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LAND USE COMMISSION
STATE OF HAWAII
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VIA HAND DELIVERY

Mr. Jonathan Scheuer, Chairman,
and Commissioners
Land Use Commission
State of Hawaii
235 South Beretania Street, Suite 406
Honolulu, Hawaii 96813

Subject: Docket No. DR19-67
Petition for Declaratory Order
Ku'ulei Highashi Kanahele and Ahiena Kanahele
TMK No. 4-4-015:009 (por.)

Dear Chairman Scheuer and Commissioners:

This office represents TMT International Observatory LLC ("TIO") with respect to above-referenced matter.[1] The Land Use Commission (the "Commission") lacks jurisdiction to consider the Petitioners' requested declaratory relief, and the Petition should be denied without a hearing. *See* Hawaii Administrative Rules ("HAR") § 15-15-100(a)(1)(D) (empowering the Commission to deny a petition where petitioners "request a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission");[2] HAR § 15-15-103 (providing that Commission may, "but shall not be required" to conduct a hearing on a petition for a declaratory order).[3]

[1] TIO is a non-profit corporation, and its members are educational institutions and governmental scientific entities: the University of California, Caltech, the National Institutes of Natural Sciences of Japan, the National Astronomical Observatories of the Chinese Academy of Sciences, the Department of Science and Technology of India, and the National Research Council of Canada.

[2] Petitioners bear the burden of proof on all issues in this proceeding. *See* HAR § 15-15-59 ("Unless otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence and the burden of persuasion.")

[3] Petitioners have not requested a hearing on the Petition nor complied with the requirements of HAR § 15-15-103 to request one. *See* HAR § 15-15-103 (requiring a petitioner who desires a hearing to "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"). This matter is also not a contested case and no hearing is required on that basis. *See Lingle v. Hawaii Gov't Employees Ass'n*, 107 Hawai'i 178 (2005) (noting that declaratory order proceedings pursuant to HRS § 91-8 are not contested case proceedings).

Petitioners request the Commission to determine that "current industrial research facility uses in the de facto industrial use precinct are appropriate within the urban district as prescribed by HRS § 205-2(b) and not the conservation district" and that "this Commission may properly issue orders stating Commission boundary amendment procedures under HRS chapter 205 are required to remove de facto industrial use precinct lands from the conservation district and into the appropriate urban district for industrial uses." Petition at 11, 15.

As an initial matter, Petitioners cannot seek a district boundary amendment themselves or compel BLNR (as the land owner) or the University of Hawaii (as the lessee) to seek a district boundary amendment, because Petitioners lack the requisite property interest under applicable law to initiate such a request. Hawaii Revised Statutes ("HRS") § 205-4 provides that only state departments and agencies, county departments or agencies, or persons with a property interest in the property sought to be reclassified may petition the Commission for a change in the boundary of a district. *See also* HAR § 15-15-46 (providing the same). In turn, a petitioner's property interest must be demonstrated through providing "a true copy of the deed, lease, option agreement, development agreement, or other document conveying to the petitioner a property interest in the subject property," or "a written authorization of all fee owners to file the petition and a true copy of the deed to the subject property." HAR § 15-15-50(c)(5).[4]

Recognizing that the Commission lacks the authority to consider a boundary amendment under these circumstances, Petitioners instead seek to have the Commission determine and declare, *without* a petition for a boundary amendment, that the *uses* within the Astronomy Precinct on Mauna Kea are allegedly "incompatible" with the conservation district, and that the Commission should thus issue "orders" stating that the boundary amendment procedures are "required".

The Commission, however, lacks jurisdiction to consider Petitioners' request and, more specifically, the Commission must reject the Petitioners' request to review and analyze the "uses" within the conservation district. Hawaii Revised Statutes ("HRS") § 205-5(a) unambiguously mandates that "[c]onservation districts *shall* be governed by the department of land and natural resources pursuant to chapter 183C" (emphasis added). *See also* HRS § 205-15 (providing that "[e]xcept as specifically provided by this chapter and the rules adopted thereto, *neither the authority for the administration of chapter 183C* nor the authority vested in the counties under section 46-4 *shall be affected.*") (Emphases added.)

Thus, the legislature expressly delegated to the Board of Land and Natural Resources ("BLNR") the *exclusive* authority to zone and regulate uses within the conservation district. In turn, HRS § 183C-3 provides in relevant part that BLNR and the Department of Land and Natural Resources ("DLNR") *shall*: "[i]dentify and appropriately zone those lands classified

[4] Nor can the Petition itself be construed as a petition for a boundary amendment, as (among other issues), it fails to comply with the requirements of HAR § 15-15-50.

within the conservation district"; "[a]dopt rules, in compliance with chapter 91 which shall have the force and effect of law"; "[e]stablish restrictions, requirements, and conditions consistent with the standards set forth in this chapter on the use of conservation lands"; and "[e]stablish and enforce land use regulations on conservation district lands". *See* HRS § 183C-3(2), (3), (6) and (7). In exercising this authority and jurisdiction, BLNR has determined that "astronomy facilities under a management plan" (such as the TMT Project) are permitted uses within the resource subzone of the conservation district. *See* HAR § 13-5-24(c).

Thus, Petitioners' request that the Commission review and evaluate certain current (and expressly permitted) uses within the conservation district, and based on that review, ostensibly "issue orders" to "remove" those uses from the conservation district, is plainly contrary to the legislature's express, unambiguous and exclusive delegation of authority to BLNR and DLNR to zone and regulate uses within the conservation district.

It is undisputed that BLNR has in fact exercised its jurisdiction and authority with respect to the conservation district in general, and with respect to the TMT Project specifically. BLNR has promulgated extensive and detailed rules identifying and regulating uses within the conservation district.[5] *See generally* HAR § 13-5-1 *et seq.* (setting forth identified uses within the conservation district subzones and criteria for the issuance of use permits and other regulations).[6]

With respect to the TMT Project specifically, BLNR held an extensive contested case hearing to consider the conservation district use application ("CDUA") for the TMT Project, which extended through forty-four days of testimony involving forty-seven witnesses. All told, the contested case hearing, from the first pre-hearing conference to the issuance of BLNR's decision and order granting the CDUA, spanned a period of over sixteen months. BLNR's over 270 page decision and order exhaustively considered the criteria of HAR § 13-5-30(c) for permitting uses within the conservation district, as well as all issues raised during the contested case hearing.

As pertinent here, BLNR determined that the TMT Project "is consistent with the purpose of the conservation district," which is 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." *See* BLNR Findings of Fact, Conclusions of Law and Decision and Order (September 28, 2017) ("BLNR D&O") at 214 (Conclusions of Law ("COL") 125-126) (citing HAR § 13-5-30(c)(1) and HRS § 183C-1).

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[5] *See* HAR § 13-5-30(b) (providing that "[u]nless provided for in this chapter, land uses shall not be undertaken in the conservation district").

[6] While Petitioners' refer to an "industrial use precinct," no such land use designation or subzone exists in the conservation district. *See* HAR Chapter 13-5.