

**BOARD OF LAND AND NATURAL RESOURCES**

**STATE OF HAWAII**

|   |   |                                   |
|---|---|-----------------------------------|
| IN THE MATTER OF                                | ) | CASE NO. BLNR-CC-16-002           |
|   | ) |                                   |
| Contested Case Hearing Re Conservation District | ) | <b>Minute Order No. 46</b>        |
| Use Application (CDUA) HA-3568 For the          | ) | (Related to Temple of             |
| Thirty Meter Telescope at the Mauna Kea Science | ) | Lono Motion to Recuse Hearing     |
| Reserve, Ka`ohe Mauka, Hamakua, Hawai`i         | ) | Officer (Doc. Nos. 262, 434, 436, |
| TMK (3) 4-4-015:009                             | ) | 536, 544))                        |
|   | ) |                                   |
| _____   | ) | <b>Certificate of Service</b>     |

**MINUTE ORDER NO. 46**

**(Related to Temple of Lono Motion to Recuse Hearing Officer  
(Doc. Nos. 262, 434, 436, 536, 544))**

The Temple of Lono filed a Temple of Lono Motion to Recuse Hearing Officer (Doc. 262), dated September 17, 2016 (“Motion”). In relation to the Motion, the following documents have been submitted:

| <b>DOC.</b> | <b>FILED</b> | <b>TITLE</b>  | <b>COUNSEL/PARTY</b>          |
|-------------|--------------|---|-------------------------------|
| 434         | 12-30-16     | University of Hawai`i at Hilo’s Opposition to Temple of Lono’s Motion to Recuse Hearing Officer, filed September 17, 2016 [Doc. 262]  | University of Hawai`i at Hilo |
| 436         | 12-31-16     | Temple of Lono Motion to Strike University of Hawai`i at Hilo’s Opposition to Temple of Lono Motion to Recuse Hearing Officer, filed September 17, 2016 [DOC-262]   | Temple of Lono                |
| 536         | 3-22-17      | Applicant University of Hawaii at Hilo's Combined Opposition to the Temple of Lono's Motion to Strike University of Hawaii at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Disqualification) [Doc. 435], Motion to Strike | University of Hawai`i at Hilo |

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|     |         | University of Hawaii at Hilo's Opposition to Temple of Lono's Motion to Recuse Hearing Officer [Doc. 436], and Motion to Strike University of Hawaii at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Desecration) [Doc. 474];  |                                    |
| 544 | 3-23-17 | TMT International Observatory, LLC's (1) Joinder in Applicant University of Hawaii at Hilo's Combined Opposition to the Temple of Lono's Motion to Strike University of Hawaii at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Disqualification) [Doc. 435], Motion to Strike University of Hawaii at Hilo's Opposition to Temple of Lono's Motion to Recuse Hearing Officer [Doc. 436], and Motion to Strike University of Hawaii at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Desecration) [Doc. 474]; and (2) Memorandum in Opposition to Temple of Lono's Motion to Strike TIO's Opposition to to [sic] Temple of Lono Motion for Summary Judgment (Desecration) Filed September 17, 2016 [Doc 490] | TMT International Observatory, LLC |

The Motion seeks to recuse the Hearing Officer on the basis of alleged “biased rulings and remarks by the Hearing Officer in this case.” Doc. No. 262 at page 1. Temple of Lono’s discontent arises during the pre-hearing motions process undertaken pursuant to Minute Order No. 13. In particular:

“On June 20, 2016, the Temple of Lono filed its “Temple of Lono Motion for Partial Summary Judgment,” DOC 78. The motion sought partial summary judgment on two issues based on facts the Temple argued were not in dispute. Id.

On August 1, 2016 at 5:00 p.m., the University of Hawaii filed the University’s opposition to the Temple’s motion for partial summary judgment. DOC-135. In its opposition, the University launched a sweeping ad hominen attack on the Temple of Lono. Id.

On August 3, 2016, although there was no schedule for filing a reply, the Temple filed a partial reply that addressed the attack. DOC-176. 2

There was no opportunity for the Temple to bring the full implications of the attack to the attention of the Hearing Officer by means of a motion because the deadline for filing pre-hearing motions had passed.1

On August 7, 2016, given the expiration of time to file pre-hearing motions, the Temple of Lono filed its Motion to File Motion out of Time. DOC-179. This motion sought permission of the Hearing Officer to file a motion to dismiss based on the bigotry demonstrated by the Applicant. Ibid., Exhibit 2.

On August 12, 2016, at a pre-hearing conference, the Hearing Officer denied the Temple of Lono motion to file motion out of time.

At no time in the hearing on the motion for partial summary judgment or in the hearing on the Temple's motion to file motion out of time did the University ever offer any explanation for or defense of its attack on the Temple.”

Doc. No. 262, pp. 1-2

The University of Hawai'i at Hilo (“UHH”) 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 o the hearing Officer.” (footnote omitted) Doc. No. 434 at pp. 1-2.

In Doc. No. 436, Temple of Lono Motion to Strike University of Hawai'i at Hilo's Opposition to Temple of Lono Motion to Recuse Hearing Officer (“Motion to Strike”), filed September 17, 2016 (Doc. No. 262), the Temple of Lono moves to strike Doc. No. 434 because it “is filed in violation of the administrative rules and long after any reasonable time for such a pleading to be filed.” Doc. No. 436 at page 4.

UHH submitted an opposition to the motion to strike in Doc. No. 536. In Doc. No. 544, TMT International Observatory, LLC (“TIO”) joined UHH's opposition to the motion to strike. Doc. No. 536, and by joinder thereof in Doc. No. 544, is a combined opposition to multiple Temple of Lono motions. As to Doc. Nos. 536 and 544, this Minute Order No. 46 considers only the oppositions to Doc. No. 436. The essence of the UHH and TIO oppositions to the motion to strike is that “the underlying motion for summary judgment filed by the Temple of Lono is untimely and unauthorized.” Doc. No. 544 at page 2.

The history of this case reflects that on or about June 17, 2016, at a Second Pre-Hearing Conference, a pre-hearing motions schedule was established. Minute Order No. 13. Temple of Lono timely filed Temple of Lono Motion for Partial Summary Judgment, document 78.

Temple of Lono Motion for Partial Summary Judgment (“MPSJ”), Document No. 78, was heard on August 5, 2016. Oral arguments were presented; the MPSJ was denied. The decision on the denial of the MPSJ is enunciated in Minute Order No. 23 (Order Denying Temple of Lono’s Motion for Partial Summary Judgment (Doc.78)), filed October 10, 2016. A process for reconsideration of the decision was set out in Minute Order No. 23. No reconsideration was filed.

This Motion purports to recuse Hearing Officer on the basis of alleged bias demonstrated in her rulings related to the MPSJ. The Hawai`i State Supreme Court ruled: “ We have long recognized, however, that petitioners may not predicate their claims of disqualifying bias on adverse rulings, even if the rulings are erroneous.” (citation omitted) *State v. Ross*, 89 Hawai`i 371, 378 (1998).

The Motion to Strike cites untimeliness as a basis to strike UHH’s opposition to the Motion. Inasmuch as the Motion was filed outside of any established process set out in rule, law or order, opposition thereto is not limited to any specific time.

Based upon the Motion, all related submissions from counsels and/or parties, all applicable law, the entire record having been considered by the Hearing Officer,

**IT IS HEREBY ORDERED that the Motion and the Motion to Strike are DENIED.**

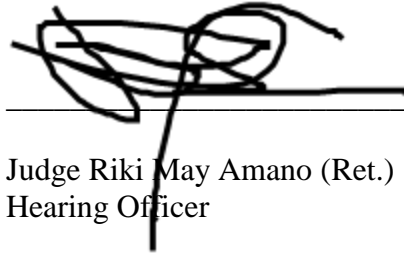
**Motion to Reconsider.** A party, who believes it appropriate, may file a motion to reconsider using the procedure set out herein. Any Motion for Reconsideration shall not be used to reargue the motion or set out positions of a purely repetitious nature or to present factual or

legal grounds that could or should have been presented at the original hearing. AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114 (1992).

The deadline for submission of any **motion** to reconsider this minute order is no later than **5 business days** after the date this Minute Order is filed in the Documents Library. Any **responses to motions to reconsider**, shall be submitted no later than **10 business days** after this order is filed in the Documents Library; essentially 5 business days after the deadline for motions to reconsider.

Any Motion to Reconsider shall be considered a non-hearing motion unless otherwise designated by the Hearing Officer.

DATED: Honolulu, Hawai`i, May 2, 2017.



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Judge Riki May Amano (Ret.)  
Hearing Officer

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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

BLNR Contested Case HA-16-02  
Document title: **Minute Order 46**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced document was served upon the following parties by email (when indicated) on May 3, 2017 and by regular mail on May 4, 2017:

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