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Attorney for OFFICE OF PLANNING AND
SUSTAINABLE DEVELOPMENT

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

OFFICE OF PLANNING AND
SUSTAINABLE DEVELOPMENT'S
RESPONSE TO 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, FILED ON
AUGUST 19, 2021; CERTIFICATE OF
SERVICE

**OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT'S
RESPONSE TO 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, FILED ON AUGUST 19, 2021**

On August 19, 2021, the Department of Education (“DOE”) filed an Emergency Motion for Recusal or Disqualification of Land Use Commission Chair Jonathan Scheuer from Participation in Any Proceeding 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 (“Emergency Motion”). The Emergency Motion raises important issues of ethics and due process. The Office of Planning and Sustainable Development (“OPSD”) believes that the Land Use Commission (“LUC”) will make the right decision. Therefore, OPSD will defer to the judgment of the LUC and their legal counsel in this matter. OPSD does, however, note the high standard applied to the LUC commissioners in presiding over adjudicatory proceedings.

The LUC commissioners serve as the decisionmakers in adjudicatory proceedings and are held to the same standard as judges with respect to impartiality. *See Matter of Conservation Dist. Use Application HA-3568*, 143 Haw. 379, 392, 431 P.3d 752, 765 (2018). “In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters.” *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 389–90, 363 P.3d 224, 237 (2015). Hawaii courts have made it clear that an administrative adjudicator should not preside over “a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality.” *Sussel v. City & Cty. of Honolulu Civ. Serv. Comm'n*, 71 Haw. 101, 109, 784

P.2d 867, 871 (1989). “It is abundantly clear that ‘[f]ew situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance’ due to ‘some identifiable potential bias.’” *Mauna Kea Anaina Hou*, 136 Haw. at 390, 363 P.3d at 238 (quoting Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483 (1986)).

For the reason stated above, OPSD defers to the LUC and its attorneys with respect to ruling on the Emergency Motion. OPSD does, however, have a long-standing and continual interest in preserving the integrity of the quasi-judicial land use decision-making process. To the extent that there may exist any reasonable doubt as to a commissioner’s impartiality, we believe it would be prudent to choose the course of action that would avoid even the appearance of impropriety.

DATED: Honolulu, Hawai‘i, 9/3/21_____.



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CERTIFICATE OF SERVICE

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I hereby certify that due service of a copy of the foregoing was served upon the following
by either hand delivery or depositing the same in the U.S. Postal Service by regular mail:

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