

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

IN THE MATTER OF	)	CASE NO. BLNR-CC-16-002
)	
Contested Case Hearing Re Conservation District	)	Minute Order No. <u>65</u>
Use Application (CDUA) HA-3568 For the	)	(Order Denying the Temple of
Thirty Meter Telescope at the Mauna Kea Science	)	Lono Motion to Dismiss TIO
Reserve, Ka`ohe Mauka, Hamakua, Hawai`i	)	as Intervenor or Alternatively,
TMK (3) 4-4-015:009	)	Stay This Proceeding (Doc. 427)
	)	and Harry Fergerstrom’s Motion
	)	to Remove TMT/TIO as a Party,
	)	for Lack of Standing Including
	)	Any and All Submissions Into
	)	the Evidentiary Library (Doc. 429))
)	
	)	Certificate of Service

MINUTE ORDER NO. 65

(Order Denying the Temple of Lono Motion to Dismiss TIO as Intervenor or Alternatively, Stay This Proceeding (Doc. 427) and Harry Fergerstrom’s Motion to Remove TMT/TIO as a Party, for Lack of Standing Including Any and All Submissions into the Evidentiary Library (Doc. 429))

The Temple of Lono filed a Temple of Lono Motion to Dismiss TIO as Intervenor or Alternatively, Stay this Proceeding; Memorandum in Support; Exhibits 1 and 2 (“Lono Motion”) (Doc. 427), on December 15, 2016. Harry Fergerstrom filed a Motion to Remove TMT/TIO as a Party, for Lack of Standing Including Any and All Submissions into the Evidentiary Library; Memorandum of Support (“Fergerstrom Motion”) (Doc. 429), on December 16, 2016.

In addition to the two motions, the following submissions were considered:

Doc. #	Filed	Party	Title
428	16-Dec-16	Lono	Exhibits 1 and 2 to Temple of Lono Motion to Dismiss as Intervenor TIO or, Alternatively to Stay This Proceeding; Memorandum in Support; Exhibits 1 and 2
440	10-Jan-17	UHH	Applicant University of Hawai'i at Hilo's Objection to the Temple of Lono's Motion to Dismiss TIO as an Intervenor or, Alternatively, Stay This Proceeding [Doc.427] and Fergerstrom's Motion to Remove TMT/TIO as a Party, for Lack of Standing, Including Any and All Submissions into the Evidentiary Library [Doc.429]; Declaration of Counsel
441	17-Jan-17	TIO	TMT International Observatory, LLC's Memorandum in Opposition to Motions to Dismiss [Doc-427] (sic) and Doc-429]; Declaration of Counsel; Exhibit "A"

The Lono Motion seeks to dismiss TIO from this contested case hearing or, in the alternative, stay this proceeding, on the basis of a ruling by the Third Circuit Court on December 15, 2016, that voided the sublease approval given to TIO for the Thirty Meter Telescope. The Fergerstrom Motion is similarly based upon the Third Circuit Court voiding of the sublease. Both movants argue that the voiding of TIO's sublease eviscerates TIO's property interests that may have given rise to TIO's admission as a party in this contested case hearing. "If there is now no sublease, then all the claims regarding a property interest in land are no longer applicable." Lono Motion at page 3. "In light of today's invalidation of the sublease between the University of Hawaii and TMT/TIO, TMT/TIO no longer has the special discretionary condition that allowed to proceed as a party to this contested case." Fergerstrom Motion at page 2.

Both movants argue in the alternative, that the contested case hearing should be stayed to provide more information and alleviate unnecessary burdens on legitimate parties. "If TIO is not legitimately an intervenor, the remaining parties should not be burdened with preparing and conducting cross examination of witnesses presented by a non-party." Lono Motion at page 4.

UHH and TIO assert that Minute Order No. 13 clearly sets out the grounds for TIO's admission as a party and there was no reliance on or reference to the TIO Sublease when the decision was made. TIO argues that:

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)

TIO Opp. Memo at page 2. (Doc. 441)

Both TIO and UHH strongly object to the motions, reasoning that the Circuit Court ruling regarding the sublease "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." TIO Opp. Memo at page 3. (Doc. 441)

Minute Order No. 13 is very clear about the issue of TIO's admission as a party to this contested case hearing. At page 4, Minute Order No. 13 states:

Motion to Have TMT International Observatory, LLC Admitted As A Party in the Contested Case Hearing. The TIO Motion is GRANTED 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.

The Circuit Court's decision about the sublease has no bearing on TIO's admission as a party to this contested case hearing. The Lono Motion and Fergerstrom Motion are meritless.

Based upon the Motion, all related submissions from counsels and/or parties, all applicable law, the entire record having been considered by the Hearing Officer,

IT IS HEREBY ORDERED that the Motion is DENIED.

Motion to Reconsider. A party, who believes it appropriate, may file a motion to reconsider using the procedure set out herein. Any Motion for Reconsideration shall not be used to reargue the motion or set out positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing. AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114 (1992).

The deadline for submission of any **motion** to reconsider this minute order is no later than **5 business days** after the date this Minute Order is filed in the Documents Library. Any **responses to motions to reconsider**, shall be submitted no later than **10 business days** after this order is filed in the Documents Library; essentially 5 business days after the deadline for motions to reconsider.

Any Motion to Reconsider shall be considered a non-hearing motion unless otherwise designated by the Hearing Officer.

DATED: Honolulu, Hawai'i, June 5, 2017.



Judge Riki May Amano (Ret.)
Hearing Officer

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-16-02
Document title: **Minute Orders 60-67**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by email (when indicated) on June 5, 2017 and by regular mail on June 5, 2017:

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