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TMT INTERNATIONAL OBSERVATORY LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF

The Petition of Mauna Kea Hui for a
Declaratory Order Filed May 24, 2021.

Case No. HA-22-02

TMT INTERNATIONAL OBSERVATORY
LLC'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER, RE: MAUNA
KEA HUI'S MOTION TO REOPEN
HEARING TO HEAR MOTION TO
CONFIRM NON-COMPLIANCE WITH
CONDITION NO. 4, OR,
ALTERNATIVELY, PETITION FOR
DECLARATORY ORDERS
CONCERNING THE SAME;
CERTIFICATE OF SERVICE

Hearing:

Date: November 7, 2023

Time: 1:00 p.m.

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
Dec 20, 2023

**TMT INTERNATIONAL OBSERVATORY LLC’S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
RE: MAUNA KEA HUI’S MOTION TO REOPEN HEARING TO
HEAR MOTION TO CONFIRM NON-COMPLIANCE WITH
CONDITION NO. 4, OR, ALTERNATIVELY, PETITION FOR
DECLARATORY ORDERS CONCERNING THE SAME**

Pursuant to Hawai‘i Administrative Rules (“HAR”) § 13-1-38, and as directed by the Chairperson of the Board of Land and Natural Resources (“BLNR”), TMT International Observatory LLC (“TIO”) respectfully submits the following Proposed Findings of Fact, Conclusions of Law, and Decision and Order Re: Mauna Kea Hui’s Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance With Condition No. 4, or, Alternatively, Petition for Declaratory Orders Concerning the Same.

FINDINGS OF FACT

I. PROCEDURAL HISTORY.

1. Mauna Kea Anaina Hou, Kealoha Pisciotto, Clarence Kukauakahi Ching, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian-Environmental Alliance (collectively, the “Petitioners”), filed a Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance With Condition No. 4, or, Alternatively, Petition for Declaratory Orders Concerning the Same (“Motion”) with BLNR in Case No. BLNR-CC-16-002 on May 24, 2021. [DLNR Office of Conservation and Coastal Lands File, 2021 Petition for a Declaratory Order (accessible at: <https://dlnr.hawaii.gov/occl/tmt/>) Document (“Doc.”) 001].

2. BLNR issued Minute Order No. 1 on October 20, 2021, finding that:

Contested Case No. BLNR-CC-16-002 was fully decided upon the issuance of Findings of Fact, Conclusions of Law and Decision and Order (hereinafter, the “D&O”) on September 27, 2017. The D&O was upheld by the Hawai‘i Supreme Court in *Matter of Conservation Dist. Use Application HA-3568*, 143 Hawai‘i 379, 431 P.3d 752 (2018).

Petitioner's Motion does not seek reconsideration of the D&O and does not comply with the requirements of Hawai'i Administrative Rule ("HAR") § 13-1-39, which governs the reconsideration of a Board's decision on the merits. Instead, Petitioner's Motion seeks a determination that Permittee UNIVERSITY OF HAWAI'I AT HILO ("UHH") has not complied with Condition No. 4 of Conservation District Use Permit HA-3568 (hereinafter, the "CDUP"), which was issued by the Board pursuant to the D&O. The Board of Land and Natural Resources ("Board") considers Petitioner's Motion as a petition for a declaratory ruling pursuant to Hawai'i Revised Statutes ("HRS") § 91-8 and HAR § 13-1-27 rather than a motion for reconsideration of the D&O. [Doc. 002 at 1].

3. Minute Order No. 1 ordered that:

Accordingly, the Board hereby GRANTS the Petitioners' Motion to the extent it seeks to open a new proceeding for a declaratory ruling for the limited purpose of determining whether UHH has complied with Condition No. 4 of the CDUP. [Doc. 002 at 1-2].

4. Minute No. 1 further ordered that:

The parties named in the Certificate of Service of Petitioners' Motion are invited to file any briefing in response to the Petitioners' Motion within fifteen (15) days of service of this Minute Order. Petitioners may file a reply in support of their Motion within ten (10) days of service of any briefings in response. The Board will consider the arguments raised in the Motion, response, and reply without a hearing. [Doc. 002 at 2].

5. Temple of Lono ("TOL") filed a Brief in Response to Petitioners' Motion on October 31, 2021. [Doc. 004].

6. Cindy Freitas ("Freitas") filed a Brief in Response to Petitioners' Motion on November 3, 2021. [Doc. 005].

7. TIO filed a Memorandum in Opposition to Mauna Kea Hui's Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance with Condition No. 4, or Alternatively, Petition for Declaratory Order Concerning the Same on November 4, 2021. [Doc. 006].

8. University of Hawai‘i at Hilo (“UHH”) filed a Substantive Joinder to TIO’s Memorandum in Opposition to Mauna Kea Hui’s Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance with Condition No. 4, or Alternatively, Petition for Declaratory Order Concerning the Same on November 4, 2021. [Doc. 007].

9. Perpetuating Unique Educational Opportunities (“PUEO”), filed a Substantive Joinder to TIO’s Memorandum in Opposition to Mauna Kea Hui’s Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance with Condition No. 4, or Alternatively, Petition for Declaratory Order Concerning the Same on November 4, 2021. [Doc. 008].

10. The Flores-Case ‘Ohana filed a document entitled, State of Hawai‘i Board of Land and Natural Resources Failure to Properly Serve Minute Order No. 1 to the Flores-Case ‘Ohana on November 8, 2021, asserting that although the Flores-Case ‘Ohana was a party to Contested Case No. BLNR-CC-16-002 (the “Contested Case”), the Flores-Case ‘Ohana was not served with Minute Order No. 1. [Doc. 009 at 1-2].

11. Petitioners filed a Reply to TMT International Observatory LLC’s Memorandum in Opposition, University of Hawai‘i at Hilo’s Substantive Joinder to TMT International Observatory LLC’s Memorandum in Opposition, and Perpetuating Unique Educational Opportunities’ Substantive Joinder to TMT International Observatory LLC’s Memorandum in Opposition on November 12, 2021. [Doc. 010].

12. BLNR issued Minute Order No. 2 on November 19, 2021 granting the Flores-Case ‘Ohana’s request for leave to file a response to the Motion and denying the Flores-Case ‘Ohana’s request to file a reply brief. [Doc. 011 at 1].

13. BLNR also noted in Minute Order No. 2 that emails to two other parties on the certificate of service for Minute Order No. 1, Stephanie-Mālia Tabbada and J. Leina‘ala Sleightholm, had “bounced back” to BLNR as undeliverable. [Doc. 011 at 2].

14. Minute Order No. 2 ordered that:

Thus, this Minute Order No. 2 along with copies of the Petitioner’s Motion and Minute Order No. 1 will be served on Tabbada and Sleightholm via U.S. mail at the addresses last on file with the Board in connection with Contested Case No. BLNR-CC-16-002. Pursuant to Hawaii Administrative Rule (“HAR”) § 13-1-13.2, Tabbada and Sleightholm may file and serve responsive briefs to the Petitioner’s Motion within seventeen (17) days of the date shown on the certificate of service of this Minute Order. If Tabbada and Sleightholm wish to be served electronically only, they should indicate so and provide their correct email addresses in their briefings. The Petitioners may file a reply brief within ten (10) days of service of any responsive briefings by Tabbada or Sleightholm. [Doc. 011 at 2 (footnote omitted)].

15. Stephanie-Mālia Tabbada and J. Leina‘ala Sleightholm did not file any responsive briefs, or otherwise appear, in connection with the Motion.

16. The Flores-Case ‘Ohana filed a Memorandum in Support of Mauna Kea Hui’s Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance with Condition No. 4, or, Alternatively, Petition for Declaratory Orders Concerning the Same on December 3, 2021. [Doc. 012].

17. TIO filed a Request to Supplement Record on December 10, 2021. [Doc. 013].

18. Mauna Kea Hui filed a Memorandum in Opposition to TMT International Observatory LLC’s Request to Supplement the Record on December 13, 2021 [Doc. 014].

19. BLNR issued Minute Order No. 3 on January 24, 2022 finding that:

[The Flores-Case ‘Ohana] filed a “Memorandum in Support” of Petitioners’ Motion on December 3, 2021 (the “Flores Brief”). The Flores Brief argues, among other things, that UHH failed to comply with Special Condition No. 32 of CDUP HA-3568, which

requires compliance with all preconstruction conditions and mitigation measures specifically required by the Board. Flores Brief at 4-6. Specifically, the Flores Brief argues that any construction which “occurred on or after June 12, 2019 would have been in violation of HA-3568 CDUP preconstruction conditions as UHH or the TMT International Observatory LLC (“TIO”) did not have a valid National Pollutant Discharge Elimination System (“NPDES”) permit which had expired June 11, 2019.” *Id.* at 4. Thus, the brief asserts that UHH could not have legally commenced with any construction work to meet Condition No. 4 because it did not have a valid NPDES permit and thus could not have met all of its preconstruction and mitigation measures as required by Special Condition No. 32. *Id.* at 6. [Doc. 022 at 1].

20. Minute Order No. 3 further found that:

On December 10, 2021, TIO filed a “Request to Supplement Record,” noting that the Flores Brief’s argument regarding the NPDES permit was a new issue not raised in the Petitioners’ Motion. TIO requested that the Board supplement the record with a May 28, 2019 letter from the Department of Health (“DOH”), which administratively extended the NPDES [National Pollutant Discharge Elimination System] permit at issue [for the TMT Project] until DOH makes a final determination on the application for a renewal of the NPDES Permit. [Doc. 022 at 1-2].

21. Minute Order No. 3 further found that:

The Flores Brief’s arguments regarding Special Condition No. 32 and the NPDES are new arguments that were not raised in the Petitioners’ Motion. The Board declines to strike these new arguments as they supplement the Petitioners’ main argument that UHH has not complied with Condition No. 4 of the CDUP. However, because these arguments were not raised in the Petitioners’ Motion, TIO did not have an opportunity to address them. Further, TIO is not seeking leave to provide additional briefing; its only request is that the Board take notice of the DOH’s May 28, 2019 letter, which is a public record and which gives additional context for the new arguments presented by the Flores Brief. Petitioners have not raised any objection to the authenticity of the letter. The Board finds that declining to strike the Flores Brief’s arguments but allowing a limited supplementation of the record to provide additional useful information to the Board will further the ultimate purpose of this action, to determine whether UHH has complied with Condition No. 4 of the CDUP, will

promote fairness, and will not prejudice any of the parties. [Doc. 022 at 2].

22. Minute Order No. 3 granted TIO's request to supplement the record:

The Board hereby GRANTS TIO's Request to Supplement Record. Under Hawai'i Administrative Rules ("HAR") 13-1-11(c), in proceedings before the Board, the Board shall "follow procedures that, in its opinion, best serve the purposes of the proceedings, unless specifically prescribed in these rules or chapter 91, HRS." The Board finds that the purpose of this declaratory action and the fundamental principles of fairness would be best served by supplementing the record with the May 28, 2019 DOH letter. [Doc. 022 at 2].

23. Petitioners filed a Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same on June 6, 2022 [Doc. 015].

24. TIO filed a Response to Mauna Kea Hui's Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same on June 9, 2022. [Doc. 016].

25. UHH filed a Substantive Joinder to TMT International Observatory LLC's Response to Mauna Kea Hui's Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same on June 9, 2022. [Doc. 017].

26. PUEO filed a Joinder to TMT International Observatory LLC's Response to Mauna Kea Hui's Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same on June 13, 2022. [Doc. 018].

27. PUEO filed a Joinder to University of Hawai'i at Hilo's Substantive Joinder to TMT International Observatory LLC's Response to Mauna Kea Hui's Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same on June 13, 2022. [Doc. 019].

28. The Flores-Case ‘Ohana filed a Memorandum in Support of Mauna Kea Hui’s Motion to Submit New Evidence, or Alternatively, to Request Judicial Notice of the Same on June 17, 2022. [Doc. 020].

29. Bianca Isaki, Esq., on behalf of Petitioners, submitted a letter to BLNR on February 23, 2023 requesting that BLNR rule or set a hearing on the Motion. [Doc. 021].

30. BLNR issued Minute Order No. 3 [sic]¹ on July 3, 2023. [Doc. 023].

31. Although Minute Order No. 1 stated that “The Board will consider the arguments raised in the Motion, response, and reply without a hearing” [Doc. 002 at 2], in Minute Order No. 3, BLNR scheduled oral argument on the Motion for July 28, 2023 at 9:30 a.m. and set the order and time limits for the argument. [Doc. 023].

32. BLNR Chairperson Dawn Chang filed a Notice of Filing of BLNR Chair Dawn Chang’s Disclosure Regarding the Petition of Mauna Kea Hui for a Declaratory Order filed May 24, 2021 on July 18, 2023 (“Disclosure”). [Doc. 024].

33. In the Disclosure, Chairperson Chang noted her role and authority with BLNR, and also noted she has designated DLNR First Deputy, Laura Kaakua, to sit on the Mauna Kea Stewardship and Oversight Authority (“MKSOA”) established by Act 255 (2022 Hawai‘i Session Laws). [Doc. 024 at 1].

34. In the Disclosure, Chairperson Chang also stated:

Prior to my nomination as the Chair of BLNR, I was the Principal of Ku‘iwalu Consulting from 2001 until 2022. As the Principal of Ho‘akea LLC dba Ku‘iwalu, I was contracted by the University of Hawaii (UH) to prepare a comprehensive management plan (CMP) for the state leased lands managed by UH. Ku‘iwalu subcontracted a team of consultants to prepare the CMP, which included The Edith Kanaka‘ole Foundation, Sustainable Resources Group

¹ Since it was issued following Minute Order No. 3 (dated January 24, 2022), and as implicitly clarified by BLNR’s issuance of Minute Order No. 5 on July 19, 2023, BLNR’s “Minute Order No. 3” issued on July 3, 2023 (setting the time and date of oral arguments) was intended to be designated as “Minute Order No. 4”.

International, Inc. (SRGII), McNeil Wilson Communications, PB Americas, Rechtman Consulting, Pacific Consulting Services, Inc. (PCSI). I prepared the CMP from 2007 — 2009.

In 2020, Ku‘iwalu was contracted by DLNR to conduct an independent assessment of the University of Hawai‘i’s implementation of the CMP. Ku‘iwalu subcontracted a team of consultants to prepare the independent assessment, which included SMS Research, and People Strategies Hawaii.

I do not believe that my previous work as a consultant in preparing the CMP or independently evaluating UH’s compliance with the CMP will affect my ability to be fair and objective in weighing the evidence and arguments fairly.

At no time, was I employed by TMT as a consultant.

I have no personal conflict with respect to any party to the contested case. I am not related to any of the parties or their counsels.

I do not believe my position as Chair of the Board of Land and Natural Resources nor my actions in carrying out my related duties at the Department of Land and Natural Resources create or reflect any bias either in support of TMT or against it, nor would it cause any reasonable person to think that my impartiality in this contested case hearing would be affected. [Doc. 024 at 2].

35. None of the parties in this matter filed any documents in response to the Disclosure or otherwise objected to any aspects of the Disclosure.

36. Although the Disclosure referred to a “contested case,” BLNR’s consideration of the Motion for a declaratory ruling is not a contested case proceeding. [Doc. 002].

37. BLNR issued Minute Order No. 5 on July 19, 2023, deferring the date of the July 28, 2023 oral argument at TIO’s counsel’s request due to a scheduling conflict with a court hearing. [Doc. 025; November 7, 2023]; Transcript of Proceedings (“Tr.”) at 42.

38. BLNR issued Minute Order No. 6 on August 4, 2023, setting oral argument on the Motion for October 6, 2023 at 1:00 p.m., and setting the order and time limits for the argument, among other logistical matters. [Doc. 026].

39. Petitioners filed a Motion to Modify Minute Order No. 6 on August 17, 2023. [Doc. 027].

40. In the Motion to Modify Minute Order No. 6, Petitioners requested BLNR to reschedule the date of the oral argument for the Motion because counsel for Petitioners had a scheduling conflict on October 6, 2023 and also requested changes to the time limits for oral argument. [Doc. 027 at 2].

41. TIO filed a Response to Petitioners' Motion to Modify Minute Order No. 6 on August 21, 2023, noting that TIO had no objection to rescheduling the October 6, 2023 hearing given Petitioners' counsel's scheduling conflict. TIO also provided available dates, and addressed the Petitioners' request to revise the time limits for the oral argument. [Doc. 028].

42. BLNR issued Minute Order No. 7 on September 11, 2023, finding that:

Upon consideration of the [Petitioners'] Motion [to Modify Minute Order No. 6, filed on August 17, 2023] and the Response [filed by TIO on August 21, 2023], the Board agrees to reschedule the date for oral arguments, and will take note that the first request for rescheduling came from counsel for TMT International Observatory, LLC. The time allotted to each party for oral arguments will remain at fifteen minutes per party. [Doc. 029].

43. Minute Order No. 7 set the date of the oral argument for November 7, 2023 at 1:00 p.m. via Zoom, and also set the order of arguments. [Doc. 029 at 1-2].

44. BLNR heard oral arguments on the Motion via Zoom (and livestreamed on YouTube) on November 7, 2023 beginning at 1:00 p.m. [Tr. at 5].

45. Chairperson Dawn N.S. Chang, and BLNR members Riley Smith, Doreen Nāpua Canto, Karen Ono, Aimee Keli‘i Barnes, Vernon Char, and Wesley “Kaiwi” Yoon attended the oral argument. [Tr. at 5-6].

46. Richard N. Wurdeman, Esq. and Bianca K. Isaki, Esq. appeared for Petitioners. [Tr. at 6].

47. Lanny A. Sinkin appeared for TOL. [Tr. at 7].

48. Cindy Freitas appeared on her own behalf. [Tr. at 7].

49. E. Kalani Flores appeared on his own behalf and on behalf of the Flores-Case ‘Ohana. [Tr. at 7].

50. Ross T. Shinyama, Esq. and J. Douglas Ing, Esq. appeared on behalf of TIO. [Tr. at 7].

51. Jesse K. Souki, Esq. appeared for UHH. [Tr. at 7].

52. Lincoln S.T. Ashida, Esq. appeared for PUEO. [Tr. at 8].

53. At the conclusion of the oral argument, BLNR requested the parties to submit proposed findings of fact, conclusions of law and decisions and orders to the BLNR custodian of records ten (10) business days after the preparation of the transcript of the hearing. [Tr. at 147].

54. On November 13, 2023, the BLNR custodian of records received emails from Clive Cabral and Cy Harris, who represented that they were, respectively, the president and vice president of the Temple of Lono. [Doc. Dated 11/13/23 (Emails regarding Temple of Lono)].

55. Messrs. Cabral and Harris disputed that Lanny Sinkin represented the Temple of Lono. [Doc. Dated 11/13/23 (Emails regarding Temple of Lono)].

56. On November 29, 2023, the BLNR custodian of records received emails from Messrs. Sinkin and Harris in response.

57. On November 30, 2023, the BLNR custodian of records received an email from King Paki-Silva in response.

II. TMT PROJECT CDUP GENERAL CONDITION NO. 4.

58. Following a contested case hearing that spanned approximately sixteen (16) months, BLNR issued its Findings of Fact, Conclusions of Law and Decision and Order in Case No. BLNR-CC-16-002 on September 28, 2017, granting a conservation district use permit for the TMT Project. *See* Board of Land and Natural Resources, State of Hawai‘i, Findings of Fact, Conclusions of Law and Decision and Order, Case No. BLNR-CC-16-002 (September 28, 2017) (“CDUP”).

59. The Hawai‘i Supreme Court affirmed the issuance of the CDUP in its entirety on November 30, 2018. *See In the Matter of Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568*, 143 Hawai‘i 379, 431 P.3d 752 (2018) (“*Mauna Kea III*”).

60. General Condition No. 4 of the CDUP (“Condition No. 4”) states:

Any work done or construction to be done on the land shall be initiated within two (2) years of the approval of such use, in accordance with construction plans that have been signed by the Chairperson, and, unless otherwise authorized, shall be completed within twelve (12) years of the approval. The UH Hilo shall notify the Department in writing when construction activity is initiated and when it is completed.

See CDUP at 266.

III. ACTIVITIES RELATING TO THE TMT PROJECT FOLLOWING THE NOTICE TO PROCEED.

61. General Condition No. 5 of the CDUP (“Condition No. 5”) states:

Before proceeding with any work authorized by the Board, UH Hilo shall submit four copies of the construction and grading plans and specifications to the Chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three of the copies will be returned to UH Hilo. Plan approval by

the Chairperson does not constitute approval required from other agencies.

See CDUP at 266.

62. On February 4, 2019, pursuant to Condition No. 5, UHH submitted to DLNR the required construction and grading plans and specifications for the TMT Project for approval, which included the TMT Project civil package construction documents (the “TMT Project Civil Package”) prepared by TIO and its consultants. [Doc. 006 at Declaration of Fengchuan Liu (“Liu Decl.”) and Ex. A].

63. On June 19, 2019, DLNR informed UHH that the TMT Project met the preconstruction requirements of the CDUP and that DLNR therefore issued a notice to proceed with construction of the TMT Project (the “Notice to Proceed”). [Doc. 006 at Liu Decl. and Ex. A].

64. In the context of the CDUP and Condition No. 5, and based upon common practice with respect to the development of large telescope projects, TIO interpreted the word “work” in Condition No. 5 as distinct from “construction to be done on the land” as stated in Condition No. 4. [Doc. 006 at Liu Decl.].

65. The TMT Project is a complex project, in which development takes place in multiple phases, including preparation for the movement of heavy construction equipment to the project site. [Doc. 006 at Liu Decl.]; Tr. at 46, 56.

66. The development of such large telescope projects, such as the TMT Project, requires extensive, on-site and site-related coordination, testing, and surveying work (among other work), which do not necessarily require ground-disturbing activities in advance of actual, physical construction on the land. [Doc. 006 at Liu Decl.].

67. After receiving the Notice to Proceed, TIO and its consultants and/or contractors conducted the following activities with respect to the TMT Project on the following dates:
- a. June 20, 2019 - Unpermitted ahu removed near the TMT Project site;
 - b. June 25, 2019 - Meeting at the TMT Project site with Goodfellow Bros, Inc. (“GBI”), the civil contractor for the TMT Project, and M3 Construction Management (“M3”), the construction manager for the TMT Project, to test the GPS equipment, and verify the benchmark locations and coordinates with the existing site survey done by Engineering Partners;
 - c. A partial survey of the Submillimeter Array (“SMA”) access road on Mauna Kea was completed on the same date (June 25, 2019) for accuracy in comparison to the owner-furnished survey;
 - d. Personnel from the SMA and James Clerk Maxwell radio telescopes also joined the construction crew on-site on the same date (June 25, 2019) to coordinate the GPS system and verify the impact on the telescope operations. This was done to confirm on the ground boundaries of the access road and project site;
 - e. July 8, 2019 - All consultants and contractors met for a pre-construction meeting at the Waikoloa Marriott to discuss procedures, safety, and requirements for the TMT Project;
 - f. July 12, 2019 - GBI, M3, and SMA representatives located and surveyed the underground fiber optic and electrical lines on Mauna Kea in preparation of mobilizing the heavy equipment to the TMT Project site to mitigate the risk of damaging the SMA fiber optics. Toning for utilities is a generally recognized

construction practice that is done at the start of construction for a project, and the identification and protection of utilities at the site were included in the TMT Project construction plans. [Doc. 006 at Liu Decl.]; Tr. at 46.

68. The unpermitted ahu removed on June 20, 2019 were on the Access Way to the TMT Project. The Access way is included in the footprint for the TMT Project, and the Hawai‘i Supreme Court noted that the two ahu were built on the Access Way. *See* CDUP at 45 (Finding of Fact (“FOF”) 256), 47 (FOF 266); *Mauna Kea III*, 143 Hawai‘i at 396, 431 P.3d at 769.

69. Other than the location of the unpermitted ahu in relation to the TMT Project, none of the Petitioners submitted evidence disputing the activities that TIO and its contractors and consultants engaged in following the Notice to Proceed as described in the findings above.

70. The activities that TIO and its contractors and consultants engaged in following the Notice to Proceed as described in the findings above were in preparation for, and in furtherance of, additional phases of the TMT Project, including the movement of heavy equipment for construction to be done at the TMT Project site. [Doc. 006 at Liu Decl.]; Tr. at 46, 56.

71. On July 16, 2019, TIO’s civil contractor, GBI, attempted to access the TMT Project site to proceed with construction at the site. [Doc. 006 at Liu Decl.]; Tr. at 47-48.

72. GBI obtained permits for, and mobilized, eighteen (18) vehicles and equipment, including a 980 Loader, D6 Dozer, WA320 Loader, and Mini-Ex/Roller (the “Construction Equipment”). [Doc. 006 at Liu Decl. and Ex. B; Doc. 001 at Ex. 01]; Tr. at 47.

73. On July 16, 2019, GBI proceeded in a convoy of its Construction Equipment for approximately three hours from GBI’s Waikoloa baseyard to an area about five miles from the entrance to Mauna Kea Access Road, but could not proceed further to the TMT Project

construction site due to protesters physically blocking the entrance to Mauna Kea Access Road. [Doc. 006 at Liu Decl.]; Tr. at 47.

74. Virtually all of the Petitioners (individually or as members of various organizations) actively participated in the protests and/or coordinated with others engaging in the protests to block access to the TMT Project site on and about July 16, 2019 and thereafter. [Doc. 006 at 20-23 and Ex. C].

75. None of the Petitioners were arrested for blocking the entrance to Mauna Kea Access Road. Tr. at 21-22.

76. The Construction Equipment remained on and near the Mauna Kea Access Road for several days after July 16, 2019. Tr. at 47.

77. The Construction Equipment eventually moved to Pohakuloa and parked there until approximately August 15, 2019. Tr. at 47.

78. TIO eventually made a decision to suspend the mobilization of the Construction Equipment to the TMT Project site indefinitely after the protestor activity near the entrance to Mauna Kea Access Road continued. [Doc. 006 at Liu Decl.].

79. TIO's civil construction contract with GBI had a schedule of values, which included a line item to stage, mobilize, and return the Construction Equipment to the GBI baseyard, and TIO was invoiced by GBI for the mobilization of the Construction Equipment under that line item. Tr. at 63-64.

80. TIO's civil construction contract with GBI had a liquidated damages provision. Tr. at 98.

81. TIO gave GBI the notice to proceed with the mobilization of the Construction Equipment for the TMT Project on or about the day that the civil construction contract was signed. Tr. at 98.

82. TIO spent substantial sums of money to have GBI transport the Construction Equipment and to keep the equipment ready and mobilized on and around July 16, 2019 and thereafter as described in the FOF above. Tr. at 48.

83. TIO is the successor in interest to TMT Observatory Corporation. Tr. at 57.

84. UHH is the permittee under the CDUP. Tr. at 57; *see* CDUP.

85. The activities and equipment mobilization relating to the TMT Project from June through July, 2019 as described in the FOF above were done pursuant to the CDUP and the Notice to Proceed. [Doc. 006 at Liu Decl. and Ex. A].

86. Prior to and during the period that TIO and its consultants and contractors conducted the activities and equipment mobilization relating to the TMT Project from June through July, 2019 as described in the FOF above, the TMT Project had a grading permit from the County of Hawai‘i, and overweight vehicle and load permits from the State of Hawai‘i Department of Transportation and the County of Hawai‘i Department of Public Works for the transport of the Construction Equipment. [Doc. 006 at Liu Decl. and Ex. B]; Tr. at 56.

87. Prior to and during the period that TIO and its consultants and contractors conducted the activities and equipment mobilization relating to the TMT Project from June through July, 2019 as described in the FOF above, the TMT Project had a National Pollutant Discharge Elimination System Permit (“NPDES”) from the State of Hawai‘i, Department of Health (“DOH”), which was on an administrative extension. [Doc. 013 at Ex. A]; Tr. at 71.

88. In granting the administrative extension, DOH stated in a letter dated May 28, 2019 that:

[I]n accordance with the Hawaii Revised Statutes (HRS), Chapter 342D-6(h), the DOH hereby administratively extends the subject NPDES permit until a final determination on your application is made. TMT International Observatory shall not be held in violation of HRS, Chapter 342D, and Hawai'i Administrative Rules, Chapters 11-54 and 11-55, during the pendency of its application, as long as it acts consistently with the permit presently granted. This administrative extension shall expire on the effective date of the subsequent permit. [Doc. 013 at Ex. A (emphasis omitted)].

89. On December 4, 2020, the Department of Health Clean Water Branch ("CWB") acknowledged receipt of correspondence from TIO's counsel that the current owner of the TMT Project is TIO and providing CWB with written agreements to indicate the transfer of ownership from TMT Observatory Corporation to TIO. [Doc. 016 at Ex. A].

90. The Department of Health subsequently issued a press release dated June 3, 2022 noting that it received a Notice of Cessation of the NPDES permit for the TMT Project's NPDES permit, and that therefore, TIO would not be allowed to conduct any "further construction work" at the TMT site unless a new NPDES permit is issued. [Doc. 015 at Ex. A].

91. The Notice of Cessation of the NPDES permit, however, was filed nearly three years after the relevant events from June to July, 2019 when TIO and its contractors performed various activities relating to the TMT Project and attempted to access the TMT Project site to proceed with construction as described in the FOF above. [Doc. 006; Doc. 015 at Ex. A].

IV. CORRESPONDENCE / NOTICES REGARDING CONDITION NO. 4.

92. In a letter dated July 29, 2019 from TIO's counsel to the University of Hawai'i's general counsel, TIO stated that:

TIO has worked expeditiously and diligently to meet the deadline to commence work at the TMT Project site, including working cooperatively with Office of Maunakea Management and the

Department of Land and Natural Resources to obtain the Notice to Proceed and timely obtaining all other necessary permits required to resume construction. TIO also believes that, since the issuance of the Notice to Proceed, it has in fact “initiated” “work” and/or “construction” at the TMT Project site through various activities at the site, including the removal of unpermitted ahu, and by conducting various site surveys. That said, given circumstances beyond TIO’s control (including a lengthy appellate process and the current situation involving protestors blocking access to the site), TIO’s heavy equipment access to the site has been substantially delayed. [Doc. 001 at Ex. 01 (Attachment 1)].

93. TIO further informed the University of Hawai‘i general counsel that:

Given the foregoing, and out of an abundance of caution, TIO respectfully requests that UH request that the chairperson of the Board of Land and Natural Resources formally extend the deadline in General Condition No. 4 by a period of two years, or until October 7, 2021. While TIO does not waive, and expressly preserves, its position that work has been initiated in compliance with the deadline in General Condition No. 4, TIO believes that a formal extension of the deadline will allow the parties to appropriately focus on other matters required to move this project forward. [Doc. 001 at Ex. 01 (Attachment 1)].

94. In a letter dated July 30, 2019, the UHH Chancellor wrote to the BLNR Chairperson to request a formal extension of Condition No. 4. [Doc. 001 at Ex. 01].

95. The UHH Chancellor informed the BLNR Chairperson that:

As described below, and based on information provided by TMT International Observatory LLC (“TIO”), UH understands, as of the date of this letter, that “work” and/or “construction” has in fact been initiated at the TMT Project site, such that the two year deadline prescribed by General Condition No. 4 has been met. Without waiving the foregoing, and given the current limitations on access to the site, however, TIO has asked that UH request, out of an abundance of caution, a two-year extension of the current deadline to initiate construction, which by our calculation would extend the deadline to, and including, October 7, 2021. This letter constitutes UH’s request for such an extension. [Doc. 001 at Ex. 01 (footnote omitted)].

96. The UHH Chancellor informed the BLNR Chairperson that although TIO “planned, and was ready and able, to begin moving its heavy construction equipment to the TMT Project site during the week of July 15, 2019,” TIO was not able to do so due to ongoing demonstrations. [Doc. 001 at Ex. 01].

97. The UHH Chancellor explained:

Although, due to circumstances beyond TIO’s and UH’s control, TIO has not been able to move its heavy construction equipment to the TMT Project site to date, UH reasonably believes that TIO has initiated “work” and/or “construction” at the site as of the date of this letter. As reported by TIO, the work at the TMT Project site following the issuance of the Notice to Proceed through the date of this letter has included among other things the following:

- June 25, 2019 - Goodfellow Bros. Inc. (“GBI”) and M3 Construction Management (“M3”) met at the project site to test the GPS equipment, and verify the benchmark locations and coordinates with the existing site survey done by Engineering Partners. A partial survey of the Submillimeter Array (“SMA”) access road was completed for accuracy in comparison to the owner-furnished survey. Personnel from the SMA and James Clerk Maxwell radio telescopes joined the construction crew to coordinate the GPS system and verify the impact to the telescope operations; and
- July 12, 2019 - To mitigate the risk of damaging the SMA fiber optics, GBI, M3 and SMA representatives located and surveyed the underground fiber optic and electrical lines in preparation of mobilizing the heavy equipment to the project site.

Given the foregoing as reported by TIO, UH believes that these activities at the TMT Project site to date are reasonably sufficient to meet the provision of General Condition No. 4 that “[a]ny work done or construction to be done on the land shall be initiated within two (2) years of the approval of such use[.]” [Doc. 001 at Ex. 01].

98. The UHH chancellor wrote: “Without waiver of the foregoing position, having consulted with TIO, and out of an abundance of caution, however, UH formally requests a two-

year extension of the construction commencement deadline provision in General Condition No. 4.” [Doc. 001 at Ex. 01].

99. In a letter dated July 30, 2019, the BLNR Chairperson granted the UHH Chancellor’s request for a two year extension of the construction commencement deadline to September 26, 2021. [Doc. 001 at Ex. 02].

100. The BLNR chairperson wrote that on June 19, 2019, DLNR’s Office of Conservation and Coastal Lands approved the civil package construction plans for the TMT Project, and the DLNR issued TIO the notice to proceed with construction. [Doc. 001 at Ex. 02].

101. The BLNR Chairperson also wrote:

On July 30, 2019 the University notified the Department that the following work has been conducted since the Notice to Proceed was issued:

- On June 25, 2019 contractors met at the project site to test GPS equipment and to verify the benchmark locations and coordinates with the existing site survey.
- On the same date a partial survey of the access road was completed.
- On July 12, 2019 contractors met with representatives from the Smithsonian Submillimeter Array (SMA) to locate and survey the SMA fiber optics and electric lines in order to mitigate the risk of damage to the cables when heavy equipment is mobilized at the site.
- During the week of July 15, 2019, the permittee attempted to move construction equipment to the project site; however, the permittee was unable to access the site due to on-going demonstrations along the Daniel K. Inouye Highway and the Mauana [sic] Kea Access Road. [Doc. 001 at Ex. 02].

102. The BLNR Chairperson also noted:

The University is requesting a two-year extension to the initiation deadline contained in CDUP HA-3568 for two reasons:

1. Construction was delayed for thirteen months after the Board issued their Decision and Order while the permit went through the appellate process; the permit was finally upheld by the Supreme Court of the State of Hawaii on October 30, 2018; and
2. Demonstrations along the access road to the summit of Mauna Kea have prevented construction crews from accessing the site. [Doc. 001 at Ex. 02].

103. The BLNR Chairperson noted that Hawai‘i Administrative Rules (“HAR”) § 13-5-43 permitted the Chairperson to grant a first extension of a board permit for up to two years to initiate or complete a project based on supportive documentation from the applicant, and that the “University has submitted documentation that shows that they have made a good faith effort comply with the deadlines contained in the permit, and the Department has no objections to issuing the requested time extension.” [Doc. 001 at Ex. 02].

104. Via a letter dated April 28, 2021, the UHH Chancellor notified the DLNR Office of Conservation and Coastal Lands that “work done” or “construction to be done on the land” for the TMT Project pursuant to, and in compliance with, Condition No. 4 of the CDUP “was initiated by no later than July 16, 2019.” [Doc. 01 at Ex. 03].

105. The UHH Chancellor informed DLNR that:

Subsequent to the issuance of the Notice to Proceed, and before the September 28, 2019 initiation deadline, the following Project Activity was initiated at the TMT Project site or in preparation for Project Activity to be performed at the TMT Project site:

- June 20, 2019—Unpermitted ahu removed.
- June 25, 2019—Goodfellow Bros, Inc. (“GBI”), the civil contractor for the TMT Project, and M3 Construction Management (“M3”), the construction manager for the TMT Project, met at the project site to test the GPS equipment, and verify the benchmark locations and coordinates with the existing site survey done by Engineering Partners. A partial survey of the Submillimeter Array (“SMA”) access road was

completed for accuracy in comparison to the owner-furnished survey. Personnel from the SMA and James Clerk Maxwell radio telescopes joined the construction crew to coordinate the GPS system and verify the impact on the telescope operations. This was done to confirm on the ground boundaries of the access road and project site;

- July 8, 2019—Kick-Off Meeting between TMT International Observatory, LLC (“TIO”), GBI, M3, subcontractors, and others to discuss construction procedures, safety protocols, other requirements, and special concerns;
- July 12, 2019—GBI, M3, and SMA representatives located and surveyed the underground fiber optic and electrical lines in preparation of mobilizing the heavy equipment to the TMT project site to mitigate the risk of damaging the SMA fiber optics;
- July 15, 2019—The Big Island Invasive Species Committee (“BIISC”) inspected TIO construction equipment and vehicles. BIISC provides invasive species compliance certificates; and
- July 16, 2019—TIO attempted to access the TMT Project site. TIO mobilized 18 vehicles and equipment, including a 980 Loader, D6 Dozer, WA320 Loader, and Mini-x/Roller. Persons objecting to the TMT Project blocked TIO’s access to the TMT Project site for several months.

The above Project Activity was performed in accordance with DLNR approved construction plans. [Doc. 001 at Ex. 03].

106. The UHH Chancellor also stated that:

By way of correspondence to Chairperson Suzanne Case, dated July 30, 2019, UH Hilo requested an extension of time as to General Condition No. 4. In making the request, UH Hilo stated that “based on information provided by [TIO], UH understands, as of the date of this letter, that ‘work’ and/or ‘construction’ has in fact been initiated at the TMT Project site, such that the two year deadline prescribed by General Condition No. 4 has been met.” UH Hilo’s extension request was made ‘[w]ithout waiving the foregoing.”

TIO also clearly stated in its July 29, 2019 correspondence to UH Hilo, which was attached as an exhibit to UH Hilo’s July 30, 2019 correspondence, that “TIO does not waive, and expressly

preserves, its position that work has been initiated in compliance with the deadline in General Condition No. 4.” [Doc. 001 at Ex. 03 (Note 1) (citations omitted)].

107. DLNR acknowledged UHH’s notice of compliance with Condition No. 4 on May 4, 2021. [Doc. 001 at Ex. 03].

108. Under the CDUP, the BLNR Chairperson has the authority to determine compliance with all conditions, and BLNR becomes involved only if the Chairperson is unsuccessful in securing compliance:

In case of noncompliance with these conditions, the chairperson shall first attempt to secure compliance from the responsible party, and if unsuccessful, shall bring the matter to the board, with notice to the permittee, to request an order revoking the permit. *See* CDUP at 271.

V. POSSIBLE NATIONAL SCIENCE FOUNDATION FUNDING.

109. The National Science Foundation (“NSF”) announced in August, 2020 that it is in the process of considering financial support for the TMT Project, and is conducting outreach to various stakeholders. [Doc. 001 at Exs. 4 and 5].

110. No federal funds have been used for the construction of the TMT Project to date, and potential funding from the NSF was not an issue during the period that TIO and its consultants and contractors conducted the activities and equipment mobilization relating to the TMT Project from June through July, 2019 as described in the FOF above. Tr. at 58.

111. There was no evidence presented at the hearing that the specifications for the TMT Project are currently different from the project permitted under the CDUP. Tr. at 101-102.

RULINGS ON PROPOSED FINDINGS OF FACT

Any of the findings of fact submitted by the parties, not already ruled upon by BLNR by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected for one or more of the following reasons:

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

CONCLUSIONS OF LAW

1. If any statement denominated a conclusion of law is more properly considered a finding of fact, then it should be treated and construed as a finding of fact; and conversely, if any statement denominated as a finding of fact is more properly considered a conclusion of law, then it should be treated and construed as a conclusion of law.

2. Certain facts or findings set forth within the specified arguments addressed herein may apply to one or more arguments, issues, or legal standards under applicable law. To the extent such facts or findings are addressed within a particular heading or section herein does not limit it to that heading or section, but instead all such facts or findings are incorporated by reference for each applicable argument, issue or legal standard as if specifically set forth within that heading or section.

3. BLNR considered all of the Parties' filings and arguments in this proceeding.² The mere fact that a party's filing or argument may not be specifically referred to herein does not and shall not be construed to mean that BLNR did not consider it. Rather, specific reference to the filing or argument was excluded because after due consideration, it was determined to be: (i)

² Since the issue of Mr. Sinkin's authority to represent TOL for purposes of the Motion (which was raised after the oral argument took place on November 7, 2023) is outside of the scope of this proceeding, BLNR, subject to this conclusion of law, has also considered all of TOL's filings and Mr. Sinkin's arguments with respect to the Motion.

immaterial; (ii) irrelevant; (iii) contrary to law; (iv) less credible or persuasive; and/or (v) cumulative.

I. SCOPE OF PROCEEDING.

4. In Minute Order No. 1, BLNR granted the Motion to the extent that it sought to open a new proceeding for a declaratory ruling for the limited purpose of determining whether UHH has complied with Condition No. 4 of the CDUP. [Doc. 003 at 1].

5. BLNR denied the Motion's alternate request to reopen the Contested Case to hear the Motion because the Contested Case was fully decided by the issuance of the CDUP, and the Hawai'i Supreme Court affirmed the CDUP in its entirety in *Mauna Kea III*. [Doc. 003 at 1].

6. The Motion did not seek reconsideration of the CDUP, and in any case, did not comply with the requirements of HAR § 13-1-39. [Doc. 001; Doc. 003 at 1]; *See* HAR § 13-1-39.

7. Since the Motion alleges subsequent non-compliance with a condition that was already incorporated within the CDUP, Petitioners cannot show that there is "[n]ew information not previously available [that] would affect" BLNR's decision to issue the CDUP, nor that a "substantial injustice would occur," from the BLNR's decision to issue the CDUP. [Doc. 001; Doc. 003 at 1]. *See* HAR § 13-1-39(a).

8. In addition, HAR § 13-1-39(b) provides that "[i]n either case, a motion for reconsideration shall be made not later than five business days after the decision or not less than fourteen days prior to any deadline established by law for the disposition of the subject matter, whichever is earlier." *See* HAR § 13-1-39(b).

9. The deadline for filing a motion to reconsider the CDUP has long passed, since the CDUP was issued on September 28, 2017. [Doc. 001]; *See* HAR § 13-1-39(b); CDUP.

10. BLNR's consideration of the Motion is not a contested case proceeding. [Doc. 002]; *See* HRS § 91-8; HAR § 13-1-27(a).

II. JURISDICTION AND STANDING.

11. Hawai'i Revised Statutes ("HRS") § 91-8 provides that "Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency." *See* HRS § 91-8.

12. HAR § 13-1-27(a) similarly provides: "On the petition of an interested person, the board may issue a declaratory order regarding the applicability of any statutory provision or of any rule or order of the board." *See* HAR § 13-1-27(a).

13. As a condition incorporated into the CDUP, Condition No. 4 is an "order" of BLNR.

14. BLNR has jurisdiction to consider the Petitioners' Motion to the extent it requests a declaratory order regarding Condition No. 4, and related filings by TOL, Cindy Freitas, and the Flores-Case 'Ohana.

15. Petitioners, TOL, Cindy Freitas, and the Flores-Case 'Ohana are collectively hereafter referred to as the "Movants".

16. HRS § 91-8 and HAR § 13-1-27(a) permit an "interested person" to petition for a declaratory order. *See* HRS § 91-8; HAR § 13-1-7(a).

17. As parties to the contested case hearing to consider the CDUA for the TMT Project in Case No. BLNR-CC-16-002 (and the subsequent appeal to the Hawai'i Supreme Court), and based on Movants' stated interest in protecting and preserving their Native Hawaiian traditional and customary rights on Mauna Kea, Movants are "interested person[s]" with respect to UHH's compliance with Condition No. 4, and therefore have standing in this proceeding. *See*

Mauna Kea Anaina Hou v. Bd. Of Land & Nat. Res., 136 Hawai‘i 376, 363 P.3d 224 (2015) (“*Mauna Kea I*”).

III. CONSTRUCTION AND APPLICATION OF CONDITION NO. 4.

A. Principles of construction of administrative rules.

18. The same general principles that apply to statutory interpretation also apply to the interpretation of administrative rules, and therefore by implication, to administrative orders. *See Allstate Ins. Co. v. Ponce*, 105 Hawai‘i 445, 454, 99 P.3d 96, 105 (2004).

19. An established principle of statutory construction requires a trier of fact “to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.” *State v. Kaakimaka*, 84 Hawai‘i 280, 289-90, 933 P.2d 617, 626-27 (1997).

20. In addition, when construing a statute, “laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other.” HRS § 1-16; *State v. Villeza*, 85 Hawai‘i 258, 273, 942 P.2d 522, 537 (1997) (citing *Richardson v. City and County of Honolulu*, 76 Hawai‘i 46, 55, 868 P.2d 1193, 1202 (1994) (internal brackets omitted)).

21. “[W]here a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed.” *State v. Rodgers*, 68 Haw. 438, 442, 718 P.2d 275, 277 (1986) (ellipses and citations omitted).

B. Construction of Condition No. 4.

22. Condition No. 4 states: “Any work done or construction to be done on the land shall be initiated within two (2) years of the approval of such use, in accordance with construction plans that have been signed by the Chairperson, and, unless otherwise authorized,

shall be completed within twelve (12) years of the approval. The UH Hilo shall notify the Department in writing when construction activity is initiated and when it is completed.” *See* CDUP at 266.

23. The first clause of Condition No. 4 is phrased in the disjunctive: “Any work done *or* construction to be done on the land shall be initiated within two (2) years of the approval of such use”. *See* CDUP at 266 (emphasis added).

24. The word “or” as a disjunctive “indicat[es] an alternative, and it usually connects words and phrases of different meanings permitting a choice of either.” *See Matter of Lindner*, 152 Hawai‘i 130, 135, 522 P.3d 1117, 1122 (Haw. App. 2022) (quoting *State v. Kalani*, 108 Hawai‘i 279, 284, 118 P.3d 1222, 1227 (2005) (citation and internal quotation marks omitted; first brackets added; other brackets omitted)).

25. Therefore, consistent with the established rules of statutory construction as noted above, the words before the disjunctive in Condition No. 4, “[a]ny work done” is distinguishable from (and is properly interpreted as having a different meaning from), the words after the disjunctive, “construction to be done on the land”. *Matter of Lindner*, 152 Hawai‘i at 135, 522 P.3d at 1122.

26. Accordingly, the Petitioners’ argument that Condition No. 4 solely requires TIO to “commence construction within two years of the [issuance of the CDUP]” is overly restrictive even under a plain reading of the condition. Tr. at 11; *See* CDUP at 266.

27. Petitioners essentially argue that Condition No. 4 requires ground disturbing activities and/or the erection of a structure on the land. Tr. at 11, 14.

28. That restrictive reading is not supported by the plain language of Condition No. 4.

29. Although Condition No. 4 *could* have included (and solely required) “ground disturbance” and/or “structures” on the land, the condition does not include, nor require, those criteria. *See* CDUP at 266.

30. The Petitioners’ arguments therefore: a) do not reflect the plain language of Condition No. 4; b) would improperly fail “to give effect to all parts” of the condition; and c) would improperly render portions of the condition “as superfluous, void, or insignificant”. *See Kaakimaka*, 84 Hawai‘i at 289-90, 933 P.2d at 626-27.

31. The CDUP conditions, when read as a whole as required, also demonstrate that the scope of “any work done” within the context of Condition No. 4 is intended to be distinct from “construction to be done on the land,” and the conditions recognize that construction of the TMT Project is a complex and multi-step process.

32. The next condition in the CDUP, General Condition No. 5, states that “[b]efore proceeding with any work authorized by the Board,” UHH is required to submit copies of the construction and grading plans and specifications to the Chairperson or designee for approval. *See* CDUP at 266.

33. Condition No. 5 does not include the clause, “construction to be done on the land.” *See* CDUP at 266.

34. The Board’s decision to only use the clause “any work” in Condition No. 5 instead of “any work or construction to be done on the land” is relevant to the construction of Condition No. 4. *See* HRS § 1-16; *Villeza*, 85 Hawai‘i at 273, 942 P.2d at 537.

35. Condition No. 5 requires that before proceeding with “any work,” UHH is required to submit construction and grading plans and specifications for approval to the chairperson for approval for consistency with the CDUP. *See* CDUP at 266.

36. A plain reading of Condition No. 5 suggests and supports that the clause “any work” is intended to be relatively broad in scope, and preliminary to any construction or ground disturbing activity, because BLNR has a strong interest in reviewing and ensuring that the construction and grading plans and specifications for the TMT Project are consistent with the CDUP at an early stage of the development of the TMT Project site (*i.e.* even before proceeding with “any work”) and before actual construction takes place at the site.

37. Since the clause “any work done” is distinguishable from the clause “construction to be done on the land” for purposes of Condition No. 4, BLNR also considers the issue of what constitutes “work” as opposed to “construction” for purposes of Condition No. 4.

38. As noted above, the TMT Project is a complex undertaking, with a number of phases, and extensive on-site (and site-related) coordination, testing, and surveying work, among other work, which do not necessarily require ground-disturbing activities in advance of physical construction on the land. [Doc. 006 at Liu Decl.]; Tr. at 54-55.

39. Such a complex project reasonably requires significant preparation to prepare for the use of the TMT Project site in advance of ground disturbing activity at the site. [Doc. 006 at Liu Decl.]; Tr. at 46.

40. Consistent with this, the Merriam-Webster Dictionary, one of the major dictionaries commonly cited by the Hawai‘i Supreme Court, defines “construction” as “the act or result of constructing, interpreting, or explaining,” as well as “the *process, art, or manner of constructing* something[.]” *See construction, Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/construction> (emphasis added) (accessed November 4, 2021); *see e.g., State v. Bright*, 147 Hawai‘i 164, 170, 465 P.3d 611, 617 (2020)

(citing both the Merriam-Webster Dictionary and the Oxford English Dictionary to interpret the word “neutral”).

41. Accordingly, under a commonly-accepted definition of “construction,” the word encompasses more than an act of physically changing something – such as ground disturbing activity – and also encompasses an “interpretation” and “process”.

42. As TIO acknowledged at the hearing, however, not all of TIO’s preparatory work should qualify as “work done” or the initiation of construction for purposes of Condition No. 4. Tr. at 45.

43. Activities such as polishing telescope mirrors, for example, while necessary for the eventual use and operation of the telescope, should not qualify as “work done” or initiation of construction for purposes of Condition No. 4, because such preparatory work does not lead to, and is not in furtherance of, construction and ground disturbing activity that has been permitted through the CDUP at the TMT Project site itself. *See* CDUP at 266; Tr. at 45.

44. On the other hand, activities that TIO initiated following the issuance of the Notice to Proceed in the early phase of the development of the TMT Project in furtherance of, and in order to prepare for, “construction to be done on the land” or ground disturbing activity at the TMT Project site qualifies as “work done” or the initiation of construction for purposes of Condition No. 4, particularly in light of the evidence that such a complex project reasonably requires significant preparation and multiple steps to prepare for the use of the TMT Project site in advance of ground disturbing activity at the site. [Doc. 006 at Liu Decl.]; *see* CDUP at 266; Tr. at 46.

45. This interpretation of “work” is also consistent with the dictionary authorities commonly cited by the Hawai‘i Supreme Court in constructing words and phrases. *See, e.g., Bright*, 147 Hawai‘i at 170, 465 P.3d at 617.

46. The Oxford English Dictionary defines “work” as, among other definitions, “[a]ctivity involving mental or physical *effort* done in order *to achieve* a purpose or result,” and “[a] task or tasks to be undertaken; something a person or thing has to do.” *See work*, *Lexico.com by Oxford English Dictionary*, <https://www.lexico.com/en/definition/work?locale=en> (emphasis added) (accessed November 4, 2021) (current website at www.oed.com).

47. Similarly, the Merriam-Webster Dictionary defines “work” as, among other definitions, “to *perform or carry through a task* requiring sustained effort or continuous operations,” and “to function or operate *according to plan or design*”. *See work*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/work> (emphasis added) (accessed November 4, 2021).

48. Thus, the word “work” encompasses more than an act of physically changing something, and contemplates activities relating to “effort[s] done in order to achieve” a certain “purpose or result,” to “carry through a task,” and to operate in accordance with a “plan or design” under the definitions cited above.

49. For purposes of Condition No. 4, the “purpose or result” and the “plan or design” is the use of the TMT Project site for the construction of the TMT Project in accordance with the construction and grading plans and specifications that DLNR previously approved in issuing the Notice to Proceed.

50. Given the foregoing, all of the activities that TIO performed after the issuance of the Notice to Proceed from June 20, 2019 through July 16, 2019 as summarized in UHH’s letters

dated July 30, 2019 and April 28, 2021 to DLNR were efforts done in order to achieve, and in order to prepare for, the early phase of ground disturbing activity at the TMT Project site in accordance with the construction and grading plans, and specifications for the TMT Project.

51. Accordingly, all of the activities conducted by TIO and / or its contractors in June through July, 2019 and described in the FOF above were “work done” relating to the TMT Project and “work done” in furtherance of construction at the TMT Project site within the meaning of Condition No. 4, and UHH therefore timely initiated construction and met the deadline for compliance with Condition No. 4.

C. Arguments relating to TIO’s intent to start construction.

52. Petitioners argue that TIO allegedly “never” had the intention of starting construction at the TMT Project site, and rely upon the NSF’s August, 2020 announcement that NSF commenced the process to consider additional funding for the TMT Project. [Doc. 001 at Ex. 04 and 05]; Tr. at 20.

53. As reflected in the CDUP, however, the funding for the TMT Project was discussed and addressed during the contested case hearing for the CDUA, and the CDUP was affirmed in its entirety by the Hawai‘i Supreme Court. *See* CDUP; *Mauna Kea III*.

54. In addition, while all Parties acknowledge that NSF is *currently* engaged in a process to consider additional funding for the TMT Project, that process -- which was announced in August, 2020 -- commenced *after* the issuance of the CDUP and after the work done by TIO through July 16, 2019. [Doc. 001 at Ex. 04 and 05]; Tr. at 58.

55. Accordingly, the NSF’s current process to consider additional funding for the TMT Project has no relevance to TIO’s intent to perform “work” and/or “construction” at the TMT Project site by September 26, 2021, which is the date of the extension of Condition No. 4.

56. Even assuming, *arguendo*, that the NSF’s current process has any relevance to TIO’s intent to start construction at the TMT Project site prior to September 26, 2021, TIO engaged in the “work” described in its letter to UHH dated July 29, 2019 and also cited in the subsequent correspondence by UHH dated July 30, 2019 and April 28, 2021, and the correspondence from DLNR dated July 30, 2019 as described in the FOF above. [Doc. 001 at Ex. 01 and Ex. 02].

57. In addition, Condition No. 4 provides that “any work done or construction to be done on the land shall be *initiated* within two (2) years of the approval of such use” (Emphasis added). *See* CDUP at 266.

58. Condition No. 4 does not require continuous and uninterrupted “work done or construction to be done on the land”. *See* CDUP at 266.

D. UHH’s compliance with Condition No. 4.

59. Accordingly, for the reasons in the conclusions of law (“COL”) above, the activities that TIO initiated following the issuance of the Notice to Proceed in the early phase of the development of the TMT Project in furtherance of, and in order to prepare for, ground disturbing activity at the TMT Project site qualifies as “work done” and/or “construction” for purposes of Condition No. 4; met the requirement of the condition; and supports TIO’s intent to commence construction at the TMT Project site during the relevant period, including up to July 16, 2019 when TIO’s contractor, GBI, mobilized the Construction Equipment.

60. Accordingly, DLNR properly acknowledged UHH’s notice of compliance with Condition No. 4. on May 4, 2021.

IV. THE MOVANTS’ ADDITIONAL ARGUMENTS.

A. Judicial estoppel.

61. While Petitioners originally argued in their brief that BLNR was “judicially estopped” from relying upon work done in connection with the TMT Project as a basis for its May 4, 2021 acknowledgment that UHH timely met Condition No. 4 because BLNR also cited that work in connection with its July 30, 2019 approval of UH Hilo’s request to extend the time to comply with Condition No. 4, Petitioners appear to have changed their position during oral argument and alleged instead that UHH and TIO should be judicially estopped for similar reasons. [Doc. 001 at 3-4]; Tr. at 17.

62. Under the doctrine of judicial estoppel, a party is not permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by the party. *See Lee v. Puamana Comm. Assoc.*, 109 Hawai‘i 561, 576, 128 P.3d 874, 889 (2006).

63. Accordingly, even assuming the doctrine of judicial estoppel applies in the administrative law context, it would apply -- if at all -- to a party, and not a decision-maker, such as DLNR or BLNR here.

64. Judicial estoppel also does not apply to UHH and TIO under these circumstances.

65. Both UHH and TIO, in their correspondence on this issue, expressly, unambiguously, and repeatedly stated their respective positions that Condition No. 4 had in fact been timely met, and both UHH and TIO did not waive their respective positions on this issue. [Doc. 001 at Ex. 1 (UHH letter to BLNR Chairperson dated July 30, 2019 stating in part, “As described below, and based on information provided by [TIO], UH understands, as of the date of this letter, that ‘work’ and/or ‘construction’ has in fact been initiated at the TMT Project site,” and that the request for an extension was made without “waiving the foregoing,” and “out of an abundance of caution”); Doc. 001 at Ex. 2 (Letter from TIO counsel to UHH noting that TIO

believed “it has in fact ‘initiated’ ‘work’ and/or ‘construction’ at the TMT Project site; the request for an extension was being made “out of an abundance of caution”; and TIO “does not waive, and expressly preserves, its position that work has been initiated in compliance with the deadline in General Condition No. 4[.]”].

66. Accordingly, UHH and TIO did not take “clearly inconsistent” positions regarding timely compliance with Condition No. 4, and DLNR could not have been misled, and was not misled, by UHH’s and TIO’s representations on the issue. *See Lee*, 109 Hawai‘i at 576, 128 P.3d at 889.

67. As such, there was clearly no “unfair advantage” or “unfair detriment” to anyone created by UHH’s and TIO’s statements on this issue, and judicial estoppel does not apply to UHH and TIO in this matter. *See Lee*, 109 Hawai‘i at 576, 128 P.3d at 889.

B. Alleged administrative rule making.

68. Petitioners also argue that the BLNR Chairperson allegedly engaged in improper administrative rule making when she acknowledged UHH’s April 28, 2021 notice of compliance with Condition No. 4 on May 4, 2021. [Doc. 001].

69. Petitioners argue that “UHH’s ‘notice of initiation’ sought to short-cut processes for determining the constitution of ‘work and/or construction on the land’, which would otherwise require filing of a petition for declaratory orders, and further to evade requirements that the Board review extensions beyond the first request. HAR §13-5-43(b). As set forth supra . . . DLNR lacked authority to issue a de facto revision of permit conditions by ‘approv[ing]’ UHH’s notice of initiation.” [Doc. 001 at 6-7].

70. DLNR’s acknowledgment of UH Hilo’s April 28, 2021 notice was made pursuant to Condition No. 4 of the CDUP, which requires that UHH “notify” DLNR. *See CDUP* at 266.

71. Accordingly, DLNR's acknowledgment was not to "evade requirements that the Board review extensions beyond the first request," as Petitioners argue, because UHH's April 28, 2021 notice plainly did not seek a further extension and complied with the notice requirement. [Doc. 001 at Ex. 3].

72. Nor did DLNR's acknowledgment of UHH's notice of compliance with Condition No. 4. somehow result in the "issue[ance] [of] a de facto revision of permit conditions," because the provisions and requirements of Condition No. 4 remained the same before and after DLNR's acknowledgment of UHH's notice of compliance with the condition.

73. Simply stated, DLNR determined that UHH complied with an existing condition of the CDUP, and DLNR's act in approving the notice did not result in a "revision" of Condition No. 4 (or any other provision of the CDUP).

74. Accordingly, instead of engaging in rulemaking, which "affects the rights of individuals in the abstract," DLNR properly exercised its authority and followed the procedure under the CDUP and applicable law to acknowledge the notice of compliance with Condition No. 4, which was a concrete action that specifically affected UHH and TIO pursuant to the terms of the CDUP. *See In re Water Use Permit Applications*, 94 Hawai'i 97, 169, 9 P.3d 409, 481 (2000) (quoting 1 Kenneth C. Davis, *Administrative Law Treatise* § 5.01 (1958)).

C. The BLNR Chairperson's alleged "finding".

75. During oral argument on the Motion, Petitioners also argued that the BLNR Chair ostensibly made a "finding" that UHH and TIO did not perform "[a]ny work done or construction to be done on the land" sufficient to meet Condition No. 4 when she issued her letter dated July 30, 2019 granting UHH's request for a two year extension of the condition. [Tr. at 18-19].

76. Petitioners argued that because of this ostensible prior “finding,” the BLNR Chairperson improperly acknowledged UHH’s April 28, 2021 notice of compliance with Condition No. 4, and should have instead referred the matter to BLNR for consideration of a second extension of time for compliance with Condition No. 4. Tr. at 15-16.

77. There is nothing in the plain language of the BLNR Chairperson’s July 30, 2019 letter that states that the Chairperson made a “finding” that TIO’s work done following the June 19, 2019 Notice to Proceed did not meet the requirements of Condition No. 4. [Doc. 001 at Ex. 02].

78. To the contrary, the plain language of the July 30, 2019 letter instead *expressly acknowledges* UHH’s representations “that the following *work* has been conducted since the Notice to Proceed was issued,” and that “construction” was delayed while the CDUP went through the appellate process and because “[d]emonstrations along the access road to the summit of Muana Kea have prevented construction crews from accessing the site.” [Doc. 001 at Ex. 02 (emphasis added)].

79. Accordingly, the BLNR Chairperson’s statements in her July 30, 2019 letter are entirely consistent with UHH’s (and TIO’s) position that “‘work’ and/or ‘construction’ has in fact been initiated at the TMT Project site, such that the two year deadline prescribed by General Condition No. 4 has been met,” but “[w]ithout waiving the foregoing, and given the current limitations on access to the site . . . TIO has asked that UH request, out of an abundance of caution, a two-year extension of the current deadline to initiate construction[.]” [Doc. 001 at Ex. 01].

80. To the extent that Petitioners argue that the BLNR Chairperson’s July 30, 2019 letter implicitly made a “finding” that UHH did not comply with Condition No. 4 because the

letter does not expressly refer to UHH's (and TIO's) request to grant the extension (out of an abundance of caution and without waiver of the position that work was initiated at the TMT Project site) BLNR declines to read the Chairperson's letter in a vacuum.

81. The Chairperson's letter expressly acknowledged and referred to UHH's July 30, 2019 letter (which attached TIO's letter) (and as noted above, expressly referred to the "work" that was "conducted since the Notice to Proceed was issued"); accordingly, the Chairperson's letter and response must be read in the context of UHH's request that the extension be granted "out of an abundance of caution" and with reservation of UHH's and TIO's position regarding work conducted at the TMT Project Site. [Doc. 001 at Ex. 01 and Ex. 02].

82. Therefore, the BLNR Chairperson did not make a "finding" that UHH and TIO did not perform "[a]ny work done or construction to be done on the land" sufficient to meet Condition No. 4 when she issued her letter dated July 30, 2019 granting UHH's request for a two year extension of the condition.

D. Sufficiency of documentation.

83. Petitioners also challenge the sufficiency of the information provided by UHH to DLNR because HAR § 13-5-43(b) and (c) permit extensions of time by the Chairperson and BLNR respectively, based on "supportive documentation from the applicant". *See* HAR § 13-5-43(b) and (c).

84. Aside from noting the format of UHH's correspondence to DLNR (*i.e.* a "letter"), however, Petitioners fail to provide any evidence of precisely *how* UHH's correspondence to the BLNR Chairperson dated July 30, 2019 allegedly did not constitute sufficient "supportive documentation" for the formal request for an extension of Condition No. 4. [Doc. 001]; Tr. at 15.

85. In addition, the documentation provided by UHH in its July 30, 2019 letter must also be considered in light of the fact that DLNR had already reviewed and approved the construction and grading plans, and specifications for the TMT Project that UHH previously submitted to DLNR in compliance with Condition No. 5 of the CDUP and the issuance of the Notice to Proceed. [Doc. 006 at Liu Decl. and Ex. A].

86. The BLNR Chairperson therefore had sufficient “supportive documentation” from UHH to grant the two year extension of the construction commencement deadline to September 26, 2021.

87. To the extent that Petitioners argue that there was insufficient “supportive documentation from the applicant” for the Chairperson to acknowledge UHH’s April 28, 2021 notice of compliance with Condition No. 4, BLNR concludes that HAR § 1-5-43(c) is not applicable because UHH’s April 28, 2021 notice did not seek a further extension of time to comply with Condition No. 4.

88. In addition, pursuant to the COL above, the Chairperson properly acknowledged the notice of compliance, and UHH’s and TIO’s correspondence must also be considered in light of the fact that DLNR had already reviewed and approved the construction and grading plans, and specifications for the TMT Project. [Doc. 006 at Liu Decl. and Ex. A].

E. The NPDES permit.

89. UHH is the permittee under the CDUP. *See* CDUP.

90. In its letter dated May 28, 2019, DOH confirmed that a valid NPDES permit existed for the TMT Project, and that the NPDES permit would remain valid for the duration of an administrative extension. [Doc. 013 at Ex. A].

91. Since a valid NPDES permit existed for the TMT Project during the period that the work and mobilization of equipment took place from June through July, 2019 relating to the

TMT Project as described in the FOF above, the alleged subsequent issues relating to the NPDES permit and the contemplated transfer of the permit from TMT Observatory Corporation to its successor in interest, TIO, do not alter the conclusion that UHH timely met the Condition 4 requirement for “work done or construction to be done on the land” pursuant to the CDUP.

V. THE RESPONDENTS’ ADDITIONAL ARGUMENTS.

A. DLNR’S prior consideration of Condition No. 4.

92. HAR § 13-1-27(a) provides that “the board may issue a declaratory order regarding the applicability of any statutory provision or of any rule or order of the board.” *See* HAR § 13-1-27(a).

93. The Hawai‘i Supreme Court has held that the administrative declaratory ruling process is not a proper means to review specific agency decisions that have already been rendered. *See Citizens Against Reckless Development v. Zoning Bd. of Honolulu*, 114 Haw. 184, 196, 159 P.3d 143, 155 (2007) (“*Card*”); *see also In re Matter of Kanahele*, 152 Hawai‘i 501, 516, 526 P.3d 478, 493 (2023) (“*In re Kanahele*”) (relying on *Card* in holding that the Land Use Commission properly concluded it lacked jurisdiction to issue a declaratory order to review DLNR’s prior land use decision).

94. As the Hawai‘i Supreme Court determined in *Card*, the declaratory ruling process is “meant to provide a means of seeking determination of whether and in what way some statute, agency rule or order *applies* to the factual situation raised by an interested person.” *See Card*, 114 Haw. at 196-197, 159 P.3d. at 155-156 (emphasis added); *see also In re Kanahele*, 152 Hawai‘i at 516-517; 526 P.3d at 493-494.

95. The Court noted that the use of the declaratory ruling procedure only makes sense where the applicability of relevant law is unknown, either because the agency has not yet acted upon particular factual circumstances, or for some other reason the applicability of some

provisions of law have not been brought into consideration. *Card*, 114 Haw. at 197, 159 P.3d at 156.

96. On May 4, 2021, DLNR acknowledged UHH's April 28, 2021 letter to DLNR that UHH met Condition No. 4. [Doc. 001 at Ex. 3].

97. Since DLNR previously acknowledged UHH's notice that it met Condition No. 4, there is currently no pending question of how DLNR "applies" Condition No. 4 of the CDUP to the current factual situation regarding the "work done or construction . . . done on the land" because DLNR previously acknowledged UHH's notice. [Doc. 001 at Ex. 3].

98. Accordingly *Card* and *In re Kanahele* collectively provide an additional basis to deny the Motion, because Petitioners' request for a declaratory ruling to ostensibly find that UHH "has not initiated construction so as to comply with Condition No. 4" is an improper request to review an already-made agency decision given DLNR's prior acknowledgment of the applicability (and fulfillment) of Condition No. 4. *See Card*, 114 Haw. at 196, 159 P.3d at 155; *see also In re Kanahele*, 152 Hawai'i at 516-517; 526 P.3d at 493-494.

B. Equity and unclean hands.

99. Under the doctrine of unclean hands, a person "who comes into equity must come with clean hands." *See 7's Enters, Inc. v. Del Rosario*, 111 Hawai'i 484, 494, 143 P.3d 23, 33 (2006).

100. BLNR has the discretion to take into account equitable considerations. *See Southern Foods Group, L.P. v. State Dept. of Educ.*, 89 Hawai'i 443, 452, 974 P.2d 1033, 1042 (1999) (noting that administrative agency discretion, "When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by

the reason and conscience of the judge to a just result”) (*quoting Booker v. Midpac Lumber Co.*, 65 Haw. 166, 172, 649 P.2d 376, 380 (1982) (citations and internal brackets omitted)).

101. Virtually all of the Petitioners (individually or as members of various organizations) actively participated in the protests and/or coordinated with others engaging in the protests to block access to the TMT Project site on and about July 16, 2019 when GBI attempted to move the Construction Equipment to the site. [Doc. 006 at Ex. C].

102. There was no evidence presented in the record of this proceeding that the Petitioners were arrested in connection with the protests.

103. The protests, however, prevented GBI from moving the Construction Equipment to Mauna Kea Access Road and up to the TMT Project site. [Ex. 006 at Liu Decl.]; Tr. at 66-67.

104. The inability to move the Construction Equipment to the TMT Project site due to the protests was cited as a basis for UHH’s request, out of an abundance of caution, and under a reservation of rights, to request an extension of the Condition No. 4 deadline from DLNR. [Doc. 001 at Ex. 01].

105. In its July 30, 2019 letter granting the extension, DLNR cited and relied upon the “[d]emonstrations along the access road to the summit of Mauna Kea [that] have prevented construction crews from accessing the site” as one of the reasons for approving UHH’s request. [Doc. 001 at Ex. 02].

106. One of the arguments Petitioners have made in this proceeding is that UHH did not timely proceed with “construction” at the TMT Project site for purposes of Condition No. 4, including the “building of something [at the TMT Project site],” since [t]here has been no grading up there [at the TMT Project site], and “[t]here’s been no pouring of concrete.” Tr. at 14.

107. The Construction Equipment convoy, which included a loader, a dozer, and a mini-ex/roller was intended to conduct ground disturbing activity at the TMT Project site, including construction.

108. The Petitioners' argument that TIO did not timely commence with "construction" at the TMT Project site is inequitable in light of their own actions that contributed to the inability of GBI to move the Construction Equipment to the TMT Project site for the purpose of proceeding with the "construction" that Petitioners argue never took place.

109. Petitioners argue that equitable considerations should not apply because no further construction took place at the TMT Project site after DLNR granted the extension and up to DLNR's acknowledgment of UHH's compliance with Condition No. 4 on May 4, 2021.

110. The relevant point to evaluate the Petitioners' actions, however, is when GBI attempted to move the Construction Equipment on and about July 16, 2019, because UHH's request for an extension of Condition No. 4 (approximately two weeks later, on July 30, 2019 in an abundance of caution and with a reservation of rights), would not have been necessary but for the protests that Petitioners participated in, which contributed to preventing GBI from timely moving the Construction Equipment to the TMT Project site as planned for construction.

111. Equitable considerations therefore apply to Petitioners' argument that UHH did not timely comply with Condition No. 4, and under the balance of equities, the doctrine of unclean hands provides an additional basis to deny the Motion.

DECISION AND ORDER

Based upon the foregoing findings of fact and conclusions of law, the Motion is DENIED.

Dated: Honolulu, Hawai'i, _____.

Dawn N.S. Chang, Chairperson
Board of Land and Natural Resources
And Presiding Officer

Riley Smith, Member

Doreen Nāpua Canto, Member

Karen Ono, Member

Aimee Keli‘i Barnes, Member

Vernon Char, Member

Wesley “Kaiwi” Yoon, Member

DATED: Honolulu, Hawai‘i, December 20, 2023.

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF

The Petition of Mauna Kea Hui for a
Declaratory Order Filed May 24, 2021.

Case No. HA-22-02

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served
upon the following parties, by email, on December 20, 2023:

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