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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'ohē Mauka, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT
HILO'S OPPOSITION TO TEMPLE OF
LONO'S MOTION FOR
RECONSIDERATION MINUTE ORDER
NO. 46, FILED MAY 4, 2017 [DOC. NO.
610]; DECLARATION OF COUNSEL;
EXHIBIT 1; CERTIFICATE OF SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO
TEMPLE OF LONO'S MOTION FOR RECONSIDERATION
MINUTE ORDER NO. 46, FILED MAY 4, 2017 [DOC. NO. 610]**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("University"), through counsel,
submits its opposition to Temple of Lono's *Motion for Reconsideration Minute Order No. 46*,
filed May 4, 2017 [Doc. No. 610] ("**Motion**").

I. INTRODUCTION

The Motion requests that the Hearing Officer vacate Minute Order No. 46 on the
following grounds: (1) the time frame within which the Temple was required to file a motion for

reconsideration is unduly burdensome; (2) the Hearing Officer's delay in ruling on the Temple's underlying *Motion to Recuse Hearing Officer* [Doc. 262] ("**Underlying Motion**") pre-ordained its denial; (3) the Hearing Officer misrepresented the basis of the Underlying Motion; and (4) the Hearing Officer's ruling that the Underlying Motion was filed outside of any established process set out in rule, law or order was erroneous. Rather than rely on citations to the record, statute, or case law, the Temple distorts the record and existing process to challenge an unfavorable ruling. *See* Motion at 5 ("The Hearing Officer should vacate Minute Order 46 as inappropriately ruled upon. A refusal to do so would simply confirm the need for recusal originally requested."). For the reasons set forth below, the Motion should be denied.

II. ARGUMENT

A. THE TEMPLE'S COMPLAINT THAT THE HEARING OFFICER ISSUED THE ORDERS IT ASKED FOR ARE HYPOCRITICAL AND IMPROPER

The Temple first complains that it was "forced to choose between preparing this motion... or continuing to work on the findings and conclusions." It is unclear what relief the Temple is seeking. The Temple's grievance serves no purpose other than to criticize the Hearing Officer. The Temple has repeatedly complained that motions remain pending in these proceedings and demanded that the Hearing Officer issue rulings. *See* Temple's *Motion to Schedule Pending Motions* [Doc. 324]. It is hypocritical for the Temple to now protest those very rulings that it sought to be issued.

Furthermore, the fact that the Temple chooses to spend its time filing yet another motion for reconsideration that alleges no new arguments or evidence, rather than devote its resources to preparing its proposed findings, distracts all parties to the existing orderly briefing process.

B. THE TEMPLE'S ARGUMENTS REGARDING TIMING ARE IRRELEVANT

The Temple's arguments regarding the deadline by which to file a motion for reconsideration and the delay in which the Hearing Officer issued a ruling have no bearing on the merits of Minute Order No. 46. As the University has repeatedly noted, HAR § 13-1-32(c) grants unfettered authority to the Hearing Officer to "fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of the hearing . . ." without any conditions on when such times may be set or dispositions issued. The Hearing Officer has full power to establish both the deadline by which parties must file motions for reconsideration as well as the timing in which such matters are ruled upon. The Temple may disagree with the deadline by which it needed to file a motion for reconsideration, however it notably fails to cite any legal authority challenging the authority of the Hearing Officer to impose a deadline expressly provided for in HAR § 13-1-39(b), which sets a five-day reconsideration period.

The Temple is well aware that the Hearing Officer has consistently maintained a five business-day deadline from issuance for any motions to reconsider, pursuant to the authority contained in HAR § 13-1-32(c). *See, e.g.*, Minute Order No. 23 [Doc. 346] (denying the Temple's Motion for Partial Summary Judgment); Minute Order No. 29 [Doc. 352] (denying the Temple's Motion to Dismiss for Lack of Jurisdiction); Minute Order No. 33 [Doc. 356] (denying the Temple's Motion to File Motion Out of Time). That five-day deadline was maintained throughout the pendency of the contested case proceedings. It is the same time period during the contested case hearing when the Temple was presumably occupied with multiple tasks, including drafting motions and oppositions, and preparing for direct and cross examination. As previously briefed, the Hearing Officer repeatedly reminded the parties that they should begin working on

their draft FOF/COL throughout the hearing. *See* University's Opp. to Temple Mot. for Recon. Minute Order 43 [Doc. No. 594] at 5. For the Temple to now allege that the five-day time frame constitutes harassment simply because the Temple is in the process of drafting findings and conclusions is simply meritless gamesmanship and strains credulity.¹ In sum, the Temple's dissatisfaction with the deadline and the Hearing Officer's ruling is not a sufficient ground on which to base a motion for reconsideration, especially where that motion lacks both legal basis and relevance to the merits of Minute Order No. 46.

C. THE TEMPLE'S ARGUMENT REGARDING THE HEARING OFFICER'S CHARACTERIZATION OF THE MOTION IS INAPPROPRIATE

The Temple also alleges that the Hearing Officer "misrepresents the Temple's motion to obscure the primary basis that the Temple for seeking recusal." Motion at 3. The Temple maintains that the primary basis for recusal in its Underlying Motion was "the refusal of the Hearing Officer to allow the Temple to be heard on the disqualifying nature of the Applicant's attack on the Temple[.]" *Id.* To that end, the Temple contends that "[n]ot allowing the Temple to be heard on the issue of whether the attack disqualified the Applicant from receiving the permit sought remains a serious due process violation never addressed by the Hearing Officer." *Id.* at 3-4.

The Temple's argument ignores the record, which clearly demonstrates that the Hearing Officer did permit the Temple to be heard on this issue on multiple occasions.² The Temple has raised this identical argument in both its Underlying Motion and Motion to Strike. *See* Underlying Motion at 6-8; Motion to Strike at 3-4. As the Hearing Officer has repeatedly

¹ Indeed, the University wonders whether the true cause of the Temple's alleged hardship is due to Mr. Sinkin's relocation to North Dakota on May 19, 2017—less than two weeks before the deadline for the parties to submit their proposed order, findings of fact, and conclusions of law. Counsel Decl. at ¶ 3.

² *See* Ex. 1, Tr. 8/5/16 at 27:16-29:21.

cautioned parties, “[a]ny Motion for Reconsideration shall not be used to reargue the motion or set our positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing.” Minute Order No. 46 at 4-5 (citing *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 114 (1992)). The Temple does not attempt to argue that its arguments are not “purely repetitious.” Rather, its sole basis for seeking reconsideration is its disagreement with the Hearing Officer’s ruling. That is improper grounds for reconsideration.

As the record demonstrates, the Temple has repeatedly utilized motions for reconsideration as mechanisms to voice its unhappiness with the Hearing Officer’s rulings,³ ignoring the well-established legal principle that motions for reconsideration are an improper vehicle to re-litigate issues already adjudicated. *See id.*; *Briggs v. Hotel Corp. of Pacific, Inc.*, 73 Haw. 276, 287, 831 P.2d 1335, 1342 n.7 (1992) (“We again remind litigants that a motion for reconsideration is not the time to relitigate old matters.”). Moreover, reconsideration is an extraordinary remedy, not a matter of due course. *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (“[Reconsideration is] an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources. Indeed, a motion for reconsideration should not be granted, absent highly unusual circumstances[.]”). The instant motion is no exception. The Temple again attempts to argue that the Hearing Officer violated its due process rights when she denied its *Motion to File Out of Time* [Doc. 179] despite the Board of Land and Natural Resources already ruling that such denial was a proper exercise of the Hearing Officer’s discretion. *See* Minute Order No. 39 [Doc. 406]. Thus, such argument is

³ *See Temple of Lono Motion for Reconsideration of Minute Order 44* [Doc. 569]; *Temple of Lono Motion for Reconsideration of Minute Order No. 43* [Doc. 559]; *Temple of Lono Motion to Restore Cross-Examination Rights* [Doc. 410]; *Temple of Lono Motion for Reconsideration* [Doc. 293].

inappropriate for a motion for reconsideration.

Unable to muster any new argument or evidence to support reconsideration, the Temple resorts to claiming that the denial of its motion was “pre-ordained.” Motion at 3. Such assertions—without any evidence or law to support it—are reckless, unwarranted, and nothing more than continued grandstanding by the Temple’s lawyer “representative” to detract attention from the orderly process and careful consideration of the merits. The Hearing Officer’s ruling is “pre-ordained” only to the extent that the Board *already* denied the Temple’s attempts to remove the Hearing Officer on the same grounds. *See* Minute Order No. 17 [Doc. 245]; Minute Order No. 39 [Doc. 406]. The Temple should hardly be surprised that reasserting the same arguments yet again yielded the same result.

D. THE TEMPLE’S ARGUMENT THAT THE HEARING OFFICER
MISTAKENLY RULED THE MOTION WAS UNTIMELY MISCONSTRUES
MINUTE ORDER 46

Lastly, the Temple’s claim that Minute Order No. 46 improperly found that the Underlying Motion was untimely filed is unfounded. In its Motion, the Temple argues:

The Hearing Officer finds that the Temple’s motion to recuse was “filed outside of any established process set out in rule, law, or order . . .” MO at 4. The Hearing Officer mistakenly rules that a motion for recusal can only be filed within the time set by the Hearing Officer for pre-hearing motions or during the hearing.

Motion at 4. This is plainly a misstatement and distortion of the Hearing Officer’s ruling. The full correct quote in proper context states: “The Motion to Strike cites untimeliness as a basis to strike UHH’s opposition to the Motion. Inasmuch as the [Underlying] Motion was filed outside of any established process set out in rule, law or order, opposition thereto is not limited to any specific time.” Minute Order No. 46 at 4. Thus, contrary to the Temple’s assertion, the Hearing Officer did not rule “that a motion for recusal can only be filed within the time set by the Hearing Officer for pre-hearing motions or during the hearing.” Motion at 4. Rather, the

Hearing Officer ruled that *to the extent* the Motion was untimely, the University's Opposition was appropriately filed. On that basis, the Hearing Officer denied the Temple's Motion to Strike, and fully considered the merits of the Motion as well as the University's Opposition thereto.

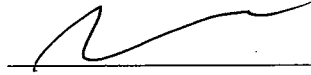
Indeed, the Hearing Officer addressed the issue of untimeliness simply because *the Temple* raised it as a basis to strike the University's Opposition. Notably, untimeliness was not raised as argument in the University's Opposition, nor did the Hearing Officer elect to raise it *sua sponte*. The Hearing Officer denied the Underlying Motion on its merits, rather than on procedural grounds. Minute Order No. 46 at 4 (holding that adverse rulings are not proper grounds for disqualifying bias). Therefore, the Temple's argument that the Hearing Officer improperly denied the Temple's *Motion* as being untimely is utterly baseless.

Despite the Temple's apparent misconception, the Hearing Officer properly denied the Temple's *Motion to Strike*. While the Temple does not address the basis on which Minute Order No. 46 also denied its Motion to Strike, it is clear that the Hearing Officer properly determined that the University's response was appropriate since the Underlying Motion was itself filed after the pre-hearing motion deadline.

III. CONCLUSION

For these reasons, the University respectfully requests that the Motion be denied.

DATED: Honolulu, Hawai'i, May 17, 2017.



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

Case No. BLNR-CC-16-002

DECLARATION OF COUNSEL;
EXHIBIT 1

DECLARATION OF COUNSEL

I, IAN L. SANDISON, declare:

1. I am an attorney with Carlsmith Ball LLP, counsel for Applicant University of Hawai'i at Hilo ("**University**") in the above-captioned matter.
2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon personal knowledge.
3. On May 16, 2017, I became aware that Lanny Sinkin, the representative for the Temple of Lono, will be leaving Hawai'i on May 19, 2017 for a new position at the Romero Institute, and will be residing in North Dakota.
4. Attached hereto as **Exhibit 1** is a true and correct copy of excerpts from the transcript prepared by Jean Marie McManus of the pre-conference hearing held on August 5, 2016 in the above-captioned matter, presided over by Judge Riki May Amano.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, May 17, 2017.

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

IAN L. SANDISON

BOARD OF LAND AND NATURAL RESOURCES

STATE OF Hawai'i

IN THE MATTER OF) CASE NO. BLNR-CC-002

)

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)

)

MOTIONS HEARING

Held on August 5, 2016, commencing at 10:05 a.m. at
the YMCA Building, 300 West Lanikaula Street, Hilo,
Hawai'i 96720.

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 JUDGE RIKI MAY AMANO, Hearing Officer

3 JULIE CHINA, Deputy Attorney General
4 WILLIAM WYNHOFF, Deputy Attorney General

5 STEPHEN MICHAEL CAIN, Staff Planner

6 TIM LUI-KWON, ESQ.

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10 RICHARD N. WURDEMAN, ESQ.

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15 LINCOLN S.T. ASHIDA, ESQ.

16 NEWTON CHU, ESQ.

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18 LANNY SINKIN

19 Temple of Lono

20 HARRY FERGERSTROM

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TIFFNIE KAKALIA

GLEN KILA

DWIGHT J. VICENTE

BRANNON KAMAHANA KEALOHA

CINDY FREITAS

WILLIAM K. FREITAS

1 Motion to Vacate ruling and supplement response time.

2 We will also allow UH-H who submitted
3 Document 135, TIO submitted 142, PUEO submitted 154,
4 TIO also submitted Document 149, Tabbada submitted
5 Document 174 in support of Document 126. And TIO
6 submitted Document 150 in opposition to Document 127.

7 Those are the persons who will be allowed
8 to speak to this next set of motions. So I've read
9 everything. I invite you to come and add whatever
10 you wish to, Mr. Sinkin.

11 MR. SINKIN: Your Honor, are you asking for
12 my comments on all of those motions at this time or
13 one at a time?

14 HEARING OFFICER AMANO: Let's do it one at
15 a time.

16 MR. SINKIN: I believe the first one that
17 you mentioned was the Motion for Partial Summary
18 Judgment; is that correct?

19 HEARING OFFICER AMANO: 78.

20 MR. SINKIN: 78 is Motion for Partial
21 Summary Judgment.

22 I think the only thing I wanted to
23 address -- stand on what we filed on those items.

24 HEARING OFFICER AMANO: I cannot hear you.

25 MR. SINKIN: We stand on what we filed to a

1 great extent, but I do want to address one aspect of
2 what we are dealing with here.

3 In their opposition, the University has
4 gone far afield from the merits of the issues before
5 them to launch an attack on the Temple of Lono as a
6 religious fundamentalist. Full expansion of free
7 exercise clause of that we are trying to use this
8 proceeding to galvanize a religious movement, that
9 the Hearing Officer should not allow this because
10 it's a diversion.

11 Basically what we have here is that the
12 University is defunct on the merits of what was
13 filed. What we filed were two simple requests of a
14 Motion for Summary Judgment that the summit of Mauna
15 Kea is sacred; and Motion for Summary Judgment on the
16 issue that Temple of Lono is still a practicing faith
17 in Hawai'i, and unable to respond to those two
18 factual issues as to whether there was a dispute, and
19 we say there's no dispute on either one of those
20 issues.

21 They tried to characterize Temple of Lono
22 as basically a terrorist organization intent on doing
23 harm to society. We objected to that, Your Honor, in
24 our opposition or reply to the opposition.

25 But I want to stress the seriousness that

1 we take on this attack. The very papers that they
2 have filed and statements they made about the Temple
3 of Lono were sent to the Department of Homeland
4 Security, and Department of Homeland Security would
5 probably need to take them seriously and perhaps
6 investigate whether those charges have any validity.

7 I request immediately that all of the
8 charges made against the Temple of Lono by
9 University, none of them had any facts or evidence
10 cited to support them. They were purely attacks. I
11 think that the University owes an apology to Temple
12 of Lono.

13 I thought about filing a Motion to Strike
14 these scandalous statements from the record and
15 decided we would leave them in the record because it
16 demonstrates what we're dealing with here. And
17 perhaps the Hearing Officer would care to take some
18 action to at least encourage them to stay on point
19 and not divert them to meaningless attacks on another
20 party.

21 That's all I have to say on that issue.

22 HEARING OFFICER AMANO: UH-H, Document 135.

23 MR. LUI-KWAN: For the record, Tim
24 Lui-Kwan. We stand on our response Doc. 135 which
25 lays out our belief on what the applicable law is on

CERTIFICATE

STATE OF Hawai'i

)

) SS.

COUNTY OF HONOLULU

)

I, JEAN MARIE McMANUS, do hereby certify:

That on July 5, 2016, at 10:05 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

Dated this 5th day of August, 2016, in Honolulu, Hawai'i.

JEAN MARIE McMANUS, CSR #156

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
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Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the
following parties by email unless indicated otherwise:

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