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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, Kahohe Mauka, Hamakua
District, Island of Hawaii, TMK (3) 4-4-
015:009

Case No. BLNR-CC-16-002

**TMT INTERNATIONAL
OBSERVATORY, LLC'S
MEMORANDUM IN OPPOSITION TO
TEMPLE OF LONO MOTION FOR
RECONSIDERATION FILED
SEPTEMBER 28, 2016; CERTIFICATE
OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S MEMORANDUM IN OPPOSITION
TO TEMPLE OF LONO MOTION FOR RECONSIDERATION
FILED SEPTEMBER 28, 2016**

COMES NOW, TMT International Observatory, LLC ("TIO"), by and through its
counsel, Watanabe Ing LLP, and hereby submits this memorandum in opposition to Temple of
Lono Motion for Reconsideration filed September 28, 2016 ("Motion for Reconsideration").

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

I. **DISCUSSION**

Pursuant to Hawaii Administrative Rules (“HAR”) § 13-1-39(a), “the board may reconsider a decision it has made on the merits only if the party can show that: (1) new information not previously available would affect the result; or (2) a substantial injustice would occur.” In this case, Temple of Lono (“TOL”) has not shown either, and consequently, the Motion for Reconsideration should be denied.

A. **TOL failed to present any “new information not previously available.”**

In its Motion for Reconsideration, TOL argues that the Hearing Officer should reconsider the decision in Minute Order No. 19 which excludes certain issues from being addressed in the above-entitled contested case hearing, namely, issues regarding the sovereignty of the Kingdom of Hawaii, challenges to the legal status of the State of Hawaii, and challenges to the State’s ownership of and title to lands. However, TOL does not cite to any “new information not previously available that would affect the result.”

Instead, on page 4 of the Motion for Reconsideration, TOL restates its argument that “consideration of those issues would be germane to the Hearing Officer determining whether the Kingdom had a competing claim to the land that the State of Hawaii, through subordinate institutions, seeks to lease....” Those are the same arguments that TOL made on page 7 of its Opposition to Pueo Motion to Set the Issues filed July 20, 2016, when it stated that “the competing claims to the land in question” were “relevant and material to this case.” The Hearing Officer already reviewed and took into consideration these arguments when it issued Minute Order No. 19.

Furthermore, TOL’s citations to various cases for the proposition that “the law in the United States is a living thing” does not present new information that was previously

unavailable. Instead, all of the cases and laws TOL cites to were issued in 1857, 1942, 1954, and 2015, unequivocally prior to the filing of TOL's Opposition to Pueo Motion to Set the Issues on July 20, 2016, and therefore TOL could have cited those cases previously. Even so, those cases do not establish that the issues excluded are relevant to the above-entitled contested case hearing. Accordingly, the Motion for Reconsideration should be denied because TOL has failed to present any new information not previously available.

B. TOL failed to establish "substantial injustice."

TOL similarly fails to establish that the Motion for Reconsideration should be granted due to "substantial injustice." In fact, it is quite the opposite. There is no "substantial injustice" created by excluding issues that present non-justiciable political questions. Issues related to whether a Hawaiian Kingdom exists are sovereignty-related issues that are non-justiciable political questions, outside the subject matter jurisdiction of this proceeding. See Sai v. Clinton, 778 F. Supp. 2d 1, 6 (D.D.C. 2011) (noting that "federal courts have long recognized that the determination of sovereignty over a territory is fundamentally a political question beyond the jurisdiction of the courts" and so holding that the status of Hawaii as part of the United States is a political question). If TOL wishes to seek a venue elsewhere to challenge the legal status of the State of Hawaii, despite the declarations by the United States Supreme Court in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) that Hawaii is a State, TOL may do so. However, this contested case hearing regarding a conservation district use permit for the TMT project is not the venue to do so. There simply is no subject matter jurisdiction over this political question. Accordingly, exclusion of the sovereignty-related issues does not in any way create substantial injustice, and TOL has not shown otherwise. Having failed to establish any "substantial injustice," TOL's Motion for Reconsideration must be denied.

II. CONCLUSION

For the foregoing reasons, and all reasons appearing of record, TIO respectfully requests that TOL's Motion for Reconsideration be denied.

DATED: Honolulu, Hawaii, October 3, 2016.

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

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BOARD OF LAND AND NATURAL RESOURCES

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Contested Case Hearing Re Conservation
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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 above referenced document was served upon the following parties by the means indicated:

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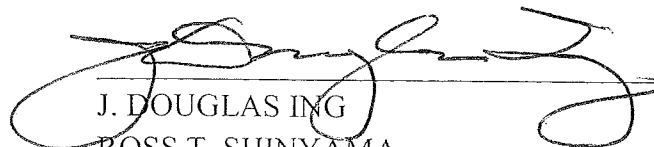
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