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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
MOTIONS TO DISMISS [DOC-427] and
DOC-429]; DECLARATION OF
COUNSEL; EXHIBIT "A";
CERTIFICATE OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S
MEMORANDUM IN OPPOSITION TO
MOTIONS TO DISMISS [DOC-427 and DOC-429]**

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits its Memorandum in Opposition to Temple of Lono's Motion to Dismiss TIO as Intervenor or, Alternatively, Stay this Proceeding [DOC-427] and Mr. Harry Fergestrom's Motion to Remove TMT/TIO as a Party, for Lack of Standing, Including Any and All Submissions into the Evidentiary Library [DOC-429] (collectively, the "Motions").

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

The Motions seek dismissal of TIO based upon the Third Circuit Court's recent order¹ regarding the consent for the sublease between the University of Hawaii at Hilo ("UH") and TIO for the Thirty Meter Telescope site (the "Sublease"); however, the Motions fail to acknowledge the Hearing Officer's basis for permitting TIO to intervene as a party in this proceeding, and the Motions must therefore be denied in their entirety.

I. ARGUMENT

Despite the petitioners' arguments, the Motions must be denied, and TIO must remain a party to this proceeding, given the basis for the Hearing Officer's decision granting TIO's intervention in this proceeding.

The Hearing Officer admitted TIO as a party to this proceeding pursuant to Hawaii Administrative Rules ("HAR") § 13-1-31(c), which provides that the BLNR may, in its discretion, admit as parties:

Other persons who can show a substantial interest in the matter. . .
. The board may approve such requests if it finds that the
requestor's participation will substantially assist the board in its
decision making. . . .

See Haw. Admin. R. § 13-1-31(c).

The Hearing Officer, "[a]fter full consideration of the record, arguments, representations, motions, [and] applications," granted TIO's motion to intervene as a party "due to TIO's substantial interest in the subject matter and because TIO's participation will substantially assist the Hearing Officer in her decision making." Minute Order No. 13 (July 21, 2016) [DOC-115]

¹ Order Granting in Part and Denying in Part Appellees State of Hawaii, Board of Land and Natural Resources, Department of Land and Natural Resources, and Chairperson Suzanne D. Case's Motion for Stay of Proceedings, or in the Alternative for the Court to Issue its Decision on Appeal, Filed October 25, 2016; Vacating Consent to Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and The University of Hawaii Under General Lease No. S-4191; and Remanding Matter to the Board of Land and Natural Resources, Filed January 6, 2017 in E. Kalani Flores v. Board of Land and Natural Resources, et al., Civil No. 14-1-00324, In the Circuit Court of the Third Circuit, State of Hawaii ("Order"), attached hereto as Exhibit "A".

at 4.² The Hearing Officer's order granting TIO's intervention did not reference, much less rely upon, the existence or validity of the Sublease, as it was not material to her decision to admit TIO as a party under HAR § 13-1-31(c).

Indeed, given the petitioners' arguments in opposition to TIO's intervention, the Hearing Officer (at the time she considered TIO's motion to intervene) was well-aware of the pendency of the separate administrative appeal filed by Petitioner E. Kalani Flores (the "Flores Appeal")³ and the issues in that administrative appeal; yet the Hearing Officer granted TIO's request to intervene.

Moreover, the Hearing Officer subsequently reiterated and reconfirmed the basis for TIO's intervention when she denied Mr. Fergstrom's motion for reconsideration of the order granting the intervention. See Minute Order No. 22 (October 10, 2016) [DOC-345] at 3 (holding, in part, that "The process used by this Hearing Officer to admit new parties to this contested case was authorized and consistent with the applicable Rules of Practice and Procedure found in Title 13, Chapter 1 of the Hawaii Administrative Rules.")

Given the foregoing, the Circuit Court's Order in the Flores Appeal does not change the basis for the admission of TIO as a party to this proceeding, and TIO therefore continues to have standing despite the entry of the Order. First, it is unquestionable that TIO, as the developer of the Thirty Meter Telescope, continues to have a "substantial interest" in the subject matter of this contested case hearing: the consideration of the Conservation District Use Application ("CDUA") for TIO's telescope on Mauna Kea.

² In contrast, HAR § 13-1-31(b) provides that "All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application."

³ TIO respectfully reserves all rights with respect to the Order and the proceedings in E. Kalani Flores v. Board of Land and Natural Resources, et al., Civil No. 14-1-00324, In the Circuit Court of the Third Circuit, State of Hawaii.

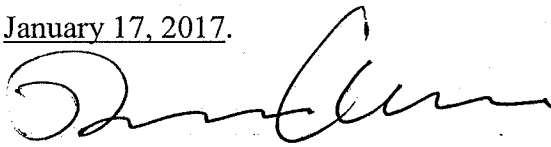
Second, there is also no reasonable dispute that TIO's participation has assisted, and will continue to assist, the Hearing Officer in the decision on the CDUA. TIO is in a unique position, for example, to provide detailed information to the Hearing Officer regarding plans for the Thirty Meter Telescope project, including the telescope's physical characteristics, the substantial public and scientific benefits of the project, TIO's mitigation plans and other facts that are relevant and material to the criteria that the Hearing Officer must consider pursuant to HAR § 13-5-30(c) for issuance of the Conservation District Use Permit.

Accordingly, based on the Hearing Officer's decision, in her sound discretion, to admit TIO as a party pursuant to HAR § 13-1-31(c), TIO (notwithstanding the entry of the Circuit Court's Order in the Flores Appeal) is -- and must continue to remain -- a party in this contested case hearing.

II. CONCLUSION

Based on the foregoing, and upon further argument that may be presented at any hearing of the Motions, the Motions must be denied in their entirety.

DATED: Honolulu, Hawaii, January 17, 2017.



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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF

Case No. BLNR-CC-16-002

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

**DECLARATION OF COUNSEL;
EXHIBIT "A"**

DECLARATION OF COUNSEL

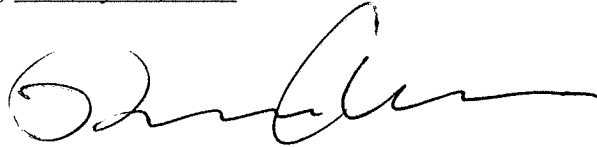
I, BRIAN A. KANG, hereby declare and state as follows:

1. I am an attorney licensed to practice law in the State of Hawaii and am one of the attorneys representing TMT International Observatory LLC, a non-profit organization ("TIO") in the above-captioned matter.
2. I make this Declaration based upon my personal knowledge and upon reliance of the files and records maintained by my office and in the normal and regular course of business.
3. Attached hereto as Exhibit "A" is a true and correct copy of the Order Granting in Part and Denying in Part Appellees State of Hawaii, Board of Land and Natural Resources, Department of Land and Natural Resources, and Chairperson Suzanne D. Case's Motion for Stay of Proceedings, or in the Alternative for the Court to Issue its Decision on Appeal, Filed October 25, 2016; Vacating Consent to Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and The University of Hawaii Under General Lease No. S-4191; and Remanding Matter to the Board of Land and Natural Resources, Filed January 6, 2017 in E.

Kalani Flores v. Board of Land and Natural Resources, et al., Civil No. 14-1-00324, In the
Circuit Court of the Third Circuit, State of Hawaii.

I, BRIAN A. KANG, declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, January 17, 2017.

A handwritten signature in black ink, appearing to read 'Brian A. Kang', written over a horizontal line.

BRIAN A. KANG

FILED

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STATE OF HAWAII
CIRCUIT COURT OF
THE THIRD CIRCUIT
CLERK *[Signature]*

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Attorneys for Appellant E. Kalani Flores

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

E. KALANI FLORES,
Appellant,

vs.

BOARD OF LAND AND NATURAL
RESOURCES; DEPARTMENT OF LAND
AND NATURAL RESOURCES;
WILLIAM J. AILA, JR., in his official
capacity as Chairperson of the Board of
Land and Natural Resources; STATE OF
HAWAI'I; and UNIVERSITY OF
HAWAI'I,

Appellees.

) CIVIL NO. 14-1-324 (Hilo)
) (Agency Appeal)
)
) ORDER GRANTING IN PART AND
) DENYING IN PART APPELLEES STATE
) OF HAWAI'I, BOARD OF LAND AND
) NATURAL RESOURCES, DEPARTMENT
) OF LAND AND NATURAL RESOURCES,
) AND CHAIRPERSON SUZANNE D.
) CASE'S MOTION FOR STAY OF
) PROCEEDINGS, OR IN THE
) ALTERNATIVE FOR THE COURT TO
) ISSUE ITS DECISION ON APPEAL, FILED
) OCTOBER 25, 2016; VACATING
) CONSENT TO SUBLEASE AND NON-
) EXCLUSIVE EASEMENT AGREEMENT
) BETWEEN TMT INTERNATIONAL
) OBSERVATORY LLC AND
) THE UNIVERSITY OF HAWAII
) UNDER GENERAL LEASE NO. S-4191;
) AND REMANDING MATTER TO THE
) BOARD OF LAND AND NATURAL
) RESOURCES
)
) HEARING:
) DATE: December 15, 2016
) TIME: 8:30 a.m.
) JUDGE: Honorable Greg K. Nakamura
)
) TRIAL DATE: None

EXHIBIT A

ORDER GRANTING IN PART AND DENYING IN PART APPELLEES STATE OF HAWAI'I, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND CHAIRPERSON SUZANNE D. CASE'S MOTION FOR STAY OF PROCEEDINGS, OR IN THE ALTERNATIVE FOR THE COURT TO ISSUE ITS DECISION ON APPEAL, FILED OCTOBER 25, 2016; VACATING CONSENT TO SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAI'I UNDER GENERAL LEASE NO. S-4191; AND REMANDING MATTER TO THE BOARD OF LAND AND NATURAL RESOURCES

This matter came on for hearing before the Environmental Court of the Third Circuit, Honorable Judge Greg K. Nakamura presiding, on December 15, 2016 at 8:30 a.m. Julie China and David Day appeared on behalf of Appellees State of Hawai'i, Department of Land and Natural Resources, Department of Land and Natural Resources, and Chairperson Suzanne D. Case. Arsima Muller appeared on behalf of Appellee University of Hawai'i. David Kauila Kopper appeared on behalf of Appellant E. Kalani Flores. No other appearances were made.

The Court, having carefully considered the Motion, the memoranda, declarations, and exhibits in support of and in opposition to the motion, and upon consideration of the arguments and authorities contained therein, the entire record on appeal and all briefing and arguments contained therein, finds good cause and, therefore, the Court hereby issues the following findings of fact, conclusions of law and order:

I. FINDINGS OF FACT

The Court makes the following findings of fact, however, to the extent that these findings of fact contain conclusions of law, they shall be considered as such.

1. This appeal relates to Appellee State of Hawai'i, Board of Land and Natural Resources, Department of Land and Natural Resources, and the Chairperson of the Board of Land and Natural Resources' (the "Board") consent to the Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawai'i (the "Sublease").

2. At a meeting held on June 27, 2014, the Board addressed whether to approve a consent to the Sublease as required by HRS § 171-36(a)(6)(the "Consent"). ROA 4.

3. At the same meeting, Appellant E. Kalani Flores (Appellant Flores) orally requested a contested case hearing on the Board's Consent to the Sublease. ROA 5 at 00122.

4. At the same meeting, the Board voted to approve the Consent before it took action on Appellant Flores' contested case hearing request. ROA 5 at 00122. The Board "stayed the effectiveness of the consent until administrative proceedings on any contested case requests" were concluded. *Id.*

5. Appellant Flores filed a timely written petition for a contested case hearing on the Board's Consent to the Sublease. ROA 7 at 00229. In his petition, Mr. Flores asserted that he is a Native Hawaiian who holds Mauna Kea sacred; that he "has substantial interest and connections to Mauna a Wākea (Mauna Kea);" and that he had "traditional and customary practices at the areas on Mauna Kea covered under the . . . proposed Sublease." *Id.* at 00230.

6. At a later meeting held on July 25, 2014, the Board denied Appellant Flores' request for a contested case hearing on the Board's Consent to the Sublease. ROA 9 at 00245.

7. Appellant Flores timely appealed the Board's denial of his contested case request to the Circuit Court of the Third Circuit in Civ. No. 14-1-324.

8. On September 15, 2015, Appellant Flores filed his Opening Brief.

9. On November 25, 2015, the Board filed its Answering Brief. On the same day, the University of Hawai'i filed its Answering Brief.

10. On December 2, 2015, the Supreme Court issued its decision in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

11. On January 13, 2016, Appellant Flores filed his Reply brief, wherein Appellant raised the intervening decision in *Mauna Kea Anaina Hou*.

12. On April 5, 2016, this Court issued an Order for Remand, which remanded this matter to the Board pursuant to HRS 91-14(e) for the limited purpose of considering the Hawai'i Supreme Court's decision in *Mauna Kea Anaina Hou* and taking appropriate action if necessary.

13. Although the Board invited briefing from the parties to address the Order of Remand, the Board took no action on the Order for Remand.

14. Instead, on October 25, 2016, the Board filed its Motion for Stay of Proceedings, or In the Alternative For The Court To Issue Its Decision on Appeal (the "Motion").

15. On November 29, 2016, the University of Hawai'i filed a Joinder to the Motion. On December 7, 2016, Appellant E. Kalani Flores filed an Opposition to the Motion. On December 12, 2016, the Board filed a Reply to the Motion.

16. All parties, both orally at the hearing on this matter as well as in their briefings on the Motion, requested that this Court issue a ruling on the matter of whether the Board's Consent to the Sublease was valid.

II. CONCLUSIONS OF LAW

The Court, based on the finding of fact above, makes the following conclusions of law. To the extent that these conclusions of law contain findings of fact, they should be considered as such.

1. Because all parties agree that this Court can issue a ruling in this matter, the interest of economy of time and effort supports declining the Board's request for a stay and granting the Board's request to issue a ruling. *City & Cty. of Honolulu v. Ing*, 100 Hawai'i 182, 193 n.16, 58 P.3d 1229, 1240 (2002).

2. The Court takes judicial notice of the Supreme Court of Hawai'i's opinion entered on December 2, 2015 in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

3. In *Mauna Kea Anaina Hou*, the Supreme Court concluded that "the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government in affording Appellants a contested case hearing" entitled Native Hawaiian cultural practitioners to a contested case hearing on a Board action permitting the construction of the TMT telescope. *Mauna Kea Anaina Hou*, 136 Hawai'i at 390.

4. *Mauna Kea Anaina Hou* further explains the Board's constitutional duty to hold a contested case hearing on decisions involving constitutional rights:

Under such facts, the role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not fulfilled simply by providing a level playing field for the parties. Rather, an agency of the State must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations. In particular, an agency must fashion procedures that are commensurate to the constitutional stature of the rights involved, and procedures that would provide a framework for the agency to discover the full implications of an action or decision before approving or denying it.

In light of the unique position that an agency occupies, the agency may be at the frontline of deciding issues that involve various interests that implicate constitutional rights. Especially in instances where an agency acts or decides matters over which it has exclusive original jurisdiction, that agency is the primary entity that can and, therefore,

should consider and honor state constitutional rights in the course of fulfilling its duties. Furthermore, to the extent possible, an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution. An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision.

Mauna Kea Anaina Hou, 136 Hawai'i at 414-15 (Pollack, J., *concurring*)(internal citations and quotations omitted).

5. Where a contested case hearing on a pending agency action is requested, it is improper for an agency to act prior to holding the requested hearing. *Id.* at 399.

6. Because Appellant Flores' request for a contested case hearing was not granted, his contested case hearing petition's assertion that he is a Native Hawaiian with "traditional and customary practices at the areas on Mauna Kea covered under the . . . proposed Sublease" must be taken as true. *Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 205 (2013).

7. Appellant Flores was denied the right to a contested hearing on the subject Consent to Sublease in violation of his constitutional right to a hearing under Article 12, Section 7 of the Hawai'i State Constitution and *Mauna Kea Anaina Hou*, and specifically section IV of the concurring opinion therein.

III. ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is HEREBY ORDERED:

1. That the Board's request for a stay of proceedings is DENIED;
2. That the Board's alternative request for a decision on appeal is GRANTED;
3. That the Court's April 5, 2016 Order on Remand is vacated;
4. That the Consent is vacated;
5. This matter is remanded to the Board of Land and Natural Resources for proceedings consistent with this Order.

DATED: Hilo, Hawai'i JAN - 6 2017



JUDGE OF THE ABOVE-ENTITLED COURT
GREG K. NAKAMURA

APPROVED AS TO FORM:

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E. KALANI FLORES v. BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; WILLIAM J. AILA, JR., in his official capacity as Chairperson of the Board of Land and Natural Resources; STATE OF HAWAI'I; and UNIVERSITY OF HAWAI'I, Civil No. 14-1-324 (Hilo); ORDER GRANTING IN PART AND DENYING IN PART APPELLEES STATE OF HAWAI'I, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND CHAIRPERSON SUZANNE D. CASE'S MOTION FOR STAY OF PROCEEDINGS, OR IN THE ALTERNATIVE FOR THE COURT TO ISSUE ITS DECISION ON APPEAL, FILED OCTOBER 25, 2016; VACATING CONSENT TO SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAI'I UNDER GENERAL LEASE NO. S-4191; AND REMANDING MATTER TO THE BOARD OF LAND AND NATURAL RESOURCES

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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DATED: Honolulu, Hawaii, January 17, 2017



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