

FLORES-CASE 'OHANA
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Petitioners pro se

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In the Matter of:)	Case No. BLNR-CC-16-002
A Contested Case Hearing Re)	
Conservation District Use Application	)	FLORES-CASE 'OHANA'S
(CDUA) HA-3568 for the Thirty Meter	)	AMENDED REQUEST FOR WITNESS
Telescope at the Mauna Kea Science	)	SUBPOENA FOR SAMUEL LEMMO –
Reserve, Ka'ohē, Hamakua District,	)	ADMINISTRATOR, OFFICE OF
Island of Hawai'i, TMK (3) 4-4-015:009	)	CONSERVATION AND COASTAL
	)	LANDS, DLNR, STATE OF HAWAII;
	)	MEMORANDUM IN SUPPORT OF
	)	AMENDED REQUEST; APPENDIX
	)	"A"; CERTIFICATE OF SERVICE
)	
	)	Hearing Officer: Hon. Riki M. Amano
	)	(Ret.)

FLORES-CASE 'OHANA'S AMENDED REQUEST FOR WITNESS SUBPOENA FOR SAMUEL LEMMO – ADMINISTRATOR, OFFICE OF CONSERVATION AND COASTAL LANDS, DLNR, STATE OF HAWAII

Petitioner, E. KALANI FLORES, pro se, representing the FLORES-CASE 'OHANA, respectfully submits this amended request for a Witness Subpoena for Samuel Lemmo, Administrator, Office of Conservation and Coastal Lands ("OCCL"), DLNR, State of Hawaii. In order to ensure due process in this proceedings, the Flores-Case 'Ohana moves the Hearing Officer to grant the amended request of the afore-mention witness subpoena based upon the supporting memorandum, and the record and files herein.

DATED: Pu'ukapu, Hawai'i, January 27, 2017



E. Kalani Flores
Representing Flores-Case 'Ohana

Received
Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 Jan 27 2:52 pm

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MEMORANDUM IN SUPPORT OF AMENDED REQUEST

I. Introduction

As noted throughout this contested case hearing, requests and motions as such have been done and filed by the Flores-Case 'Ohana in the capacity as pro se without the benefit of knowledge pertaining to certain legal standards. The request for witness subpoena was filed on January 12, 2017 in a timely manner based upon the oral instructions of Hearing Officer without a written order or any explicit instructions regarding any legal standards for such a request.

This amended request for witness subpoena is being filed based upon the oral directive of the Hearing Officer on January 26, 2017.

II. Testimony of Witness is Material and Relevant to the Issues

This amended request clarifies why the testimony of Samuel Lemmo, Administrator of OCCL, DLNR is considered to be material and relevant to this contested case hearing. In addition, the address along with the witness and mileage fees associated with this witness are included in Appendix "A".

- Mr. Lemmo serves in the capacity as Administrator for OCCL, an office of DLNR, who oversees the permitting process for requests and applications for a conservation district use permit ("CDUP"). In addition, as the OCCL Administrator, Mr. Lemmo is often the primary signatory on correspondence and matters pertaining to a CDUP. As such, it is intended to call Mr. Lemmo to verify the validity of several of the exhibits associated with OCCL that were issued by him or his office as there appears to be several discrepancies in some of these records.

- Amendments to and compilation of Chapter 13-5, Hawaii Administrative Rules, dated August 12, 2011, were revised, updated, and approved subsequent to the submittal of CDUA HA-3568 [Exhibit R-7], dated September 2, 2010, and subsequent to OCCL's Staff Report [Exhibit R-7], dated February 25, 2011. Relevant to this contested case hearing are noted revisions to §13-5-39 Management plan approvals including Exhibit 3 entitled "Management Plan Requirements: August 12, 2011". It is anticipated that OCCL Administrator would provide clarity regarding the new revised HAR Chapter 13-5 if these new requirements pertaining to management plan approvals are applicable or not to CDUA HA-3568, this contested case hearing, and the issues set forth.
- OCCL through its staff was tasked with submitting the Staff Report, as noted in Exhibits R-7 & R-8, regarding CDUA HA-3568 for the proposed TMT project which Board members relied upon in making their decision to approve this application. Within this Staff Report, dated Feb. 25, 2011, are several sections including the sections entitled "Conservation Criteria," "Conclusion" and "Recommendation" that were submitted to the BLNR for their consideration. In addition, OCCL Staff evaluated the merits of the proposed land use by applying the criteria established in HAR §13-5-30, formulated conclusions to approve this application, and recommended BLNR's approval of CDUA HA-3568 along with 20 conditions also drafted by Staff. [These OCCL Staff actions are noted in Exhibit R-7, pp. 45-66].
- BLNR/DLNR is obligated to verify and substantiate that the information in the CDUA HA-3568 is complete and accurate. Since OCCL is tasked with this obligation to verify and substantiate this information, Mr. Lemmo would be able to clarify to what extent this was executed for this CDUA.
- BLNR/DLNR, representing the State as the Lessor, has the sole legal obligation, duty, and responsibility to appropriately manage and protect these conservation and public trust lands of Mauna Kea. Mr. Lemmo would be able to clarify to what extent this obligation, duty, and responsibility were met for this CDUA.
- BLNR/DLNR, representing the State as the Lessor, has the statutory and constitutional obligations under *Ka Pa'akai o Ka'aina v. Land Use Commission (Ka Pa'akai)* 94 Hawaii 31, 7 P.3d 1068 (2000) to preserve and protect traditional and customary rights of Native Hawaiians. Mr. Lemmo would be able to clarify to what extent these obligations were met for this CDUA.

OCCL's responsibility for overseeing the public lands of Mauna Kea within the State Land Use Conservation District is affirmed in their Mission Statement as noted below:

"The OCCL is responsible for overseeing approximately 2 million acres of private and public lands that lie within the State Land Use Conservation District. In addition, to privately and publicly zoned Conservation District lands, OCCL is responsible for overseeing beach and marine lands out to the seaward extent of the State's jurisdiction."

As such, the OCCL Administrator and Staff previous played and continues to play a significant role in the approval process of the permit for CDUA HA-3568. The role of OCCL as the primary State agency responsible for this permitting process for a project within a conservation district further emphasizes that Mr. Lemmo as Administrator of OCCL would indeed be material and relevant to the issues of this contested case hearing

In the concurring opinion rendered by the Hawai‘i Supreme Court (“HSC”) in *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, SCAP-14-0000873 (Dec. 2, 2015), legal clarity and guidance on the role of the State through its board, agency, and employees as it pertains to such issues in this contested case hearing as noted below:

As a result, an agency is often the primary protector of constitutional rights and perhaps is in the best position to fulfill the State's affirmative constitutional obligations.

Consequently, an agency bears a significant responsibility of assuring that its actions and decisions honor the constitutional rights of those directly affected by its decisions.

As recognized by the Administrator of the Office of Conservation and Coastal Lands, the proposed use of the conservation land implicates the constitutional right of individuals of Native Hawaiian descent to exercise traditional and customary Native Hawaiian practices.

Under such facts, the role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not fulfilled simply by providing a level playing field for the parties. See Save Ourselves, Inc., 452 So. 2d at 1157 (“[T]he commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it.”). Rather, an agency of the State must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations. See, e.g., Ka Pa'akai O Ka 'Aina, 94 Hawai'i at 45, 7 P.3d at 1082 (placing "an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights"); In re Water Use Permit Applications (Waiahole I), 94 Hawai'i 97, 143, 9 P. 3d 409, 456 (2000) (describing the state agency's affirmative duty of "considering, protecting, and advancing public rights in the resource at every stage of the planning and decision making process”).

Id. 44-46.

Furthermore, this witness subpoena request is in alignment of the issues set for this contested case hearing in Minute Order No. 19 as outlined below:

- Is the proposed land use, including the plans incorporated in the application, consistent with Chapter 183C of the Hawai‘i Revised Statutes, the eight criteria in HAR §13-5-30(c), and other applicable rules in HAR, Title 13, Chapter 5 Conservation District?

- Is the proposed land use consistent with Article XII, Section 7 of the Hawai'i State Constitution and *Ka Pa`akai O Ka `Aina v. Land Use Comm'n. State of Hawai'i*, 94 Hawai'i 31, 7 P.3d. 1068 (2000)?
- Is the proposed land use consistent with Article XI, Section 1 of the Hawai'i State Constitution and the public trust doctrine?

III. UHH's Motion to Quash Should be Denied

University of Hawai'i at Hilo's ("UHH") counsel submitted a motion, dated January 19, 2017, to quash the Flores-Case 'Ohana's request for witness subpoena. This motion should be denied for the following stated reasons.

Firstly, it's unclear if the counsel of the Applicant, UHH, has any legal standing to file a motion to quash this request for witness subpoena for a State employee of OCCL. It would appear that if there was an initiator of such a motion to quash this request, that the appropriate entity would be the Office of Hawaii State Attorney General. However, no such motion was filed by this Office.

The primary discussion in UHH's motion to quash was centered around whether this request for witness subpoena met the legal standard of HAR § 13-1-33(a)(1). Thus, this amended request and appendix satisfies this legal standard.

Most importantly, UHH counsel failed to articulate any potential harm to them as a party in the approval of this request. Likewise, they failed to substantiate their claim that this request for witness subpoena would be "unreasonable and oppressive".

IV. Conclusion

As such, the Flores-Case 'Ohana calls upon the Hearing Officer to **approve** this amended request and to **deny** UHH's motion to quash the afore-mentioned subpoena request as there is reasonable and good cause, the testimony to be provided by Mr. Lemmo would be material and relevant to this contested case hearing, and this action would ensure due process. This amended request fulfills those legal standards as outlined in HAR §13-1-33. In formulating a decision in this matter, the Hearing Officer is called upon to weigh the balance of due process and any potential harm that this decision would cause upon any party in this contested case hearing. It is clearly apparent that the balance is in favor of due process as any harm to other parties in this contested case hearing doesn't exist.

The Hearing Officer, in capacity as a representative of the Hawaii State BLNR, is further compelled to protect the rights and interests of the public land trust, its beneficiaries, and Native Hawaiians, including members of the Flores-Case 'Ohana. Mr. Lemmo's testimony would also assist the Hearing Officer in determining if the State of Hawaii has met its obligations, duty, and responsibilities in these matters as it pertains to the CDUA HA-3568. Likewise, because the UHH is also a State agency, whom is also entrusted and obligated by constitutional and statutory provisions to protect the afore-mentioned rights and public resources, there should be no detriment or prejudice to the UHH should the Hearing Officer **approve** this amended request for witness subpoena for Samuel Lemmo, Administrator of OCCL, DLNR in this contested case hearing.

DATED: Pu'ukapu, Hawai'i, January 27, 2017



E. Kalani Flores
Representing Flores-Case 'Ohana

APPENDIX "A"

**ADDRESS & FEES ASSOCIATED WITH WITNESS SUBPOENA REQUEST BY
FLORES-CASE 'OHANA FOR CASE NO. BLNR-CC-16-002**

Samuel Lemmo

Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawaii.

Kalanimoku Building
1151 Punchbowl St., Room 131
Honolulu, HI 96813
Ph: (808) 587-0377
Fax: (808) 587-0322
Email: dlnr.occl@hawaii.gov

FEES: \$6.00 appearance off-island + 20¢ per mile round trip + expenses per HRS §607-13

\$6.00 appearance off-island

\$2.00 mileage (10 miles rt from OCCL office to Honolulu International Airport)

tbd expenses per HRS §607-13

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAI'I

Contested Case Hearing Re
Conservation District Use
Application (CDUA) HA-3568
for the Thirty Meter Telescope
at the Mauna Kea Science
Reserve, Ka'ohē, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-002
Document title: FLORES-CASE 'OHANA'S AMENDED
REQUEST FOR WITNESS SUBPOENA FOR SAMUEL
LEMMO – ADMINISTRATOR, OFFICE OF
CONSERVATION AND COASTAL LANDS, DLNR,
STATE OF HAWAII; MEMORANDUM IN SUPPORT
OF AMENDED REQUEST; APPENDIX "A"

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by the means indicated below:

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Date: January 27, 2017