

CARLSMITH BALL LLP

IAN L. SANDISON 5597  
JOHN P. MANAUT 3989  
LINDSAY N. MCANEELEY 8810  
ASB Tower, Suite 2100  
1001 Bishop Street  
Honolulu, HI 96813  
Tel No. 808.523.2500  
Fax No. 808.523.0842  
[isandison@carlsmith.com](mailto:isandison@carlsmith.com)  
[JPM@carlsmith.com](mailto:JPM@carlsmith.com)  
[lmcaneley@carlsmith.com](mailto:lmcaneley@carlsmith.com)

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO

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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, Hāmakua,  
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 OF MINUTE  
ORDER 57; CERTIFICATE OF SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF  
LONO'S MOTION FOR RECONSIDERATION OF MINUTE ORDER 57**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("University") submits its opposition to the *Motion for Reconsideration of Minute Order 57*, filed by the Temple of Lono ("Temple") on June 6, 2017 [Doc. 694] (the "Motion").

**I. INTRODUCTION**

Minute Order No. 57 denied the Temple's *Motion to Schedule Pending Motions*, filed on October 6, 2016 [Doc. 324] (the "Underlying Motion") on the basis that the "motions that are the subject of [the Underlying Motion], *inter alia*, were filed well after the deadlines set out in

Minute Order 13.”<sup>1</sup> Through the Motion, the Temple argues that the Hearing Officer should withdraw Minute Order No. 57 because: (1) the only ground for denial of the Temple's Motion was timeliness; (2) the ruling hypothetically could be extended to exclude legitimate motions; and (3) the purported untimeliness of the ruling rendered impartiality and objectivity impossible. These arguments — rather than address the specific defects of the Underlying Motion — merely employ *ad hominem* attacks on the Hearing Officer as a way of distracting from the issue at hand. As such, the Motion fails to demonstrate any cogent reasoning why Minute Order No. 57 should be reconsidered. Despite the Temple’s attempt to attribute the denial of its Underlying Motion to the unsubstantiated, hypothetical bad faith or bias on the part of the Hearing Officer, the record clearly demonstrates that the Underlying Motion was not only procedurally improper, but also lacking in merit, both factually and legally. Accordingly, the Motion should be denied.

## II. ARGUMENT

### A. THE TEMPLE’S UNSUBSTANTIATED CLAIMS OF BIAS DO NOT PROVIDE A BASIS FOR RECONSIDERATION OF MINUTE ORDER NO. 57

Minute Order No. 57 was abundantly clear that one of the fatal deficiencies of the Underlying Motion was that the Pending Motions were untimely filed. In an “effort to engage an orderly process for this contested case hearing,” the Hearing Officer expressly set July 18, 2016 as the deadline for all prehearing motions.<sup>2</sup> See Minute Order No. 53 [Doc. 654]; Minute

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<sup>1</sup> The Underlying Motion sought to schedule briefing for the following motions: (1) *Motion to Recuse Hearing Officer*, filed September 17, 2016 [Doc. 262]; (2) *Motion for Summary Judgment (Disqualification)*, filed September 17, 2016 [Doc. 263]; (3) *Motion for Summary Judgment (Desecration)*, filed September 17, 2016 [Doc. 264]; and (4) *Motion for Reasoned Explanations and Extension of Time*, filed September 26, 2016 [Doc. 286] (collectively, the “**Pending Motions**”).

<sup>2</sup> In the Motion, the Temple incorrectly interprets Minute Order No. 13 as permitting the filing of pre-hearing motions up until August 1, 2016. See Motion at 2. Minute Order No. 13 unambiguously set July 18, 2016 as the “[d]eadline for filing pre-hearing motions.” Minute

Order No. 13 [Doc. 115]. Indisputably, the Temple did not file the Pending Motions until September 2016 — approximately two full months *after* the filing deadline. Nor did the Temple seek or obtain leave from the Hearing Officer for the Pending Motions, or make any showing of good cause for its tardiness. Accordingly, the Pending Motions were plainly untimely and procedurally improper, and the Hearing Officer properly ruled that “[s]etting a hearing or hearings for said motions would be inapposite.” Minute Order No. 57 [Doc. 674] at 2.

The Temple does not dispute that the Pending Motions were filed well past the set deadline, nor does it dispute that untimeliness is an appropriate basis to deny its Motion. Despite this reality, the Temple insists that the order denying the Motion be withdrawn because the Hearing Officer is purportedly biased against the Temple. *See* Motion at 4 (“As a result of the delay [of ruling on the Underlying Motion], the Hearing Officer cannot make an impartial and objective decision[.]”). This is not the first time the Temple has resorted to *ad hominem* attacks in order to contest an unfavorable ruling; nor is it the first time the Temple has utterly failed to provide anything other than unsubstantiated argument and conjecture to support this contention.<sup>3</sup>

The Temple cites no evidence or legal authority to support its assertion that the Hearing Officer’s ruling that the Pending Motions were untimely was the result of legal or factual error, nor could it. Instead, the Temple attempts to manufacture a claim of bias out of thin air where none exists. Such arguments are wholly improper, do not support reconsideration, and should be

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Order No. 13 [Doc. 115] at 6. August 1, 2016 was the deadline to file , *inter alia*, motions to reconsider dismissal or *responses* to pre-hearing motions. *Id.*

<sup>3</sup> *See* University’s *Opposition to Temple of Lono’s Motion for Reconsideration of Minute Order 53* [Doc. 701]; *Opposition to Temple of Lono’s Motion for Reconsideration of Minute Order 47* [Doc. 641]; *Opposition to Temple of Lono’s Motion for Reconsideration of Minute Order 46* [Doc. 638]; *Opposition to Temple of Lono’s Motion for Reconsideration of Minute Order 44* [Doc. 599]; *Opposition to Temple of Lono’s Motion to Recuse Hearing Officer* [Doc. 434]; *Opposition to Temple of Lono’s Motion for Summary Judgment (Disqualification)* [Doc. 433].

rejected.<sup>4</sup>

Although termed a Motion for Reconsideration, the Temple's Motion does not actually request that the Hearing Officer reconsider Minute Order No. 57 on any one of the proper grounds for reconsideration. *See Sousaris v. Miller*, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (2000) ("[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding."). Rather, the Temple requests that the Hearing Officer "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." Motion at 5. Thus, the Temple unabashedly admits that its intent and purpose in filing the Motion is to inject this manufactured bias into the record and essentially disrupt the timeliness of the final resolution. Such an absurd position is plainly improper and should be rejected outright. Moreover, the Temple's requested relief is particularly troubling given its repeated allegations of prejudice caused by the *absence* of a ruling on its pending motions. *See, e.g.*, Temple's Mot. for Recon. Minute Order 43 at 3-4 [Doc. 559]; Underlying Motion; Temple's Substantive Joinder and Supplement to MKAH's Renewed Mot. to Disqualify Hearing Officer [Doc. 343]; Temple: Unresolved Matters [Doc. 371]. For the Temple to now seek withdrawal of a ruling that it asked for, simply because the ruling is

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<sup>4</sup> The University notes that the Hearing Officer has already rejected identical arguments contained in previous motions for reconsideration filed by the Temple. *See* Minute Order No. 78 [Doc. 710] at 2 ("The Temple's complaints regarding timing and the objectivity of the Hearing Officer are not germane to the substance of the Minute Order and irrelevant for purposes of reconsideration of Minute Order No. 46."); *see also* Minute Order No. 79 [Doc. 711] at 2 ("All of the Temple's assertions amount to reargument and/or attempts to raise issues that are irrelevant to the substance of Minute Order No. 47.").

unfavorable, is further evidence of the gamesmanship and questionable litigation tactics employed by the Temple and its representative throughout this proceeding.

B. THE TEMPLE'S EFFORTS TO MANUFACTURE A DUE PROCESS VIOLATION DO NOT PROVIDE A BASIS FOR RECONSIDERATION OF MINUTE ORDER NO. 57

The Temple also baldly claims that “[b]y 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.” Motion at 4. This contention is patently frivolous. As an initial matter, the Board has already ruled that “no authority mandates a deadline for issuing orders on motions in contested cases.” See Minute Order No. 39 [Doc. 406] at 3. Furthermore, the record clearly demonstrates that the Temple has been heard repeatedly on these issues, not the least of which is that the Hearing Officer has ruled on each of the substantive Pending Motions despite their untimely filing. The Temple’s complaint that a briefing schedule was not established fails to appreciate the multiple pleadings it has filed in this proceeding and the multiple days of evidentiary hearing in which it fully participated. While the ultimate dispositions of its motions were not favorable to the Temple, it is disingenuous to suggest that it has been denied a meaningful opportunity to be heard. See *Sandy Beach Defense Fund v. City Council of the City and County of Honolulu*, 70 Hawai‘i 361, 378, 773 P.2d 250, 261 (1989) (holding that the guarantee of due process is meant to ensure that parties are granted notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

Moreover, to the extent the Motion claims that the ability to submit briefs in and of itself is right guaranteed by procedural due process, such contention is plainly contradicted by the language of Hawai‘i Administrative Rule (“HAR”) § 13-1-36(b) which provides that briefs are submitted at the request and at the discretion of the Hearing Officer. “The presiding officer *may* request briefs setting forth the issues, facts and legal arguments upon which the parties intend to

rely and the presiding officer may fix the conditions and time for the filing of briefs and the number of pages.” *Id.* (emphasis added). In other words, the Hearing Officer was not required to allow further briefing on the Pending Motions. The word “*may*” is clearly permissive. It is at the discretion of the Hearing Officer — not the Temple— to determine whether and when briefs are submitted. Therefore, the Temple’s contention that it was denied due process because it was unable to submit further briefings is both unsupported and directly contradicted by the administrative rules. As such, the Temple’s due process complaint is unavailing and fails as a matter of law.

### III. CONCLUSION

For these reasons, the University respectfully submits that the Motion has failed to establish any grounds for reconsideration of Minute Order No. 57 and should be denied.

DATED: Honolulu, Hawai‘i, June 15, 2017.



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IAN L. SANDISON  
JOHN P. MANAUT  
LINDSAY N. MCANEELEY

Attorneys for Applicant  
UNIVERSITY OF HAWAI‘I AT HILO

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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:

DLNR Office of Conservation and Coastal  
Lands ("OCCL")  
[dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov)

MICHAEL CAIN  
Office of Conservation and Coastal Lands  
1151 Punchbowl Street, Room 131  
Honolulu, HI 96813  
[michael.cain@hawaii.gov](mailto:michael.cain@hawaii.gov)  
*Custodian of the Records*  
*(original + digital copy)*

DAVE M. LOUIE, ESQ.  
CLIFFORD K. HIGA, ESQ.  
NICHOLAS R. MONLUX, ESQ.  
Kobayashi Sugita & Goda, LLP  
[dml@ksglaw.com](mailto:dml@ksglaw.com)  
[ckh@ksglaw.com](mailto:ckh@ksglaw.com)  
[nrm@ksglaw.com](mailto:nrm@ksglaw.com)  
*Special Deputy Attorneys General for*  
*ATTORNEY GENERAL DOUGLAS S. CHIN,*  
*THE DEPARTMENT OF THE ATTORNEY*  
*GENERAL, and DEPUTY ATTORNEYS*  
*GENERAL IN THEIR CAPACITY AS*  
*COUNSEL FOR THE BOARD OF LAND AND*  
*NATURAL RESOURCES and HEARING*  
*OFFICER*

WILLIAM J. WYNHOFF, ESQ.  
Deputy Attorney General  
[bill.j.wynhoff@hawaii.gov](mailto:bill.j.wynhoff@hawaii.gov)  
*Counsel for the BOARD OF LAND AND*  
*NATURAL RESOURCES*

J. DOUGLAS ING, ESQ.  
[douging@wik.com](mailto:douging@wik.com)  
ROSS T. SHINYAMA, ESQ.  
[rshinyama@wik.com](mailto:rshinyama@wik.com)  
SUMMER H. KAIawe, ESQ.  
[skaiawe@wik.com](mailto:skaiawe@wik.com)  
Watanabe Ing LLP  
*Counsel for TMT INTERNATIONAL  
OBSERVATORY, LLC*

JOSEPH KUALII LINDSEY CAMARA  
[kualiic@hotmail.com](mailto:kualiic@hotmail.com)

HARRY FERGERSTROM  
P.O. Box 951  
Kurtistown, HI 96760  
[hankhawaiian@yahoo.com](mailto:hankhawaiian@yahoo.com)  
*(via email & U.S. mail)*

WILLIAM FREITAS  
[pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)

TIFFNIE KAKALIA  
[tiffniekakalia@gmail.com](mailto:tiffniekakalia@gmail.com)

BRANNON KAMAHANA KEALOHA  
[brannonk@hawaii.edu](mailto:brannonk@hawaii.edu)

GLEN KILA  
[makakila@gmail.com](mailto:makakila@gmail.com)

JENNIFER LEINA'ALA SLEIGHTHOLM  
[leinaala.mauna@gmail.com](mailto:leinaala.mauna@gmail.com)  
[leina.ala.s808@gmail.com](mailto:leina.ala.s808@gmail.com)

LANNY ALAN SINKIN  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
*Representative for the Temple of Lono*

MAUNA KEA ANAINA HOU  
c/o Kealoa Pisciotta  
[keomaivg@gmail.com](mailto:keomaivg@gmail.com)

LINCOLN S.T. ASHIDA, ESQ.  
[lsa@torkildson.com](mailto:lsa@torkildson.com)  
NEWTON J. CHU, ESQ.  
[njc@torkildson.com](mailto:njc@torkildson.com)  
Torkildson, Katz, Moore, Hetherington &  
Harris  
*Counsel for PERPETUATING UNIQUE  
EDUCATIONAL OPPORTUNITIES (PUEO)*

DWIGHT J. VICENTE  
2608 Ainaola Drive  
Hilo, HI 96720-3538  
[dwrightjvicente@gmail.com](mailto:dwrightjvicente@gmail.com)  
*(via email & U.S. mail)*

RICHARD L. DELEON  
[kekaukike@msn.com](mailto:kekaukike@msn.com)

CINDY FREITAS  
[hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)

C. M. KAHO'OKAHI KANUHA  
[kahookahi.kukiaimauna@gmail.com](mailto:kahookahi.kukiaimauna@gmail.com)

KALIKOLEHUA KANA ELE  
[akulele@yahoo.com](mailto:akulele@yahoo.com)

MEHANA KIHAI  
[uhiwai@live.com](mailto:uhiwai@live.com)

STEPHANIE-MALIA: TABBADA  
[s.tabbada@hawaiiantel.net](mailto:s.tabbada@hawaiiantel.net)

DONNA H. KALAMA, ESQ.,  
Deputy Attorney General  
[donna.h.kalama@hawaii.gov](mailto:donna.h.kalama@hawaii.gov)  
*Counsel for the Honorable DAVID Y. IGE, and  
BLNR Members SUZANNE CASE and  
STANLEY ROEHRIG*



E. KALANI FLORES  
[ekflores@hawaiiantel.net](mailto:ekflores@hawaiiantel.net)

DEBORAH J. WARD  
[cordylinecolor@gmail.com](mailto:cordylinecolor@gmail.com)

YUKLIN ALULI, ESQ.  
Law Offices of Yuklin Aluli  
[yuklin@kailualaw.com](mailto:yuklin@kailualaw.com)  
DEXTER KAIAMA, ESQ.  
Law Offices of Dexter K. Kaiama  
[cdexk@hotmail.com](mailto:cdexk@hotmail.com)  
*Counsel for KAHEA: THE ENVIRONMENTAL ALLIANCE*

IVY MCINTOSH  
[3popoki@gmail.com](mailto:3popoki@gmail.com)  
*Witness for the Hearing Officer*

PATRICIA P. IKEDA  
[peheakeanila@gmail.com](mailto:peheakeanila@gmail.com)  
*Witness for the Hearing Officer*

CRYSTAL F. WEST  
[crystalinx@yahoo.com](mailto:crystalinx@yahoo.com)  
*Witness for Hearing Officer*

CLARENCE KUKAUAKAHI CHING  
[kahiwaL@cs.com](mailto:kahiwaL@cs.com)


B. PUALANI CASE  
[puacase@hawaiiantel.net](mailto:puacase@hawaiiantel.net)

PAUL K. NEVES  
[kealiikea@yahoo.com](mailto:kealiikea@yahoo.com)

WILMA H. HOLI  
P. O. Box 368  
Hanapepe, HI 96716  
[w\\_holi@hotmail.com](mailto:w_holi@hotmail.com)  
*Witness for the Hearing Officer*  
*(via email & U.S. mail)*

MOSES KEALAMAKIA, JR.  
[mkealama@yahoo.com](mailto:mkealama@yahoo.com)  
*Witness for the Hearing Officer*

DATED: Honolulu, Hawai'i, June 15, 2017.

  
\_\_\_\_\_  
IAN L. SANDISON  
JOHN P. MANAUT  
LINDSAY N. MCANEELEY

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO