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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF

A Contested Case Hearing Re Conservation
District Use Permit (CDUP) HA-3568 for the
Thirty Meter Telescope at the Mauna Kea
Science Reserve, Kaohe Mauka, Hamakua
District, Island of Hawaii, TMK (3) 4-4-
015:009

Case No. BLNR-CC-16-002

**TMT INTERNATIONAL
OBSERVATORY, LLC'S OPPOSITION
TO THE THREE MOTIONS FILED BY
HARRY FERGERSTROM [DOC. 96];
CERTIFICATE OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S OPPOSITION TO THE THREE
MOTIONS FILED BY HARRY FERGERSTROM [DOC. 96]**

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel,
hereby submits its Opposition to the Three Motions Filed by Harry Fergerstrom [Doc. 96]. Mr.
Ferberstrom filed the following three motions:

- (1) Motion to Reconsider All Motions, Application, and/or Request for Admission or Intervention as a Party or other parties in this matter ("Motion to Reconsider");
- (2) Motion to Strike All Motions, Applications, Decisions, etc.: essentially making moot the entire hearing ("Motion to Strike"); and

- (3) Motion to Remove Hearing officer Riki May Amano; Attorney General Julie China; and Director of coastal and conversation lands Michael Cain (“Motion to Remove”).

The Motion to Reconsider, the Motion to Strike, and the Motion to Remove are collectively referred to herein as the “Ferberstrom Motions.”

Though not entirely clear, the Fergerstrom Motions seemingly argue that BLNR and/or this Hearings Officer violated unspecified sections of the Rules of Practice and Procedure found in Title 13, Chapter 1 of the Hawai‘i Administrative Rules (“HAR”). Specifically, as an example, Mr. Fergerstrom argues that the process used by this Hearings Officer to admit parties, including Mr. Fergerstrom himself, to the contested case hearing violated the Rules of Practice and Procedure. This argument is meritless as are Mr. Fergerstrom’s other arguments discussed infra. The process used by this Hearings Officer to admit new parties to the upcoming contested case hearing was authorized by and complied with the applicable Rules of Practice and Procedure. The Fergerstrom Motions and the relief requested¹ therein should be denied.²

I. BACKGROUND

The Hawai‘i Supreme Court in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai‘i 376, 363 P.3d 224 (2015) stated:

This matter is remanded to the circuit court to further remand to BLNR for proceedings consistent with this opinion, **so that a**

¹ The Fergerstrom Motions request that everything done to date in this contested case be struck, that the University of Hawai‘i at Hilo (“UHH”) be required to resubmit its Conservation District Use Permit (“CDUP”) application, and that this Hearings Officer, deputy attorney general Julie China, and Michael Cain of the Office of Conservation and Coastal Lands be removed. Mr. Fergerstrom is not entitled to such drastic relief for the reasons explained infra.

² Kalikolehua Kanaele [Doc. 122] and Richard DeLeon [Doc. 123] sent e-mails joining in the Fergerstrom Motions. The joinders filed by Messrs. Kanaele and DeLeon are entirely derivative of the Fergerstrom Motions and do not assert any independent basis or bases for the requested relief. The joinders should be denied for the same reasons that the Fergerstrom Motions should be denied.

contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion.

Id. at 399, 363 P.3d at 247 (emphasis added).

Consistent with the instructions above, the Honorable Greg K. Nakamura of the Third Circuit Court of the State of Hawai‘i, remanded this matter to the Board of Land and Natural Resources (“BLNR”) on February 22, 2016. See Order for Remand, filed February 22, 2016, in Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al., Civil No. 13-1-0349. Judge Nakamura “remand[ed] this matter to the Board of Land and Natural Resources so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with the Opinion.” Id.

On March 31, 2016, BLNR issued Minute Order No. 1 [Doc. 1] notifying the parties that the Honorable (Ret.) Riki May Amano had been selected as the Hearings Officer for this matter. Minute Order No. 1 also advised the parties to submit any comments and objections to the selection of Judge Amano by a certain date and time. See id.

On May 6, 2016, after extensive briefing by the parties, BLNR issued Minute Order No. 4 [Doc. 14], which addressed and rejected the objections of the Petitioners to the selection of this Hearings Officer and the selection process. Minute Order No. 4 concluded by stating that “[t]his matter is hereby submitted to Judge Amano for her to hold the contested case as required.” Id. at 16.

On May 9, 2016, this Hearings Officer scheduled a pre-hearing conference for May 16, 2016 to discuss, inter alia, the parties, motions hearing(s) schedule, and other procedural and logistical matters. See Minute Order No. 5 [Doc. 16]. During the May 16, 2016 pre-hearing conference, this Hearings Officer set a deadline to submit “intervention applications, motions, or

request[s].” Minute Order No. 7 [Doc. 44] at 2. This Hearings Officer also scheduled a hearing on “intervention applications, motions, or request[s]” for June 17, 2016. Id.

On June 17, 2016, a hearing was held on all “intervention applications, motions, or request[s].” During the hearing, this Hearings Officer granted Mr. Fergerstrom’s request to intervene finding that his participation will substantially assist her in her decision-making. See Minute Order No. 13 [Doc. 115] at 4. This Hearings Officer also admitted TIO as a party finding that it has a substantial interest in the subject matter and because TIO’s participation will substantially assist her in her decision-making. See id.

II. DISCUSSION

1. The process used to determine parties to the upcoming contested case hearing did not violate the Rules of Practice and Procedure.

Mr. Fergerstrom’s arguments in the Fergerstrom Motions are not clear. Nevertheless, as best as could be determined, Mr. Fergerstrom appears to argue that BLNR and/or this Hearings Officer violated the Rules of Practice and Procedure. Notably, Mr. Fergerstrom does not identify the specific section(s) of the Rules of Practice and Procedure that he believes have been violated. Mr. Fergerstrom, however, generally argues that this Hearings Officer did not have the authority under the Rules of Practice and Procedure to admit new parties to the upcoming contested case hearing. Mr. Fergerstrom argues that “[t]he procedure under [the Rules of Practice and Procedure] clearly state[] that a person or persons wanting to contest the out come [sic] of a hearing on the permit must state so at the time of the hearing (same day), his or her intent to contest, and must be followed within 10 day[s] with a letter to the same, seeking standing to contest.” Motion to Reconsider at 3. He also argues that the process used by the Hearings Officer “did not vet new applicants[,] it did not follow the rules concerning parties, how they become one and the timing deadlines.” Motion to Strike at 5. Mr. Fergerstrom is incorrect. The

process used by this Hearings Officer to admit new parties to the upcoming contested case hearing, including Mr. Fergerstrom himself, was authorized by and complied with the applicable Rules of Practice and Procedure.³

Initially, Mr. Fergerstrom confuses a petitioner with a party. Indeed, the administrative rules that apply to petitioners are different from those that apply to parties. HAR § 13-1-29 details the procedure that a petitioner must follow to request a contested case hearing. HAR § 13-1-31 details the procedure to become a party once it is determined that a contested case will be held. The latter applied to the process used by this Hearings Officer to admit new parties to the upcoming contested case hearing.

HAR § 13-1-29(a) provides that a petitioner “must both request a contested case and petition the board to hold a contested case hearing.” The request can be oral or written but “must be made to the board by no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition.” *Id.* To perfect his or her request, the petitioner “must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition.” *Id.* This is the process that Mr. Fergerstrom described in his Motion to Reconsider and that he argues should have been applied by this Hearings Officer to admit new

³ Mr. Fergerstrom complains in the Motion to Remove that TIO’s and PUEO’s attorneys were included on a “certificate of service dated June 13, 2016” before this Hearings Officer determined the new parties. *See* Motion to Remove at 3. It is unclear the exact certificate of service that Mr. Fergerstrom is referring to. Nevertheless, Mr. Fergerstrom was also included on the June 6, 2016 certificate of service to Minute Order No. 10 along with TIO’s and PUEO’s attorneys. *See* Minute Order No. 10 [Doc. 65]. Notwithstanding that they had not yet been admitted as parties, BLNR and this Hearings Officer included any and all individuals or entities that moved to intervene in the upcoming contested case hearing on the certificate of service to ensure that they received notice of minute orders relating to the contested case. Indeed, if BLNR and this Hearings Officer had not done so, Mr. Fergerstrom would instead be arguing that BLNR and the Hearings Officer violated his due process rights by failing to provide him notice of such minute orders.

parties. See supra. Mr. Fergstrom is incorrect as this Hearings Officer was not deciding who is a petitioner. This Hearings Officer instead determined who should be a party to the upcoming contested case hearing.

The process to admit parties is detailed and governed by HAR § 13-1-31. HAR § 13-1-31(a) provides:

Except as otherwise provided in section 13-1-31.1, parties to a contested case shall be determined within a reasonable time following the ten-day period following the board meeting, the presiding officer shall notify all persons and agencies, including the applicant or alleged violator, as the case may be, who timely petitioned for the contested case hearing of the date and time for a hearing to determine whether any or all of the persons and agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case. Such notice shall also set the time for filing any objections to the admission of any requestor as a party to the contested case.

Id. (emphasis added).

The process used by this Hearings Officer to admit parties to the contested case hearing complied with HAR § 13-1-31. HAR § 13-1-31(a) only requires that the parties to the contested case be determined within “a reasonable time.” Id.⁴ The Rules of Practice and Procedure do not define “a reasonable time.” Nevertheless, as detailed supra in the Background section, this Hearings Officer determined the parties within 45 days of the contested case being submitted to her through Minute Order No. 4 and within 4 months of the matter being remanded to the BLNR pursuant to the Hawai‘i Supreme Court’s opinion in Mauna Kea Anaina Hou. This time period

⁴ HAR § 13-1-31(a) provides that the parties to the contested case hearing shall be determined “within a reasonable time following the ten-day period following the board meeting.” Id. Given the lengthy history of this case, and that this Hearings Officer determined the parties within 45 days of the contested case being submitted to her, TIO respectfully submits that this Hearings Officer has complied with HAR § 13-1-31(a) and its “reasonable time” requirement. Moreover, any delay in determining the parties has prejudiced TIO, not the Petitioners or Mr. Fergstrom. Indeed, the Petitioners have tried to delay at every step of this contested case.

is clearly “a reasonable time[,]” especially given the importance of the subject matter and the number of intervenors.⁵

2. **There is no basis to require UHH to resubmit its CDUP application.**

Mr. Fergerstrom argues that the “proper process” would be for UHH to resubmit their CDUP application. See Motion to Reconsider at 3. Mr. Fergerstrom does not cite to or submit any authority, nor is there any, to support his novel claim that the “proper process” is for UHH to resubmit its CDUP application. The Hawai‘i Supreme Court in Mauna Kea Anaina Hou remanded this matter to the BLNR “**so that a contested case hearing can be conducted before the Board or a new hearing officer.**” The Hawai‘i Supreme Court did not remand this matter to BLNR so that UHH can resubmit their CDUP application. Though the Hawai‘i Supreme Court did state that it was also remanding this matter to the BLNR “for other proceedings consistent with this opinion[,]” the opinion itself did not discuss the CDUP application. The opinion did not identify any deficiencies or issues with the CDUP application previously submitted by UHH. Consequently, there is no basis to require UHH to resubmit its CDUP application.⁶ The imposition of such a requirement would not be consistent with the Hawai‘i

⁵ Mr. Fergerstrom argues that the Hearings Officer “did not vet new applicants.” This Hearings Officer required potential parties to file a written motion or request detailing their interests relevant to the subject matter of this contested case and any other bases for their requests to intervene. This Hearings Officer also orally questioned each potential party that was present at the June 17, 2016 hearing. Such steps taken by this Hearings Officer were more than sufficient for her to determine whether to admit a particular party. Mr. Fergerstrom does not specify what else he believes this Hearings Officer should have done in determining the parties. Mr. Fergerstrom also does not cite to any legal authority that even suggests that the steps taken by this Hearings Officer were insufficient or improper.


⁶ Indeed, as an analogous example, when a civil case is remanded back to the Circuit Court, the plaintiff is not required to re-file the complaint unless the opinion identifies deficiencies with the complaint and the appellate court specifically directs the plaintiff to file an amended complaint. In comparison, the Hawai‘i Supreme Court in Mauna Kea Anaina Hou did

Supreme Court's opinion in Mauna Kea Anaina Hou. Mr. Fergerstrom's argument that UHH should resubmit their CDUP application is therefore meritless and the Fergerstrom Motions should be denied.⁷

III. CONCLUSION

Based on the foregoing, the Fergerstrom Motions should be denied. There is simply no basis to grant Mr. Fergerstrom the drastic relief he seeks in the Fergerstrom Motions.

DATED: Honolulu, Hawaii, August 1, 2016.



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not identify any deficiencies with UHH's CDUP application and did not direct UHH to re-submit its CDUP application.

⁷ Surprisingly, Mr. Fergerstrom seems to argue that because the Hawai'i Supreme Court's decision in Mauna Kea Anaina Hou vacated the CDUP, there is no CDUP to contest and therefore a contested case hearing is inappropriate at this time. See Motion to Reconsider at 3 (arguing that "if the permit is vacated, then there is no permit to contest"). The Hawai'i Supreme Court remanded this matter back to the BLNR for doing the same thing that Mr. Fergerstrom argues for in his Motion to Reconsider – i.e., that there must be an approved CDUP before a contested case hearing can be held.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ohē Mauka,
Hāmākua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that the foregoing document was served upon the following parties by the means indicated:

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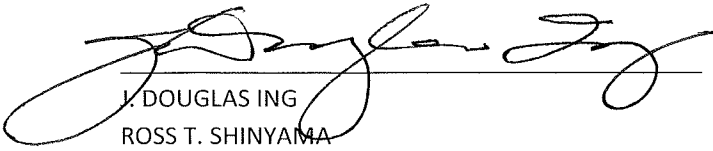
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DATED: Honolulu, Hawaii, August 1, 2016.

A handwritten signature in black ink, appearing to read "J. Douglas Ing", is written over a horizontal line. The signature is fluid and cursive.

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