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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 Allow Real Public
2-9-014:001, 005, 011, 012 & 017; (2) 1-1-) Access to the Contested Case Hearing;
002:002 (por.) and (2) 1-2-004:005 & 007 for) Certificate of 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 Allow Real Public Access to the Contested Case Hearing

“[C]ourts consistently have found a right of access to civil proceedings and *quasi-judicial administrative proceedings*.” *Frietas v. Administrative Dir. of Courts*, 104 Hawai‘i 483, 488, 92 P.3d 993, 998 (2004). Due process requires that quasi-judicial hearings be public. *Id.* at 489, 92 P.3d at 999. “[T]he First Amendment serves the core function of prohibit[ing] government from limiting the stock of information from which members of the public may draw. . . . [T]he 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). “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. . . . 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 192-93, 407 P.3d at 148-49.

Rights of public access to government proceedings are among those rights, “while not unambiguously enumerated in the very terms of the [First] Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.” *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982). “A major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Id.* Thus, to the extent that the constitution guarantees a qualified right of public access, “it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.” *Id.* at 605; accord *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (“An informed public is the most potent of all restraints upon misgovernment.”).

The reasons underlying the policy of open and public administration of justice are clear and compelling. Because of our natural suspicion and traditional aversion as a people to secret proceedings, suggestions of unfairness, discrimination, undue leniency, favoritism, and incompetence are more easily entertained when access by the public to judicial proceedings are unduly restricted.

Gannett Pac. Corp. v. Richardson, 59 Haw. 224, 230, 580 P.2d 49, 55 (1978).¹

Our constitution guarantees a qualified public right to observe certain government proceedings. *Oahu Publications Inc. v. Ahn*, 133 Hawai‘i 482, 494-96, 331 P.3d 460, 472-74 (2014). While *Oahu Publications* involved the ability of the public to observe criminal trials, the reasons for allowing Maui residents (including those who are Sierra Club members) to observe this quasi-judicial contested case are even more compelling. The fate of 33,000 acres of ceded land and dozens of streams is of significant public interest to Maui residents. Moreover, unlike a criminal trial, there are no countervailing factors—none—that call for limiting public access. The

¹ Moreover, HRS § 205A-2(b)(8)(A) and -2(c)(8)(A), which are binding on BLNR, require BLNR to “[s]timulate public awareness, education, and participation in coastal management” and to “[p]romote public involvement in coastal zone management processes.”

witness exclusion rule does not apply to contested cases. Nor is there a jury.

Hawai‘i courts consider “whether the place and process have historically been open to the press and general public because a tradition of accessibility implies the favorable judgment of experience.” *O‘ahu Publications*, 133 Hawai‘i at 494, 331 P.3d at 472. BLNR’s long-standing practice has been to hold contested case hearings on the island where the permitted activity is to take place. It held its contested case hearing on a conservation district use permit at Pāo`o in Kohala on Hawai‘i island in 2008. It held its contested case hearing on a conservation district use permit for construction of a telescope at the summit of Haleakalā on Maui in 2011.² The contested case hearing on the TMT telescope proposed to be build on Mauna Kea was held in Hilo on Hawai‘i island.³ BLNR’s sister agency has held all its contested case hearings involving Maui streams on Maui – both the Nā Wai ‘Ehā and the Nā Moku Aupuni O Ko‘olau Hui contested case hearings (Chair Case presided in both). BLNR’s long-standing practice has been to hold contested case hearings on the island where the permitted activity is to take place so that those who would be most affected can watch.

The Sierra Club acknowledges that given the Covid-19 pandemic, it would be fool-hardy to hold the contested case hearing in-person on Maui. Holding the contested case hearing virtually makes sense in the context of a pandemic. But refusing to live-stream the proceeding and prohibiting the Sierra Club from doing so, are antithetical to article I, section 4 of the Hawai‘i Constitution as well as due process. BLNR’s minute orders 13 and 15 give Maui residents a choice: risk your life by flying to Honolulu to sit in a confined room with others for days, or stay home and give up an opportunity to watch the contested case hearing.

In February this year, the Department of Health held a contested case hearing on whether

² The Sierra Club’s counsel was counsel in both of those proceedings.

³ The Sierra Club’s counsel was a witness at that hearing.

it should grant a permit to the Navy to operate its underground storage tanks at Red Hill.⁴ That hearing was live-streamed and posted on youtube. BLNR live-streams its board meetings twice a month. There is no reason why that should not and cannot take place for this contested case hearing. BLNR has failed to offer a single reason to justify its effective denial of access.

An audio recording is no substitute. Members of the public will have no way of knowing who is talking. Is the witness supposed to say his or her name every single time s/he talks? There is no way that is happening. BLNR's counsel, Linda Chow, acknowledged that she was unable to do that at the prehearing conference held on December 1, 2021.

The Sierra Club, therefore, requests that BLNR either (a) live-stream the contested case hearing, or (b) allow the Sierra Club to do so. BLNR can point to no prejudice in allowing live-streaming to take place. Failure to modify minute orders 13 and 15 effectively bars Maui residents (including Sierra Club members who live on Maui) from watching these proceedings, and excludes the public from "information about their officials' public activities." *Russo*, 141 Hawai'i at 191, 407 P.3d at 147.

Dated: Honolulu, Hawai'i, December 7, 2021

/s/ David Kimo Frankel
Attorney for the Sierra Club

⁴ The Sierra Club's counsel is counsel in that proceeding, which is on-going.

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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 7, 2021

/s/ David Kimo Frankel
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