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DEPT. OF LAND &
NATURAL RESOURCES,
STATE OF HAWAII

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'ohe Mauka, Hāmakua,
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 FOR SUMMARY
JUDGMENT (DESECRATION)**, FILED
SEPTEMBER 17, 2016 [DOC. 264];
CERTIFICATE OF SERVICE

**UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO
TEMPLE OF LONO'S MOTION FOR SUMMARY JUDGMENT (DESECRATION),
FILED SEPTEMBER 17, 2016 [DOC. 264]**

Applicant UNIVERSITY OF HAWAI'I AT HILO (“**University**”), by and through its undersigned counsel, submits its *Opposition* to the *Motion for Summary Judgment (Desecration)* filed by the Temple of Lono (“**Temple**”) on September 17, 2016 [Doc. 264] (“**Motion**”).

I. INTRODUCTION

The Motion requests that the Hearing Officer “grant summary judgment on the Temple’s claim that the construction proposed . . . would constitute desecration under State law and, therefore, the permit for construction cannot be granted.” Mot. at 1. The Temple argues,

without admissible evidence or legal authority, that the construction of the Thirty Meter Telescope (“TMT”) would violate the Hawai‘i Penal Code, specifically Hawai‘i Revised Statutes (“HRS”) § 711-1107; and that the University’s Conservation District Use Application (“CDUA”) should be rejected and the related contested case hearing be dismissed because “the agency lack[s] the jurisdiction to hear an application for a permit to break the law and the authority to grant a permit to break the law.” Mot. at 5. The University opposes the Motion on the grounds that: (1) it is untimely; (2) it seeks to adjudicate issues that are not within the Hearing Officer’s jurisdiction; and (3) the Temple fails to carry its burden of establishing that there are no genuine issues of material fact and that, based on undisputed facts, the Temple is entitled to judgment as a matter of law.

II. ANALYSIS

A. THE MOTION IS UNTIMELY

As a preliminary matter, the University objects to the Motion as untimely. On June 17, 2016, the Hearing Officer set a procedure and a schedule for pre-hearing motions, requiring, *inter alia*, that all pre-hearing motions be filed by July 18, 2016. *See* Minute Order No. 13 [Doc. 115]. The Temple, however, did not file the Motion until September 17, 2016—two months past the established deadline. The Motion does not identify any reason that it could not have been filed by the pre-hearing motions deadline. Indeed, as is evident from the face of the Motion, there is no such reason. None of the limited facts asserted, law cited, or arguments proffered arose after the motions deadline. The Temple has failed to show any good cause to excuse its failure to file the Motion by the ordered pre-hearing motions deadline, so the Motion should be denied as untimely.

B. THE HEARING OFFICER DOES NOT HAVE JURISDICTION TO ADJUDICATE VIOLATIONS OF THE HAWAI'I PENAL CODE

The Motion should also be denied as the enforcement of the desecration statute is not within the Hearing Officer's jurisdiction. The Motion seeks summary judgment on the basis of alleged anticipatory violations of the Hawai'i Penal Code, specifically HRS § 711-1107. Even if HRS § 711-1107 were applicable to the University—which, as discussed below, it is not—this contested case hearing is not the proper forum to adjudicate a *criminal* statute. Indeed, it is well established that the authority of an administrative agency is limited by the powers expressly granted to it by the legislature. *See Morgan v. Planning Dep't, Cnty. of Kauai*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004). The Temple fails to cite any authority that would transform this contested case proceeding, related to the permit application, into a criminal court or otherwise authorize the Hearing Officer to rule on alleged *criminal* violations under HRS § 711-1107, prospective or otherwise. Furthermore, HRS § 711-1107 does not create a private right of action. Therefore, the Temple lacks standing to prosecute alleged violations of that statute.

Accordingly, for those reasons, the Motion should be denied.

C. THE TEMPLE HAS NOT CARRIED ITS BURDEN FOR SUMMARY JUDGMENT

Even if the Hearing Officer had jurisdiction to adjudicate the merits of an alleged act of criminal desecration under HRS § 711-1107, the Temple has not carried its burden to show it is entitled to summary judgment as a matter of law, nor can it. A party moving for summary judgment bears the burden of showing that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense addressed by the motion; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. *See Ralston v. Yim*, 129 Hawai'i 46, 56, 292 P.3d 1276, 1286 (2013) (citation omitted). Only when this initial burden is satisfied does the burden shift to the non-moving party to respond by demonstrating

that a genuine issue worthy of trial exists. *Id.* at 56-57, 292 P.3d at 1286-87 (citations omitted).

As described in greater detail below, the Temple has plainly failed to satisfy either of those essential requirements for summary judgment. Accordingly, the Motion must be denied.

The statute at issue, HRS § 711-1107, states as follows:

(1) *A person commits the offense of desecration if the person intentionally desecrates:*

(a) Any public monument or structure; or

(b) A place of worship or burial; or

(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.

(2) “Desecrate” means ***defacing, damaging, polluting, or otherwise physically mistreating*** in a way that the defendant knows will outrage the sensibilities of person likely to observe or discover the defendant’s action.

(3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both.

In the Motion, the Temple argues that the construction of the TMT Project, as proposed in the CDUA, would constitute criminal desecration under HRS § 711-1107 because it is purportedly undisputed that: (1) Mauna Kea is a place of worship or burial, as provided for under HRS § 711-1107(1)(b); (2) the construction of the TMT Project would cause extensive and irreparable damage to Mauna Kea; (3) such damage would constitute desecration under HRS § 711-1107(2) *if it provokes outrage*; and (4) such outrage “is already proven”.¹ *See* Mot. at 2-4. The Temple further argues that by submitting the CDUA, the University improperly seeks to engage in criminal actions; and that, if the requested permit is granted, the Board would be complicit in a

¹ The University presently addresses those issues raised in the Motion; it does so without waiver of its right to address additional issues or arguments that may be appropriate at a future time, which right is hereby expressly reserved

conspiracy to violate the law. *See id.* at 4-5. Thus, according to the Temple, the CDUA should never have been accepted, and the only appropriate response is to dismiss the case. *See id.* at 5. These arguments, however, fundamentally mischaracterize both the state of the record as being undisputed, and the applicable law. As set forth below, because the Temple has not established the absence of genuine issues of material fact or an entitlement to judgment as a matter of law, the Motion should be denied.

1. The Motion Is Unsupported by Any Admissible Evidence

It is well established that a motion for summary judgment must be decided only on the basis of *admissible evidence*. *See Sierra Club v. Hawai'i Tourism Auth.*, 100 Hawai'i 242, 255 n.19, 59 P.3d 877, 890 n.19 (2002) (quoting *Takaki v. Allied Mach. Corp.*, 87 Hawai'i 57, 69, 951 P.2d 507, 519 (App. 1998)). The Motion, however, contains no supporting declaration or accompanying *admissible evidence* to establish the absence of genuine issues of material facts with respect to the essential elements of a HRS § 711-1107 violation. The Motion seeks to establish facts solely through reference to a Supreme Court concurring opinion and two website links. Not only are those references unaccompanied by a proper showing and request for judicial notice, as set forth below, they are otherwise insufficient to establish the absence of genuine issues of material fact. *See Mot.* at 2-4. Because the Temple has failed to support the Motion with admissible evidence necessary to establish that material facts are undisputed, the Motion is plainly deficient as a matter of law. *See Sierra Club.*, 100 Hawai'i at 255 n.19, 59 P.3d at 890 n.19 (quoting *Takaki*, 87 Hawai'i at 69, 951 P.2d at 519) (acknowledging that it is well established that a motion for summary judgment must be decided only on the basis of admissible evidence). Having failed to carry that threshold burden, the Motion should be denied.

2. The Temple Has Failed to Establish Whether or to What Extent Mauna Kea is a Place of Worship or Burial Within the Meaning of HRS § 711-1107(1)(b)

The Temple asserts that “[t]he Supreme Court of Hawai‘i has already made [the] determination” that Mauna Kea is a “place of worship or burial,” as provided for under HRS § 711-1107(1)(b). Mot. at 2. That is simply not true. To support that flawed contention, the Temple cites to certain excerpts of a concurring opinion of the Supreme Court that states, among other things, that the “summit region” of Mauna Kea is “sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit region”; and that the Board was “aware of the project’s potential adverse impact on the ‘spiritual nature of Mauna Kea’ and the ‘cultural beliefs and practices of many’.” As a threshold matter, statements made in a concurring opinion simply are *not* binding, indisputable factual determinations, as the Temple erroneously contends. Moreover, nowhere does the cited opinion refer to HRS § 711-1107 or otherwise state that Mauna Kea is a “place of worship or burial,” within the meaning of HRS § 711-1107(1)(b). While the Temple appears to argue that the Court’s references to areas on Mauna Kea being sacred or having a spiritual nature necessarily means that the mountain as a whole is a “place of worship or burial” under HRS § 711-1107(1)(b), that issue simply was not before the Court in the cited case and thus no such determination was made; nor does the applicable law support such a broad conclusion.

The Motion similarly cites to statements on the website for the Imiloa Astronomy Center that, according to the Temple, show that the University “accepts the sacred nature of the mountain and particularly the summit region.” Mot. at 3. Again, it appears that the Temple’s argument is that *anything* considered sacred to some, including expansive natural or environmental features such as *the entirety of Mauna Kea*, necessarily fall within the scope of HRS § 711-1107(1)(b) and cannot be built upon, even if such construction would otherwise be

lawful. As noted, however, the Temple has not shown that that is the intended scope of HRS § 711-1107. Contrary to the Temple's contention, the term "place of worship" is commonly used to refer to a specific structure, delineated space or otherwise designated locale, not an entire geographical feature. *See* HAR § 15-126-9 (requiring that an application for a community-based development grant state assurances that the *facilities* will not be used as a place of worship); HAR 15-217-8 (defining "religious *facility*" as a classification pertaining to places of worship); *State v. Pratt*, 127 Hawai'i 206, 208 277 P.3d 300, 302 n.7 (2012) (defining *heiau* as a Pre-Christian place of worship, noting that some were elaborately constructed stone platforms, while others were simple earth terraces); *Marsland v. International Soc. for Krishna Consciousness*, 66 Hawai'i 119, 121, 657 P.2d 1035, 1037 (1983) (finding that a *building* that was used as both a place of worship and residence qualified as a church as it related to permissible uses and structures). Having failed to provide any legal support or admissible evidence to support its proposition that the entirety of Mauna Kea is a "place of worship or burial," within the meaning of HRS § 711-1107(1)(b), or explain how such a conclusion would not run afoul of the Establishment Clause of the First Amendment to the U.S. Constitution, the Temple is unable to establish as a matter of undisputed fact or law whether or to what extent Mauna Kea in general, or the TMT site in particular, are sites that fall within the scope of HRS § 711-1107(1)(b).

3. The Temple Has Failed to Establish that Construction of the TMT Project Would Cause Extensive and Irreparable Damage, or that Any Damage Associated with Construction Would Constitute Desecration

The Temple contends that the construction of the TMT Project will cause "extensive and irreparable damage" that would "constitute desecration, if the damage provokes outrage in those aware of the damage." Mot. at 3. The Temple, however, has provided no admissible evidence whatsoever to support its factual claim of "extensive and irreparable damage." *See generally*, Mot. Nor has it appropriately supported its argument that the Hearing Officer should take

judicial notice of certain “expressions of outrage.” *See* Mot. at 4. Accordingly, because the Temple has failed to establish the absence of genuine issues of material fact with respect to these issues, the Motion should be denied.

Moreover, to the extent the Temple claims that *any* damage to Mauna Kea that would occur through construction on the mountain that causes *any* outrage amounts to desecration as a matter of law, such claims are unfounded. Indeed, HRS § 711-1107 requires that the act of desecration be *intentionally* committed. Thus, to be guilty of criminal desecration, one must have the requisite *criminal mens rea*—that is, the *specific intent to mistreat a protected site*. The Temple has produced no evidence to support a finding that the University has such a criminal intent. Indeed, such an assertion is belied by the University’s submission of the CDUA, and accompanying studies, and its ongoing efforts to comply with processes and requirements for lawfully obtaining the conservation district use permit necessary for construction of the TMT Project. Similarly, there is no evidence that the Board, in administering the processes provided for and making the decisions expressly contemplated under its rules, possesses any intent to commit the offense of desecration. To conclude that criminal desecration occurs whenever an agency considers granting a permit on lands that some may consider sacred could essentially halt all development and construction in this State. Such an impracticable results renders the Temple’s proffered interpretation of the desecration statute unreasonable, and indeed, entirely implausible.

4. The Temple Has Failed to Establish that the University and the BLNR Can Be Guilty of the Criminal Offense of Desecration Under HRS § 711-1107

The Motion also fails to establish that, as a matter of law, actions by the University or Board can amount to criminal desecration of HRS § 711-1107. Indeed, by its own terms, HRS § 711-1107 does *not* apply to actions by either the University or the Board. As noted above HRS §

711-1107 refers to actions by a “person”. HRS § 701-118 defines a “person” to include:

any natural person, including any natural person whose identity can be established by means of scientific analysis, including but not limited to scientific analysis of deoxyribonucleic acid and fingerprints, whether or not the natural person’s name is known, and, where relevant, a corporation or an unincorporated association.

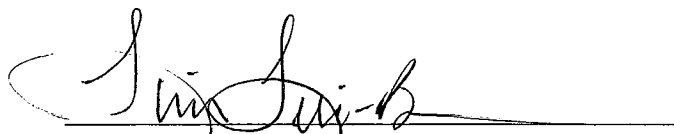
(Emphasis added.) HRS § 702-229 clarifies that a corporation “**does not include** an entity organized as or by a **governmental agency** for the execution of a governmental program.”

(Emphasis added.) Further, the commentary on HRS § 702-229 states: “[i]t seems clear that, in dealing with corporate penal liability, government corporations must be exempt. Penal liability in such a case is pointless.” (Emphasis added.) Thus, the basis for the Temple’s argument fails as a matter of law as government corporations, like the University and the Board, are exempt from corporate penal liability.

III. CONCLUSION

For the reasons set forth above, the University submits that the Temple’s claim that it is entitled to summary judgment because the University is purportedly seeking a permit for illegal activities, which the Board cannot grant, is unsupported by both fact and law. Indeed, the Motion fails to establish with admissible evidence or legal authority, among other things, that: (1) Mauna Kea, generally, or the TMT site, specifically, falls within the scope of HRS § 711-1107(1)(b), as the Temple contends; (2) the actions proposed by the CDUA, if approved, would constitute criminal desecration; (3) either the University or the Board has the requisite *mens rea* to commit the crime of desecration; (4) either the University or the Board can be guilty of the crime of desecration; (5) HRS § 711-1107 somehow trumps other governing laws and regulations applicable to the lands on the TMT site, or (6) otherwise lawful actions can be deemed violations of HRS § 711-1107. Accordingly, the Motion should therefore be denied.

DATED: Honolulu, Hawai'i, February 22, 2017.

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

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BOARD OF LAND AND NATURAL RESOURCES

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Case No. BLNR-CC-16-002

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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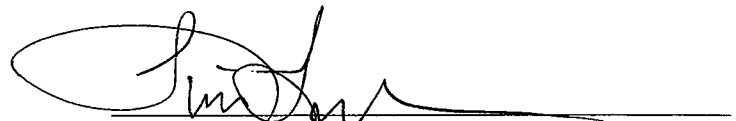
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