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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

A Contested Case Hearing Re Conservation  
District Use Application (CDUP) HA-3568 for  
the Thirty Meter Telescope at the Mauna Kea  
Science Reserve, Ka'ohē Mauka, Hamakua  
District, Island of Hawai'i,  
TMK (3) 4-4-015:009

CASE NO. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT  
HILO'S **STATEMENT OF POSITION  
ON PETITIONERS' MOTION FOR  
RECONSIDERATION OF MINUTE  
ORDER NO. 4, FILED ON MAY 6, 2016  
AND/OR MOTION TO STRIKE  
SELECTION PROCESS AND TO  
DISQUALIFY VARIOUS MEMBERS  
AND HEARING OFFICER, FILED  
MAY 13, 2016; DECLARATION OF  
COUNSEL; EXHIBITS "1" AND "2";  
CERTIFICATE OF SERVICE**

**THE UNIVERSITY OF HAWAI'I AT HILO'S STATEMENT  
OF POSITION ON PETITIONERS' MOTION FOR RECONSIDERATION OF MINUTE  
ORDER NO. 4, FILED ON MAY 6, 2016 AND/OR MOTION TO STRIKE  
SELECTION PROCESS AND TO DISQUALIFY VARIOUS  
MEMBERS AND HEARING OFFICER, FILED MAY 13, 2016**

The University of Hawai'i at Hilo (the "University"), through counsel, submits this  
*Statement of Position on Petitioners' Motion for Reconsideration of Minute Order No. 4, Filed  
on May 6, 2016 and/or Motion to Strike Selection Process and to Disqualify Various Members  
and Hearing Officer, filed May 13, 2016 ("Motion").*

I. ARGUMENTS

A. THE MOTION IS DUPLICATIVE AND/OR INSUFFICIENT

Petitioners' Motion states that it is being brought as a substantive motion and/or as a Motion for Reconsideration of Minute Order 4. *See* Mot. at 3. To the extent that Petitioners frame the Motion as a *new* substantive motion, it is duplicative of the series of objections previously filed by Petitioners, which were construed by the Board of Land and Natural Resources ("Board") as a motion that resulted in the issuance of Minute Order 4. To the extent Petitioners frame the Motion as one for reconsideration of Minute Order 4, it should be denied as it fails to cite to and meet any recognized standard for reconsideration. More specifically, Petitioners' Motion fails to demonstrate any "[n]ew information not previously available [that] would affect the result" or risk of "substantial injustice" that would warrant reconsideration of Minute Order 4. *See* Hawai'i Administrative Rule ("HAR") § 13-1-39. Mere dissatisfaction or disagreement with the Board's decision is not a sufficient basis to support reconsideration. Therefore, to the extent the Motion seeks reconsideration it is unsupported legally, factually, and is simply a tactical maneuver to improperly and unnecessarily delay the contested case hearing.

B. PETITIONERS' ARGUMENTS LACK MERIT AND DO NOT WARRANT THE RELIEF REQUESTED

1. The Board Followed the Correct Procedure Upon Remand to Restart the Contested Case Hearing Process and Appoint a Hearing Officer

Petitioners objected to the selection process for, and appointment of, Hearing Officer Amano in their objections filed on April 15, 2016 and May 2, 2016. *See* Doc. Nos. 5, 13. The Motion restates and reargues these very same objections. As set forth in the University's letters of April 15, 2016 and April 21, 2016, copies of which are attached hereto as Exhibits 1 and 2, and incorporated by reference, Petitioners' arguments regarding the hearing officer selection process lack merit for several reasons. First, Hawai'i Revised Statutes ("HRS") § 103D-304(b)

expressly authorizes the Board to solicit professional services that “the agency *anticipates* needing” at the beginning of each fiscal year, *and* when the initial response is adequate *or new needs arise*. See HRS § 103D-304(b)(1)-(3); Ex. 1 at 2. The publication of a notice and solicitation of applicants is merely a ministerial action, which does not require Board delegation of a contested case hearing to a hearing officer to occur; nor does this solicitation evidence or involve any prejudgment of the substantive issues to be heard in the contested case.

Second, Petitioners provide no authority to support their contention that the Board’s delegation of the contested case to a hearings officer mandated a public meeting and did not fall within the adjudicatory function exception to Hawai‘i’s Sunshine Law, HRS Chapter 92. The scope of the remand orders from both the Supreme Court and Circuit Court were clear—the matter was remanded to the Board *so that a contested case hearing could be conducted* in a manner consistent with the Supreme Court’s opinion in *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 363 P.3d 224 (2015). Accordingly, upon remand, the Board was sitting in its adjudicatory capacity and poised to make decisions associated with its ordered duty to conduct the contested case hearing. Moreover, the Board’s meeting to determine whether to delegate the contested case hearing to a hearing officer was plainly a decision *related to the conduct of the contested case hearing* and a matter that is entirely within the Board’s discretion, and thus, an *adjudicatory function* that is exempt from the Sunshine Law. See HRS § 92-6(a)(2) (“[Chapter 92] shall not apply:...(2) to adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9, or authorized by other sections of the Hawaii Revised Statutes”); HAR § 13-1-32(b) (“The board may conduct the hearing or, the board in its discretion may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer.”). As previously noted, the State of Hawai‘i Office

of Information Practices (“OIP”) has opined that “adjudicatory functions” that are exempt from HRS Chapter 92 are not limited to the deliberative process only, but may include other matters ancillary to the contested case hearing. *See* OIP Opinion Letter No. 04-14 at \*3 (Aug. 27, 2004); Ex. 1 at 2; Ex. 2 at 3. There simply is no requirement that, once a contested case hearing has been initiated, the Board must conduct open meetings under the Sunshine Law regarding its decision making for that contested case, including the delegation of the Board’s authority to a hearing officer to conduct the contested case and the selection of the individual hearing officer. *See* Ex. 1 at 1-2; Ex. 2 at 2-3.

Third, there is no requirement under HRS § 91-9 that the Board must publish notice of the initiation or commencement of the contested case hearing *process*. Ex. 2 at 3-4. Rather, HRS § 91-9 requires only that notice of the hearing dates for the contested case itself, which has not yet been scheduled, be provided. Moreover, even if a form of notice was required, the Third Circuit’s remand order caused the parties to resume the contested case hearing process that was initiated in 2011. This was based on the exact directive from the Hawai‘i Supreme Court, which provided that the matter be remanded “*so that a contested case hearing can be conducted before the Board or a new hearing officer.*” *Mauna Kea*, 136 Hawai‘i at 399, 363 P.3d at 247 (emphasis added). Based on these clear directives, the public was plainly on notice that the contested case process, which may include the selection of a hearing officer, would resume upon remand. The University’s position on the correct procedure for the selection of a Hearings Officer is consistent with the rationale articulated in Minute Order #4. *See* Exhibits 1, 2.

2. Petitioners’ Arguments for Disqualification of Chris Yuen from the Board and/or Selection Committee Are Baseless

The University does not believe there is any legitimate basis for disqualification of Board member Chris Yuen. Petitioners seek to disqualify Chris Yuen as both a Board Member and

Selection Committee Member on the basis of general statements made in an interview nearly *eighteen* years ago, in July 1998, regarding the impact of telescopes on Mauna Kea over the approximately 20-25 years prior to then. Petitioners contend that the limited statements Petitioners quote are evidence of an “appearance of prejudgment, a lack of an appearance of justice, and potential bias,” warranting disqualification of Mr. Yuen from this matter, and that Mr. Yuen’s purported failure to disclose this specific article was somehow improper because he disclosed other matters that occurred even further back in time than this article.

Contrary to Petitioner’s first contention, these statements *cannot* evidence any prejudgment or bias of the specific issues presented in this case—which relate to the TMT Project—as they were made long before the TMT Project was even conceived. Petitioners’ citation to a selective interview from almost two decades ago cannot fairly be found to demonstrate any abdication by Mr. Yuen of his duties as a Board Member to evaluate each permit application and associated project on its respective merits and against the appropriate legal standards.

With respect to Petitioner’s second contention, the University submits that: (1) Mr. Yuen did not need to specifically disclose the article to which Petitioners cite because it simply is not relevant to these proceedings; (2) it is patently unreasonable to expect a person who is serving in a public capacity to recall and disclose every public statement made over the course of decades of service; (3) an interview for an monthly newsletter about various issues Mr. Yuen faced as a Board Member over eight years of service (at that time) is notably different from, and less likely to be remembered than, where one served as a professional lecturer or graduated from law school; (4) because, according to Petitioners, the article was purportedly easily found through an internet search and Petitioners have experienced no prejudice from Mr. Yuen’s nondisclosure of

this specific article.

Lastly, Petitioners' argument that Mr. Yuen could not serve as a member of the Selection Committee pursuant to HAR § 3-122-69(b) does not make sense and is not supported by any recognized authority.

3. Judge Amano's Membership in 'Imiloa is Not a Disqualifying Conflict

Minute Order 4 sets forth the appropriate standard for disqualification of a hearing officer and the evaluation of whether Judge Amano's membership in 'Imiloa is a disqualifying conflict for purposes of this case. *See* Minute Order 4 at 6-16. Under established Hawai'i law, the appropriate standard for disqualification of decision-makers in an administrative context is the "appearance of impropriety." *Sussel v. City & Cty. of Honolulu*, 71 Haw. 107, 784 P.2d 867 (1989). Since this is similar to the standard applied to judges, authorities that address what would constitute a disqualifying conflict for a judge provide guidance on whether Judge Amano's family membership at 'Imiloa would disqualify her from serving as the hearing officer in this contested case proceeding. *See e.g.* Hawaii Revised Code of Judicial Conduct ("HRCJC"), Rule 2.11. Among other things, Courts have ruled that a judge's prior membership in an organization that has advocated a position in an environmental case did not provide a basis for disqualification, even where the organization was also a party to the proceedings. *See Sierra Club v. Simkins*, 847 F.2d 1109 (4<sup>th</sup> Cir. 1998) (Prior membership in an advocacy organization did not raise reasonable doubts regarding a judge's impartiality); *cf.* HRCJC Rule 2.11(a)(2)(A) (disqualification is warranted when a judge is an officer, director, general partner, managing member, or trustee of a party—*i.e.* when the judge holds a position of power and control in the organization that gives rise to duties of loyalty, but not when it is simply a member). A finding that Judge Amano is lacking objectivity (actual or apparent) and must be disqualified from this case solely based on annual membership in and/or donations to the University or University's

affiliated programs/organizations would mean that many Hawai'i judges, at all levels, should be disqualified from adjudicating cases involving the University. Such a standard for disqualifying conflicts would unduly restrict the pool of potential hearing officers and adjudicators in this State, and has clearly not been adopted or applied.

C. THE CONTESTED CASE HEARING CANNOT BE HELD HOSTAGE TO PETITIONERS IMPROPER DELAY TACTICS

Based on the past filings and public statements of Petitioners and their counsel, the University recognizes that no matter whom the Board selected, the Petitioners would likely find almost any reason to object. The critical concern of the University, as the applicant seeking review of its pending conservation district use application, is that the contested case proceed expeditiously, while adhering to the applicable statutes, regulations, and the Supreme Court's mandate. Motions asserting baseless objections are designed to stall the contested case hearing for as long as possible. By demanding a public hearing for every ministerial or ancillary decision by the Board on due process grounds, Petitioners are effectively denying the University and its lessee due process rights to be heard on the merits of the University's permit application. The Board should not allow the Petitioners' delay tactics to unreasonably infringe upon the rights of the University and its lessee to proceed with a timely hearing on its application.

The propriety of the selection process notwithstanding, the University has recently become aware that Judge Amano is serving as a mediator in another matter in which the University of Hawaii (Manoa) is a party. Whether or not this neutral third-party role should have been disclosed prior, because Judge Amano did disclose another mediation in which the University is a party, the University anticipates that Petitioners will repeat their mantra of failure to disclose, prejudice and the appearance of impropriety. The University has already been through a full contested case hearing in this matter, only to have the results vacated years later

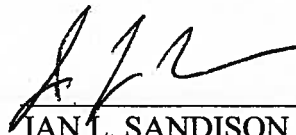
based on allegations of prejudice and appearance of impropriety. It would be manifestly prejudicial to the University and its lessee to have this occur again after another lengthy contested case hearing process.

Therefore, while the University maintains that Judge Amano is eminently qualified to serve as the hearing officer in this matter and that the selection procedure was proper, the University must respectfully request that the Board specifically determine at this point whether Judge Amano should be replaced as the hearing officer to ensure these proceedings satisfy “the appearance of justice” mandated by the Hawaii Supreme Court. *See Mauna Kea*, 136 Hawai‘i at 390, 363 P.3d at 238. Based on the Supreme Court’s directives, it is possible that Petitioners’ “appearance of justice” arguments could be adopted on appeal which would result in crippling delays to the permit approval process. On that basis, the University respectfully and with great reluctance requests that the Board proceed with a new hearings officer.

## II. CONCLUSION

In conclusion, the University respectfully requests that Petitioners’ Motion be denied on the grounds raised in the Motion itself. However, to ensure the orderly proceedings to achieve a just and final result and to eliminate any basis for or risk of further delays and appeals, the University respectfully requests that the Board designate an alternative hearing officer to handle these proceedings.

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



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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

A Contested Case Hearing Re Conservation  
District Use Application (CDUP) HA-3568 for  
the Thirty Meter Telescope at the Mauna Kea  
Science Reserve, Ka'ohe Mauka, Hamakua  
District, Island of Hawai'i,  
TMK (3) 4-4-015:009

CASE NO. BLNR-CC-16-002

DECLARATION OF COUNSEL;  
EXHIBITS "1" AND "2"

**DECLARATION OF COUNSEL**

I, Ian L. Sandison, declare:

1. I am an attorney at the law firm Carlsmith Ball LLP, counsel for Applicant UNIVERSITY OF HAWAI'I AT HILO ("University") in the above-captioned lawsuit.
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. Attached hereto as Exhibit 1 is a true and correct copy of my letter dated April 15, 2016 to the DLNR Board.
4. Attached hereto as Exhibit 2 is a true and correct copy of my letter dated April 21, 2016 to the DLNR Board.

This declaration is made upon personal knowledge and is filed pursuant to Rule 7(g) of the Rules of the Circuit Courts of the State of Hawai'i. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 25, 2016 at Honolulu, Hawaii.

  
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Ian L. Sandison

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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District Use Application (CDUP) HA-3568 for  
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District, Island of Hawai'i,  
TMK (3) 4-4-015:009

CASE NO. BLNR-CC-16-002

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I hereby certify that on the date of service noted below, a true and correct copy of the foregoing was duly served on the above-identified parties at their last known address, by U.S. mail, postage prepaid:

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



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