 324 and 371. The refusal of the presiding officer to take up motions filed by the Temple is evidence of bias against the Temple and has reduced the Temple to second-class status as a party.

² The motion to recuse is inextricably related to the Temple's Motion for Summary Judgment (Disqualification), filed on September 17, 2016, to which the University

D. The Temple's due process rights have been violated.

The University argues that the Temple is not denied its due process rights because

it is a party to the ongoing contested case proceedings and has the ability to not only cross-examine witnesses, but also to put on its own witnesses, and to then submit post-hearing proposed findings of fact and conclusions of law and briefing.

Opp. at 3.

Another right that parties have is the right to be heard on issues that are germane and material to the proceeding. The Hearing Officer clearly denied that right when she refused to allow the Temple to file a motion raising the question whether the attack on the Temple by the University disqualified the University from receiving a permit.

The Hearing Officer's ruling was not adverse in the sense of openly denying the Temple's motion. She refused to allow the Temple to file a motion raising the disqualification issue at all. In that refusal, she *sub silentio* denied the Temple's disqualification motion without providing the Temple an opportunity to be heard.

This violation of the Temple's due process rights is so closely related to the due process violation that led to the vacating of the permit – voting to approve the permit before hearing from those opposed, *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224, 248 (2015) – as to demonstrate both a determination to ignore the clear direction provided by the Supreme Court on how this proceeding should be conducted and to prevent the

also filed an untimely opposition. The Temple responded to that motion with a motion to strike. The Temple incorporates by reference all the arguments raised in that concurrently filed motion to strike.

University from being held accountable for the attack, even at the expense of the Temple's right to be heard.

E. The refusal of the Hearing Officer to allow the Temple to be heard on the issue of disqualification has become a pattern of refusing to hear Temple motions.

As discussed at length in the Temple's motion to strike the University's opposition to the Temple's Motion for Summary Judgment (Disqualification), the Hearing Officer has gone to extraordinary lengths to prevent the Temple from litigating the content and implications of the University's attack on the Temple.

What began as an effort to prevent such a hearing has now become a pattern of refusing to take up any motion filed by the Temple. See e.g. DOC-371.³

Denying the Temple the right to have its motions heard makes the Temple a second-class party in this proceeding. That the Temple should file a motion to recuse the Hearing Officer should come as no surprise.

That the Hearing Officer refuses to address such a motion once filed is a violation of the Hearing Officer's obligations to the parties and the process.

III. CONCLUSION

The University's opposition to the Temple's motion to recuse the Hearing Officer is filed in violation of the administrative rules and long after any reasonable time for such a pleading to be filed. The opposition should be struck.

DATED: Kurtistown, Hawai'i, December 30, 2016

_____/s/_____
Lanny Alan Sinkin
Lay representative for Temple of Lon

³ Both the Motion for Summary Judgment (Disqualification) and the Motion to Remove Hearing Officer that the University just filed oppositions to are among the Temple motions that have languished while the Hearing Officer ignored them.

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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) **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 STRIKE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO MOTION TO REMOVE HEARING OFFICER, FILED SEPTEMBER 7, 2016** was served on the following parties by email on December 30, 2016:

Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands <dlnr.maunakea@hawaii.gov>, Kealoha Pisciotta-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, cordylinecolor@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@hawaiiantel.net <s.tabbada@hawaiiantel.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

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and will be served by first class mail or hand delivery on December 31, 2016 to:

1. Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom

2. Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760

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

Dated: December 30, 2016

_____/s/_____
Lanny Alan Sinkin