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HILO

University of Hawai'i at Hilo Administration
Office of the Chancellor

LAND USE COMMISSION
STATE OF HAWAII

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September 16, 2019

Mr. Jonathan Scheuer, Chair,
and Commissioners
Land Use Commission
235 South Beretania Street, Suite 406
Honolulu, Hawai'i 96813

Subject: University of Hawai'i at Hilo's Response to Petition For Declaratory Order
Docket No. DR19-67
Ku'u lei Higashi Kanahahele and Ahiena Kanahahele
TMK No. 4-4-015:009 (por.)

Dear Chair Scheuer and Commissioners:

The University of Hawai'i at Hilo holds the conservation district use permit ("CDUP") issued by the Board of Land and Natural Resources ("BLNR") for the construction and operation of the Thirty Meter Telescope ("TMT") project. The University of Hawai'i is leasing the subject lands from the BLNR. The University opposes the Petitioners' request. We respectfully ask the Commission to either (1) deny the petition without a hearing¹; or in the alternative, (2) issue a declaratory order without a hearing consistent with the Hawai'i Supreme Court's decision affirming the BLNR's decision authorizing the issuance of a CDUP for the TMT.²

I. Background Regarding Astronomy on Mauna Kea and the TMT Project.

a. Astronomy on Mauna Kea.

In *Mauna Kea II*, the Hawai'i Supreme Court provides a concise factual and procedural background regarding astronomy on Mauna Kea, which we quote here in pertinent part:

¹ Hawaii Administrative Rules ("HAR") § 15-15-100(a)(1).

² *Matter of Conservation Dist. Use Application HA-3568*, 143 Hawai'i 379 (2018) ("*Mauna Kea II*").

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After statehood, in 1968, the BLNR entered into a General Lease with the University of Hawai'i ("University") for the Mauna Kea Science Reserve ("MKSR"); the General Lease is scheduled to terminate on December 31, 2033. The MKSR totals 11,288 acres, consisting of a 10,763-acre cultural and natural preserve and a 525-acre Astronomy Precinct, and includes almost all of the land on Mauna Kea above the 12,000-foot elevation, except for certain portions that lie within the Mauna Kea Ice Age Natural Area Reserve ("MKIANAR").

[...]

In response to significant criticism raised in a 1998 audit, the University's Board of Regents ("BOR") adopted the MKSR Master Plan ("Master Plan") in 2000, which updated management guidelines for the areas of Mauna Kea managed by the University, including the MKSR. The Master Plan established the Office of Mauna Kea Management ("OMKM"), housed in the University of Hawai'i at Hilo ("UHH"). The OMKM is advised by volunteer residents of the Big Island of the Mauna Kea Management Board and Kahu Kū Mauna (Guardians of the Mountain) to effectuate the Master Plan's goals of (1) protecting cultural, natural, educational/scientific, and recreational resources; (2) preserving and protecting the cultural and natural landscape; (3) preserving and managing cultural resources and practices for future generations; (4) defining areas for use of cultural, natural and recreational resources; (5) protecting the right to exercise traditional cultural practices; (6) allowing for sustainable, integrated planning and management; and (7) protecting and enhancing astronomy research.

The Master Plan identifies five types of astronomy development and their locations within the 525-acre Astronomy Precinct area of the MKSR, described as Areas A through F, for redevelopment or expansion of existing observatory facilities. These locations include Area E, intended for development of a next generation large telescope, such as the TMT.

After preparation of the Master Plan, a Comprehensive Management Plan was also finalized in April of 2009. Various sub-plans were also prepared, including a Cultural Resources Management Plan and a Decommissioning Plan for the decommissioning of existing telescopes.³

b. TMT CDUP

³ *Mauna Kea II*, 143 Hawai'i at 385 (internal footnotes omitted).

Conservation District Use Application HA-3568 for the TMT was originally submitted on September 2, 2010. The BLNR initially granted a CDUP on April 12, 2013 (“CDUP I”), but the Hawai‘i Supreme Court essentially vacated CDUP I holding that BLNR should have held a contested case hearing prior to issuance of CDUP I.⁴

Subsequently, the BLNR appointed a hearing officer who conducted a contested case hearing over forty-four days, in 2016 through 2017. The contested case included evidence submitted by over twenty parties. Based on these hearings, the BLNR issued its 271-page Findings of Fact, Conclusions of Law and Decision and Order containing 1070 Findings of Fact and 512 Conclusions of Law (“CDUP II”).⁵ The Hawai‘i Supreme Court affirmed the BLNR’s decision authorizing the issuance of CDUP II in *Mauna Kea II*.

II. It is Unnecessary to Determine Petitioners’ Status as a Party in these Proceedings nor the Status of “Potential Parties” because a Petition for Declaratory Order is not a Contested Case.

As a preliminary matter, the Commission need not decide Petitioner’s status as a “party.” Hawai‘i Revised Statutes (“HRS”) § 91-8, provides that “[a]ny interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency.”

Furthermore, the Hawai‘i Supreme Court has determined that HRS § 91-8 declaratory orders are not contested cases. The Commission’s rules on declaratory orders are substantially similar to the rules before the Hawai‘i Supreme Court in *Lingle v. Hawai‘i Gov’t Employees Ass’n, AFSCME, Local 152, AFL-CIO*, 107 Hawai‘i 178 (2005). In *Lingle*, the court held that declaratory order proceedings under HRS § 91-8 are not contested cases. Consequently, these proceedings should not include, for example, the presentation and cross-examination of witnesses or submission of evidence as required in contested case hearings.

Accordingly, anyone who wants to testify at an open HRS chapter 92 meeting on this Petition may do so, subject to the rules of the Commission regarding public testimony.

III. The Commission Should Act on this Petition without a Hearing.

HRS § 91-8, provides that “[e]ach agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition.”

⁴ *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376 (2015).

⁵ *Id.* at 387.

The Commission has adopted rules regarding declaratory order petitions under HAR §§ 15-15-98 through 15-15-104.1. Explicitly, the Commission is not required to hold a hearing. HAR § 15-15-100(a) provides that the Commission has three options upon receiving a petition for declaratory order (1) deny the petition, (2) issue a declaratory order, or (3) set the petition for hearing. In addition, HAR § 15-15-103, provides that “[t]he commission may, but shall not be required to, conduct a hearing on a petition for declaratory order.”

Petitioners did not request a hearing in their Petition as required under HAR § 15-15-103.⁶

IV. The Petition Should be Denied without a Hearing Pursuant to HAR § 15-15-100(a)(1)(D).

The Petition should be denied without a hearing on the following grounds under HAR § 15-15-100(a)(1)(D), where “[t]he petitioner requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission[.]”

a. The Commission does not have authority to order landowners to file district boundary amendments and Petitioners do not have authority to initiate a petition for district boundary amendment.

To the extent that the Petitioners are requesting the Commission to order the landowner, BLNR, or the long-term lessee, the University, to file a district boundary amendment, the Commission does not have that authority.

HAR § 15-15-4, enumerates “persons [who] may initiate a petition to the commission for district boundary[.]” These persons are “(1) State departments or agencies; (2) County departments or agencies of the county in which the property is situated; or (3) Any person with a property interest in the property sought to be reclassified.” HAR § 15-15-50, prescribes the content and information required to show a property interest in a boundary amendment petition: a “true copy of the deed, lease,

⁶ HAR § 15-15-103, entitled “Declaratory orders; request for hearing,” provides:

The commission may, but shall not be required to, conduct a hearing on a petition for declaratory order. Any petitioner or party in interest who desires a hearing on a petition for a declaratory order shall set forth in detail in the request the reasons why the matters alleged in the petition, together with supporting affidavits or other written briefs or memoranda of legal authorities, will not permit the fair and expeditious disposition of the petition, and to the extent that the request for a hearing is dependent upon factual assertion, shall accompany the request by affidavit establishing those facts.

option agreement, development agreement” or “written authorization of all fee owners to file the petition.”

Petitioners cannot petition the Commission themselves for a district boundary amendment because they do not have the requisite property interested under HAR §§ 15-15-4 and -50.

b. The Commission does not have enforcement or zoning authority regarding uses within the state conservation district.

The jurisdiction of an agency is created by statute, and that jurisdiction is limited by the terms of the governing statute.⁷ HRS § 205-12, provides that “[t]he appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission[.]” There is an exception for the conservation district, where HRS § 205-5(a) provides “[c]onservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C.”

BLNR’s authority to zone and regulate in the conservation district was explicitly decided by the Hawai’i Supreme Court in *Pilaa 400*. In *Pilaa*, the court opined:

The powers and duties of the BLNR and DLNR with respect to Conservation District lands are set forth in HRS § 183C-3. HRS § 183C-3 states, in relevant part, as follows:

The board and department shall:

....

(3) Adopt rules, in compliance with chapter 91 which shall have the force and effect of law;

....

(7) Establish and enforce land use regulations on conservation district lands including the collection of fines for violations of land use and terms and conditions of permits issued by the department.

⁷ *Pilaa 400, LLC v. Bd. of Land & Nat. Res.*, 132 Hawai’i 247, 263 (2014).

HRS § 183C-3 (2011). In accordance with this directive, the BLNR adopted HAR § 13-5-30(b), which specifies that “[u]nless provided for in this chapter, land uses shall not be undertaken in the conservation district.”⁸

Petitioners misconstrue HRS § 205-2, entitled “Districting and classification of lands,” as a zoning and enforcement statute. They further confuse county zoning with BLNR’s exclusive role in zoning within the conservation district. HRS § 205-2, creates the “four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation.” Generally, HRS § 205-2(e), provides:

Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept. Conservation districts shall also include areas for geothermal resources exploration and geothermal resources development, as defined under section 182-1.

It is within BLNR’s discretion, through rule-making, to establish uses BLNR determines are consistent with the conservation district. BLNR adopted HAR chapter 13-5, entitled, “Conservation District.” The lands which are the subject of the Petition are located within the conservation district and the resource subzone. HAR § 13-5-24 allows many types of land uses, including “[a]stronomy facilities under a management plan approved simultaneously with the permit[.]” Astronomy facilities specifically require approval by the BLNR and a management plan.

As discussed in Section I, above, astronomy on Maunakea generally and specifically as it relates to TMT was before the Hawai’i Supreme Court, which upheld CDUP II in *Mauna Kea II*. The court specifically opined on the BLNR’s application and analysis of its eight criteria under HAR § 13-5-30(c) in evaluating the merits of the specific proposed use.⁹ The court noted that “[t]he BLNR made extensive FOFs and COLs

⁸ *Id.*

⁹ HAR § 13-5-30, entitled, “Permits, generally,” provides:

(c) In evaluating the merits of a proposed land use, the department or board shall apply the following criteria:

regarding each of the eight criteria,” but that “Appellants . . . generalized assertions relate only to subsections (4) through (6)[.]”¹⁰

Relevant to Petitioners’ claims, the court in *Mauna Kea II* upheld the BLNR’s conclusions that (1) under HAR § 13-5-30(c)(4), “TMT will not have a substantial adverse impact to existing natural resources within the surrounding area, community, or region”; (2) under HAR § 13-5-30(c)(5), “the TMT Project is ‘compatible with the locality and surrounding areas’”; and (3) under HAR § 13-5-30(c)(6), “The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable[.]”¹¹

V. In the alternative, the Commission Should Issue a Declaratory Order without a Hearing Under HAR § 15-15-100(a)(2).

In the alternative, the Commission may “[i]ssue a declaratory order on the matters contained in the petition,” without a hearing.¹² Consistent with the rules and statutes that govern BLNR and the LUC as discussed herein, a declaratory order might state the following based on Petitioners’ three prayers for relief on page 15 of the Petition.

First, “industrial use” and “de facto industrial” are not land uses recognized under BLNR’s conservation district rules under HAR chapter 13-5. BLNR is charged with identifying and appropriately zoning lands classified within the conservation district, establishing categories of uses or activities on conservation lands, and establishing and

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- (1) The proposed land use is consistent with the purpose of the conservation district;
 - (2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;
 - (3) The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled “Coastal Zone Management”, where applicable;
 - (4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;
 - (5) The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;
 - (6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;
 - (7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and
 - (8) The proposed land use will not be materially detrimental to the public health, safety, and welfare.

The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria.

¹⁰ *Mauna Kea II*, 143 Hawai’i at 776.

¹¹ *Id.* 778-79.

¹² HAR § 15-15-100(a)(2).

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enforcing land use regulations through HRS chapter 91 rulemaking, as authorized by the legislature under HRS § 183C-3.

Second, the landowner, not the Commission, must file a district boundary amendment. When and if such a petition is brought to the Commission, then and only then does the Commission have "power to determine the boundaries of the conservation districts," pursuant to HRS § 205-2(a)(4).

Third, the BLNR, through its conservation district rules, has a process for determining whether certain uses are allowed and permitted in the conservation district. CDUP II, which prompted this Petition, was upheld by the Hawai'i Supreme Court in *Mauna Kea II*.

Should you have any questions, please contact University Associate General Counsel Jesse K. Souki at (808) 956-2211.

Sincerely,



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Chancellor, University of Hawai'i at Hilo

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