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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

In the Matter of a Contested Case Regarding ) DLNR File No. CCH-LD-21-01  
the Continuation of Revocable Permits (RPs) )  
for Tax Map Keys (2) 1-1-001:044 & 050; (2) ) Sierra Club’s Motion to Lift the Prohibition  
2-9-014:001, 005, 011, 012 & 017; (2) 1-1- ) on Recording of Hearing; Certificate of  
002:002 (por.) and (2) 1-2-004:005 & 007 for ) Service  
Water Use on the Island of Maui to Alexander )  
& Baldwin, Inc. and East Maui Irrigation )  
Company, LLC for the remainder of the 2021 )  
RPs, if applicable, and for their continuation )  
through the end of 2022 )

**Sierra Club’s Motion to Lift the Prohibition on Recording of Hearing**

“The First Amendment protects the public's right of access to information about their officials' public activities.” *State v. Russo*, 141 Hawai‘i 181, 191, 407 P.3d 137, 147 (2017) (cleaned up).

We agree with the reasoning of the First Circuit and of other federal courts of appeal that have considered this issue. The rights to free speech and press serve not only to protect the individual's right to self-expression, but also to promote **the vital goal of "affording the public access to discussion, debate, and the dissemination of information and ideas."** *Bellotti*, 435 U.S. at 783, 98 S.Ct. 1407. Exercising the constitutionally-protected rights to free speech and press plays a crucial role in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Id.* at 781, 98 S.Ct. 1407. . . In light of these principles, this court likewise concludes that **the "filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities,"** *Glik*, 655 F.3d at 82, **is protected by the First Amendment to the United States Constitution and by the independent protections afforded by article I, section 4 of the Hawai‘i Constitution.**

*Id.* at 192-93, 407 P.3d at 148-49. The fate of 33,000 acres of ceded land and dozens of streams is off significant public interest.

Inexplicably, BLNR has rejected A&B’s offer to pay for the cost of transcribing the proceeding and having that transcript made available to the parties for the record. It has also limited those who can actually attend the contested case hearing via zoom to attorneys, witnesses,<sup>1</sup> and client representatives. Although BLNR routinely live-streams its meetings twice a month on YouTube, it is refusing to do so in this contested case, or even post the zoom recording at the end of each day. Members of the public are barred from watching the proceeding – although an audio recording will be made available. And the parties are barred from recording the proceeding – with absolutely no reason provided. Taken together, these arbitrary orders exclude the public from “information about their officials’ public activities.” *Id.* at 191, 407 P.3d at 147.

The public and BLNR would be best served by live-streaming the contested case hearing. The Sierra Club cannot force BLNR to do so, but BLNR’s refusal appears to be arbitrary, and frankly, petty. But the Sierra Club can call on BLNR to lift that portion of its unconstitutional Minute Order No. 13 that prohibits the parties from recording the hearing in any way using their own electronic devices.<sup>2</sup>

Dated: Honolulu, Hawai‘i, December 1, 2021

/s/ David Kimo Frankel  
Attorney for the Sierra Club

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<sup>1</sup> There is no witness exclusion rule.

<sup>2</sup> Ironically, BLNR Chair Case has specifically allowed A&B to have a court reporter transcribe the proceeding (for A&B’s exclusive purposes). Such a transcription is a form of recording using an electronic device.

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Certificate of Service

Pursuant to Minute Order No.s 1 & 5, a copy of the foregoing is being served via email  
today to:

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Dated: Honolulu, Hawai'i December 1, 2021

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