

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com
Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Application (CDUA) (HA-) **TEMPLE OF LONO MOTION TO**
3568) The Thirty Meter Telescope at the) **RECONSIDER MINUTE ORDER 57;**
Mauna Kea Science Reserve, Kaohe Mauka,) **MEMORANDUM IN SUPPORT; COS**
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO MOTION FOR RECONSIDERATION OF MINUTE ORDER 57

NOW COMES the Temple of Lono and moves the Hearing Officer to
reconsider Minute Order 57.

On October 5, 2016, the Temple filed its Motion to Schedule Pending Motions.
DOC-324.

No other party responded to the Temple's motion.

On May 31, 2017, the Hearing Officer filed Minute Order 57, which denied the
Temple's motion.

The Temple herein moves the Hearing Officer to reconsider Minute Order 57
and files the accompanying memorandum in support of said motion.

June 3, 2017

_____/s/_____
Lanny Alan Sinkin
Lay Representative for Temple of Lono

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
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FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Application (CDUA) (HA-) **TEMPLE OF LONO MEMORANDUM IN**
3568) The Thirty Meter Telescope at the) **SUPPORT OF MOTION TO**
Mauna Kea Science Reserve, Kaohe Mauka,) **RECONSIDER MINUTE ORDER NO. 57**
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER MINUTE ORDER NO. 57**

I. INTRODUCTION

On October 5, 2016, the Temple filed its Motion to Schedule Pending Motions. DOC-324. The motion sought to schedule motions that had been filed without being heard. The motions were:

- DOC-262: Motion to Recuse Hearing Officer filed September 17, 2016
- DOC-263: Motion for Summary Judgment (Disqualification) filed September 17, 2016
- DOC-264: Motion for summary Judgment (Desecration) filed September 17, 2016
- DOC-286: Motion for reasoned Explanations and Extension of Time filed September 26, 2017

Doc. 324 at 1.

No other party responded to the Temple's motion.

On May 31, 2017, the Hearing Officer filed Minute Order 57 ("MO 57"), which denied the Temple's motion. DOC 674.

II. ARGUMENT

A. The only grounds for denial of the Temple Motion was timeliness.

The Hearing Officer created three time periods regarding the filing of motions.

The first time period ran from the beginning of the proceeding until August 1, 2016. MO 13 at 6. During that period of time, parties could file pre-hearing motions.

The second time period apparently ran from August 2 until the hearings began on October 20. During that period, no further motions could be filed. MO 57 at 1-2.

The third time period apparently began on October 21 and continues to include post-hearing motions, such as this one.¹

The Temple's Motion to Schedule Pending Motions is denied because the motion was filed after the deadline set for the first time period. MO 57 at 1-2.

B. The ruling improperly excludes legitimate motions.

According Minute Order 57, as applied to the Temple's motion, no party could file a motion requesting the Hearing Officer recuse herself in the time period

¹ The Temple notes that the bar on filing motions during the "dead zone" from August 2 to October 20, was not absolute. For example, on September 23, 2016, the Hearing Officer filed Minute Order 19: Order granting Perpetuating Unique Educational Opportunities, Inc.'s motion to set the issues. DOC 281. That Minute Order provided for motions for reconsideration to be filed within 3 working days. Ibid. at 5. Such motions would perforce be filed after the August 1 deadline for pre-hearing motions and before the beginning of the hearings on October 20.

from August 2 through October 20. Such a prohibition of a recusal motion violated the due process rights of parties to an impartial and objective presiding officer.

There is also no legal support for the proposition that a Hearing Officer can foreclose the filing of motions to recuse simply by setting artificial time limits on the filing of motions.

According to Minute Order 57, no party could file a dispositive motion seeking to dismiss the entire case in the time period from August 2 through October 20. Such an exclusion violated the due process rights of parties to be heard and forces parties to continue litigation beyond the point where summary disposition of the case could be appropriate.

According to Minute Order 57, no party could seek reasoned explanations for orders issued during the time period from August 2 through October 20. Such an exclusion violated the due process rights of parties to have reasoned explanations for rulings. The absence of such reasons foreclosed the parties' ability to seek reconsideration and fails to provide a record sufficient for judicial review.

A motion to recuse, a motion for summary judgment, and a motion for reasoned explanations are all appropriate motions. To prohibit the filing of such motions during a particular time period prior to the initiation of hearings is arbitrary and capricious.

C. The untimely nature of the ruling makes impartiality and objectivity impossible.

The Temple filed its motion on October 5, 2016. DOC-324.

The Hearing Officer failed to rule on the motion until May 31, 2017.

By waiting more than seven months to rule on the Temple's motion, the Hearing Officer denied the Temple's due process right to be timely heard.

As a result of the delay, the Hearing Officer cannot make an impartial and objective decision on the motion.

To grant the motion would be to call up a motion that could result in recusal of the Hearing Officer retroactive to October 5, 2016 – the date the motion was filed. DOC-262.

To grant the motion would be to call up motions that could be dispositive of this entire case as of September 17, 2016 – DOC-263 – and October 5, 2016 – DOC-264.

To grant the motion would also be to call up a motion that could result in a revised determination of the issues to be heard in the proceeding. DOC-286.

In the first three of the motions, the Hearing Officer faced a decision on whether to grant the motions disposing of the entire case months prior to a ruling and after 71 witnesses had testified over 44 days of hearings.

Granting the fourth motion could have required reopening the record to address issues not included initially.

Under these circumstances, the Hearing Officer could not possibly be objective in deciding whether to grant the Temple's motions.

III. Conclusion

The Hearing Officer's denial of the Temple's motion is based solely on the arbitrary and capricious proposition that the motions the Temple sought to have scheduled could be barred based on a scheduling order.

The true timeliness issue precedes the question of the Temple's timeliness. The failure of the Hearing Officer to rule over an extended period of time created the situation where the delayed ruling could not possibly be considered objectively.

The appropriate remedy for this situation is to withdraw Minute Order 57 and leave the Temple's motion as an unresolved matter to be considered when assessing the conduct of this proceeding and the due process rights of the Temple.

DATED: June 6, 2017.

_____/s/_____
Lanny Alan Sinkin
Lay Representative for Temple of Lono

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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) HA-3568 for) **CERTIFICATE OF SERVICE**
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the **TEMPLE OF LONO MOTION FOR RECONSIDERATION OF MINUTE ORDER NO. 57** was served on the following parties by email on June 6, 2017.

Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands <dlnr.maunakea@hawaii.gov>, Kealoha Pisciotta-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiintel.net>, Pua Case <puacase@hawaiiintel.net>, cordylinicolor@gmail.com, kealiikea@yahoo.com, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, tluikwan@carlsmith.com, John P. (Pete) Manaut <jpm@carlsmith.com>, Lindsay N. McAneeley <lmcaaneeley@carlsmith.com>, T. Shinyama' <RShinyama@wik.com>, douging@wik.com <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, lsa@torkildson.com <lsa@torkildson.com>, njc@torkildson.com <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, akulele@yahoo.com <akulele@yahoo.com>, s.tabbada@hawaiiintel.net <s.tabbada@hawaiiintel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, hanahanai@hawaii.rr.com <hanahanai@hawaii.rr.com>, pohaku7@yahoo.com <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, Kealamakia Jr. <mkealama@yahoo.com>, Patricia Ikeda

<peheakeanila@gmail.com>, Yuklin Aluli <yuklin@kailualaw.com>, Dexter Kaiama <cdexk@hotmail.com>

and by first class mail on June 7, 2017 to:

1. Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom

2. Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760

3. Michael Cain, Custodian of Records
Conservation and Coastal Lands
1151 Punchbowl, Room 131
Honolulu, Hawai'i 96813

Dated: June 7, 2017

_____/s/_____
Lanny Alan Sinkin