BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition for a Declaratory Order KU'ULEI HIGASHI KANAHELE and AHIENA KANAHELE, individuals, for a Declaratory Order concerning the invalid classification of the de facto and improper use precinct on approximately 525 acres of State Land Use Conservation District lands located in Mauna Kea and Hilo, County of Hawai'i, Tax Map Key No.: 4-4-015:009 (por.)	DOCKET NO. DR 19-67 ORDER DENYING PETITION FOR DECLARATORY ORDER AND CERTIFICATE OF SERVICE

ORDER DENYING PETITION FOR DECLARATORY ORDER

AND

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE DOCUMENT ON FILE IN THE OFFICE OF THE STATE LAND USE COMMISSION, HONOLULU, HAWAI'I.

Date 11/29/19

BY _____
DANIEL E. ORODENKER
Executive Officer

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

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ORDER DENYING PETITION FOR DECLARATORY ORDER

On September 3, 2019, Ku'ulei Higashi Kanahele and Ahiena Kanahele ("Petitioners"), through their attorney Bianca Isaki, filed a Petition For Declaratory Order ("Petition"), pursuant to Hawai'i Revised Statutes ("HRS") §91-8, and Hawai'i Administrative Rules ("HAR"), §15-15-98 *et seq.*,; Declaration of Ku'ulei Higashi Kanahele, Declaration of Ahiena Kanahele, Exhibits 1 – 3, and Certificate of Service.

Petitioners requested a declaratory order from the State of Hawai'i Land Use Commission ("Commission") as to whether HRS Chapter 205 applies to an approximately 525 acres of State Conservation District lands located in Mauna Kea and Hilo, County of Hawai'i, Tax Map Key No. 4-4-015:009 (por.) ("Property"), that through successive issuances of conservation district

use permits and subleases, has been transformed into a "de facto industrial use precinct". Specifically, Petitioners seek a ruling that:

(1) 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 within the conservation district;

(2) Further industrial uses proposed for the de facto industrial use precinct must comply with HRS Chapter 205 and Commission procedures for obtaining a district boundary amendment to reclassify conservation lands into the urban district; and,

(3) Even if a single scientific laboratory or other research facility may be appropriate within non-urban districts, the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities within the de facto industrial use precinct constitutes urban uses inconsistent with conservation district uses and/or detrimental to a multiple use conservation concept for which a district boundary amendment must be obtained.

This Commission , having heard and examined: the testimony and evidence presented by Petitioners, the State Office of Planning ("OP"), the County of Hawai'i ("County"), the State Department of Land and Natural Resources ("DLNR"), the University of Hawai'i at Hilo ("UHH"), TMT International Observatory LLC ("TIO"), and other public witnesses; and the filings and public testimony submitted via electronic mail; at its meeting on October 24-25, 2019, in Hilo, Hawai'i, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Procedural Matters

1. On September 3, 2019, Petitioners filed a Petition for a Declaratory Order, Declarations of Ku'ulei Higashi Kanahele and Ahiena Kanahele, Exhibits 1-3, and Certificate of Service.
2. On September 16, 2019, the County filed a Statement of Position and Notice of Non-Appearance.
3. On September 17, 2019, UHH filed a Response to Petition.
4. On October 14, 2019, the Commission mailed an agenda and hearing notice for a meeting on October 24-25, 2019 to the Petitioner; and, the Statewide, email, and Hawai'i Island mailing lists.
5. Between October 11 and October 23, 2019, the Commission received public testimony via regular mail and electronic mail, from the following: MaryLu Kelley, Billy Boy, Robert Soares, Laura Arcibal, Anna Louise Fontaine, Jade Young, Kathy Vierra, Mona Trenae-Maynard, Laura Arcibal, Cindy Freitas, Gary Hooser, Alexander McNicoll, William Freitas, Lehua Kaulukukui, Hanalei Fergerstrom, Marc Lefebvre, Katherine Roseguo, Amanda Niles, Josie Kojima, Cheryl Burghardt, Annette Reyes, David Shizuma, Mele Look, Suzie Garrett, Kim Falinski, Garid Faria, Stephen Paulmier, Thayne Currie, Simon Bouchard, Momi Ventura, Ronald Fujiyoshi, Kirra Swenerton, Warnice Hanamaikai, DeWaine Tollefsrud, Sandra Kirkpatrick, Ru Carley, Kelsey Baker, Patti Freeman, Ravi Grover, Anna Louise Fontaine, Michelle Cabalse, JoAnn Tsark, Lisa Lehuanani Chang, Raphiell Nolin, Stephanie Ross, Normand Dufresne, Hope Fa-Kaji, Miles Greenberg, P. Tearson, Clarence Ching, Janet Graham, Michael

Zhang, Mele McPherson, Eric Tielemans, Jane Young, Sean Nagamatsu, Joan Heller, Janice Jong, Michelle Sandell, Eric Takasugi, Corrina Marcelino, Jane Perry, Christina Manzano-King, Olivia Pasciuta, Sierra Club Hawai'i Island Group – Deborah Ward, Karen Luke, Kapela Eli, Sheridan Noelani Enomoto, Mahina Oshie, Miles Yoshioka, Tiara Na'puti, Mike Maddux, Maxine Kahaulelio, Katherine Roseguo, Eddie Werner, Momi Wheeler, Audrey Allencastre, Erik Meade, Deissery Ann Medeiros, Daniel Kalani Wassman, Kenneth Wagner, Joseph Kualii Lindsey Camara, Ashley Kaono, Marisa Plemer, Yvonne Geesey, Kevin Landers, Pua'ena Ahn, Serafina Gajate, Alihilani Katoa, Uala Mills, and Keao Victorino.

6. On October 15, 2019, DLNR filed a Response to Petition, and Exhibits A to C.

7. On October 15, 2019, Petitioners filed a Supplemental Memorandum in Support of Petition.

8. On October 17, 2019, TIO filed a Response to Petition.

9. On October 18, 2019, OP filed Comments on Petition for Declaratory Order.

10. On October 23, 2019, the Commission mailed an agenda and hearing notice for a meeting on October 31, 2019 to the Petitioner; and, the Statewide, email, O'ahu and Hawai'i Island mailing lists.

11. Between October 24 and 28, 2019, the Commission received public testimony via regular mail and electronic mail, from the following: Shelley Muneoka, Joseph Kohn, Dexter Ke'eaumoku Ka'iama, Jessica Waia'u, Kapua Silva, Donn Mende, Prana Mandoe, Edward Ayau, Pomaikalani Bertelmann, and Kamana Kapele.

12. On October 28, 2019, Petitioners filed Submission of Referenced Materials, Appendices A and B, and a Certificate of Service.

13. On October 24-25, 2019, the Commission met in Hilo, Hawai'i, to consider the Petition pursuant to HAR §15-15-100. Bianca Isaki, Esq., appeared on behalf of Petitioners Ku'ulei Higashi Kanahele and Ahiena Kanahele, who were also present.

14. OP, UHH, and TIO were present at the proceeding. Bryan Yee, Esq. appeared on behalf of OP; Jesse Souki, Esq. for UHH; and, Ross Shinyama, Esq. for TIO.

15. Several Commissioners made disclosure of potential conflicts.[1] There were no objections from Petitioners to any of the Commissioners continuing to participate in the proceedings.

16. At the meeting the LUC entered into the record, the written public testimonies received on the Petition, including the written submissions filed by OP, the County, UHH, DLNR, and TIO, and afforded those present the opportunity to provide public testimony on the Petition. The LUC heard public testimony from the following: Petitioners Ahiena Kanahele and Ku'ulei Higashi Kanahele; James Mauliola Keaka Stone, Jr.; Hanalei Fergestrom (Na Kupuna Moku O Keawe); Ken Church; Donna Keala Leong; Deborah J. Ward (Sierra Club Hawai'i Island Group); Manu Kaiama; Dexter Kaiama; Laura Acasio; James K. Kaulukukui, Jr.; Shelly Muneoka (KAHEA); Cory Harden; Millicent Cummings; Jaerick Medeiros-Garcia; Grace Bezilla; and Kaikolehua Kanaele (Aloha 'Āina Life and Education Center); Bonnie Irwin, Chancellor (UHH); Greg Chun (UHH); Lanny Sinkin, Esq.; and, Lance Collins, Esq. (West Maui Preservation Association and Nā Papa'i Wawae 'Ula'ula).

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[1] Commissioners Ohigashi, Okuda, Wong, Cabral, and Chair Scheuer disclosed their respective past and present personal/voluntary/professional associations and business relationships with the University of Hawai'i, and various legal entities/businesses with the local community. Additionally, Chair Scheuer disclosed he is co-authoring a book with Petitioner's attorney, Ms. Isaki.

17. At the conclusion of the public testimony by the government and TIO representatives, the Commission heard from Ms Isaki. In their pleadings, Petitioners did not request a hearing on the Petition as provided for in HAR §15-15-103.

18. On October 31, 2019, the Commission met in via video conference with Commissioners present at each site in Hilo, Kahului, Līhu'e, and Honolulu, Hawai'i, to consider the Petition pursuant to HAR §15-15-100. A motion was made and approved to remove the agenda item due to technical difficulties with internet services that precluded distribution of Commission materials for this docket. The Commission rescheduled a hearing to adopt the form of the order to November 20, 2019.

Description of the Property

19. The Property is situated in Mauna Kea and Hilo, County of Hawai'i, and is identified as Tax Map Key No. 4-4-015:009 (por.) and consists of approximately 525 acres of land.

20. The Property is situated completely within the State Land Use Conservation District.

21. The Property is owned and held in trust by the State of Hawai'i, administered by the Department of Land and Natural Resources, and currently under a long-term lease to the University of Hawai'i at Hilo.

Description of the Request

22. Based on the Petition, Ms. Isaki's arguments and responses to questions by the Commissioners, and the testimony of the Petitioners, Petitioner's seek a declaratory order from the Commission requiring that a district boundary amendment be obtained for the Property.

23. It is Petitioners' position that the current industrial research facility uses taking place on the Property, which is within the State Land Use Conservation District, are inconsistent with Conservation District uses and/or are detrimental to a multiple use conservation concept.

24. It is Petitioners' position that the current industrial research facility uses on the Property have created a de facto industrial use precinct appropriate within the State Urban District and not the State Conservation District.

25. It is Petitioners' position that further industrial uses proposed for the Property requires compliance with HRS Chapter 205 for obtaining a district boundary amendment to reclassify conservation lands into the urban district.

26. Without limiting the foregoing, the Commission further concludes that the declaratory ruling procedure could not be invoked by the Petitioner's in this matter.

> "Based on the text and structure of the statute, its legislative history, and relevant caselaw, we agree with Wal–Mart that the declaratory ruling procedure was not intended to be utilized to seek review of agency determinations that have already been made and which have not been timely appealed.
>
> HRS § 91–8, entitled "Declaratory rulings by agencies," provides that:
>
> Any 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. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.
>
> HRS § 91–8 (emphasis added).
>
> As both the title ("Declaratory rulings by agencies") and the pertinent text ("a declaratory order as to the applicability [of a

> statute, agency rule, or order]") make clear, the declaratory ruling procedure of HRS § 91–8 is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person. It was not intended to allow review of concrete agency decisions for which other means of review are available. Reading HRS § 91–8 in a common sense fashion, and bearing in mind the plain meaning of the term "applicability," it cannot seriously be maintained that the procedure was intended to review already-made agency decisions. For such decisions, like the DPP Director's issuance of the CUP to Wal–Mart, the agency has already spoken as to the "applicability" of the relevant law to the factual circumstances at hand—implicitly or explicitly it has found the relevant legal requirements to be met. There is no longer a question of how the relevant laws, in this case the LUO, "apply."

Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cty. of Honolulu, 114 Haw. 184, 196–97, 159 P.3d 143, 155–56 (Hawaii 2007).

27. In voting to approve the form of the decision and order in this matter on November 20, 2019, the Commission requested that the closing comments prior to decision-making by Commissioner Scheuer be included in the findings. The following comments can be found in transcripts (pages 198-204) for the Commission's October 25, 2019 hearing in Hilo, Hawai`i.

"CHAIRPERSON SCHEUER: Thank you, Commissioner Okuda.

Is there anything further before the chair shares remarks?

So the tradition of being the chair is that you don't make a motion. You let the body make the motion, and then you speak last. So I've somewhat foregone my ability to try and convince my fellow commissioners (who I have tremendous respect for), but it was not the motion I would have made. So I will not be voting for it.

The case -- the petition before us – brings up novel issues never litigated before. The University of Hawaii's attorney admitted as much. We're not relitigating Mauna Kea II here.

The petition has brought up some irony, and I don't think I've been in a room where Hawaiian nationals agreed with the State of Hawai'i Office of Planning that we had no

jurisdiction, but here we are. Although, of course, they think we have no jurisdiction for very different issues.

I find myself thinking of the day when the Office of Hawaiian Affairs took formal ownership of Wao Kele O Puna on this island, 25,000 acres of so-called ceded lands that were taken by the
revolutionary government, ceded to the federal government and then to the state, and the state later sold them to a private entity. I think it remains, on this island, the site of the largest number of arrests for civil disobedience – when people were protesting the development of geothermal energy at Wao Kele O Puna.

And decades later, we managed to take it into protective ownership for permanent protection. And at that ceremony, Haunani Apoliona asked "How can the past not be a trap, but be a liberation?"

I ask: You know, are we, all of us, maoli, haole, are we brave enough, are we creative enough to
see our way through the current standoff and find a Hawai'i that is far better than we can even dare to imagine now?

I know some people, and I don't live on this island, and so, really, I have a great deference
for what Commissioner Cabral has said. I know some people are feeling a schism and perhaps an
unprecedented schism. I actually take the point of view, however, that it's not that things are getting worse, but things are being revealed that have been hidden for too long.

If we first look backwards and we ask how did we get here, I really believe the statements of testifiers Shelley Muneoka and Debbie Ward that had the University of Hawai'i come to this body with our powers originally, we would not be in the mess we are now. It's a shame.

So jurisdictional issues aside, I think we have a clear picture that if they had followed the proper process, this process, we would not be in the dilemma we are now. And I say that because I come to it from an understanding of the law that this commission is charged with implementing. Why did Hawai'i pass, which has become HRS 205, the only comprehensive land use law among the 50 states?

So it's 1961, two years after statehood, jet engines just invented. So we're getting this tremendous economic pressure; right? We just had the democratic -- so-called democratic revolution. So, finally, after more time since anytime since 1893, the average person in Hawai'i had some say over how government was going. And, yet, all the land in Hawai'i was still largely owned by the Big Five or the state.

So we passed this law to try to give the people this wedge, this step in being able to approve how our state moves forward and how our land is taken care of. And we set these four districts, three at the time. We added rural later.

And really one of the things that this process allows, it does not say that what is in conservation shall be permanently protected. Our land use law does not say 'that we will never harm the public trust'. But, actually, what it says is – it gives us the process by which, as a society, we can say: you know what? We need to do something for the collective good. It will cause harm. It will cause permanent harm. It will cause irrevocable harm. That harm may be disproportionate
to one community or one group. But we're allowed to go through the district boundary amendment to thoughtfully consider those impacts.

And to quote the Hawai'i Supreme Court in Waiāhole, 'the state may compromise public rights in a resource pursuant only to a decision that is made with a level of openness, diligence and foresight commensurate with the high priority that these rights command under the laws of our state."'

Instead, what we've had is incremental decision-making, CDUP by CDUP by CDUP with no one
ever looking at the entirety of the summit and the impacts. That process – very clearly from the record of this proceeding – does not allow for that possibility, even if cumulative impacts were looked at in the last CDUP issued.

The permit itself says: here's the conditions that will be addressed by the new telescope. Here's the conditions that will be addressed by the state, but these conditions are all severable. So we can go forward without any addressing of the comprehensive impacts.

To me, this question -- this petition focuses on two issues.

One is, is it urban? Are the collection of these uses urban? And for me, you know, if it look likes a duck, it quacks like a duck, it's a duck. The summit no longer looks like a conservation district even if individually, clearly, individual telescopes are allowed to exist in a conservation district.

And the second issue is do we have jurisdiction? You know, I respectfully hear and listened to the arguments of my fellow commissioners, but I can't reconcile that against the obvious language in 205-2 that defines what's in the conservation district.

And if it's not up to this commission to ensure that the four districts' lines are respected, I don't know who it's up to? There's not a case -- there's not an ability to go on a single CDUP in front of the BLNR and contest the entirety of their actions that are all the previous ones. There's no avenue.

So somebody has to do it, and maybe I'm wrong -- I'm wrong every day usually before I get out of bed. So I could well be wrong on this one.

But I'd rather be told that I'm wrong by the courts, that you overreached our protective actions
of the statute - than to be overly cautious, and not be told.

And so I actually hope that this gets appealed because I think this commission really needs
clarity on what the limits are of our abilities and our protections.

The last thing I'll say before we vote, I just want to, for the record, wholly reject two statements that were made on the record by witnesses.

As I mentioned before in discussions, the assertions by the deputy attorney general for the State Office of Planning, that the only district – distinction between our land use districts was the level of how difficult it was to get a permit would make -- if you implemented that, it would make a mockery of our entire land use schemework.

And I would also reject the discussion that was made by a member of Mauna Kea Management
that said that we can't find solutions in a regulatory process. I think the dilemma that we have
had is that we've had all these listening sessions and these soft processes where people's individual rights and collective rights can't be addressed. And that a regulatory process like the LUC's DBA process is actually the avenue to give finality to the rights that the people have.

Mahalo.

Mr. Orodenker, please poll the commission."

RULING ON PROPOSED FINDINGS OF FACT

Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

Jurisdiction

1. HRS §91-8 allows any interested person to petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of an agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.
2. Petitioners are interested persons pursuant to HRS §91-8 and HAR §15-15-98(a), and thus have standing to bring this Petition before the Commission.
3. The Commission has jurisdiction to issue this declaratory order. HRS §91-8, as implemented by the Commission's administrative rules, HAR §§15-15-98 through 15-15-104.1, authorize the Commission to issue a declaratory order "as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation." The Commission's statutes, the applicability of which are put at issue in this Petition, are those sections of HRS Chapter 205 that govern the authority to reclassify land and to govern the permitted uses on State Conservation District lands.
4. HAR §15-15-98(c) allows the Commission to issue a declaratory order "...without notice of hearing" to terminate a controversy or to remove uncertainty. The Commission concludes that based on the facts presented at the meeting, the testimony of public witnesses, the pleadings filed, together with the exhibits, the opportunity of Petitioners to present their views, and the fact that neither Petitioner requested a hearing pursuant to

HAR §15-15-103, a hearing is not necessary before issuing a declaratory order in this matter.

5. HAR §15-15-100(a)(1)(D) provides that the Commission can deny the petition where "the petition requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission."

Jurisdiction to Redistrict Land

6. HRS §205-2(a) provides the State Land Use Commission with the authority to place lands within one of the four major land use districts: Urban, Rural, Agricultural, and Conservation.

> "The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts."

7. HRS §205-2(a)(4) further provides standards for the Commission in determining the initial boundaries of each district, including, specifically the Conservation District:

> "In establishment of the boundaries of conservation districts, the "forest and water reserve zones" provided in Act 234, section 2, Session Laws of Hawaii 1957, are renamed "conservation districts" and, effective July 11, 1961, the boundaries of the forest and water reserve zones, theretofore established pursuant to act 234, section 2, Session Laws of Hawaii 1957, shall constitute the boundaries of the conservation districts; provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission."

8. HRS §205-2(e) provides standards for the types of lands to be included in the Conservation District:

> "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 resource exploration and geothermal resources development, as defined under section 182-1."

9. HRS §205-3.1(a) provides that the State Land Use Commission is the government body to process district boundary amendments involving State Conservation District lands:

> "District boundary amendments involving lands in the conservation district, land areas greater than fifteen acres, or lands delineated as important agricultural lands shall be processed by the land use commission pursuant to section 205-4."

Jurisdiction to Petition for District Boundary Amendment

10. HRS §205-3.1(b) provides what entities may petition for district boundary amendments of less than fifteen acres:

"Any department or agency of the State, and department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified may petition the appropriate county land use decision-making authority of the county in which the land is situated for a change in the boundary of a district involving lands less than fifteen acres presently in the rural and urban districts and lands less than fifteen acres in the agricultural district that are not designated as important agricultural lands."

11. HRS §205-4(a) provides what entities may petition for district boundary amendments for land areas greater than fifteen acres:

"Any department or agency of the State, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district. This applies to all petitions for changes in district boundaries of lands within the conservation districts, lands designated or sought to be designated as important agricultural lands, and lands greater than fifteen acres in the agricultural, rural, and urban districts, except as provided in section 201H-38. The land use commission shall adopt rules pursuant to chapter 91 to implement section 201H-38."

Jurisdiction to Identify Uses in the State Conservation District

12. HRS §205-5(a) provides what government entities have authority over uses within each of the land use districts:

"Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts. Conservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C."

13. HRS §205-15 addresses any conflicts created:

"Except as specifically provided by this chapter and the rules adopted hereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected."

14. HRS §183C-3(1 to 6) describes the powers of the board and department of land and natural resources with respect to uses within the conservation district:

"(1) Maintain an accurate inventory of lands classified within the state conservation district by the state land use commission, pursuant to chapter 205;

(2) Identify and appropriately zone those lands classified within the conservation district;

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

(4) Set, charge, and collect reasonable fees in an amount sufficient to defray the cost of processing applications for zoning, use, and subdivision of conservation lands;

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

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

15. HRS §183C-6(a) provides regulatory authority over land use in the conservation district:

"The department shall regulate land use in the conservation district by the issuance of permits."

Jurisdiction to Enforce Uses in the State Conservation District

16. HRS §205-5 specifies the appropriate governing authority for conservation districts:

"Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts. Conservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C."

17. HRS §205-15 addressed any conflicts created:

"Except as specifically provided by this chapter and the rules adopted hereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected."

18. HRS §183C-3(7) provides specific language regarding authority to enforce activities within the conservation district:

"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."

19. The Hawai`i Supreme Court has considered and ruled on permitting and jurisdictional issues regarding *Mauna Kea in* Mauna Kea Anaina Hou v. Bd. Of Land & Nat. Res., *136 Hawaii 376, 363 P.3d 224* (2015) and *Matter of Conservation District Use Application HA-3568 for the Thirty Meter Telescope, 143 Hawaii 379, 431 P.3d 752* (2018).

20. Based on the information provided by Petitioners, the Commission concludes that the Petition involves lands that are currently classified within the State Land Use Conservation District.

21. Based on the information provided by Petitioners, the Commission concludes that it lacks authority under HRS Chapter 205 to require a landowner to petition for reclassification.

22. Based on the information provided by Petitioners, the Commission concludes that pursuant to HRS §§205-5(a), 205-15, and HRS §§183C-3 and 183C-6(a), it is the Department of Land and Natural Resources and not the Commission, that is statutorily authorized to determine, permit, and enforce land uses within the State Conservation District.

23. The Commission concludes that the plain language of HRS §205-5(a) makes clear that governance over the State Conservation District is under the authority of the DLNR pursuant to HRS §183C. Therefore, the Commission lacks subject matter jurisdiction and must deny the Petition.

ORDER DENYING PETITION FOR DECLARATORY ORDER

At the Commission's meeting on the Petition on October 24 and 25, 2019, a motion was made and seconded to deny the Petition. Following discussion by the Commission, a vote was taken on this motion. There being a vote tally of 5 ayes, 2 nays, and 1 excused[2], the motion carried.

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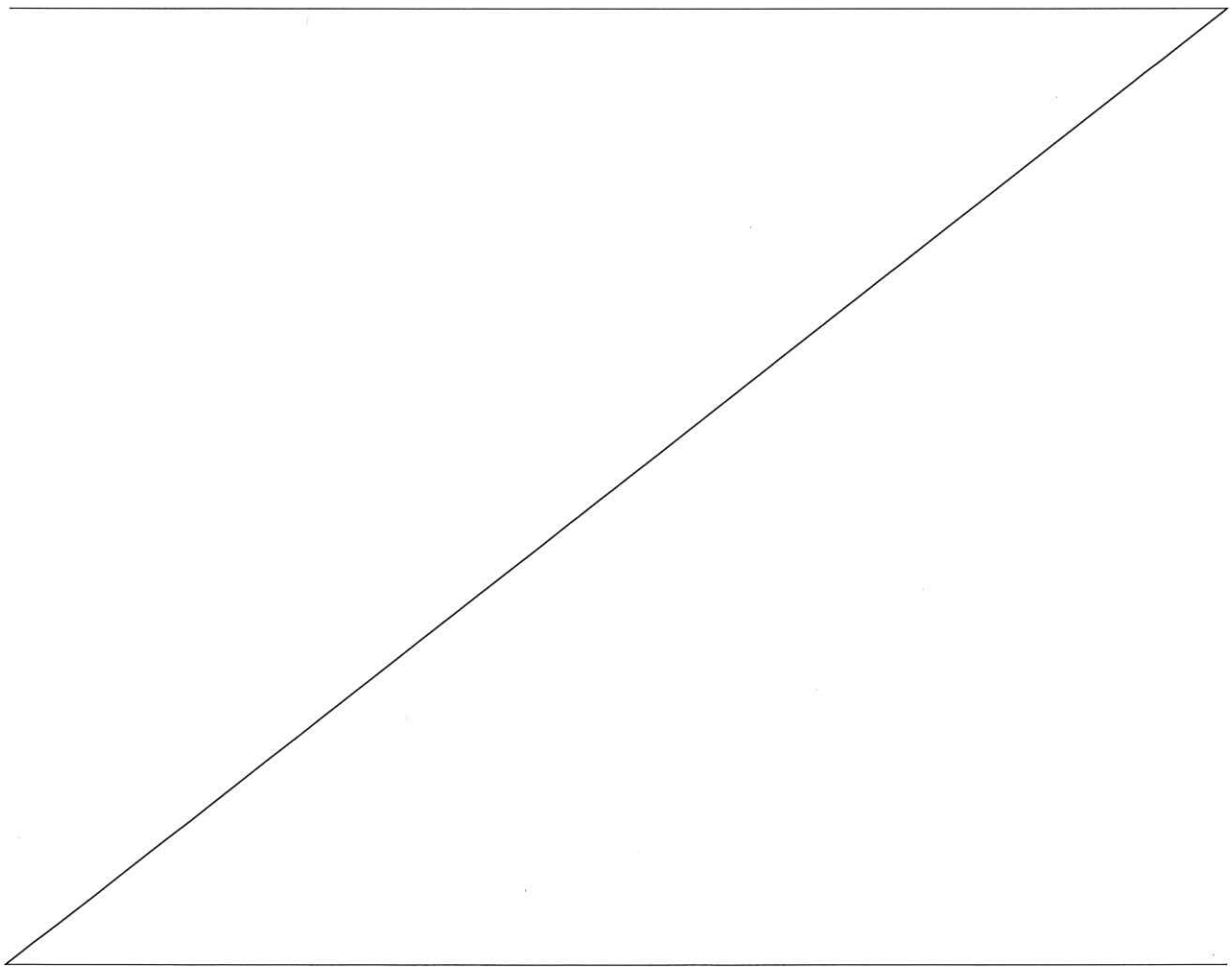
[2] The Commission normally is comprised of nine members, however, an at-large position is currently vacant.

Having duly considered the Petition and the written and oral arguments presented by Petitioners, the pleadings filed by OP, DLNR, UHH, and TIO, as well as public comments received, and a motion having been made at a meeting conducted on October 25, 2019, in Hilo, Hawai'i, and the motion having received the affirmative votes required by HAR §15-15-13, and there being good cause for the motion, this Commission ORDERS that the Petition be DENIED and RULES as follows:

The Petitioner has requested a ruling on a statutory provision not administered by the Commission and a matter that is not otherwise within the jurisdiction of the Commission.



ADOPTION OF DECLARATORY ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, O'ahu, Hawai'i, this 29th, day of November, 2019, per motion on October 25, 2019.

LAND USE COMMISSION

STATE OF HAWAI'I

APPROVED AS TO FORM

Deputy Attorney General

By
JONATHAN SCHEUER
Chairperson and Commissioner

Filed and effective on:

11/29/19

Certified by:

DANIEL ORODENKER
Executive Officer

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition for a Declaratory Order KU'ULEI HIGASHI KANAHELE and AHIENA KANAHELE, individuals, for a Declaratory Order concerning the invalid classification of the de facto and improper use precinct on approximately 525 acres of State Land Use Conservation District lands located in Mauna Kea and Hilo, County of Hawai'i, Tax Map Key No.: 4-4-015:009 (por.)	DOCKET NO. DR 19-67 ORDER DENYING PETITION FOR DECLARATORY ORDER

CERTIFICATE OF SERVICE

I hereby certify that an ORDER DENYING PETITION FOR DECLARATORY ORDER was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

CERT. MAIL: BIANCA ISAKI
LAW OFFICE OF BIANCA ISAKI
1720 Huna Street, 401B
Honolulu, HI 96817

Dated: Honolulu, Hawai'i, 11/29/19

DANIEL E. ORODENKER
Executive Officer