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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 **JOINDER** TO THE UNIVERSITY  
OF HAWAII AT HILO'S **OPPOSITION**  
**TO TEMPLE OF LONO'S MOTION**  
**FOR SUMMARY JUDGMENT**  
**(DESECRATION)**, FILED  
SEPTEMBER 17, 2016 [DOC. 264],  
FILED FEBRUARY 22, 2017 [DOC. 473];  
CERTIFICATE OF SERVICE

RECEIVED  
OFFICE OF CONSERVATION  
AND COASTAL LANDS

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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

**TMT INTERNATIONAL OBSERVATORY, LLC'S  
JOINDER TO THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO  
TEMPLE OF LONO'S MOTION FOR SUMMARY JUDGMENT (DESECRATION),  
FILED SEPTEMBER 17, 2016 [DOC. 264], FILED FEBRUARY 22, 2017 [DOC. 473]**

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby joins in the *University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Desecration)*, filed September 17, 2016 (Doc. 264), filed February 22, 2017 (Doc. 473) (the "Opposition"). The Temple of Lono's Motion for Summary Judgment (Desecration), filed September 17, 2016 (Doc. 264) (the "Motion") should be denied for the reasons stated in the Opposition.

Hawaii law is very clear that an administrative agency only has those powers expressly granted to it by statute. Morgan v. Planning Dep't, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004). This contested case hearing is not the proper forum to adjudicate alleged violations of the Hawai'i Penal Code, including anticipatory violations of HRS § 711-1107 as alleged in the Motion, because no statute has granted the BLNR with the power to do so. Indeed, as explained below, neither the Hawai'i Penal Code nor the enabling statutes for the BLNR provide the BLNR with jurisdiction over criminal offenses.

Nothing in the Hawai'i Penal Code provides the BLNR with jurisdiction over criminal offenses, including alleged violations of HRS § 711-1107.<sup>1</sup> Instead, HRS § 603-21.5 confers upon the circuit courts of the State of Hawaii jurisdiction over all "criminal offenses cognizable under the laws of the State," except for those offenses "otherwise expressly provided." To that

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<sup>1</sup> The statute at issue, HRS § 711-1107(3), provides that "[a]ny person convicted of committing the offense of desecration **shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both.**" Haw. Rev. Stat. §711-1107(3) (emphasis added). HRS § 701-107(1) provides in relevant part, "[a]n offense defined by this Code or by any other statute of this State for which a sentence of imprisonment is authorized constitutes a crime." Because HRS § 711-1107(3) authorizes a sentence of imprisonment, desecration constitutes a criminal offense.

end, the circuit courts are expressly authorized to “enjoin or prohibit any violation of the laws of the State.” Haw. Rev. Stat. § 603-23. By comparison, HRS § 604-8 confers upon the district courts of the State of Hawaii limited jurisdiction of “criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without fine[,]”<sup>2</sup> *i.e.*, misdemeanor cases. Haw. Rev. Stat. § 604-8.

The procedures applicable to prosecuting criminal offenses in the circuit and district courts are set forth in the Hawai‘i Penal Code. See Haw. Rev. Stat. § 806-6, *et seq.* (criminal procedures applicable in circuit courts); see also Haw. Rev. Stat. § 805-1 *et seq.* (criminal procedures applicable in district courts); see also Haw. Rev. Stat. § 806-71 (regarding sentencing, it is “the court or judge before which or whom the conviction is had” that is responsible for sentencing the accused). None of these criminal procedures are applicable to this contested case hearing.

Nothing in the enabling statutes for the BLNR provides it with jurisdiction over criminal offenses. See Haw. Rev. Stat. §§ 26-15 (composition of BLNR), 171-3 (recognizing the BLNR as the executive board of the DLNR), and 171-6 (powers and functions of the BLNR). The Motion does not (and cannot) cite any legal authority in support of the proposition that the BLNR has jurisdiction to adjudicate the alleged anticipatory violations of HRS § 711-1107 because no such authority exists. Quite simply, the BLNR does not have jurisdiction to adjudicate Hawai‘i Penal Code offenses, including HRS § 711-1107.

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<sup>2</sup> Except that in any misdemeanor case under which a defendant has a right to a trial by jury, the timely demand for a trial by jury divests the district court of jurisdiction, and confers jurisdiction on the circuit court. Haw. Rev. Stat. § 604-8.

Based on the positions herein, and for all the reasons and authorities stated in the Opposition, the Motion should be denied.

DATED: Honolulu, Hawaii, February 28, 2017.

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

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

**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that the foregoing document was served upon the following parties by e-mail only unless otherwise indicated below:

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