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MAUNA KEA ANAINA HOU, ROYAL ORDER OF
KAMEHAMEHA I, SIERRA CLUB, HAWAI'I
CHAPTER and CLARENCE CHING

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

MAUNA KEA ANAINA HOU, ROYAL)
ORDER OF KAMEHAMEHA I, SIERRA)
CLUB, HAWAI'I CHAPTER and)
CLARENCE CHING,)

Plaintiffs-Appellants,)

vs.)

BOARD OF LAND AND NATURAL)
RESOURCES, UNIVERSITY OF)
HAWAI'I INSTITUTE FOR)
ASTRONOMY, HARRY FERGESTROM,)

CIVIL NO. 04-1-397 (Hilo)
(Agency Appeal)

DECISION AND ORDER:
(1) REVERSING BLNR'S
DECISION GRANTING
CONSERVATION DISTRICT USE
PERMIT FOR THE
CONSTRUCTION AND OPERATION
OF SIX 1.8 METER OUTRIGGER
TELESCOPES WITHIN THE
SUMMIT AREA OF THE MAUNA
KEA SCIENCE RESERVE DATED

I hereby certify that this is a full, true and correct
copy of the original on file in this office.

Clerk, Third Circuit Court, State of Hawaii

and HAWAI'I ISLAND ECONOMIC
DEVELOPMENT BOARD, INC.,

Defendants-Appellees.

) **OCTOBER 29, 2004;**
) **(2) REVERSING BLNR'S FINDING**
) **OF FACT, CONCLUSIONS OF LAW**
) **AND DECISION AND ORDER**
) **DATED OCTOBER 29, 2004; AND**
) **(3) AFFIRMING IN PART BLNR'S**
) **FINDING OF FACT, CONCLUSION**
) **OF LAW AND DECISION AND**
) **ORDER FOR MANAGEMENT PLAN**
) **DATED OCTOBER 9, 2004**

DECISION AND ORDER:

- (1) **REVERSING BLNR'S DECISION GRANTING CONSERVATION DISTRICT USE PERMIT FOR THE CONSTRUCTION AND OPERATION OF SIX 1.8 METER OUTRIGGER TELESCOPES WITHIN THE SUMMIT AREA OF THE MAUNA KEA SCIENCE RESERVE DATED OCTOBER 29, 2004;**
- (2) **REVERSING BLNR'S FINDING OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER DATED OCTOBER 29, 2004; AND**
- (3) **AFFIRMING IN PART BLNR'S FINDING OF FACT, CONCLUSION OF LAW AND DECISION AND ORDER FOR MANAGEMENT PLAN DATED OCTOBER 9, 2004**

I. INTRODUCTION

On November 29, 2004, Appellants MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB, HAWAI'I CHAPTER, AND CLARENCE CHING (collectively "Mauna Kea Appellants") filed a Notice of Appeal appealing the following decisions of Appellee BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I ("BLNR"):

- a. BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8-Meter Outrigger Telescopes Within the Summit area of the Mauna Kea Science Reserve dated October 29, 2004.
- b. BLNR's Finding of Fact, Conclusion of Law and Decision and Order dated October 29, 2004.

- c. BLNR's Finding of Fact, Conclusion of Law and Decision and Order for Management Plan dated October 29, 2004.
- d. All orders and rulings incorporated in the foregoing documents.

II. DESCRIPTION OF THE PROJECT

1. In 1968, BLNR leased the summit area of Mauna Kea, known as the Mauna Kea Science Reserve, to the University of Hawai'i ("UH"). ROA, Tab 298. The Mauna Kea Science Reserve and the summit of Mauna Kea are located in the Conservation District, in a Resource Subzone.
2. The entire summit area of Mauna Kea is public land owned by the State of Hawai'i and under the jurisdiction of the State Board of Land and Natural Resources ("BLNR").
3. Appellee UNIVERSITY OF HAWAI'I INSTITUTE FOR ASTRONOMY ("UHIFA") was established in 1969 and eventually assumed responsibility within the UH system for Mauna Kea. ROA Tab 140, Exhibit 23.
4. In 1985, the BLNR approved a Master Plan (CDUP HA-1573; 2/22/85) ("1985 Management Plan") as Part VII of the Mauna Kea Science Reserve Complex Development Plan. CDUP HA-1573. ROA Tab 306.
5. The 1985 Management Plan and Mauna Kea Science Reserve Complex Development Plan include a "General Description of Planned Astronomy Development" that envisioned for the entire Mauna Kea Science Reserve "thirteen steel-framed domed telescope facilities, approximately 100 to

125 feet in diameter, ranging from 60 to over 125 feet in height" (11 major, 2 minor facilities). *Id.* at 68.

6. Between 1968 and 1999, a total of eleven (11) separate telescopes, one antenna, and one array were built or were under construction. ROA Tab 140, Exhibit F-23 (Audit) at 27-28.

7. On March 10, 1995, the BLNR adopted a Revised Management Plan for the UH Management Areas on Mauna Kea which superceded the 1985 Management Plan, CDUP HA-1573A ("1995 Revised Management Plan"). ROA Tab 136 (Exhibit A-19, Appendix D, 2986-3010).

8. The 1995 Revised Management Plan did not provide for the same scope or coverage for the development of astronomy facilities on Mauna Kea as did the 1985 Management Plan.

9. The 1995 Revised Management Plan would not support and did not approve or authorize the Outrigger Telescopes Project because the 1995 Revised Management Plan is virtually silent on the matter of future development of astronomy facilities on Mauna Kea.

10. The 1995 Revised Management Plan includes the Mauna Kea Science Reserve (Tax Map Key 4-4-15:09), the 19.3 acre site at Hale Pohaku (CDUP No. HA1819, Tax Map Key 4-1-15:12) encompassing the Onizuka Center for International Astronomy (OCIA), the Visitor Information Station and the Construction Camp, and the summit access road from the OCIA at Hale Pohaku to the Science Reserve boundary. *Id.* (Part I., paragraph C). The scope

of the 1995 Revised Management Plan does not include the Outrigger Telescopes Project at issue here.

11. In 2000, UHIFA developed a Mauna Kea Science Reserve Master Plan ("2000 Master Plan") which the University of Hawaii Board of Regents adopted. ROA Tab 136, Exhibit A-10.

12. However, the State BLNR never adopted or approved the 2000 UHIFA Master Plan.

13. In 2001, UHIFA filed a Conservation District Use Permit application ("CDUA") with the BLNR to construct and operate up to six 1.8-meter Outrigger Telescopes adjacent two the Keck I & II 10-meter telescopes ("Outrigger Telescopes Project").

14. UHIFA did not initially submit a management plan that would support its CDUA for the Outrigger Telescopes Project.

15. The Mauna Kea Appellants and others requested a contested case hearing. The BLNR appointed a Hearing Officer to conduct a contested case hearing.

16. UHIFA eventually submitted a project specific management plan which covered the Outrigger Telescopes Project area within an approximately 5 acre site of the William M. Keck Observatory ("Outrigger Management Plan"). Conclusion of Law 12, BLNR's Findings of Fact, Conclusions of Law and Decision and Order dated October 29, 2004, ROA

Tab 298; BLNR's Finding of Fact, Conclusion of Law and Decision and Order for Management Plan dated October 29, 2004, *id.*

17. On October 29, 2004 BLNR granted the Outrigger Telescopes Project a Conservation District Use Permit and approved the Outrigger Management Plan for the 5 acre site. BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8-Meter Outrigger Telescopes Within the Summit area of the Mauna Kea Science Reserve dated October 29, 2004, ROA Tab 298; BLNR's Finding of Fact, Conclusion of Law and Decision and Order dated October 29, 2004, *id.*; BLNR's Finding of Fact, Conclusion of Law and Decision and Order for Management Plan dated October 29, 2004, *id.*

18. On November 29, 2004, the Mauna Kea Appellants filed a Notice of Appeal of the following BLNR decisions:

- a. BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8-Meter Outrigger Telescopes Within the Summit area of the Mauna Kea Science Reserve dated October 29, 2004.
- b. BLNR's Finding of Fact, Conclusion of Law and Decision and Order dated October 29, 2004.
- c. BLNR's Finding of Fact, Conclusion of Law and Decision and Order for Management Plan dated October 29, 2004.
- d. All orders and rulings incorporated in the foregoing documents.

III. STANDARD OF REVIEW

1. Hawai'i Revised Statutes ("Haw. Rev. Stat.") § 91-14 (1993 repl.) sets forth the standards of review for an agency appeal:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Haw. Rev. Stat. § 91-14(g) (1993 repl.).

2. Findings of fact are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record. *Alvarez v.*

Liberty House, Inc., 85 Haw. 275, 277, 942 P.2d 539, 541 (1997);

Haw. Rev. Stat. § 91-14(g)(5).

3. Conclusions of law are freely reviewable under the *de novo* standard to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law. *Hardin v. Akiba*, 84 Haw. 305, 310, 933 P.2d 1339, 1344 (1997) (citations omitted); Haw. Rev. Stat. §§ 91-14(g)(1), (2), and (4).

4. Courts give deference to an agency's expertise and experience in its particular field, and should not substitute its own judgment for that of the administrative agency where mixed questions of fact and law are present. To be accorded deference, however, the agency's decision must be consistent with the Legislature's purpose. *Camara v. Aagsulud*, 67 Haw. 212 (1984).

IV. CONCLUSIONS OF LAW: THE LEGAL REQUIREMENT TO PREPARE A COMPREHENSIVE MANAGEMENT PLAN

1. Haw. Rev. Stat. Chap. 183C (amended 1994), governs land uses in the conservation district. Haw. Rev. Stat. Chap. 183C (2006 Supp.).

2. The purpose of the conservation district as implemented through Chap. 183C is to protect Hawaii's natural resources.

The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature to conserve, protect and preserve the important natural resources of the State through **appropriate management** and use to promote their

long-term sustainability and the public health, safety and welfare.

Haw. Rev. Stat. § 183C-1 (2005 Supp.) (emphasis added).

3. The BLNR adopted administrative rules, Hawai'i Administrative Rules ("H.A.R.") Chap. 13-5 (Sept. 6, 2004), to implement Haw. Rev. Stat. Chap. 183C. These rules were authorized by and carry out the requirements in Haw. Rev. Stat. Chap. 183C.

4. The purpose of the H.A. R. Chap. 13-5 is to "regulate land use in the conservation district for the purpose of conserving, protecting, and preserving important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare." H.A.R. § 13-5-1.

5. H.A.R. § 13-5-30(b) sets out a system and requirements for obtaining different kinds of permits within the conservation district:

(b) Unless provided in this chapter, land uses shall not be undertaken in the conservation district. The department shall regulate land uses in the conservation district by issuing one or more of the following approvals:

- (1) Departmental permit (see section 13-5-33);
- (2) Board permit (see section 13-5-34);
- (3) Emergency permit (see section 13-5-35);
- (4) Temporary variance (see section 13-5-36);
- (5) Nonconforming uses (see section 13-5-37);
- (6) Site plan approval (see section 13-5-38); or
- (7) Management plan (see section 13-5-39).

6. Under H.A.R. § 13-5-30(c)(2), a proposed land use in a conservation district must be "consistent with the objectives of the subzone of the land on which the use will occur."

7. The summit of Mauna Kea is located in a "Resource Subzone": "The objective of th[e] [Resource] subzone is to develop, with **proper management**, areas to ensure sustained use of **natural resources** of those areas." H.A.R. § 13-5-13(a) (emphasis added).

8. "Natural resource" is defined to include "resources such as plants, aquatic life and wildlife, **cultural, historic and archeological sites** and minerals." H.A.R. § 13-5-2 (emphasis added).

9. H.A.R. § 13-5-24(c)(4) identifies "Astronomy Facilities" as a "use" which is allowed within the R-3 Resource Subzone, subject to an approved management plan:

R-3 ASTRONOMY FACILITIES

(D-1) Astronomy facilities under an approved **management plan** (emphasis added).

10. H.A.R. § 13-5-22(b)(4) provides that: "Identified uses beginning with letter (D) require a board permit, and where indicated, a management plan."

11. "R-3 ASTRONOMY FACILITIES" begins with the letter "D." Under H.A.R. § 13-5-24(c)(4), a "D-1" use requires a management plan.

12. UHIFA's application for a Conservation District Use Permit for the Outrigger Telescopes Project is a proposed "use" under "D-1" of administrative rule H.A.R. § 13-5-24(c)(4) and therefore requires an approved management plan.

13. DLNR's Administrative Rules define "Management Plan" as "a **comprehensive** plan for carrying out multiple land uses. H.A.R. § 13-5-2 (emphasis added).

14. The plain meaning of the word "comprehensive" is a scope that is "all-covering, all-embracing, all-inclusive, all-pervasive" Burton, William C., *Legal Thesaurus* (Reg. Ed. 1980) as opposed to limited, narrow, or confined.

15. The term "comprehensive" is defined by *The American Heritage Dictionary of the English Language* (1969) as "[i]ncluding or comprehending much, **large in scope or content.**" (Emphasis added).

16. Black's Law Dictionary defines a "comprehensive zoning plan" as "[a] general plan to control and direct the use and development of a large piece of property."

17. DLNR's administrative rules define "Land use" as follows:

"Land use" means:

(1) The placement or erection of any solid material on land if that material remains on the land more than fourteen days, or which causes a permanent change in the land area on which it occurs;

(2) The grading, removing, harvesting, dredging, mining or extraction of any material or natural resource on land;

- (3) The subdivision of land; or
- (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

For purposes of this chapter, harvesting and removing does not include the taking of aquatic life or wildlife that is regulated by state fishing and hunting laws nor the gathering of natural resources pursuant to Article 12, Section 7 of the Hawai'i State Constitution or section 7-1, Haw. Rev. Stat. relating to certain traditional and customary Hawaiian practices.

H.A.R. § 13-5-2.

18. The plain meaning of the term "comprehensive management plan" and the DLNR's own past interpretation of that term support the conclusion that, as a matter of law, DLNR Administrative Rule H.A.R. § 13-5-24, for the R-3 Resource Subzone requires a management plan which covers multiple land uses within the larger overall area that UHIFA controls at the top of Mauna Kea in the conservation district.

19. The Outrigger Management Plan covers only a single project, not the comprehensive "multiple land uses" and large land area required by the definition of "management plan" in H.A.R. § 13-5-2.

20. Thus, the Outrigger Management Plan does not qualify as a "management plan" under H.A.R. § 13-5-24.

21. A "management plan" under H.A.R. § 13-5-24 is a precondition to granting a CDUP for the R3 Resource Subzone land use at issue here.

22. Although a Court will normally give deference to an agency's expertise and experience in its particular field, the agency's decision must be consistent with the legislative purpose in its own authorizing statute. In this instance, BLNR's decision approving the Outrigger Management Plan involves a mixed question of law and fact. However, BLNR's interpretation is not consistent with the Legislature's stated purpose in managing the Conservation District. Haw. Rev. Stat. § 183C-1 expressly provides:

The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature to conserve, protect and preserve the important natural resources of the State through **appropriate management** and use to promote their **long-term sustainability** and the public health, safety and welfare.

Haw. Rev. Stat. § 183C-1 (2005 Supp.) (emphasis added).

23. The resource that needs to be conserved, protected and preserved is the summit area of Mauna Kea, *not* just the area of the Outrigger Telescopes Project.

24. Allowing management plans on a project by project basis would result in foreseeable contradictory management conditions for each project or the imposition of special conditions on some projects and not others.

25. The consequence would be projects within a management area that do *not* conform to a comprehensive management plan.

26. This result would *not* be consistent with the purposes of appropriate management nor the promotion of long-term sustainability of protected resources required by Haw. Rev. Stat. § 183-1.

27. The Court concludes that BLNR *failed* to follow the provisions of H.A.R. § 13-5-24.

28. The Mauna Kea Appellants' substantial rights have been prejudiced by the BLNR's approval of CDUP for UHIFA's Outrigger Telescopes Project and approval the Outrigger Management Plan without an approved comprehensive management plan.

29. Because these legal determinations are dispositive, the Court does not need to reach any other legal or factual issues.

V. DECISION AND ORDER

Based on the foregoing, and pursuant to Haw. Rev. Stat. § 91-1(g), it is hereby ORDERED, ADJUDGED AND DECREED, that:

1. BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8-Meter Outrigger Telescopes Within the Summit area of the Mauna Kea Science Reserve dated October 29, 2004 is REVERSED;
2. BLNR's Finding of Fact, Conclusion of Law and Decision and Order dated October 29, 2004 (granting the issuance of a conservation district use permit) is REVERSED; and

3. BLNR's Finding of Fact, Conclusion of Law and Decision and Order for Management Plan dated October 29, 2004, is **AFFIRMED**, *subject to this Court's decision that the Outrigger Management Plan approved thereby is not a "management plan" within the meaning of H.A.R. § 13-5-24 that is sufficient to support a conservation district use permit for the Project.*

Dated: Hilo, Hawai'i, JAN 19 2007

GLENN S. HARA (SEAL)

JUDGE OF THE ABOVE-ENTITLED COURT

MAUNA KEA ANAINA HOU et. al. v. BOARD OF LAND AND NATURAL RESOURCES, et al.
Third Circuit Court, State of Hawai'i, Civil No. 04-1-397 (Hilo), Decision and Order: (1) Reversing BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8 Meter Outrigger Telescopes Within the Summit Area of the Mauna Kea Science Reserve Dated October 29, 2004; (2) Reversing BLNR's Finding of Fact, Conclusions of Law and Decision and Order Dated October 29, 2004; and (3) Affirming in Part BLNR's Finding of Fact, Conclusion of Law and Decision and Order for Management Plan Dated October 9, 2004.

APPROVED AS TO FORM:

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MAUNA KEA ANAINA HOU et. al. v. BOARD OF LAND AND NATURAL RESOURCES, et al.,
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