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**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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LAND
STATE PARKS

October 14, 2019

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

Subject: Department of Land and Natural Resources' Response to Petition for
Declaratory Order
Docket No. DR19-67
Ku'ulei Higashi Kanahahele and Ahiena Kanahahele
TMK No. (3) 4-4-015:009 (por.)

2019 OCT 15 A 10:32
LAND USE COMMISSION
STATE OF HAWAII

Dear Chair Scheuer and Commissioners:

The Petition concerns the construction of the Thirty Meter Telescope ("TMT Project") in the Astronomy Precinct of the Mauna Kea Science Reserve MKSR – an area that was expressly set aside for astronomical observatories nearly five decades ago.¹ Mauna Kea is home to a unique combination of resources that make it a premier location worldwide for astronomical observatories. The Department of Land and Natural Resources ("DLNR") opposes the Petition. We respectfully request that the Land Use Commission ("Commission") either (1) deny the Petition without a hearing; or in the alternative, (2) issue a declaratory order without a hearing consistent with the Hawai'i Supreme Court² and the Board of Land and Natural Resources' ("BLNR") decision to approve a conservation district use permit³ ("CDUP") for the TMT Project.

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

¹ Petition for Declaratory Order at Exhibit "2."

² *Matter of Conservation District Use Application HA-3568*, 143 Hawai'i 379, 431 P.3d 752 (2018).

³ BLNR Findings of Fact, Conclusions of Law, and Decision and Order, a true and correct copy of which is attached hereto as Exhibit "A."

The Petition should be denied pursuant to Hawaii Administrative Rule (HAR) § 15-15-100(a)(1)(D) without a hearing because “[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[.]”⁴ Specifically, it is within BLNR’s sole discretion to establish uses that are consistent with a conservation use district and enforce land use regulations on conservation district lands.

The Commission is tasked with establishing the boundaries of each of the four land use districts: urban, rural, agricultural, and conservation.⁵ Hawaii Revised Statute (HRS) § 205-2 defines what activities or uses shall be relegated to each district. Specifically,

Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing parklands, 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 of 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.

Once lands are classified, “[c]onservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C.”⁶ Pursuant to HRS § 183C-3, the BLNR is authorized by law to:

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

...

(5) Establish categories of uses or activities on conservation lands, including allowable uses or activities for which no permit shall be required;

(6) Establish restriction, requirements, and conditions consistent with the standards set forth in this chapter on the use of conservation land; and

⁴ Petitioners have not requested a hearing in their Petition as required by HAR § 15-15-103.

⁵ HRS § 205-2(a).

⁶ HRS § 205-5(a).

(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.

The BLNR adopted rules to provide for land uses within the conservation district.⁷ These rules classify conservation district lands into five subzones: protective, limited, resource, general, and special, moving from most to least restrictive uses.⁸ The Mauna Kea Science Reserve, consisting of 11,288 acres of land leased to the University of Hawai'i, is located in the resource subzone of a conservation district.⁹ The 525 acre Astronomy Precinct at issue in the Petition is part of the Mauna Kea Science Reserve.¹⁰ The TMT Project footprint of the TMT observatory dome, support building, parking area, and area disturbed during construction will cover roughly five acres of the Astronomy Precinct.¹¹ Astronomy facilities are an identified land use in the rules within the resource subzone, but the decision to authorize such uses is at the discretion of the BLNR.¹²

The BLNR did not take its responsibilities lightly. The BLNR exerted its jurisdiction over the Mauna Kea conservation district by requiring that a permit be issued for the construction of an astronomy facility.¹³ The BLNR further exerted its jurisdiction over the Mauna Kea conservation district by requiring that its lessee, the University, develop a Comprehensive Management Plan for the entire 11,288 acres of University leased lands, as well as a Cultural Resources Management Plan, a Natural Resources Management Plan, a Public Access Plan, and a Decommissioning Plan for the Mauna Kea Observatories, and submitting them all to the BLNR for approval.¹⁴ The Comprehensive Management Plan contains a description of Mauna Kea's cultural, natural, recreational, educational, and scientific resources, identifies uses and activities, identifies threats to the resources, and includes 103 management actions to mitigate threats and protect the resources.¹⁵ Since 2009, the BLNR has required that the University provide annual reports, in writing and in person at a BLNR meeting that is open to the public, on the status of implementation of the Comprehensive Management Plan actions.¹⁶

⁷ HAR chapter 13-5, entitled, "Conservation District".

⁸ HAR § 13-5-10.

⁹ Exhibit "A" at p. 20; Exhibit "2."

¹⁰ Exhibit "A" at p. 20.

¹¹ Exhibit "A" at p. 47.

¹² Other identified uses in the resource subzone include aquaculture, commercial forestry, marine construction including the construction of harbors, piers, marinas, and artificial reefs, mining and extraction, single family residences, and botanical gardens complete with access road, restrooms, shelters, and a structure. HAR § 13-5-24

¹³ HAR § 13-5-24.

¹⁴ Exhibit "A" at pp. 25-26, 34.

¹⁵ Exhibit "A" at p. 25.

¹⁶ Exhibit "A" at p. 35; Petition for Declaratory Order at Exhibit "1."

Petitioners' claim concerns the alleged unpermitted use within a conservation district. Because zoning and enforcement within the conservation district are strictly within the purview of the BLNR, the Petition should be denied without a hearing.

II. Alternatively, the Commission Should Issue a Declaratory Order without a Hearing under HAR § 15-15-100(a)(2).

In the alternative, the Commission should, without a hearing, "[i]ssue a declaratory order on the matters contained in the petition" under HAR § 15-15-100(a)(2). A declaratory order would be based on the findings of fact and conclusions of law from the second TMT contested case hearing, the Hawai'i Supreme Court decision upholding that decision, and an additional Hawai'i Supreme Court case that found telescopes were consistent with the purposes of a conservation district.

The Hawai'i Supreme Court in *Mauna Kea Anaina Hou v. Board of Land & Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015), vacated the BLNR's decision on the CDUP application for the TMT Project and remanded the matter back to the BLNR for a second contested case hearing.

Testimony in the second contested case was taken over 44 days.¹⁷ Those opposing the TMT Project presented 46 witnesses including Petitioner Ku'ulei Kanahahele, who presented both written and oral testimony.¹⁸ True and correct copies of her written and oral testimonies are attached hereto as Exhibits "B" and "C." To say that the Petitioner has "never requested or been granted a contested case hearing on my interests and rights in lands on Maunakea" is incorrect since she actually testified during the contested case hearing.¹⁹ Petitioners could even have requested to intervene as parties in the second contested case just like 36 other individuals and organizations who, in addition to the parties to the first contested case, moved to intervene in the second contested case.²⁰ Everyone who wanted to be a party, made a timely request, and who showed up was admitted as a party.²¹

In considering the merits of the proposed TMT Project, the BLNR applied the following eight criteria under HAR § 13-1-30(c):

- (1) The proposed land use is consistent with the purpose of the conservation district;

¹⁷ Exhibit "A" at p. 16.

¹⁸ Exhibit "A" at p. 18.

¹⁹ Ku'ulei Higashi Kanahahele Declaration at para. 8.

²⁰ Exhibit "A" at p. 9.

²¹ Exhibit "A" at pp. 10-11.

- (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 BLNR made extensive findings of fact and conclusions of law on each of the eight criteria.²² On appeal, the Hawai'i Supreme Court focused on criteria (4) through (6) and found the appellants' allegations without merit.²³

A declaratory order on the Petition could thus state that the BLNR applied the eight criteria from HAR § 13-5-30(c) and determined that the proposed land use by the TMT Project was compatible with the conservation district. This decision was upheld by the Hawai'i Supreme Court in *Matter of Conservation District Use Application HA-3568*, 143 Hawai'i 379, 431 P.3d 752 (2018).

The Hawai'i Supreme Court has also specifically addressed the allegation that a telescope was not consistent with the purposes of the conservation district. The Court rejected that argument.

²² Exhibit "A" at pp. 77-189 and pp. 213-37.

²³ *Matter of Conservation District Use Application HA-3568*, 143 Hawai'i at 403-06, 431 P.3d at 776-79.

Kilakila argues that the ICA erred in determining that the Advanced Technology Solar Telescope (“ATST”) is consistent with the purposes of the conservation district because of its “unprecedented height, mass, and scale; industrial appearance; use of hazardous materials, location in ‘Science City’, location in an area that is already 40% developed, and substantial impacts[.]” The issue presents a mixed question of fact and law, and is therefore “reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case.” *Save Diamond Head Waters*, 121 Hawai‘i at 25, 211 P.3d at 83 (quoting *Del Monte Fresh Produce*, 112 Hawai‘i at 499, 146 P.3d at 1076).

To grant a CDUP in a conservation district, HAR § 13–5–30(c)(1) requires that the proposed land use is “consistent with the purpose of the conservation district[.]” Additionally, HAR § 13–5–30(c)(2) requires that the proposed land use must be “consistent with the objectives of the subzone of the land on which the use will occur[.]” The ATST must therefore be consistent with the purposes of general subzones and conservation districts.

A general subzone seeks to “designate open space where specific conservation uses may not be defined, but where urban use would be premature.” HAR § 13–5–14(a). HAR § 13–5–24 together with HAR § 13–5–25 provide guidance on appropriate land uses in general subzones. HAR § 13–5–24 lists “astronomy facilities under an approved management plan” as one of the allowable uses under a resource subzone. HAR § 13–5–25 states that “[i]n addition to the land uses identified [for general subzones], all identified land uses ... for the ... resource subzones also apply to the general subzone, unless otherwise noted.” Together, these rules specifically permit the construction of astronomy facilities and do not specify a limit as to size, appearance, or other characteristics. As an astronomy facility, the ATST falls under an appropriate use and is not inconsistent with the purposes of a general subzone.

Additionally, as discussed above, the ATST complies with the broad purposes set out in the statute and agency rules regulating conservation districts. See HAR § 13–5–1 (directing BLNR to manage natural and cultural resources “to promote their long-term sustainability and the public health, safety, and welfare”); HRS § 183C–1 (stating that the legislature created conservation districts “to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare”).

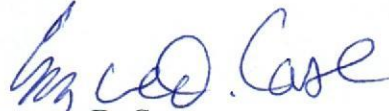
Mr. Jonathan Scheuer, Chair
and Commissioners
October 14, 2019
Page 7

In sum, BLNR did not erroneously conclude that the ATST was consistent with the purposes of both general subzones and conservation districts.

Kilakila 'O Haleakala v. Bd. of Land, 138 Hawai'i 383, 407-08, 382 P.3d 195, 219-20 (2016).

Should you have any questions, please contact me at (808) 587-0401.

Sincerely,



Suzanne D. Case
Chairperson, Board of Land and Natural Resources

C: Daniel Orodener, Executive Officer, Land Use Commission
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