

**BOARD OF LAND AND NATURAL RESOURCES**

**STATE OF HAWAII**

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, Hamakua, Hawai`i )  
TMK (3) 4-4-015:009 )  
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)  
\_\_\_\_\_ ) **Certificate of Service**

**MINUTE ORDER NO. 47**

**(Related to Temple of Lono Motion for Summary Judgment  
(Disqualification) (Doc. 263))**

The Temple of Lono filed Temple of Lono Motion for Summary Judgment  
(Disqualification) (Doc. 263), dated September 17, 2016 (“Motion”). In relation to the Motion,  
the following submissions were submitted:

<b>DOC.</b>	<b>FILED</b>	<b>TITLE</b>	<b>COUNSEL/PARTY</b>
433	12/30/16	University of Hawai`i at Hilo’s Opposition to Temple of Lono’s Motion for Summary Judgment (Disqualification), filed September 17, 2016 [Doc. 263]	University of Hawai`i at Hilo
435	12/31/16	Temple of Lono Motion to Strike University of Hawai`i at Hilo’s Opposition to Temple of Lono Motion for Summary Judgment (Disqualification), filed September 17, 2016 [DOC-263]	Temple of Lono
536	3/22/16	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];	University of Hawai`i at Hilo

Received  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
State of Hawaii  
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544	3/23/16	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
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The Motion asks the Hearing Officer to “grant a summary judgment on the Temple’s claim that the Applicant’s bigoted and libelous attack on the Temple disqualifies the Applicant from being given a permit by the State..[sic]” Doc. No. 263 at Motion page. Specifically, the Temple of Lono takes issue with statements written in the University of Hawai`i at Hilo’s opposition (Doc. No. 135) to Temple of Lono’s Motion for Partial Summary Judgment (Doc. No. 78).

Citing *N.M. Ranchers Ass’n v. ICC*, 702 f.2d 227 (D.C. Cir. 1983) (per curiam), the Temple of Lono contends that UHH’s application for a Conservation District Use permit should be dismissed. The Temple of Lono believes that the court in *N.M. Ranchers Ass’n v. ICC*, supra, “found that the ICC erred in failing to consider evidence of bad faith tending to show that the rail line developer would not fulfill its promises to preserve sacred and historical Native American sites along the right-of-way. Id. At 232-33” Doc. No. 263 at page 5. The Temple of Lono concludes that “[T]his case is analogous to the ICC case because the attack on the Traditional

Hawaiian Faith by the Applicant is also evidence of their bad faith in seeking a permit that would require them to respect and protect that faith.” Doc. 263 at page 6.

The University of Hawai`i at Hilo (“UHH”) argues that the “[M]otion should be denied because: (1) the Motion is plainly improper, given that the Hearing Officer previously denied the Temple leave to file such a motion; and (2) because the Temple plainly fails to carry its burden of establishing, through admissible evidence, that there are no genuine issues of material fact, and that the Temple is entitled to judgment as a matter of law.” Doc. No. 433 at pp. 1-2.

In Doc. No. 435, Temple of Lono Motion to Strike University of Hawai`i at Hilo’s Opposition to Temple of Lono’s Motion for Summary Judgment (Disqualification) Filed September 17, 2016 [Doc-263] (“Motion to Strike”) (Doc. No. 263), the Temple of Lono moves to strike Doc. No. 433 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. 435 at page 4.

UHH submitted an opposition to the motion to strike. (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.47 considers only the oppositions to Doc. No. 435. 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 law on summary judgments is well established in Hawai`i.

Summary Judgment is a drastic remedy. To avoid improperly depriving a party to a lawsuit of the right to a trial on disputed factual issues, summary judgment must be "cautiously invoked." Miller v. Manuel, 9 Haw.App. 56, 65-66, 828 P.2d 286, 292 (1991), cert. denied, 72 Haw. 618, 841 P.2d 1075 (1992). Summary judgment should only be granted if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c) (1990).

The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. First Hawaiian Bank v. Weeks, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989); 6 J. Moore, Moore's Federal Practice (hereinafter Moore's Federal Practice) p 56.15 at 56-249--56-250 (2d ed. 1995). This burden has two components.

First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, Miller, 9 Haw.App. at 65, 828 P.2d at 292; HRCP Rule 56(c); and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Rodriguez v. Nishiki, 65 Haw. 430, 438, 653 P.2d 1145, 1150, reconsideration denied, 65 Haw. 682 (1982); HRCP Rule 56(c). Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. C. Wright, A. Miller & M. Kane, 10A Federal Practice and Procedure: Civil 2d (hereinafter Wright's Federal Practice) § 2727, at 148 (1983).

Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 332, 106 S.Ct. 2548 2557, 91 L.Ed.2d 265 (1986) (Brennan, J., dissenting); M. Nelken, One Step Forward, Two Steps Back: Summary Judgment. After Celotex, 40 Hastings L.J. 53, 55 n. 9 (1989); G. Foremaster, The Movant's Burden in a Motion for Summary Judgment, 1987 Utah L.Rev. 731, 734-35.

The moving party's burden of proof is a stringent one, since the inferences to be drawn from the underlying facts alleged in the relevant materials considered by the court in deciding the motion must be viewed in the light most favorable to the non-moving party, Fernandes v. Tenbruggencate, 65 Haw. 226, 228, 649 P.2d 1144, 1147 (1982), and any doubt concerning the propriety of granting the motion should be resolved in favor of the non-moving

party. Wright v. Fireman's Fund Ins. Cos., 11 Cal.App.4th 998 1011, 14 Cal.Rptr.2d 588, 595 (1992); 10 Wright's Federal Practice § 2716, at 643-46.

***GECC Financial Corp. v. Jaffarian*, 79 Hawai`i 516, 535 (Hawai`i App. 1995)**

The Temple of Lono has failed to meet its burden to show that it is entitled to summary judgment as a matter of law. The *ICC* case and this contested case hearing are incomparable and there is no other law cited by the Temple of Lono to support its motion for summary judgment. In addition, the Temple of Lono has failed to show that there is no genuine issue of material fact in dispute.

Like 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], referenced in Minute Order No. 46, the Motion to Strike herein cites untimeliness as a basis to strike UHH's opposition to the Motion. 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 4, 2017.

A handwritten signature in black ink, appearing to be 'RMA', written over a horizontal line.

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,  
Hāmakua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02  
Document title: **Minute Order 47**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced document was served upon the following parties by email (when indicated) on May 5, 2017 and by regular mail on May 5, 2017:

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