

BOARD OF LAND AND NATURAL RESOURCES

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OFFICE OF CONSERVATION
AND COASTAL LANDS

STATE OF HAWAI'I

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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)
_____)

Case No. BLNR-CC-16-002
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII
Response to Petitioners'
Objections to Christopher
Yuen; Certificate of Service

RESPONSE TO PETITIONERS' OBJECTIONS TO CHRISTOPHER YUEN

Petitioners filed "Objections" on May 6, 2016, objecting to, among other matters, my participation in this contested case. These objections were repeated in a filing dated May 13, 2016. Treating their objections as a motion for me to disqualify myself, I decline to do so for the reasons stated below.

For this contested case, the main task for a board member will be to evaluate the physical, cultural, and other impacts of the proposed TMT project, and analyze them within the framework of laws and regulations that apply to a CDUA of this nature. Under the current procedural posture, the hearing officer will submit recommended findings of fact, conclusions of law, and a proposed decision and order to the board. The board will make the final decision with each member voting according to his or her individual judgment.

All factual determinations will have to be made based upon evidence in the record of the contested case. The contested case hearing is de novo. Board members must make their decisions based upon the evidence presented and the law, and set aside any preconceptions and opinions that they had before the contested case began. We must also make decisions without partiality toward any side arising from personal sympathies with

the parties, their supporters, attorneys, witnesses, or others, and without regard to whom we will please or displease.

I recognize and agree with these principles and will apply them to the current contested case.

It's important for anyone making decisions that affect the public to try to have an open mind, to listen to new evidence, and to be willing to revise opinions in the light of evidence. This is true generally, but more so in making quasi-judicial decisions. In a board like the BLNR where the members are supposed to have some experience in the kinds of matters entrusted to them, they will often bring some background and experiences to an issue. You must be aware of them so that you can account for how they may affect your ability to make a judgment solely on the facts presented in the case.

Petitioners' opposition to my involvement refers primarily to comments about Mauna Kea reported in an interview in 1998, when I was finishing my prior terms as a BLNR member. Many things have happened since 1998 concerning Mauna Kea. During this contested case hearing, the parties will present evidence about the possible impacts of the proposed project, as well as the impact of other existing telescope facilities on Mauna Kea. Much of this evidence will come from work done after 1998. I'm sure the parties will also present other evidence that may have been available earlier, but that I simply didn't know in 1998. I also recognize that there are significant gaps in my knowledge about Mauna Kea. After 1998 I wasn't directly involved until being reappointed to the BLNR in June 2014.

Some legal developments since 1998, such as case law discussing the public trust, may also affect the legal analysis of the TMT project compared to how a project would have been analyzed in 1998.

The TMT project itself was not proposed until many years after 1998, and is sited on a different general area—the northern plateau-- than earlier telescope development on Mauna Kea. In 1998, I had little or no specific information about the northern plateau of Mauna Kea. Without implying any judgment whether the northern plateau is better or worse than other areas on Mauna Kea for telescopes, I am fairly certain that in 1998 I didn't foresee that major telescope construction would be proposed there.

My ultimate decision on whether or not to approve this CDUA will be based solely upon the evidence in this contested case, analyzed against the current legal framework, and not upon opinions I had in 1998 (or at any other time). I could have voted for or against a CDUA for a telescope on Mauna Kea in 1998, depending on the evidence presented about the specific project and site, and that is true now. I will make my final decision on this contested case after the parties have presented their arguments for and against the hearing officer's proposed findings of fact, conclusions of law, and decision and order.

Petitioners also refer to my vote in favor of the "emergency rule" in July 2015 as evidence of bias.

At the time the emergency rule was being considered, the TMT had a CDUP approved by the BLNR in 2013. This permit and related approvals gave a legal right to start construction. Although the CDUP was on appeal (and vacated in December 2015), no stay had been entered, nor even requested by petitioners. The BLNR has management

responsibilities on Mauna Kea which include ensuring that permittees, as well as others, can exercise their legal rights safely. In my view, that was the purpose of the emergency rule. It was not a judgment on the merits of the 2013 CDUP itself.

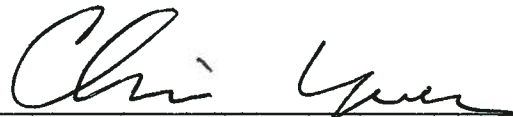
To understand the legal framework it is necessary to go beyond broad general statements of law about prejudgment of a contested case. I've reviewed the large body of case law about the specific question whether public comments of a board member should disqualify the member from voting on a land use application in quasi-judicial proceedings because of the claim that the comments create an appearance of impropriety, or indicate prejudgment. In all of the cases I found disqualifying the board member, the reason was public advocacy for or against the **specific project** being considered. See, e.g. cases collected at Anno., 4 A.L.R. 6th 263, sec. 24, 25(2005). On the other hand, comments made opposing even a specific project did not disqualify a board member when some modifications had been made to the project by the time of the vote, and the comments had been made three years earlier. *Davisco Foods International v. Gooding Cty.*, 141 Idaho 784, 118 P.3d 116 (2005).

A board dealing with land use will often make decisions involving similar projects in the same general area. This is true for the BLNR, and not just on Mauna Kea. A member who votes for one project publicly endorses the findings for that project, and this may suggest how the member would vote on a future project, but it would be extremely impractical to then say that the member is disqualified to vote on the future project. Conversely, a member who votes against one project is not disqualified from later voting on a similar nearby project. For example, a board member may endorse findings in a contested case that seawalls generally cause beach loss, and that a seawall is

doing so in this location. This should not disqualify the board member from hearing a case involving a seawall on neighboring property where the property owner wants to dispute that same basic factual issue even though it may seem that the member has formed an opinion. The member has to re-decide the issue based upon the facts presented in the next case.

I've also considered whether I should recuse myself despite there not being adequate legal grounds to do so. I think that the policy for board members is similar to that for judges: there is a duty to serve when you are not legally disqualified, just as there is a duty to disqualify yourself when good cause exists. This may be especially true in my case because I was appointed to be the member on the BLNR statutorily required to have a background in "conservation and natural resources." H.R.S. sec. 171-4(b). To disqualify one's self because a party to a contested case thinks that comments the member has expressed in some point in the past imply a predisposition on a particular application means that individuals who, for example, have expressed strong opinions on the need to preserve coastal open space should not vote on a CDUA for a house on the shoreline if the applicant objects. Board members should not be selected for the absence of opinions: they have to know how to review facts and decide particular cases on their merits given the legal criteria.

DATED: Honolulu, Hawai'i, May 25, 2016.



CHRISTOPHER YUEN, Member
Board of Land and Natural Resources

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