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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 HEARING
MEMORANDUM RE: STANDARD FOR
ADMISSIBILITY OF EVIDENCE;
CERTIFICATE OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S
HEARING MEMORANDUM RE: STANDARD FOR ADMISSIBILITY OF EVIDENCE**

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits this hearing memorandum to provide background on the applicable standard for the admissibility of evidence at this administrative agency contested case hearing.

As discussed in detail below, it is well-established under Hawaii law that evidence presented at administrative agency contested case hearings are not subject to the formal rules of evidence, and hearing officers may admit and consider all evidence, limited only by

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STATE OF HAWAII

considerations of relevancy, materiality and repetition, and policies relating to settlement discussions and recognized privileges.

As the Hawaii Supreme Court has recognized, “The rules of evidence governing administrative hearings are considerably more relaxed than those governing judicial proceedings. This is due in part [because of] the absence of a jury.” Price v. Zoning Bd. of Appeals, 77 Hawaii 168, 176 n.8, 883 P.2d 629, 637 n.8 (1994) (emphasis added) (citing 4 J. Stein, G. Mitchell & B. Mezines, Administrative Law § 22.01 (1994)).

The Hawaii Administrative Procedure Act (Hawaii Revised Statutes (“HRS”) Chapter 91) governs all agency procedures, including administrative contested case hearings. Hawaii Revised Statutes § 91-10 provides that administrative agencies conducting contested case hearings have substantial latitude to receive “any” evidence, subject only to statements made in conjunction with settlement discussions, agency rules for the exclusion of irrelevant and unduly repetitious evidence, and the recognized rules of privilege:

Except as provided in section 91-8.5 [relating to mediation statements and settlement offers], any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law.

Haw. Rev. Stat. § 91-10(1) (emphasis added).¹

¹ Consistent with the administrative procedures act, the administrative rules governing procedures before the Board of Land and Natural Resources broadly provide that the presiding officer in a contested case hearing “may exercise discretion in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial justice.” Haw. Admin. R. § 13-1-35.

In construing the Hawaii Administrative Procedure Act (and specifically, HRS § 91-10), the Hawaii Supreme Court noted that the act's mandate that "[a]ny oral or documentary evidence may be received" by an agency must be liberally construed. Dependents of Cazimero v. Kohala Sugar Co., 54 Haw. 479, 482, 510 P.2d 89, 92 (1973). The court observed that the legislative history of the administrative procedure act also supported the liberal admission of evidence, as the history indicated "that the direction chosen [by the Legislature] was towards the admission of any and all evidence [in administrative hearings] limited only by considerations of relevancy, materiality and repetition." Id. at 482-83, 510 P.2d at 92 (emphasis added).

The court further observed that the analogous federal statute (which served as a model for the Hawaii statute) was intended to "free administrative agencies from the bounds of any technical rules of evidence," and was also intended to permit agencies to "admit evidence that would have been inadmissible in common law trials," including hearsay.² Id. at n.10. The court instructed that when an agency is faced with "evidence of doubtful admissibility, it is preferable that it allow the admission of such evidence," for the practical reason of permitting all evidence to be available in the record in the event of appellate review. 54 Haw. at 482, 510 P.2d at 93.

The liberal standard of the admissibility of evidence in administrative hearings is also reflected in the established rule that even when ostensibly irrelevant or incompetent evidence is admitted during a hearing, the admission of such evidence alone is not grounds for reversal if there is "substantial evidence in the record to sustain the agency's determination" and the aggrieved party is not prejudiced. Shorba v. Board of Education, 59 Haw. 388, 398, 583 P.2d 313-19 (1978). Stated another way, unless an aggrieved party can show prejudice resulting from

² See, also Price, 77 Haw. at 176, 883 P.2d at 637 (noting that the "rules of evidence in administrative hearings, unlike those applicable to judicial proceedings, allow admission of hearsay evidence.")

the admission of ostensibly irrelevant or incompetent evidence, admission of such evidence alone is not grounds for reversal. Id.³

Based on the foregoing, TIO requests that the well-established standards for the admissibility and consideration of evidence in administrative agency contested case hearings be applied to this proceeding as stated herein.

DATED: Honolulu, Hawaii, October 19, 2016.

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

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³ Shorba is instructive in this regard. In connection with a school board's hearing on a teacher's termination for violation of the board's rule on corporal punishment, the Hawaii Supreme Court determined that the admission of improper evidence of a teacher's alleged incompetency did not result in prejudice where (1) the board did not rely on such improper evidence, and (2) the record included substantial evidence of teacher's violation of the board's rule on corporal punishment. Id. at 398-399, 583 P.2d at 319-320.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation
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BLNR Contested Case HA-16-002

CERTIFICATE OF SERVICE

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

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