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

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

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits this this supplemental hearing memorandum in response to recent arguments raised by Petitioner KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit Corporation ("Kahea") regarding the applicable standard for the admissibility of evidence at this administrative agency contested case hearing.

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Contrary to Kahea's arguments, TIO's Hearing Memorandum Re: Standard for Admissibility of Evidence filed on October 19, 2016 accurately summarizes the controlling standard for admissibility of evidence in this proceeding, and Kahea's recent reference to Diamond v. Dobbin, 132 Hawaii 9, 319 P.3d 1017 (2014) confirms that standard.

Diamond involved a shoreline certification by the Board of Land and Natural Resources (BLNR) for a parcel on Kauai and an appeal of that certification pursuant to Hawaii Revised Statutes (HRS) § 205A-42 (1993) and Hawaii Administrative Rules (HAR) §§ 13-222-10 and 13-222-26 (2003). Under Hawaii law, a shoreline determination constitutes an administrative contested case hearing. Diamond, 132 Hawaii at 33, 319 P.3d at 1041 (citing Diamond v. State Board of Land & Natural Resources, 112 Hawaii 161, 165, 145 P.3d 704, 708 (2006)).

Among numerous issues raised in the case was the propriety of BLNR's decision during the contested case hearing to disregard testimony submitted by a kama'aina beach user on behalf of petitioners regarding the shoreline location because BLNR concluded that the testimony: 1) "was not in the form of an affidavit or declaration"; 2) "was not attested to by anyone nor was any context for the document provided by [Petitioners]"; and 3) "[i]t is not clear from the document or [Petitioners'] Opening Brief [to the BLNR] whether the person who allegedly authored the document is an expert or what his expertise might be, if any." Id.

The Hawaii Supreme Court found that the BLNR's decision to exclude the testimony at issue was "manifestly contrary to HRS Chapter 91." Id. The court observed that HRS § 91-10 provides that in contested case hearings, "any oral or documentary evidence may be received," subject to agency rules for the exclusion of "irrelevant, immaterial or unduly repetitious evidence[.]" Id. (citing Haw. Rev. Stat. § 91-10 (Supp. 2003)) (emphasis added).

The court noted that “it is elemental that contested case hearings do not require that evidence presented to the BLNR must be in the form of an affidavit or declaration, or ‘attested to’,” and that instead, “any oral or documentary evidence may be received” unless such evidence is “irrelevant, immaterial, or unduly repetitious.” Id. (emphasis added).

Thus Diamond confirms, and is fully consistent with, the line of cases cited by TIO in its Hearing Memorandum Re: Standard for Admissibility of Evidence that, under Hawaii law, the rules of evidence governing administrative hearings are “considerably more relaxed than those governing judicial proceedings”; that evidence presented at administrative agency contested case hearings are not subject to the formal rules of evidence; and that hearing officers may admit and consider all evidence, limited only by considerations of relevancy, materiality and repetition, and policies relating to settlement discussions and recognized privileges. See, e.g., Price v. Zoning Bd. of Appeals, 77 Hawaii 168, 176 n.8, 883 P.2d 629, 637 n.8 (1994); Dependents of Cazimero v. Kohala Sugar Co., 54 Haw. 479, 482, 510 P.2d 89, 92 (1973).

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 27, 2016.


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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-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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

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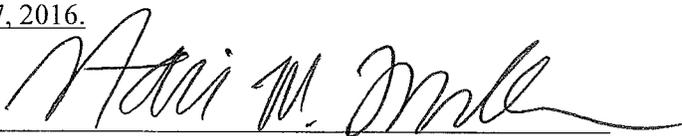
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