

## VI. PUBLIC TRUST DOCTRINE

1058. Prof. Callies, a witness for TIO, is one of the foremost recognized experts in planning and land use in Hawai'i. He is an elected member of both the College of Fellows of the American Institute of Certified Planners and the American College of Real Estate Lawyers. He is a professor at the William S. Richardson School of Law, University of Hawai'i at Mānoa and teaches courses focused on land use planning and development permitting at the local, state and national levels, with a particular emphasis on land use controls in Hawai'i. He is the author of several publications concerning eminent domain, land use, and other real property issues. He is also the author of the Hawai'i land use law treatise, *Regulating Paradise: Land Use Controls in Hawai'i*. Ex. C-6 (WDT Callies) at 1; Tr. 12/16/16 at 44:17-45:7.
1059. Prof. Callies reviewed numerous documents related to the CDUA for the TMT Project, including the appellate court pleadings and opinions in this matter. He is familiar with the issues presented to the BLNR and the Hearing Officer in this contested case hearing. Prof. Callies visited the TMT Project site in August 2016. Ex. C-6 (WDT Callies) at 2.
1060. Prof. Callies testified that "the public trust doctrine does not require pristine and absolute preservation." *Id.* at 2. "Instead, the public trust doctrine requires a balancing process between protection and conservation of public resources, on the one hand, and the development and utilization of these resources, on the other." *Id.* The public trust doctrine contemplates a balancing of private and public uses, and not the elimination of one at the expense of the other. *Id.* In other words, "a public trust doctrine resource does not foreclose private uses of that public trust doctrine resource." *Id.* at 3.
1061. Prof. Callies also testified that not all public resources held in trust are impressed with or subject to the Public Trust Doctrine. He testified that while it is a truism to state that government holds resources for its public, its citizens, if all such resources were impressed with or held subject to the Public Trust Doctrine, government could never sell or exchange such resources since it is black letter law that resources held by government subject to the Public Trust Doctrine cannot be sold or transferred. This, according to Prof. Callies, would lead to an absurd result. *Id.* at 3-4; Tr. 12/16/16 at 45:8-22.
1062. Prof. Callies also testified that the public trust doctrine in Hawai'i appears to have been "constitutionalized" to the extent that once a resource like water or submerged land is impressed with the public trust doctrine, Article XI, Section 1 of the Hawai'i State Constitution reinforces the obligation of state and county agencies in their decision-making to carefully examine any proposed use of or on that resource to ensure that the public use of that resource remain paramount and intact. Ex. C-6 (WDT Callies) at 3.
1063. Prof. Callies testified that the eight criteria set forth in HAR § 13-5-30(c) already incorporate the considerations of the public trust doctrine. *Id.* at 3.
1064. Notwithstanding the above, Prof. Callies testified that in his opinion the public trust doctrine does not apply to the TMT Project because the TMT project is not located on land impressed with or subject to the Public Trust Doctrine nor does it restrict or impair

- any water resources. He noted that the public trust doctrine has traditionally been exclusively connected to water, and stated that the Hawai‘i Supreme Court has interpreted the scope of the public trust doctrine as applying to water resources. *Id.* at 4. He also stated that the applicable literature has almost never extended the public trust doctrine beyond water resources. *Id.* at 2.
1065. Prof. Callies further testified that if the land use is public or quasi-public, then the public trust doctrine would not require a balancing between public and private uses. *Id.* at 4. Prof. Callies noted that the TMT Project is not a private undertaking, but rather "involves public and quasi-public entities for an education use that will benefit the public and is consistent with the designated conservation use of that area." *Id.* at 4. Therefore, Prof. Callies concluded that based on his experience, "the TMT Project easily qualifies as a public or quasi-public use and is thus consistent with most, if not all, other public uses so that the need to balance public and private uses does not apply." *Id.* at 4.
1066. Prof. Callies testified that even if the public trust doctrine applied and the proposed TMT Project constitutes a private use of a public trust resource, the TMT Project is consistent with the public trust doctrine due to "[t]he absence of adverse impacts [to the public’s use of a water resource] combined with the obvious benefits of the project to the public." *Id.* at 6.
1067. In rebuttal to Prof. Callies’ testimony, KAHEA offered the testimony of David Frankel, a Hawai‘i land use attorney with litigation experience in, *inter alia*, state land use law, conservation district law, the coastal zone management act, environmental impact statement law, and the public trust doctrine. Ex. B.53 (WDT Frankel) at 1-2. Frankel represented the appellant in the recent *Kilakila ‘O Haleakalā* case before the Hawai‘i Supreme Court. The *Kilakila ‘O Haleakalā* case was the only case identified by Frankel in his written direct testimony that involved a CDUA. Tr. 1/11/17 at 43.
1068. In his testimony, Frankel testified that he disagreed with Prof. Callies’ opinion that the public trust doctrine is exclusively connected to water. To support his argument, Frankel cites to dicta within a footnote in the Hawai‘i Supreme Court case, *Morgan v. Planning Dep’t*, 104 Hawai‘i 173, 86 P.3d 982 (2004). There, the Hawai‘i Supreme Court stated that the scope of the public trust doctrine is set forth in Article XI, Section 1, which provides for the conservation and protection of "Hawai‘i's natural beauty and all natural resources, including land, water, air, mineral and energy sources...." Ex. B.53 (WDT Frankel) at 4; Tr. 1/11/17 at 29-30. Frankel also relies on the concurring opinion of the recent *Mauna Kea Anaina Hou* opinion, in which two members of the Hawai‘i Supreme Court stated that the public trust doctrine under the Hawai‘i State Constitution applied to conservation land and the summit of Mauna Kea. B.53 at 4 (quoting *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376,407 363 P.3d 224,255 (2015)(concurring opinion)). Ex. B.53 (WDT Frankel) at 4.
1069. In his testimony, Frankel also accused Prof. Callies of a pro-development bias. *Id.* at 2. Frankel, however, conceded that everyone has their biases, including himself. *Id.*; Tr. 1/11/17 at 39:10-17. He acknowledged that others may accuse him of having an anti-development bias. Tr. 1/11/17 at 39:18-22.

1070. Frankel also acknowledged that in his former position as an attorney for the Native Hawaiian Legal Corporation, he represented some of the Petitioners to this contested case, specifically Flores and Ching, in other matters. Tr. 1/11/17 at 36-39.

## CONCLUSIONS OF LAW

### I. INTRODUCTION

1. This contested case hearing requires the BLNR to consider whether the proposed land use as provided in the CDUA for the TMT Project, complies with:
  - (1) the statutory and regulatory requirements for a development within the Conservation District;
  - (2) Article XII, Section 7 of the Hawai‘i State Constitution and *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n State of Hawai‘i*, 94 Hawai‘i 31, 7 P.3d. 1068 (2000); and, **if applicable**,
  - (3) Article XI, Section 1 of the Hawai‘i State Constitution and the public trust doctrine.
2. In evaluating whether the proposed land use for the TMT Project is consistent with the statutory and regulatory requirements for a development within the Conservation District, the BLNR is required to consider and apply the eight criteria set forth in HAR § 13-5-30(c).
3. The following issues are not material or relevant to this proceeding:
  - a. the sovereignty of the Kingdom of Hawai‘i or any other issues relating to the purported existence of the Kingdom of Hawai‘i;
  - b. challenges to the legal status of the State of Hawai‘i; and
  - c. challenges to the State’s ownership of and title to, the lands related to this contested case hearing. Minute Order No. 19 [Doc. 281]
4. If any statement denominated a COL is more properly considered a FOF, then it should be treated as a FOF; and conversely, if any statement denominated as a FOF is more properly considered a COL, then it should be treated as a COL.
5. Certain facts set forth within specified criteria addressed herein may apply to one or more criteria, issue, or legal standard. To the extent such facts or findings are addressed within a particular heading or section below does not limit it to that heading or section, but instead all such facts or findings are incorporated by reference for each applicable criteria section, as if specifically set forth within that heading or section.
6. The Hearing Officer and the BLNR considered the testimony of all witnesses at the evidentiary hearings and all exhibits received into evidence. The mere fact that a