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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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| IN THE MATTER OF<br><br>Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009 | Case No. BLNR-CC-16-002<br><br>THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO PETITIONER CLARENCE KUKAUAKAHI CHING'S EXCEPTIONS TO HEARING OFFICER'S |

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED AS DOCUMENT 783 ON JULY 26, 2017 [DOC. 831]; APPENDIX A; CERTIFICATE OF SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO PETITIONER CLARENCE KUKAUAKAHI CHING'S EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED AS DOCUMENT 783 ON JULY 26, 2017 [DOC. 831]**

The University of Hawai'i at Hilo ("**UH Hilo**") and Intervenor TMT International Observatory, LLC ("**TIO**") jointly submit the following brief in response to Petitioner Clarence Kukauakahi Ching's ("**Ching**") *Exceptions to Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Decision and Order Filed as Document 783 on July 26, 2017*, filed August 21, 2017 [Doc. 831] ("**Ching's Exceptions**") pursuant to Hawai'i Administrative Rules ("**HAR**") § 13-1-43.

## I. INTRODUCTION

On July 26, 2017, after presiding over forty-four days of testimony from October 2016 through early March 2017, and reviewing hundreds of exhibits, Judge (Ret.) Riki May Amano ("**Hearing Officer**") issued her detailed Proposed Findings of Fact, Conclusions of Law and Decision and Order [Doc. 783] ("**HO FOF/COL**"). The Hearing Officer recommended that the Conservation District Use Application HA-3568 ("**CDUA**") for the Thirty Meter Telescope ("**TMT**") Project and the attached TMT Management Plan be approved subject to a number of conditions stated therein. *See* HO FOF/COL at 260-263.

The Board of Land and Natural Resources ("**BLNR**") issued Minute Order No. 103 on July 28, 2017 [Doc. 784]. Pursuant to Minute Order No. 103, the parties to the Contested Case

Hearing ("**CCH**") were given until no later than August 21, 2017 at 4:00 p.m. to file exceptions to the HO FOF/COL. Minute Order No. 103 expressly required the following for any exceptions:

> The exceptions shall: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken (2) identify that part of the recommendations to which objections are made; and (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendation. The grounds not cited or specifically urged are waived.

Minute Order No. 103 at 1; *see also* HAR § 13-1-42(b).

Minute Order No. 103 also gave the parties to the CCH until September 11, 2017 at 4:00 p.m. to file any responsive briefs. Minute Order No. 103 expressly required the following for any responsive briefs:

> The responsive briefs shall: (1) answer specifically the points of procedure, fact, law, or policy to which exceptions were taken; and (2) state the facts and reasons why the recommendations should be affirmed.

Minute Order No. 103 at 2; *see also* HAR § 13-1-43(b).

The BLNR has scheduled oral arguments on the CDUA for September 20, 2017 at 9:00 a.m. *See* Minute Order No. 103 at 2.

## II. STANDARD OF REVIEW

Ching and the other Petitioners/Opposing Intervenors do not state a position on the applicable standard that BLNR must review the HO FOF/COL. Hawai'i Revised Statutes ("**HRS**") § 91-11 sets out the procedure that is to be followed by an agency where a hearing officer has been employed:

> **Examination of evidence by agency.** Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself,

> shall not be made until a proposal for decision[1] containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, ***who shall personally consider the whole record or such portions thereof as may be cited by the parties.***

HRS §91-11 (emphasis added).

The Hawai'i Supreme Court has stated that "[t]he general rule is that if an agency making a decision has not heard the evidence, it must at least consider the evidence produced at a hearing conducted by an examiner or a hearing officer." *White*, 54 Haw. at 13, 501 P.2d at 361. Quoting from the Revised Model State Administrative Procedure Act, Fourth Tentative Draft (1961) ("**RMSAPA**"), the Hawai'i Supreme Court explained that this requirement "is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude signing on the dotted line." *Id.* at 14, 501 P.2d at 362 (citation and internal quotations omitted).

The Hawai'i Intermediate Court of Appeals ("**ICA**") described the "function and effect of the hearing officer's recommendations" in *Feliciano v. Board of Trustees of Employees'*

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[1] The Hawai'i Supreme Court has held that a hearing officer's recommendations can serve as the agency's "proposal for decision" under HRS § 91-11. *See White v. Board of Education*, 54 Haw. 10, 14, 501 P.2d 358, 362 (1972); *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 408, 652 P.2d 1143, 1146 (1982); *see also County of Lake v. Pahl*, 28 N.E.3d 1092 (Ind. Ct. App. 2015) (holding that it is not uncommon or per se improper for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party); *Ivie v. Smith*, 439 S.W.3d 189 (Mo. 2014) (holding that while trial courts must act independently in making findings of fact and conclusions of law, it is not error for trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings); *East Coast Paving & Sealcoating, Inc. v. North Allegheny School Dist.*, 111 A.3d 220 (Pa. Commw. Ct. 2015) (holding that there is nothing untoward about a trial court adopting a party's proposed findings of fact and conclusions of law as its own).

*Retirement System*, 4 Haw. App. 26, 659 P.2d 77 (1983). The ICA explained that the recommendations are "to provide guidance" and an agency is "not bound by those findings or recommendations." *Id.* at 34, 659 P.2d at 82. Indeed, an agency, after review of the reliable, probative and substantial evidence in the proceeding, may reject a hearing officer's recommendations and "ma[ke] its own findings and conclusions based on the same evidence." *Id.*

Therefore, BLNR must determine whether the reliable, probative, and substantial evidence in the record as a whole supports approval of the CDUA. However, and notwithstanding that it is not binding, BLNR should give due consideration to, and be guided by, the HO's FOF/COL, particularly her determinations on the credibility of the witnesses that appeared before her. The RMSAPA provides that "[i]n reviewing findings of fact in a recommended order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses." RMSAPA § 415(b) (October 15, 2010). Section 415(b) of the RMSAPA is consistent with the well-settled legal principle that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawai'i 106, 119, 170 P.3d 357, 370 (2007) (citation omitted); *see also* Haw. R. Civ. P. 52(b) (providing that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses").

Other jurisdictions have gone even further and held that a hearing officer's credibility determinations are entitled to deference so long as the record supports the determination. In *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 267 F.3d 877 (9th Cir. 2001), the Ninth Circuit was confronted with the question of whether to affirm the State Review Officer's

decision to deviate from the hearing officer's credibility determination of a witness. Joining its colleagues in the Second, Third, Fourth, and Tenth Circuits, the Ninth Circuit held that

> due weight should be accorded to the final State determination . . . unless [the] decision deviates from the credibility determination of a witness whom only the [hearing officer] observed testify. **Traditional notions of deference owed to the fact finder compel this conclusion. The State Review Officer is in no better position than the district court or an appellate court to weigh the competing credibility of witnesses observed only by the Hearing Officer.** This standard comports with general principles of administrative law which give deference to the unique knowledge and experience of state agencies while recognizing that **a [hearing officer] who receives live testimony is in the best position to determine issues of credibility.**

*Id.* at 889 (emphases added); *see Doyle v. Arlington Cty Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1992) (holding that where two state administrative decisions differ only with respect to the credibility of a witnesses, the hearing officer is entitled to be considered prima facie correct); *Karl by Karl v. Board of Educ. of Geneseo Cent. School Dist.*, 736 F.2d 873, 877 (2d Cir. 1984) ("There is no principle of administrative law which, absent a disagreement between a hearing officer and reviewing agency over demeanor evidence, obviates the need for deference to an agency's final decision where such deference is otherwise appropriate."); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520-29 (3d Cir. 1995) ("[C]redibility-based findings [of the hearing officer] deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."); *O'Toole v. Olathe Dist. Schs. Unified Sch Dist. No. 233*, 144 F.3d 692, 699 (10th Cir. 1998) ("[W]e will give due weight to the reviewing officer's decision on the issues with which he disagreed with the hearing officer, unless the hearing officer's decisions involved credibility determination and assuming, of course, that the record supports the reviewing officer's decision."); *see also McEwen v. Tennessee Dept. of Safety*, 173 S.W.3d 815, 824 (Tenn. Ct. App.

2005) (holding that if credibility plays a pivotal role, then the hearings officers' or administrative judge's credibility determinations are entitled to substantial deference); *Stejskal v. Dep't. of Administrative Svcs.*, 665 N.W.2d 576, 581 (Neb. 2003) (holding that agencies may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the hearing officer's judgment as to credibility).

Consequently, BLNR should consider and give due regard to the Hearing Officer's credibility determinations so long as those determinations are supported by the reliable, probative, and substantial evidence in the whole record. *See* HRS § 91-14 (providing that administrative findings, conclusions, decisions and orders must be supported by "the reliable, probative, and substantial evidence in the whole record").

## III. GENERAL OBJECTIONS TO CHING'S EXCEPTIONS

UH Hilo and TIO generally object to Ching's Exceptions to the extent that they do not comply with Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b). In many instances, Ching's Exceptions do not cite to specific findings or conclusions in the HO FOF/COL, and instead cite to findings or conclusions proposed by UH Hilo and TIO, and/or cite to findings or conclusions proposed by Ching himself.

UH Hilo and TIO object to each of the points in Ching's Exceptions to the extent that they are irrelevant, inapplicable, immaterial, mischaracterize the evidence, misstate or misrepresent the record, rely on evidence that is not credible, biased, or incomplete, and/or not supported by the evidence in the record. UH Hilo and TIO also object to Ching's Exceptions to the extent they assert alleged "findings" or "conclusions" that are beyond the scope of issues set forth in Minute Order No. 19 [Doc. 281] or beyond the scope of the authority delegated by BLNR to the Hearing Officer, or by the legislature to BLNR for these proceedings.

UH Hilo and TIO further object to Ching's Exceptions to the extent that they raise procedural issues that were previously raised (in some cases, multiple times by multiple parties and through multiple motions for reconsideration) during the course of the CCH, and the arguments were previously fully briefed, considered and rejected by the Hearing Officer or BLNR.

UH Hilo and TIO further object to Ching's Exceptions to the extent they seek to challenge the Final Environmental Impact Statement ("**FEIS**") for the TMT Project. This proceeding is not an EIS challenge; Ching's ability to make such a challenge expired long ago, and he cannot use this proceeding to reopen the FEIS approval process. This proceeding pertains only to the CDUA and is entirely governed by applicable constitutional law, HRS Chapter 183, and the Conservation District rules, HAR Title 13, Chapter 5 that are genuinely at issue here.

UH Hilo and TIO also object to Ching's Exceptions to the extent they are not supported by the record and/or applicable legal authority. As set forth in the HO FOF/COL, substantial evidence has been adduced to show that the CDUA satisfies the eight criteria as set forth in HAR § 13-5-30(c). The record also shows that the TMT Project is consistent with UH Hilo's and BLNR's obligations under the public trust doctrine, to the extent applicable, as well as under *Ka Pa'akai*, and Article XI, section I and Article XII, section 7 of the Hawai'i Constitution.

Ultimately, it is evident that Ching is categorically opposed to the construction of the TMT Project regardless of whether or not it satisfies the legal criteria applicable to the CDUA. No location on the mountain, and no combination of mitigation measures, will make the TMT Project acceptable to Ching. That position is not supported by the law.

**Appendix A** contains general objections to Ching's Exceptions, which UH Hilo and TIO hereby incorporate by reference into their response to each of Ching's Exceptions, to the extent

applicable.

In addition to the general objections in Appendix A, UH Hilo and TIO respond to Ching's Exceptions below. Citations to the evidence in the record provided herein are not intended to be exhaustive or comprehensive, but demonstrate evidentiary support for UH Hilo and TIO's responses and objections. Pursuant to Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b), UH Hilo and TIO object to all unsupported assertions in Ching's Exceptions, and BLNR should disregard all such unsupported assertions.

The FOF/COL and page numbers referenced herein follow those as provided in Ching's Exceptions. References to the HO FOF/COL are denoted by the prefix "HO FOF" and "HO COL" for the numbered FOF or COL, respectively, in the HO FOF/COL.

Acronyms and defined terms used herein are defined in the Index of Select Defined Terms in the HO FOF/COL.

## IV. RESPONSES TO CHING'S EXCEPTIONS

As Ching did not number his exceptions, the arguments made in Ching's Exceptions are addressed topically below, and similar arguments made by Ching in various portions of his filing are addressed together. As discussed in detail below, Ching's arguments lack merit, and his Exceptions should be denied.

### A. The hearing officer properly admitted TIO as an intervenor to the contested case proceeding

BLNR should reject Ching's argument that the Hearing Officer "violated" HAR § 13-1-29 by adding "new" parties (including, presumably, TIO) to the contested case hearing. Ching's Exceptions at 6-7. The fallacy of Ching's argument is that the Hearing Officer did *not* add "new" parties to this contested case hearing pursuant to *HAR § 13-1-29*, but *did* permit various individuals and entities (including TIO, PUEO, and all Opposing Intervenors) to intervene in this

proceeding pursuant to *HAR § 13-1-31(c)*. *See* Minute Order No. 13, filed July 21, 2016 [Doc. 115].

HAR § 13-1-31(c) provides for the discretionary admission of parties:

> Other persons who can show a substantial interest in the matter may be admitted as parties. The board may approve such requests if it finds that the requestor's participation will substantially assist the board in its decision making. The board may deny any request to be a party when it appears that:
>
> (1) The position of the requestor is substantially the same as the position of a party already admitted to the proceedings; and
>
> (2) The admission of additional parties will not add substantially new relevant information or the addition will make the proceedings inefficient and unmanageable.

HAR § 13-1-31(c).

The Hearing Officer found that TIO could properly 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 13 at 4. *See also* HO COL 25 (concluding that "TIO's participation has substantially helped the Hearing Officer in her decision making").

There is in fact, substantial, reliable and credible evidence in the record to support TIO's admission as a party in this proceeding pursuant to HAR § 13-1-31(c), given the detailed and comprehensive evidence presented by TIO regarding the plans for the TMT Project, the scientific value of the project, extensive mitigation measures, community benefits, and other matters. *See, e.g.,* Minute Order No. 44, filed April 20, 2017 [Doc. 553] at 37-38 (noting TIO exhibits admitted into evidence); *see also, e.g.,* Tr. 12/19/16 and 1/4/17 (testimony of Dr. Edward Stone), and Tr. 10/25/16, 1/3/17, and 1/4/17 (testimony of Dr. Gary Sanders).

Given the foregoing, as the Hearing Officer based her decision to admit TIO and the other intervenors on HAR § 13-1-31(c) (and not HAR § 13-1-29), and there was substantial,

reliable and credible evidence to support the Hearing Officer's decision, Ching's straw-man argument that the Hearing Officer allegedly "violated" HAR § 13-1-29 must be denied.

**B. The notice of the first pre-hearing conference was proper**

Ching's assertion that Minute Order No. 5, filed May 9, 2017 [Doc. 16] "violated the 15-day rule" is incorrect.[2] Ching does not cite any law supporting his argument; however, it appears that Ching is relying upon HAR § 13-1-31.2, which states:

> Notice of hearing. After a determination is made that a contested case hearing is required and the parties have been determined, a written notice of hearing shall be served on parties by registered or certified mail in accordance with section 91-9.5(a), HRS, and shall be served on all persons or agencies admitted as a party at their last recorded addresses at least fifteen days before the hearing date. If notice by publication is permitted under section 91-9.5(b), it shall be published at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen calendar days prior to the hearing date.

HAR § 13-1-31.2.

Under the well-accepted rules of statutory interpretation, where language is plain and unambiguous, it must be given its "plain and obvious meaning." *Awakuni v. Awana*, 115 Hawai'i 126, 133, 165 P.3d 1027, 1034 (2007) (citation omitted). Under a plain reading of HAR § 13-1-31.2, the phrase "written notice of hearing" clearly refers to a written notice of the "contested case hearing" since the first sentence of the rule provides in pertinent part that "After a determination is made that a *contested case hearing* is required and the parties have been determined, *a written notice of hearing* shall be served on parties . . . ."

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[2] Ching cites "FOF 40" in connection with this particular exception; however, it appears that the correct citation is to HO FOF 46 (not 40) ("On May 9, 2016, Minute Order No. 5 was issued to UHH and the MKAH Petitioners, setting a pre-hearing conference on May 16, 2016. [Doc. 16]. The purpose of the prehearing conference was to discuss the record, parties, anticipated pre-hearing motions, a motions hearing(s) schedule, and other procedural and logistical matters.")

Thus, while Ching's argument is that Minute Order No. 5 allegedly "violated" this 15-day notice rule (because the minute order was filed on May 9, 2017 and the prehearing conference was scheduled for May 16, 2016), the rule clearly does not apply to *prehearing* conferences, which take place *prior to* a contested case hearing to discuss administrative matters.

The conduct of prehearing conferences is instead governed by HAR § 13-1-36, which provides, in that:

> §13-1-36 Prehearing conference; exchange of exhibits; briefs. (a) The presiding officer may hold or cause to be held pre-hearing conferences with the parties for the purpose of formulating or simplifying the issues, written testimony, setting of schedules, exchanging names of witnesses, limitation of number of witnesses, and such other matters as may expedite orderly conduct and disposition of the proceeding as permitted by law.
>
> (b) The presiding officer may request briefs setting forth the issues, facts and legal arguments upon which the parties intend to rely and the presiding officer may fix the conditions and time for the filing of briefs and the number of pages. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities.

HAR § 13-1-36.

Notably, HAR § 13-1-36 does not specify a specific time frame for providing notice of prehearing conferences, and it was well within the Hearing Officer's discretion and authority to provide reasonable notice and schedule the prehearing conference for May 16, 2016. *See* HAR § 13-1-32(c) (granting the Hearing Officer all powers incident to administering a contested case hearing, including the power to "dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing").

Ching's exception on this issue must therefore be denied.

### C. The Hearing Officer properly confined the record to the evidence in this contested case hearing

Ching's argument that the Hearing Officer should have included the record from the prior contested case hearing that took place in 2011 is without merit. *See* Ching's Exceptions at 7-8.[3] As Ching acknowledges, BLNR's April 12, 2013 decision and order following the first contested case hearing was vacated through an appeal filed by Ching and the other Petitioners by the Supreme Court's decision in *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015) ("***MKAH***"). In *MKAH*, the Supreme Court expressly ordered that the case be remanded to the circuit court to further remand to the BLNR "so that a contested case hearing can be conducted before the board or a new hearing officer, or for other proceedings consistent with this opinion." *MKAH*, 136 Hawai'i at 388, 363 P.3d at 236. On February 22, 2016, the Third Circuit Court issued its remand order, remanding this matter to BLNR. *See* Minute Order No. 2, filed April 8, 2016 [Doc. 3].

Given the Supreme Court's order in *MKAH* that a contested case hearing be held in this matter before BLNR or a "new hearing officer," it would not have made sense (and in fact would have contravened the Supreme Court's order) for Judge Amano (as the new Hearing Officer) to include in the *current* record, the record of the *prior* contested case hearing, from which BLNR based its April 12, 2013 decision and order, and which, in turn was vacated by the Hawai'i Supreme Court.

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[3] *See* HO FOF/COL at 7 ("The following Findings of Fact ('**FOF**'), Conclusions of Law ('**COL**'), and Decision and Order are based on the records maintained by the Department of Land and Natural Resources ('**DLNR**') in CDUA HA-3568 and the witness testimonies and exhibits presented during the evidentiary hearing for this contested case. The hearing was held from October 20, 2016 through March 2, 2017. Exhibits were received into evidence after the hearing.")

Ching's reliance on HAR § 13-1-32.4 does not support his argument, and the application of the rule as Ching suggests would lead to an absurd result. The rule requires that "[r]ecords directly relating to the application that are on file with the board, including, but not limited to, the record of the public hearing (if held), shall be a part of the record of the contested case[.]" HAR § 13-1-32.4. Under a plain reading of the rule, the rule does not require that the entire record of a *prior* contested case hearing be included in the record of a *subsequent* contested case hearing before a *new* hearing officer on *remand* (which occurred because a prior order of BLNR based on the prior record was vacated by an order of the Hawai'i Supreme Court). Ching's interpretation and application of the rule under these circumstances cannot be correct. *See, e.g., Morgan v. Planning Dep't, Cnty. of Kaua'i,* 104 Hawai'i 173, 185, 86 P.3d 982, 994 (2004) (citing *Iddings v. Mee-Lee*, 82 Hawai'i 1, 15, 919 P.2d 263, 277 (1996)) (interpreting statute to avoid an absurd result). More importantly, however, Ching (aside from broadly claiming that the entire record of the 2011 contested case hearing should be part of the current record), does not cite any specific documents or other evidence "relating to the application that are on file with the board" that he believes were not properly included in the record of this current contested case proceeding.[4] Thus, Ching has waived any argument with respect to any violation of HAR § 13-1-32.4.

Finally, Ching takes exception with the Hearing Officer's statement that the HO FOF/COL is "based on the records maintained by the Department of Land and Natural Resources ("DLNR") in CDUA HA-3568 and the witness testimonies and exhibits presented during the evidentiary hearing for this contested case." Ching's Exceptions at 8 (citing HO FOF/COL at 7).

[4] The Hearing Officer, consistent with HAR § 13-1-32.4, in fact ordered BLNR on May 25, 2016 to "prepare a file consisting of the University of Hawai'i at Hilo's Application for the Permit with attachments, the Staff Report and any record of hearings prior to the BLNR's decision at the February 25, 2011 meeting." *See* Minute Order No. 7, filed May 25, 2016 [Doc. 44].

Ching again claims that the Hearing Officer did not consider records relating to the application, but again, he cites no evidence to support his claim, much less any specific documents or other evidence he claims were not properly included in the record of the current proceeding or not properly considered by the Hearing Officer. Ching's exception on this issue must be denied.

**D. The Hearing Officer properly excluded Exhibit B.19i from evidence**

Contrary to Ching's arguments, the Hearing Officer properly excluded Exhibit B.19i from evidence because Ching did not identify or offer Ex. B.19i until March 8, 2017 – six days after the close of the testimonial portion of the hearing on March 2, 2017.[5]

On March 1, 2017, the Hearing Officer instructed the parties on the procedure for moving exhibits into evidence:

> So you'll have a week after tomorrow, until March 9th to *move your exhibits into evidence*. And you will do that in writing by uploading your motion. By then, the testimonial evidence will be over and so you will know which exhibits need to be in your moving papers. So the deadline for that is March 9th. And then you will have a week to object to exhibits that others may have put in that you don't believe are appropriate or grounded or relevant or whatever the reasons are. And that deadline is March 16th. So that's one full week.

Tr. 3/1/17 at 253:10-21 (emphasis added).

On March 2, 2017, the Hearing Officer declared the testimonial evidence portion of the hearing closed. Tr. 3/2/17 at 287:17:19. The Hearing Officer then reiterated that: "I want to repeat that the way I'm asking that the exhibits *be moved into evidence* is by written motion."

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[5] Although Ching cites "FOF 107" in this exception, it appears that he is referring to HO FOF 116, which states: "On March 1, 2017, a deadline of March 9, 2017 was set for parties to file written motions to move Written Direct Testimonies and exhibits into evidence that had already been introduced or referred to in the evidentiary portion of the contested case hearing. No new exhibits were to be included if not previously introduced or referred to before the close of the evidentiary hearing on March 2, 2017. March 16, 2017 was set as the deadline for any objections if a party believed the exhibits sought to be moved into evidence were not 'appropriate, or grounded, or relevant'. Tr. 3/1/17 at 253:10-253:21. *See* Appendix D for a summary of all evidentiary motions and post-hearing filings." HO FOF 116.

Tr. 3/21/17 at 287:25 – 288:4.

The Hearing Officer clearly meant what she repeatedly told the parties: that the parties had until March 9, 2017 to file a written motion to *move* their exhibits into evidence. The Hearing Officer clearly did not – as Ching now suggests – permit the parties to *add or introduce new* exhibits into the record after the close of the testimonial portion of the hearing. Permitting the parties to add new exhibits after the close of the testimonial portion of the hearing (and then admitting such exhibits into evidence) would preclude other parties from cross-examining or otherwise questioning witnesses with respect to the new exhibit.

As Ching concedes, he did not identify Exhibit B.19i until March 8, 2017 – six days after the close of the testimonial portion of the hearing, and on the eve of the deadline to move exhibits into evidence. *See* Clarence Kukauakahi Ching's Supplemental Motion to Admit Exhibits and Written Direct Testimony into Evidence, filed March 8, 2017 [Doc. 497]. Thus, the Hearing Officer properly excluded the belatedly-identified exhibit from evidence and Ching's exception on this issue must be denied. *See* Minute Order No. 44, filed April 20, 2017 [Doc. 553] at 36.

Ching implies that Ex. B19i, while untimely identified, should have been admitted into evidence anyway because Ching's supplemental written direct testimony filed on January 5, 2017 cited a web page that apparently contained the contents of Ex. B19i. Ching's Exceptions at 8. Ching's supplemental written direct testimony cited the web page for a brief, three sentence statement relating to a survey of lichens on the summit of Mauna Kea. *See* Ex. B19d at 8. This is materially different from introducing the entire webpage and all of the information contained on the page, into evidence. Accordingly, Ching's attempt to bootstrap the citation for a brief statement on lichens into an argument that the Hearing Officer improperly excluded his belated

attempt to introduce into evidence the entire webpage as Ex. B19i must also be denied.

### E. The Hearing Officer properly exercised her authority in administering the course and conduct of the hearing

Without citing to specific findings of fact or conclusions of law in the HO FOF/COL, Ching argues that the Hearing Officer allegedly violated various procedural administrative rules during the course of the hearing, including HAR §§ 91-9, 13-1-28, as well as "normally accepted court procedures." *See* Ching's Exceptions at 9-10.[6] All of Ching's arguments relating to the power of the Hearing Officer to administer the course and conduct of the contested case hearing are contrary to the rules themselves and defy common sense.

The BLNR administrative rules grant hearing officers various powers incident to administering a contested case hearing, including the power to "dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing." HAR § 13-1-32(c). Thus, the Hearing Officer has discretion to implement procedures that she or he believes are necessary to maintain order and ensure fairness in the course of the proceeding.

Ching argues that since HAR § 91-9 and HAR § 13-1-28 provide that contested case procedures "may" be modified or waived by the parties, the Hearing Officer "violated" these rules because the Hearing Officer imposed policies and procedures during the contested case hearing (including requesting the parties at one point to sign in and out of the hearing) that were not stipulated and agreed upon by the parties. *See* Ching's Exceptions at 10 ("In actuality, she [the Hearing Officer] did not have the power that she assumed were hers to broker. In forcing [sic] her perceived authority on the Parties, she was actually violating HAR § 13-1-28 and the

[6] Ching also reiterates his argument that the hearing officer allegedly violated HAR § 13-1-32.4 because she properly limited the record to the evidence in the present contested case hearing. These arguments are addressed in Section IV.C., *supra*.

parties' due process. . . . It is the parties who have the power and authority to stipulate to modify any procedure – not the HO.").

Ching's expansive view of the parties' rights under the administrative rules violates standard rules of statutory construction, and would lead to completely absurd and unmanageable results. Under the rules of statutory construction, statutes and rules are interpreted to avoid rendering any provision redundant or superfluous. *See Aluminum Shake Roofing, Inc. v. Hirayasu*, 110 Hawai'i 248, 253, 131 P.3d 1230, 1235 (2006); *Okada Trucking Co. v. Bd. of Water Supply*, 101 Hawai'i 68, 77, 62 P.3d 631, 640 (App. 2002) ("We will not construe a statute so that it is rendered meaningless."). Ching's expansive interpretation of HAR §§ 91-9 and 13-1-28 would essentially render the powers granted to the Hearing Officer pursuant to HAR § 13-1-32(c) to conduct an "orderly and just" hearing entirely meaningless and a nullity because the parties could completely control the conduct and course of a hearing through stipulating to any and all procedures at their whim. The Hearing Officer would be at the mercy of the parties with respect to the conduct and course of the hearing.

In order to avoid this clearly absurd result, HAR §§ 91-9 and 13-1-28 must be read in conjunction with HAR § 13-1-32(c). Read in this way, HAR §§ 91-9 and 13-1-28 are clearly intended to permit the parties to agree upon reasonable and appropriate procedures, subject, however, to the ultimate authority of the Hearing Officer to conduct an orderly and just proceeding pursuant to HAR § 13-1-32(c).

As such, and contrary to Ching's arguments, it was also clearly within the Hearing Officer's authority and discretion to require the parties to submit their written direct testimonies and witness lists simultaneously on October 11, 2016. *See* Tr. 10/3/16 at 78:19-21. As an initial matter, Ching's assertion that this administrative contested case hearing must comply with

"normally accepted court procedures" (Ching's Exceptions at 10) is not accurate.

This is an administrative proceeding governed by BLNR's administrative rules and applicable law. A hearing officer has discretion in exercising the authority vested under HAR Title 13, Chapter 1 to implement the generally more flexible procedures typical for an administrative proceeding, as long as those procedures do not affect the substantial rights of the parties. *See Cariaga v. Del Monte Corp.*, 65 Haw. 404, 409, 652 P.2d 1143, 1147 (1982) ("The administrative tribunal or agency has been created in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and non-technical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes."); *see also Application of Wind Power Pac. Investors–III*, 67 Haw. 342, 343, 686 P.2d 831, 832-33 (1984) (refusing to reverse a Public Utilities Commission decision based on procedural irregularities because the irregularities complained of did not prejudice the substantial rights of the appellant) (citing HRS § 91–14(g)). Thus, it was clearly within the Hearing Officer's authority and discretion to order the simultaneous submission of prehearing documents in this administrative hearing, which is a commonly-accepted administrative practice and procedure.[7]

Nor did the Hearing Officer's decision affect the substantial rights of the parties to this proceeding. Ching's claim that the Petitioners and Opposing Intervenors had to "blindly anticipate the specific issues that the proponents were planning to submit," is simply not credible. UH Hilo filed the CDUA nearly seven years ago. *See* Ex. A-1/R-1. Ching and others have been actively involved in litigation before BLNR regarding the CDUA since its filing.

[7] BLNR may take official notice of such matters as may be judicially noticed by the courts of the State of Hawai'i. HAR § 13-1-35(i). BLNR may clearly take official notice of its own practices and procedures.

Ching and others were extensively consulted throughout the CDUA process. In Ching's case, he was consulted on the FEIS (which has a written record of his views) (Ex. A-5/R-5); he was interviewed in connection with the CIA three separate times (Ex. A-5, App. D at 92); and the CIA contains a full summary of his interviews (Ex. A-5, App. D, § 7.13 at 169-71). In short, Ching and others were, and are, well-aware of, and well-versed in, the issues relating to the CDUA, and were not prejudiced by the Hearing Officer's decision, in her discretion and within her authority, to efficiently administer the proceeding by requiring the simultaneous submission of prehearing documents.

Ching's exceptions relating to the Hearing Officer's clear authority to conduct an orderly and fair hearing must be denied.

**F. <u>The HO FOF/COL complies with HRS § 91-12</u>**

Ching's argument that the Hearing Officer "violated" HRS § 91-12 has no legal or factual basis. The statute provides:

> §91-12 Decisions and orders. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record.

HRS § 91-12.

Ching appears to argue that the Hearing Officer herself (but more accurately, the HO FOF/COL) "violates" HRS § 91-12 because the Hearing Officer allegedly "ignored" evidence, pleadings and motions in the record that Ching believes supports his (and other parties') position in this proceeding. As an initial matter, Ching fails to cite or identify a *single specific* finding of fact or conclusion of law in the HO FOF/COL to which his alleged "HRS § 91-12 violation"

"exception" applies, and only makes extremely broad generalizations about the HO FOF/COL as a whole. Nevertheless, Ching's broad and conclusory argument that the Hearing Officer allegedly "ignored" evidence in the record is demonstrably incorrect.

As Ching's concedes, the Hearing Officer expressly stated that she considered all of the witness testimony and documents received into evidence in this matter:

> The Hearing Officer considered the testimony of *all witnesses at the evidentiary hearings and all exhibits received into evidence.* The mere fact that a particular witness testimony or exhibit may not be specifically referred to below *does not and shall not be construed to mean that said testimony or exhibit was not considered.* Rather, specific reference to said witness testimony or exhibit was excluded because, after due consideration of said testimony or exhibit, it was determined to be: (i) immaterial, (ii) irrelevant, (iii) contrary to law, (iv) less credible or persuasive, and/or (v) cumulative of other testimonies or exhibits specifically referred to below.

HO FOF/COL at 7 (emphasis added).

Moreover, the Hearing Officer noted that any finding proposed by the parties that was not specifically incorporated into her proposed order was "rejected for one or more of the following reasons":

- They are repetitious or similar to the Hearing Officer's own findings of fact or conclusions of law or decision and order, and/or
- They are not supported by reliable and/or probative evidence, and/or
- They are in whole or in part not supported by and/or are contrary to the facts or law, and/or
- They are immaterial, superfluous, and/or irrelevant to the material facts, issues, and/or law of this case.

HO FOF/COL at 7.

Thus, the HO FOF/COL clearly complies with the HRS § 91-12 requirements that the proposed decision and order be accompanied by separate findings of fact and conclusions of law, and that it incorporate in the decision a ruling upon each proposed finding proposed by the

parties. HRS § 91-12; HO FOF/COL at 7. Moreover, the law is clear that an administrative agency is not required to provide a separate ruling on each proposed finding of fact. *See Outdoor Circle v. Harold K.L. Castle Trust Estate*, 4 Haw.App. 633, 644, 675 P.2d 784, 792 (1983) (noting that "It is not indispensable that there be a separate ruling [by an administrative agency] on each proposed finding of fact," and rejecting contention that the LUC violated HRS § 91-12 by failing to specify in its decision the disposition of each of appellants' proposed findings); *Survivors of Timothy Freitas v. Pacific Contractors Co.*, 1 Haw.App. 77, 613 P.2d 927 (1980) (holding that Labor and Industrial Relations Appeals Board's rejection of appellants' findings of fact without specifically indicating why the proposed findings were rejected complied with HRS § 91-12, and rejecting appellants' argument that HRS § 91-12 required board's decision to "specifically state reasons for rejecting particular proposed findings of fact").

Moreover, Ching's broad argument (again, without specific citations to the HO FOF/COL or to the record) that the HO FOF/COL "ignored" evidence, pleadings and motions introduced and filed by Ching (and presumably the other Petitioners and Opposing Intervenors) is plainly contradicted by the HO FOF/COL.

Ching, for example, claims that the Hearing Officer "excluded virtually all of Petitioners' Written Direct Testimony" (Ching's Exceptions at 11); yet, the HO FOF/COL cites (and in many cases quotes extensively from) the written and oral testimony of numerous Petitioners and Opposing Intervenors (and the witnesses called by those parties). *See, e.g.*, HO FOF 3, 758-762, 828, 915 (K. Kealoha Pisciotta); HO FOF 5, 620, 692, 811-816, 913 (E. Kalani Flores); HO FOF 5, 400-423, 823, 831 (B. Pualani Case); HO FOF 6, 559, 807-809, 871, 894, 914 (Deborah Ward); HO FOF 4, 669 (Clarence Ching); HO FOF 7, 806 (Paul Neves); HO FOF 11, 802-803, 916, 980 (Mehana Kihoi); HO FOF 12 (Chase Michael Kaho'okahi Kanuha); HO FOF 13, 1006

(Harry Fergerstrom); HO FOF 14, 787, 879 (Joseph Kuali'i Lindsey Camara); HO FOF 15, 805 (Jennifer Leina'ala Sleightholm); HO FOF 16 (Maelani Lee); HO FOF 17 (Richard Maele DeLeon); HO FOF 18, 560, 798-799, 853, 873, 875, 1004-1005 (Cindy Freitas); HO FOF 19, 608, 685, 786, 800-801, 831, 876 (William Freitas); HO FOF 21, 789, 880 (Kalikolehua Kanaele); HO FOF 22 (Stephanie-Malia Tabadda); HO FOF 23, 790 (Tiffnie Kakalia); HO FOF 24 (Glen Kila); HO FOF 25, 818 (Dwight Vicente); HO FOF 26 (Brannon Kamahana Kealoha); HO FOF 342-344, 463, 731-732, 753, 852, 895, 918 (Dr. Ku Kahakalau); HO FOF 320-321, 460, 514, 736, 820, 829, 950, 1003, 1012, 1017-1026, 1028-1032 (Professor Candace Fujikane); HO FOF 896, 911-912, 1001 (Marti Townsend); HO FOF 626, 824, 868, 979 (Laulani Teale); HO FOF 1043-1046 (David Frankel); HO FOF 700-701, 822, 917, 974 (Professor Jonathan Osorio); HO FOF 821, 825-826 (Narissa Spies); HO FOF 490-491, 664-668, 919 (Dr. Kehaunani Abad); HO FOF 627 (Diana LaRose); HO FOF 361-368, 724-725, 866-867, 967-970 (Dr. Taualii Ku'ulei Kanahele); HO FOF 618-619, 819 (Professor Peter Mills); HO FOF 817 (Davin Vicente); HO FOF 380-393, 972-973 (Dr. Manulani Aluli Meyer); HO FOF 804 (Sara Kihoi); HO FOF 660-662 (Ruth Aloua); HO FOF 394-399, 663 (Hawane Rios); HO FOF 770-777 (Professor Gregory Johnson); HO FOF 988-991 (Nanci Munroe); HO FOF 872, 992-993 (Susan Rosier); HO FOF 796-797, 878 (Nelson Ho); HO FOF 793-795 (Professor N. Kaopua-Goodyear); HO FOF 975-977 (Professor Joseph Keaweaimoku Kaholokula); HO FOF 978 (Tammie Noelani Perreira); HO FOF 214 (Brian Cruz); HO FOF 778-782 (Prof. Mililani Trask); HO FOF 784 (Frank Nobriga); HO FOF 788 (Wiremu Carroll); HO FOF 783 (Ronald Fujiyoshi); HO FOF 459, 791, 869 (Keahi Tajon); HO FOF 537-540, 953 (Eric Hansen); and HO FOF 628, 870 (Michael Kumukauoha Lee).

The majority of the Hearing Officer's proposed findings that quote (or extensively summarize) the Petitioners' and Opposing Intervenors' written and oral testimony (and the testimony of their witnesses) were not proposed by UH Hilo or TIO, nor included in their joint proposed findings and conclusions. *See* The University of Hawai'i at Hilo and TMT International Observatory, LLC's Joint [Proposed] Findings of Fact and Conclusions of Law, and Decision and Order, filed May 30, 2017 [Doc. 671] ("**UHH/TIO FOF/COL**").

To the extent that Ching implies that the Hearing Officer was biased or acted improperly because she adopted other portions of the UHH/TIO FOF/COL, it is well-established that findings that are adverse to a party – even findings that are adopted verbatim from proposed findings of an opposing party – do not, without more, establish bias or impropriety. *See generally*, *Kumar v. Kumar*, 2014 WL 1632111, at *8 (Ct. App. 2014) (holding that a court's substantial adoption of a proposed decree did not establish an appearance of impartiality, *i.e.*, bias). Moreover, in the context of civil proceedings, it is widely accepted that a trial judge may adopt a party's proposed findings *in total* or in part. *See, e.g.*, *Howard v. Howard*, 259 P.2d 41, 42 (Cal.App. 2 Dist. 1953) (stating that courts may adopt proposed finding in total or in part); *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 376 (Colo. 1994) (holding that the adoption of a proposed FOF/COL is not necessarily improper, and that "[F]indings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel.") (citations omitted). Accordingly, Ching's assertion is insufficient to overcome the "presumption of honesty and integrity" in favor of the Hearing Officer's FOF/COL and establish bias. *See Sifagaloa v. Board of Trustees of the Employment Retirement System*, 74 Haw. 181, 193, 840 P.2d 367, 372 (1992).

Ching's further argument that the Hearing Officer "excluded" (or allegedly disregarded) Petitioners' and Opposing Intervenors' exhibits, motions, objections and other filings is entirely without merit, as the record plainly demonstrates. *See* HO FOF/COL at Appendices A-D (noting consideration and disposition of, collectively, Petitioners' and Opposing Intervenors' 277 motions, objections and other filings filed from April 15, 2016 through July 25, 2017 (excluding numerous joinders and other memoranda in support); and Minute Order No. 44, filed April 20, 2017 [Doc. 553] (noting Petitioners' and Opposing Intervenors' written direct testimony and exhibits received in evidence).

Given the foregoing, Ching's argument that the HO FOF/COL "violates" HRS § 91-12 is clearly refuted by the record in this case and applicable law, and the HO FOF/COL strongly supports the conclusion that the Hearing Officer thoroughly, carefully and independently considered all of the evidence presented by Ching (and all other parties) in this case.

Thus, stripped of hyperbole, Ching's arguments relating to HRS § 91-12 comes down to Ching's general disagreement with the Hearing Officers' findings and conclusions. Yet, Ching's general disagreement, without more, is insufficient to supplant or modify the Hearing Officer's findings and conclusions in this case. *See Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 165, 172 P.3d 471, 477 (2007) ("It is well-settled that mere adverse rulings are insufficient to establish bias."); *James W. Glover, Ltd. v. Fong*, 39 Hawai'i 308, 316 (1952) (stating that "mere adverse rulings, even if erroneous[,]" would not constitute a "basis for disqualification").

Ching fails in his burden to show that the HO FOF/COL is not supported by reliable, probative and substantial evidence, and his "exception" relating to HRS § 91-12 must be denied.

### G. The CDUA is not "tainted" in this proceeding

Ching argues that although BLNR, through Minute Order No. 36, filed October 14, 2016 [Doc. 376], formally voided the Conservation District Use Permit ("**CDUP**") granted in

February, 2011 and April, 2013 (the "**Prior CDUP**"), the "approved" CDUA from 2011 and 2013 continues to "taint" the current proceeding. Ching's Exceptions at 12-14. Without citing any legal authority, Ching appears to argue that BLNR was required to affirmatively rescind the Prior CDUA despite the Supreme Court's holding in *MKAH*, and even though the CDUP (which resulted from the approval) was formally rescinded by BLNR.

As an initial matter, Ching's arguments do not constitute a proper exception to the HO FOF/COL, as the Hearing Officer did not have any findings or conclusions relating to this issue, and this matter would not have been an issue properly before the Hearing Officer. *See* Minute Order No. 2, filed April 8, 2016 [Doc. 3] (limiting the delegation of BLNR's authority to the Hearing Officer to the conduct of a contested case hearing). Assuming, however, BLNR considers this issue in connection with Ching's Exceptions, the Supreme Court's holding in *MKAH* and subsequent procedural history demonstrates that Ching's arguments are completely without merit.

In *MKAH*, the Supreme Court held in pertinent part:

> For the foregoing reasons, this court *vacates* the circuit court's May 5, 2014 Decision and Order Affirming *Board of Land and Natural Resources, State of Hawaii's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit for the Thirty Meter Telescope at the Mauna Kea Science Reserve Dated April 12, 2013*, and final judgment thereon. This matter is remanded to the circuit court *to further remand to BLNR for proceedings consistent with this opinion*, so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion.

*MKAH*, 136 Hawai'i at 399, 363 P.3d at 247 (emphasis added).

Accordingly, the Supreme Court in *MKAH vacated* the Third Circuit Court's order affirming BLNR's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit for the Thirty Meter Telescope at the Mauna Kea Science Reserve Dated April 12, 2013. As a result, the Prior CDUP was no longer effective. Thus, the

Supreme Court's holding and order in *MKAH* effectively vacated BLNR's prior approval of the CDUA, and BLNR was therefore not required to affirmatively take further action with respect to rescinding its approval.

The subsequent procedural history of this case further demonstrates that the Prior CDUP had been rescinded and was no longer operative. On February 22, 2016, the Third Circuit Court – consistent with the Supreme Court's order in *MKAH* -- issued its remand order, remanding this matter to BLNR. *See* Minute Order No. 2, filed April 8, 2016 [Doc. 3]. The purpose of the remand was to conduct a new contested case hearing in order for BLNR to consider the approval of the CDUA. Thus, it would not make sense – as Ching now suggests – that BLNR (in light of the Supreme Court's order in *MKAH* and the Third Circuit Court's remand) had to affirmatively rescind the previously-vacated Prior CDUP before it could conduct a new contested case hearing to consider the approval of the CDUA in the current proceeding.

Finally, even assuming Ching is correct that BLNR was required to take further, affirmative action to promulgate the Supreme Court's and Third Circuit Court's vacatur of the decision to grant the Prior CDUP, Ching acknowledges that BLNR, through Minute Order No. 36, formally voided the CDUP granted in February, 2011 and April, 2013. Ching's Exceptions at 13. Thus, although Ching's arguments on this issue are completely refuted by the Supreme Court's holding in *MKAH* and the Third Circuit Court's subsequent remand, BLNR's decision to formally void the CDUP provides further confirmation that there was no "taint" from the prior proceeding in this new contested case hearing before a new hearing officer.

Given the foregoing, although Ching's arguments relating to the Prior CDUA are not properly raised in connection with his exceptions, BLNR, in any case, must deny Ching's "exceptions" on this issue.

## H. The Hearing Officer properly exercised her authority in setting the deadline for the filing of the proposed findings of fact and conclusions of law

Ching's argument that the Hearing Officer "prematurely" set the deadline for the submission of Proposed FOF/COL is without merit, and is essentially a repackaged request for further reconsideration of the Hearing Officer's decision on this issue.[8] *See* Minute Order No. 50, filed May 23, 2017 [Doc. 646] (denying multiple motions for reconsideration of Minute Order No. 43 setting post-hearing deadlines).

Ching argues that the Hearing Officer "prematurely" set the May 30, 2017 deadline for the parties to file their Proposed FOF/COL because the record "was still open on May 30, 2017, and a backlog of minute orders and decisions on pending motions were grossly back-logged." Ching Exceptions at 16. Ching's sole citation to HAR § 13-1-38(a) on this issue is not only unsupportive of his arguments, but also contradicts his position on this issue. The rule states in pertinent part:

> §13-1-38 Decisions and orders. (a) After all evidence has been taken, the parties may submit, within the time set by the presiding officer, a proposed decision and order which shall include proposed findings of facts and conclusions of law. A party to the proceedings may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law. The proposals shall be filed with the board and mailed to each party to the proceeding not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.

HAR § 13-1-38(a)

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[8] Ching does not cite any provisions of the HO FOF/COL in connection with this exception; however, HO FOF 118 states: "On April 19, 2017, Minute Order No. 43 was issued informing parties that complete copies of the transcripts were available for reviewing at five locations. Minute Order No. 43 [Doc. 552]. Minute Order No. 43 established the deadline of May 30, 2017 for any proposed decision and order, findings of fact and conclusions of law. Minute Order No. 43 [Doc. 552]." HO FOF 119 states: "Multiple motions for reconsideration of Minute Order No. 43 were filed and subsequently denied by Minute Order No. 50 [Doc. 646]. *See* Appendix D."

A plain reading of HAR § 13-1-38(a) demonstrates that there is no limitation on *when a hearing officer* may set the deadline for the parties to submit their Proposed FOF/COL, and in fact, the rule provides that the hearing officer has the authority to set the deadline for the submissions. This is fully consistent with HAR § 13-1-38(c), which, among other powers, grants full authority to a hearing officer (without timing limitations) to "fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of the hearing" HAR § 13-1-38(c). Given the foregoing, the Hearing Officer clearly had the authority to set the deadline for the submission of the Proposed FOF/COL for May 30, 2017. *See Citizens Against Reckless Dev. v. Zoning Bd. Of Appeals of City & County of Honolulu*, 114 Hawai'i 184, 193, 159 P.2d 143, 152 (2007) (noting that where statutory language is plain and unambiguous, a court's "sole duty is to give effect to its plain and obvious meaning.").

To the extent that Ching now argues that the Hearing Officer should have – on May 30, 2017 (or any other date) -- changed the deadline for the submission of the Proposed FOF/COL in light of various pending orders on motions (the vast majority of which were various procedural motions, including motions for reconsideration, filed by the Petitioners and Opposing Intervenors), Ching's exception on this issue must also be denied. Ching appears to confuse the formal closing of the "record" on July 25, 2017 with the provision in HAR § 13-1-38(a) that proposed findings of fact and conclusions of law may be submitted after "all evidence has been taken".

While the Hearing Officer formally declared the *record* in the contested case hearing closed on July 25, 2017, there is no dispute that HAR § 13-1-38(a) refers to *evidence* taken in the proceeding. HAR § 13-1-38(a). The testimonial evidentiary portion of the hearing concluded on March 2, 2017 (*see* Tr. 3/2/17 at 287:17-19), the transcripts were available on April 18, 2017

(*see* Minute Order No. 43, filed April 18, 2017 [Doc. 552]), the Hearing Officer ruled on the admissibility of documentary evidence on April 20, 2017 (*see* Minute Order No. 44, filed April 20, 2017 [Doc. 553]), and the Hearing Officer ruled on all pending motions for reconsideration regarding Minute Order No. 44 on May 25, 2017 (*See* Minute Order No. 51, filed May 25, 2017 [Doc. 647]). Thus, notwithstanding pending orders on various motions, it was clear that the Hearing Officer's deadline complied with HAR § 13-1-38(a), and Ching's argument that the entire *record* in this contested case hearing had to be closed prior to the submission of the Proposed FOF/COL is incorrect.

Finally, Ching's general argument that the May 30, 2017 deadline violated due process is groundless. Procedural due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See Sandy Beach Defense Fund v. City Council of the City and County of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). Here, Ching and the other Petitioners and the Opposing Intervenors were given full notice of appropriate deadlines that were set well after the default 10 day rule for the submission of Proposed FOF/COL.

Although HAR § 13-1-38(a) provides that proposed findings of fact and conclusions of law are to be filed with BLNR and served "not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe," the Hearing Officer allotted nearly six *weeks* for the parties to finalize and file their Proposed FOF/COL after the transcripts were made available. *See* Minute Order No. 43, filed April 18, 2017 [Doc. 552]. Moreover, the Hearing Officer reminded the parties, no fewer than ten times throughout the proceeding, beginning from at least *October 31, 2016* (nearly seven *months* prior to the actual deadline), to begin thinking about and drafting their Proposed FOF/COL, which the Hearing Officer

repeatedly reminded the parties would be due after the transcripts were made available.[9] *See* Minute Order 50, filed May 23, 2017 [Doc. 646] at 8-9 (noting numerous instances in the record where Hearing Officer reminded parties of the Proposed FOF/COL and urged the parties to begin drafting).

Thus, the Hearing Officer made substantial and diligent efforts – including adjusting the deadline for the submission of the Proposed FOF/COL in light of the then-current state of the record – to accommodate the reasonable needs of the parties and permit more than sufficient time for the parties to prepare their proposed submissions. Ching's due process arguments are baseless and must be denied.

## I. Ching's arguments relating to the effect of the Third Circuit Court's order in the Flores Consent Appeal are without merit

Ching raises two related exceptions arising from the Third Circuit Court's order vacating BLNR's consent to the TIO sublease in the separate case of *E. Kalani Flores v. Board of Land and Natural Resources, et al.*, Civil No. 14-1-324 ("**Flores Consent Appeal**"). First, Ching argues that the Third Circuit Court's order "revoked" the sublease for the TMT Project, which therefore triggered the Decommissioning Plan and the decommissioning provisions of the TIO sublease. *See* Ching's Exceptions at 14-15.[10] Second, Ching argues that because the Third

[9] The Hearing Officer originally notified the parties that the proposed findings of fact and conclusions of law would be due two weeks after the transcripts were available. *See* Tr. 10/31/16 at 249:19-251:24; however, given the state of the record later in the proceeding, the Hearing Officer made reasonable adjustments and informed the parties that the proposed findings of fact and conclusions of law would be due 30 days after the transcripts were available. *See* Tr. 3/2/17 at 296:9-16. As noted above, the Hearing Officer eventually provided the parties with even additional time – nearly six weeks -- to file their Proposed FOF/COL after the transcripts became available. Minute Order No. 43, filed April 18, 2017 [Doc. 552].

[10] Ching cites various provisions of his own Proposed FOF/COL in connection with this exception, but does not cite any provisions of the HO FOF/COL, as the Hearing Officer did not propose any findings or conclusions relating to the Flores Consent Appeal "decommissioning" issue.

Circuit Court's order "revoked" the sublease, TIO lacks standing in this proceeding. *See* Ching's Exceptions at 17-18.[11]

Ching's arguments relating to BLNR's consent to the sublease are without merit, and, to the extent BLNR considers them, the exceptions must be denied.

1. **The Third Circuit Court's order in the Flores Consent Appeal did not "revoke" the sublease for the TMT Project**

Ching's first argument relating to the Third Circuit Court's order in the Flores Consent Appeal is premised on the false assertion that the order "revoked" the sublease for the TMT Project. *See* Ching's Exceptions at 14. A plain reading of the order, however, confirms that the court did not "revoke" the sublease for the TMT Project, but instead ordered that the BLNR's *consent* to the sublease be "vacated" because the court determined that Flores was entitled to a contested case hearing on BLNR's *consent* to the TIO sublease. *See* Ex. B.19h (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, filed January 6, 2017)

[11] HO FOF 25 states: "Several of the parties challenged TIO's standing as a party, particularly in light of the Circuit Court's decision to vacate BLNR's consent to the sublease between TIO and the University. *See, e.g.*, [Docs. 427 and 429]. However, TIO's admission as an intervenor was not predicated on the status of the sublease consent. Rather, TIO's motion to intervene was 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.' Minute Order 13 at 4 [Doc. No. 115]. TIO still has a valid sublease with the University and will be the entity responsible for building and operating the TMT Observatory, if it is built. Thus, TIO continues to maintain a substantial interest in the subject matter. Moreover, TIO's participation has substantially helped the Hearing Officer in her decision making. Therefore, TIO is properly a party to the contested case hearing."

("**Flores Order**").

In fact, the Flores Order confirms that the validity of the TIO sublease was *not* at issue in the Flores Consent Appeal:

> 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").

*See* Exhibit B.19h at 2 (emphasis added).

Accordingly, since the validity of the TIO sublease was not at issue in the Flores Consent Appeal, and the TIO sublease was clearly not "revoked" or otherwise rescinded by operation of the Flores Order, none of the provisions cited by Ching in the Decommissioning Plan or the TIO Sublease relating to decommissioning have been triggered, and there is no present obligation for TIO to decommission any aspect of the TMT Project.

2. **The Flores Order did not affect TIO's standing in this matter**

Ching's second argument arising from the Flores Order is that since the order allegedly "revoked" the sublease for the TMT Project, TIO lacks standing in this matter. For the reasons noted above, however, Ching's argument on this issue is based on a false premise, as the court's order did not "revoke" the sublease.

Moreover, as noted in detail in Section IV.A., *supra*, the Hearing Officer did not base her decision to admit TIO as a party in this proceeding based on the status of the sublease consent, but rather pursuant to HAR § 13-1-31(c), which provides 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. . . .

HAR § 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, filed July 21, 2016 [Doc. 115] at 4. *See, also* HO COL 25. Thus, the Hearing Officer's order granting TIO's intervention did not 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). *See* Minute Order No. 13, filed July 21, 2016 [Doc. 115].

Accordingly, Ching's second argument with respect to the order in the Flores Consent Appeal is without merit, and his exception relating to this issue must also be denied.

### J. The CDUA's reference to TMT Observatory Corporation does not affect the validity of the CDUA or the authority of BLNR to grant the CDUP

Ching argues that because the CDUA references TMT Observatory Corporation ("**TMT Corporation**") and a separate corporation, TIO, will develop the TMT Project, the CDUA is allegedly defective and BLNR should not grant the CDUP for the TMT Project. Ching's Exceptions at 18-25.[12] Despite the great pains taken by Ching to falsely characterize the formation of TIO as part of a covert and nefarious conspiracy to cause unspecified harm to unspecified parties,[13] the benign and transparent reasons for the formation of TIO are supported by substantial, reliable and credible evidence in the record, and the Hearing Officer's conclusion

[12] Ching references HO COL 427, 431, 432 and 433 in connection with this exception.

[13] Despite disparaging the formation and administration of TIO as, among other things, allegedly "irregular," "illegal," "conspiratorial[]," "disconcerting," "unpalatable," and the result of "deceit and/or fraud," (*See* Ching's Exceptions at 17-27), Ching provides no evidence – much less any credible, substantive evidence -- of any allegedly illegal, much less "irregular" practices with respect to the establishment and formation of TIO. Ching's hyperbole is just that, and he cannot meet his burden to show that the HO's FOF/COL on this issue are contradicted by the reliable, substantial, and probative evidence in this proceeding.

that the existence of TIO does not affect the validity of the CDUA (or the authority of BLNR to grant the CDUP) should be affirmed.

TIO is a not-for-profit entity formed on May 6, 2014 as a Delaware limited liability company, and comprised of the University of California, Caltech, and government institutions from China, Japan, India and Canada. Tr. 12/19/16 at 11:16-19; Ex. C-2 (WDT Sanders) at 1; Ex. C-2 (WDT Sanders) at 1. The reason that TIO was formed was a practical one: it was formed so that the voting power (and observing time on the telescope) could vary amongst the members and be proportionate to their respective contributions to the TMT Project. Tr. 12/19/16 at 10:9-20. In contrast, TMT Corporation, a California corporation, did not allow for such unequal voting power, and all members had the same voting power. Tr. 12/19/16 at 10:3-14.

Witnesses at the hearing testified that, upon TIO's formation, it succeeded the TMT Corporation as the owner of the TMT Project, and over time, TMT Corporation's role in the project has been reduced and transitioned to TIO. Tr. 12/19/16 at 13:15-20; Tr. 1/4/17 at 77:11-20. It was also undisputed by Ching and all other parties that: 1) UH Hilo, and not TIO (or TMT), is the CDUA applicant (*See* Ex. A-1 / R-1); 2) the July 28, 2014 sublease for the TMT Project is between UH Hilo and TIO (*See* Ex. B.02f); and 2) as a matter of law, under any sublease for the MKSR, UH Hilo and any sub-lessee (including TIO) would be required to comply with all terms of the CDUP. *See* HO COL 430.

Thus, although it is undisputed that TMT Corporation and TIO are different successor entities for purposes of corporation law, Ching fails to cite any legal basis for his exception regarding this issue. In fact, the reliable, substantial and probative evidence supports the Hearing Officer's findings and conclusions that TIO's formation, existence and administration does not affect the validity of the CDUA or the ability of BLNR to issue the CDUP, and Ching's

exceptions on this issue should be denied.

### K. The Hearing Officer's evaluation of Ching's credibility is supported by the reliable, probative and substantial evidence in the record

Ching takes exception to the Hearing Officer's evaluation of his credibility in light of the evidence of his suspension from the practice of law and his decision not to comply with one of the conditions of reinstatement by applying for and completing the Hawai'i bar examination. Ching's Exceptions at 25-26 (citing HO COL 428). It is well-established, however, that "the competence, credibility and weight" of the testimony of all witnesses "is exclusively in the province of the trier of fact." *See Hawai'i Prince Hotel Waikiki Corp. v. City & County of Honolulu*, 89 Hawai'i 381, 390, 974 P.2d 21, 30 (1999) (quoting *State v. Pioneer Mill Co.*, 64 Haw. 168, 179, 637 P.2d 1131, 1139 (1981)). As the finder of fact, it is the Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the weight and value of evidence, determine whether it is credible, not credible, or more or less credible than other evidence. The underlying principle being that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawaii 106, 119, 170 P.3d 357, 370 (2007) (citation omitted). Thus, as with the testimony of any witness on any matter, the Hearing Officer had the discretion to give the appropriate weight, if any, to Ching's testimony in light of the evidence admitted in the proceeding.

Ching's argument that he should not have been evaluated based on his ability to render legal opinions appears to misconstrue the Hearing Officer's conclusion of law on this issue. The Hearing Officer did not conclude whether Ching could (or could not) provide legal opinions or whether Ching was (or was not) providing legal opinions. *See* HO COL 428. She noted, however, that she considered the *weight* of Ching's opinions in light of the evidence presented

regarding his disbarment and decision not to comply with one of the conditions for reinstatement, which was fully within the Hearing Officer's discretion to do as the trier of fact in this matter.

Finally, Ching alleges that the Hearing Officer's evaluation of his credibility constitutes "bias". Ching's Exception at 25. Given the Hearing Officer's prerogative to evaluate the credibility of *all* witnesses, however, a finding, without more, of a specific witness's credibility cannot reasonably constitute "bias" against the witness, given that *all* witnesses are subject to the Hearing Officer's evaluation of credibility. The logical conclusion of Ching's argument is that the Hearing Officer would not be able to evaluate the credibility of *any* witness, lest that the Hearing Officer be accused of "bias". That is not the law. *See, Hawai'i Prince*, 89 Hawai'i 381, 390, 974 P.2d 21, 30; *see also, Sifagaloa v. Board of Trustees of the Employment Retirement System*, 74 Haw. 181, 193, 840 P.2d 367, 372 (1992) (noting presumption of honesty and integrity applies to adjudicators); *Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 165, 172 P.3d 471, 477 (2007) ("It is well-settled that mere adverse rulings are insufficient to establish bias."). This argument ignores the reality that it is squarely the Hearing Officer's duty to make credibility determinations. It is undisputed that determinations of credibility are best made by the presiding fact finder and will not be disturbed on appeal. *See State v. Buch*, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) ("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact].").

Ching does not meet his burden to dispute the reliable, probative and substantial evidence regarding the Hearing Officer's evaluation of Ching's credibility. Ching's exception on this issue must be denied.

## V. CONCLUSION

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO's Pre-Hearing Statement, the testimony of UH Hilo's and TIO's witnesses, UH Hilo's and TIO's evidence, the examination of the Petitioners' and Opposing Intervenors' witnesses, and in UH Hilo's and TIO's other filings, and the HO FOF/COL, UH Hilo and TIO respectfully jointly request that BLNR reject Ching's Exceptions in its entirety, and adopt the HO FOF/COL as revised to reflect UH Hilo's and TIO's respective proposed exceptions filed on August 21, 2017.

DATED: Honolulu, Hawai'i, September 11, 2017.

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## Appendix A

| General Responses to Petitioners'/Opposing Intervenors' Exceptions | |
|---|---|
| **Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b)** | The Exception should be disregarded because it fails to (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. The grounds not cited or specifically urged are waived. |
| **Citation does not support the proposition.** | The citation offered by Petitioners/Opposing Intervenors does not support the Exception. |
| **Estoppel/Improper Reconsideration** | The Exception or a portion thereof is improper to the extent it is barred by estoppel or waiver, or improperly seeks reconsideration of the Hearing Officer's or the BLNR's prior ruling, |
| **Inaccurate/False** | The Exception or a portion thereof is inaccurate or false. |
| **Incomplete.** | The Exception is materially incomplete. |
| **Irrelevant/Inapplicable.** | The information in the Exception is irrelevant or inapplicable in this contested case proceeding. *See* Minute Order No. 19 [Doc. 281]. |
| **Lack of Jurisdiction** | The Exception exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority |
| **Mischaracterization.** | The Exception mischaracterizes legal authority or the contents of the record. |
| **Misleading. Partial quotation.** | The Exception contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader. |
| **Misleading. Presented out of context.** | The Exception presents law or information in the record out of context and/or in a way that is likely to mislead the reader. |
| **Misrepresentation** | The Exception affirmatively misrepresents legal authority or the contents of the record. |

| | |
|---|---|
| **Not credible.** | The Exception is not credible based on the totality of the evidence contained in the record and/or the demonstrated biases of the witness whose testimony is cited in support of the Exception. |
| **Not in dispute.** | Either (1) the Exception is not at issue in this proceeding, or (2) standing alone, the Exception is not objectionable. The designation of any individual Exception as "not in dispute" does not and should not be construed as an admission of said Exception or a concession that said Exception should be incorporated into the final FOFs and COLs. It also does not and should not be construed as assent to any inferences suggested or that may be suggested by Petitioners/Opposing Intervenors from, e.g., their misleading grouping or ordering of otherwise unrelated facts. |
| **Not in evidence.** | The Exception asserts "facts" and/or cites documents that are not in evidence. |
| **Unsupported/Unsubstantiated** | The Exception is not supported by information in the record or was not substantiated by the Petitioners/Opposing Intervenors through the contested case process. |

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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| Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009 | BLNR Contested Case HA-16-002<br><br>**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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