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Attorneys for Petitioner
DEPARTMENT OF EDUCATION,
STATE OF HAWAI'I

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of

DEPARTMENT OF EDUCATION,
STATE OF HAWAI'I,

To Amend the Agricultural Land Use
District Boundaries into the Urban Land
Use District for Approximately 77.2 acres
of land at Kihei, Maui, Hawai'i, Maui Tax
Map Key Nos. 2-2-02: 81 and 83.

DOCKET NO. A11-794

PETITIONER DEPARTMENT OF
EDUCATION, STATE OF HAWAI'I'S
EMERGENCY MOTION FOR RECUSAL
OR DISQUALIFICATION OF LAND USE
COMMISSION CHAIR JONATHAN
SCHEUER FROM PARTICIPATION IN
ANY PROCEEDINGS RELATED TO
THE DEPARTMENT OF EDUCATION'S
MOTION TO AMEND THE LAND USE
COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION AND ORDER FILED JULY
29, 2013; MEMORANDUM IN SUPPORT
OF MOTION; EXHIBIT A;
DECLARATION OF STUART N.
FUJIOKA; DECLARATION OF BRENDA
LOWREY; CERTIFICATE OF SERVICE



**PETITIONER DEPARTMENT OF EDUCATION, STATE OF HAWAII'S
EMERGENCY MOTION FOR RECUSAL OR DISQUALIFICATION OF LAND
USE COMMISSION CHAIR JONATHAN SCHEUER FROM PARTICIPATION IN
ANY PROCEEDINGS RELATED TO THE DEPARTMENT OF EDUCATION'S
MOTION TO AMEND THE LAND USE COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION AND ORDER FILED JULY 29, 2013**

Petitioner Department of Education, State of Hawai'i (Petitioner), through counsel above-named, respectfully submits this Emergency Motion for Recusal or Disqualification of Land Use Commission Chair Jonathan Scheuer, Ph.D. from Participation in any Proceedings herein. This Motion is based on and supported by the attached memorandum and declaration, along with evidence establishing improper *ex parte* communication between the Land Use Commission Chair Jonathan Scheuer, Ph.D. (hereinafter referred to as "Dr. Scheuer") and a witness to the proceedings, which is prohibited under §15-15-62 of the Hawaii Administrative Rules, conclusively demonstrates a lack of neutrality, and renders him unable to participate in meaningful deliberations and/or to render a fair and impartial decision herein.

As this motion affects the composition of the Land Use Commission (LUC) with respect to a hearing on the Department of Education's Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order Filed July 29, 2013 (underlying Motion) which is already scheduled for August 25, 2021, Petitioner respectfully requests that the

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matter of recusal or disqualification of Dr. Scheuer be decided on an emergency basis, prior to the hearing scheduled on the LUC's calendar for August 25, 2021.

DATED: Honolulu, Hawai'i, August 19, 2021.

/s/ Stuart N. Fujioka
STUART N. FUJIOKA
RYAN W. ROYLO
MELISSA J. KOLONIE
CARTER K. SIU
Deputy Attorneys General
Attorneys for Petitioner

DEPARTMENT OF EDUCATION,
STATE OF HAWAI'I

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MEMORANDUM IN SUPPORT OF
MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On August 20, 2020 the Petitioner filed a Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order Filed July 29, 2013 (FOF/COL) (said Motion is referred to herein as the "underlying Motion"). The underlying Motion seeks to remove the requirement of a Grade Separated Pedestrian Crossing (GSPC) from the FOF/COL at the location of the future Kihei High School on Maui. The underlying Motion has been the subject of two hearings, and is set for further hearing on August 25, 2021. Although it is not a party, the Kihei Community Association (KCA) through its President Mike Moran and others, has been a vocal proponent of the GSPC and a staunch opponent of the pending motion. Mr. Moran has testified before the LUC in this matter.

Petitioner has just become aware of the following email correspondence from Chair Scheuer to Mr. Moran.

From: Jonathan Scheuer <jillscheuer@gmail.com>
To: Mike Moran <mmmmahalo2000@aol.com>
Sent: Wed, Aug 11, 2021 6:00 pm
Subject: Re: KCA letter to LUC re: Kihei High School GSPC condition

Mike,
Thanks for the letter and this other information.
Did you ever see the DOE's response to our LUC letter? It can be found here: <https://luc.hawaii.gov/wp-content/uploads/2021/02/A11-794-Petitioner-Department-of-Education-State-of-Hawaii-Response-to-LUCs-Letter-Dated-Nove.pdf>
I think the only way we are going to move the incredibly stubborn DOT and DOE is if we gain greater publicity for the issue and their obstinacy.
Jonathan

As set forth in the declaration of Brenda Lowrey, a true copy of the email is also attached hereto as Exhibit A.

II. ARGUMENT

A. *Ex Parte* Communication with Witnesses is Prohibited

The Dr. Scheuer's correspondence to Mr. Moran constitutes a prohibited *ex parte* communication under

section 15-15-62 of the Hawaii Administrative Rules (HAR):

Ex parte communications. (a) No person whether or not a party to a proceeding before the commission shall make an unauthorized *ex parte* communication either oral or written about the proceeding to any member of the commission or hearings officer who will be a participant in the decision-making process...

While the rule expressly prohibits individuals from directly communicating with an LUC Member on a pending matter, it is equally vital to the integrity of the process that the LUC members, including Dr. Scheuer, forbear from contacting the parties and witnesses to its proceedings. Mr. Moran is not a party, but has testified as a witness and strongly opposes the Motion. *Ex Parte* communication between Mr. Moran and Dr. Scheuer is strictly prohibited. In

addition, this type of interaction is not fall an exception under section 15-15-62 (b), HAR.

Furthermore, the Dr. Scheuer's email clearly reflects a bias or predisposition and his remarks are calculated to influence the outcome of the proceeding.

B. Dr. Scheuer Lacks Neutrality

The administrative process implicates due process rights and guarantees that unbiased decision makers will preside over hearings.

In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decision makers from being biased, and more specifically, prohibits decision makers from prejudging matters and the appearance of having prejudged matters. *See Sussel*, 71 Haw. at 109, 784 P.2d at 871 (concluding that where an adjudicator's actions while presiding over a matter gave rise to an appearance of impropriety, the circuit court erred in not enjoining the adjudicator from deciding the case); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) ("Not only is a biased decision maker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.' ") (quoting *Murchison*, 349 U.S. at 136, 75 S.Ct. 623); *see also Cinderella Career & Finishing Schs., Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C.Cir.1970) (holding that the standard for evaluating the existence of improper prejudgment in an adjudicative context is whether "a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it").

Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 389–90, 363 P.3d 224, 237–38 (2015).

In this matter, Dr. Scheuer's characterization of the Petitioner and the Hawai'i Department of Transportation (DOT), as "incredibly stubborn" exhibits a clear bias against them and shows a propensity to decide the pending matter against the Petitioner. Furthermore, the aim of gaining "greater publicity" and reference to the Petitioner and DOT's "obstinacy" evinces a personal desire to publicly malign the agencies for legally advocating a position which is supported by both law and fact.

III. CONCLUSION

Based on the preceding, it is clear that Dr. Scheuer has taken a side in this matter, and has personally aligned himself with opponents of the pending Motion. Additionally, he has participated in improper *ex parte* communication with a member of the public who has testified as a witness. In the interest of ensuring due process rights and preserving fairness, as well as to the integrity of the LUC, Dr. Scheuer must be recused or disqualified from any further participation in this matter. Since Dr. Scheuer's participation would affect the proceedings on the underlying Motion, which is set for hearing on August 25, 2021, the matter of recusal or disqualification must be decided immediately, on an emergency basis.

DATED: Honolulu, Hawai'i, August 19, 2021.

/s/ Stuart N. Fujioka
STUART N. FUJIOKA
RYAN W. ROYLO
MELISSA J. KOLONIE
CARTER K. SIU
Deputy Attorneys General

Attorneys for Petitioner
DEPARTMENT OF EDUCATION,
STATE OF HAWAI'I

From: [Brenda Lowrey](#)
To: [Fujioka, Stuart N](#); [Yamachika, Jodi H](#); [Roylo, Ryan W](#); [Funakoshi, Rodney Y](#); [Maki, Lorene K](#); [Kato, Alison S](#); [Sniffen, Edwin H](#); [Tatsuguchi, Ken](#); [Gavlyn Nakatsuka](#); [Edward Ige](#); [Roy Ikeda](#); [Randall Tanaka](#)
Subject: [EXTERNAL] Fwd: KCA letter to LUC requesting new traffic studies
Date: Wednesday, August 18, 2021 9:36:20 AM
Attachments: [08-11-21 LUC re new traffic study 2.AB.pdf](#)

fyi

----- Forwarded message -----

From: **Halle Maxwell** <halle.maxwell@k12.hi.us>
Date: Wed, Aug 18, 2021 at 9:30 AM
Subject: Fwd: KCA letter to LUC requesting new traffic studies
To: Brenda Lowrey <10012147@k12.hi.us>

----- Forwarded message -----

From: **Andrew Beerer** <andrew@alohabydesign.com>
Date: Thu, Aug 12, 2021 at 10:37 AM
Subject: KCA letter to LUC requesting new traffic studies
To: Halle Maxwell <halle.maxwell@k12.hi.us>
Cc: Rep. Tina Wildberger <repwildberger@capitol.hawaii.gov>, Natalia Hussey-Burdick <n.hussey@capitol.hawaii.gov>

Halle,

cc: Tina & Natalia

Thanks everyone for the great meeting this morning.

Attached is the letter KCA recently sent LUC, and attached response from LUC Chair Scheuer.

While I would like to see the data, Scheuer also wants to see the emotion. I guess it's both.

aloha,
Andrew

From: Jonathan Scheuer <jillscheuer@gmail.com>
To: Mike Moran <mmmmahalo2000@aol.com>
Sent: Wed, Aug 11, 2021 6:00 pm
Subject: Re: KCA letter to LUC re: Kihei High School GSPC condition

Mike,

Thanks for the letter and this other information.

Did you ever see the DOE's response to our LUC letter? It can be found

here: <https://luc.hawaii.gov/wp-content/uploads/2021/02/A11-794-Petitioner-Department-of-Education-State-of-Hawaii-Response-to-LUCs-Letter-Dated-Nove.pdf>

I think the only way we are going to move the incredibly stubborn DOT and DOE is if we gain greater publicity for the issue and their obstinacy.

Jonathan

EXHIBIT A

Andrew Beerer
808-283-8600

This email was scanned by the Cisco IronPort Email Security System contracted by the Hawaii Dept of Education. If you receive suspicious/phish email, forward a copy to phishing-report@k12.hi.us. This helps us monitor suspicious/phish email getting thru. You will not receive a response, but rest assured the information received will help to build additional protection.

--

Brenda Lowrey, Facilities Planner
Hawaii Department of Education, Office of Facilities & Operations, Facilities Development Branch

Ph. (808) 784-5091, Fax (808) 733-2103, 3633 Waialae Ave., Bldg. E, 2nd Flr., Honolulu, HI 96816

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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI‘I

In the Matter of the Petition of

DEPARTMENT OF EDUCATION,
STATE OF HAWAI‘I,

To Amend the Agricultural Land Use
District Boundaries into the Urban Land
Use District for Approximately 77.2 acres
of land at Kihei, Maui, Hawai‘i, Maui Tax
Map Key Nos. 2-2-02: 81 and 83.

DOCKET NO. A11-794

DECLARATION OF STUART N.
FUJIOKA

DECLARATION OF STUART N. FUJIOKA

Stuart N. Fujioka, an attorney duly licensed before all courts in the State of Hawai‘i,
makes this declaration which is based on personal knowledge.

1. I am a Deputy Attorney General for the State of Hawai‘i and represent the
Petitioner herein.
2. On August 18, 2021, I received the email dated August 11, 2021, which appears
to be written by Land Use Commission (LUC) Chair Jonathan Scheuer, Ph.D.
(Dr. Scheuer) to Mr. Mike Moran and has been referenced in the attached Motion.
3. A true and accurate reproduction of the August 11, 2021 email is embedded in the
Memorandum in support of the Motion.
4. I am informed and believe that Mr. Moran is the President of the Kihei
Community Association and he has testified as a witness in opposition to the
Petitioner’s Motion to Amend the Land Use Commission’s Findings of Fact,

Conclusions of Law and Decision and Order Filed July 29, 2013 (underlying Motion).

5. On behalf of Petitioner, I believe that it is necessary and in the Petitioner's best interest to file the attached Motion.
6. The Underlying Motion is set for hearing before the LUC on August 25, 2021.
7. Since the foregoing Motion for Recusal or Disqualification of the Chair could affect the composition of the LUC which hears and decides the underlying Motion, the Petitioner respectfully requests that the matter of Recusal or Disqualification be heard and resolved prior to the proceedings related to the underlying Motion.

DATED: Honolulu, Hawai'i, August 19, 2021.

/s/ Stuart N. Fujioka
STUART N. FUJIOKA

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of

DEPARTMENT OF EDUCATION,
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DOCKET NO. A11-794

DECLARATION OF BRENDA LOWREY

DECLARATION OF BRENDA LOWREY

Brenda Lowrey, a resident of the State of Hawai'i, hereby declares that the following is true and based on personal knowledge.

I am the Facilities Planner in the Facilities Development Branch of the Office of Facilities and Operations of the Hawai'i Department of Education.

Attached as Exhibit A is a true copy of the email thread which was forwarded to me by Ms. Halle Maxwell on August 18, 2020.

DATED: Honolulu, Hawai'i, August 19, 2021.


BRENDA LOWREY

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of

DEPARTMENT OF EDUCATION,
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Map Key Nos. 2-2-02: 81 and 83.

DOCKET NO. A11-794

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of Petitioner Department of Education, State of Hawaii's Emergency Motion for Recusal or Disqualification of Land Use Commission Chair Jonathan Scheuer from Participation in Any Proceedings Related to the Department of Education's Motion to Amend the Land Use Commission's Findings of Fact, Conclusions of Law and Decision and Order Filed July 29, 2013; Memorandum in Support of Motion was duly served via Electronic Mail upon the following at:

MOANA LUTEY (Moana.Lutey@co.maui.hi.us)
Corporation Counsel
THOMAS KOLBE (Thomas.Kolbe@co.maui.hi.us)
MICHAEL K. HOPPER (Michael.Hopper@co.maui.hi.us)
Deputies Corporation Counsel
County of Maui
200 South High Street
Kalana O Maui Building, 3rd Floor
Wailuku, Maui, Hawai'i 96793

Attorneys for Respondent
DEPARTMENT OF PLANNING, COUNTY OF MAUI

Bryan Yee (Bryan.C.Yee@hawaii.gov)
Alison Kato (Alison.S.Kato@hawaii.gov)
Deputy Attorney General
425 Queen Street
Honolulu, Hawai'i 96813

Attorneys for State Office of Planning and Sustainable Development

DATED: Honolulu, Hawai'i, August 19, 2021.

/s/ Stuart N. Fujioka
STUART N. FUJIOKA
RYAN W. ROYLO
MELISSA J. KOLONIE
CARTER K. SIU
Deputy Attorneys General

Attorneys for Petitioner
DEPARTMENT OF EDUCATION,
STATE OF HAWAII

Docket No. A11-794; In the Matter of the Petition of Department of Education, State of Hawai'i, before the Land Use Commission of the State of Hawai'i; PETITIONER DEPARTMENT OF EDUCATION, STATE OF HAWAII'S EMERGENCY MOTION FOR RECUSAL OR DISQUALIFICATION OF LAND USE COMMISSION CHAIR JONATHAN SCHEUER FROM PARTICIPATION IN ANY PROCEEDINGS RELATED TO THE DEPARTMENT OF EDUCATION'S MOTION TO AMEND THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED JULY 29, 2013; MEMORANDUM IN SUPPORT OF MOTION; EXHIBIT A; DECLARATION OF STUART N. FUJIOKA; DECLARATION OF BRENDA LOWREY; CERTIFICATE OF SERVICE