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STATE OF HAWAII
CIRCUIT COURT OF
THE THIRD CIRCUIT
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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

E. KALANI FLORES,

Appellant,

vs.

BOARD OF LAND AND NATURAL
RESOURCES; DEPARTMENT OF LAND
AND NATURAL RESOURCES;
WILLIAM J. AILA, JR., in his official
capacity as Chairperson of the Board of
Land and Natural Resources; STATE OF
HAWAI'I; and UNIVERSITY OF
HAWAI'I,

Appellees.

) CIVIL NO. 14-1-324 (Hilo)
) (Agency Appeal)
)
) ORDER GRANTING IN PART AND
) DENYING IN PART APPELLEES STATE
) OF HAWAI'I, BOARD OF LAND AND
) NATURAL RESOURCES, DEPARTMENT
) OF LAND AND NATURAL RESOURCES,
) AND CHAIRPERSON SUZANNE D.
) CASE'S MOTION FOR STAY OF
) PROCEEDINGS, OR IN THE
) ALTERNATIVE FOR THE COURT TO
) ISSUE ITS DECISION ON APPEAL, FILED
) OCTOBER 25, 2016; VACATING
) CONSENT TO SUBLEASE AND NON-
) EXCLUSIVE EASEMENT AGREEMENT
) BETWEEN TMT INTERNATIONAL
) OBSERVATORY LLC AND
) THE UNIVERSITY OF HAWAII
) UNDER GENERAL LEASE NO. S-4191;
) AND REMANDING MATTER TO THE
) BOARD OF LAND AND NATURAL
) RESOURCES
)
) **HEARING:**
) **DATE: December 15, 2016**
) **TIME: 8:30 a.m.**
) **JUDGE: Honorable Greg K. Nakamura**
)
) TRIAL DATE: None

ORDER GRANTING IN PART AND DENYING IN PART APPELLEES STATE OF HAWAI'I, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND CHAIRPERSON SUZANNE D. CASE'S MOTION FOR STAY OF PROCEEDINGS, OR IN THE ALTERNATIVE FOR THE COURT TO ISSUE ITS DECISION ON APPEAL, FILED OCTOBER 25, 2016; VACATING CONSENT TO SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAI'I UNDER GENERAL LEASE NO. S-4191; AND REMANDING MATTER TO THE BOARD OF LAND AND NATURAL RESOURCES

This matter came on for hearing before the Environmental Court of the Third Circuit, Honorable Judge Greg K. Nakamura presiding, on December 15, 2016 at 8:30 a.m. Julie China and David Day appeared on behalf of Appellees State of Hawai'i, Department of Land and Natural Resources, Department of Land and Natural Resources, and Chairperson Suzanne D. Case. Arsima Muller appeared on behalf of Appellee University of Hawai'i. David Kauila Kopper appeared on behalf of Appellant E. Kalani Flores. No other appearances were made.

The Court, having carefully considered the Motion, the memoranda, declarations, and exhibits in support of and in opposition to the motion, and upon consideration of the arguments and authorities contained therein, the entire record on appeal and all briefing and arguments contained therein, finds good cause and, therefore, the Court hereby issues the following findings of fact, conclusions of law and order:

I. FINDINGS OF FACT

The Court makes the following findings of fact, however, to the extent that these findings of fact contain conclusions of law, they shall be considered as such.

1. This appeal relates to Appellee State of Hawai'i, Board of Land and Natural Resources, Department of Land and Natural Resources, and the Chairperson of the Board of Land and Natural Resources' (the "Board") consent to the Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawai'i (the "Sublease").

2. At a meeting held on June 27, 2014, the Board addressed whether to approve a consent to the Sublease as required by HRS § 171-36(a)(6)(the "Consent"). ROA 4.

3. At the same meeting, Appellant E. Kalani Flores (Appellant Flores) orally requested a contested case hearing on the Board's Consent to the Sublease. ROA 5 at 00122.

4. At the same meeting, the Board voted to approve the Consent before it took action on Appellant Flores' contested case hearing request. ROA 5 at 00122. The Board "stayed the effectiveness of the consent until administrative proceedings on any contested case requests" were concluded. *Id.*

5. Appellant Flores filed a timely written petition for a contested case hearing on the Board's Consent to the Sublease. ROA 7 at 00229. In his petition, Mr. Flores asserted that he is a Native Hawaiian who holds Mauna Kea sacred; that he "has substantial interest and connections to Mauna a Wākea (Mauna Kea);" and that he had "traditional and customary practices at the areas on Mauna Kea covered under the . . . proposed Sublease." *Id.* at 00230.

6. At a later meeting held on July 25, 2014, the Board denied Appellant Flores' request for a contested case hearing on the Board's Consent to the Sublease. ROA 9 at 00245.

7. Appellant Flores timely appealed the Board's denial of his contested case request to the Circuit Court of the Third Circuit in Civ. No. 14-1-324.

8. On September 15, 2015, Appellant Flores filed his Opening Brief.

9. On November 25, 2015, the Board filed its Answering Brief. On the same day, the University of Hawai'i filed its Answering Brief.

10. On December 2, 2015, the Supreme Court issued its decision in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

11. On January 13, 2016, Appellant Flores filed his Reply brief, wherein Appellant raised the intervening decision in *Mauna Kea Anaina Hou*.

12. On April 5, 2016, this Court issued an Order for Remand, which remanded this matter to the Board pursuant to HRS 91-14(e) for the limited purpose of considering the Hawai'i Supreme Court's decision in *Mauna Kea Anaina Hou* and taking appropriate action if necessary.

13. Although the Board invited briefing from the parties to address the Order of Remand, the Board took no action on the Order for Remand.

14. Instead, on October 25, 2016, the Board filed its Motion for Stay of Proceedings, or In the Alternative For The Court To Issue Its Decision on Appeal (the "Motion").

15. On November 29, 2016, the University of Hawai'i filed a Joinder to the Motion. On December 7, 2016, Appellant E. Kalani Flores filed an Opposition to the Motion. On December 12, 2016, the Board filed a Reply to the Motion.

16. All parties, both orally at the hearing on this matter as well as in their briefings on the Motion, requested that this Court issue a ruling on the matter of whether the Board's Consent to the Sublease was valid.

II. CONCLUSIONS OF LAW

The Court, based on the finding of fact above, makes the following conclusions of law. To the extent that these conclusions of law contain findings of fact, they should be considered as such.

1. Because all parties agree that this Court can issue a ruling in this matter, the interest of economy of time and effort supports declining the Board's request for a stay and granting the Board's request to issue a ruling. *City & Cty. of Honolulu v. Ing*, 100 Hawai'i 182, 193 n.16, 58 P.3d 1229, 1240 (2002).

2. The Court takes judicial notice of the Supreme Court of Hawai'i's opinion entered on December 2, 2015 in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

3. In *Mauna Kea Anaina Hou*, the Supreme Court concluded that "the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government in affording Appellants a contested case hearing" entitled Native Hawaiian cultural practitioners to a contested case hearing on a Board action permitting the construction of the TMT telescope. *Mauna Kea Anaina Hou*, 136 Hawai'i at 390.

4. *Mauna Kea Anaina Hou* further explains the Board's constitutional duty to hold a contested case hearing on decisions involving constitutional rights:

Under such facts, the role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not fulfilled simply by providing a level playing field for the parties. Rather, an agency of the State must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations. In particular, an agency must fashion procedures that are commensurate to the constitutional stature of the rights involved, and procedures that would provide a framework for the agency to discover the full implications of an action or decision before approving or denying it.

In light of the unique position that an agency occupies, the agency may be at the frontline of deciding issues that involve various interests that implicate constitutional rights. Especially in instances where an agency acts or decides matters over which it has exclusive original jurisdiction, that agency is the primary entity that can and, therefore,

should consider and honor state constitutional rights in the course of fulfilling its duties. Furthermore, to the extent possible, an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution. An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision.

Mauna Kea Anaina Hou, 136 Hawai'i at 414-15 (Pollack, J., *concurring*)(internal citations and quotations omitted).

5. Where a contested case hearing on a pending agency action is requested, it is improper for an agency to act prior to holding the requested hearing. *Id.* at 399.

6. Because Appellant Flores' request for a contested case hearing was not granted, his contested case hearing petition's assertion that he is a Native Hawaiian with "traditional and customary practices at the areas on Mauna Kea covered under the . . . proposed Sublease" must be taken as true. *Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 205 (2013).

7. Appellant Flores was denied the right to a contested hearing on the subject Consent to Sublease in violation of his constitutional right to a hearing under Article 12, Section 7 of the Hawai'i State Constitution and *Mauna Kea Anaina Hou*, and specifically section IV of the concurring opinion therein.

III. ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is HEREBY ORDERED:

1. That the Board's request for a stay of proceedings is DENIED;
2. That the Board's alternative request for a decision on appeal is GRANTED;
3. That the Court's April 5, 2016 Order on Remand is vacated;
4. That the Consent is vacated;
5. This matter is remanded to the Board of Land and Natural Resources for proceedings consistent with this Order.

DATED: Hilo, Hawai'i JAN - 6 2017.



JUDGE OF THE ABOVE-ENTITLED COURT
GREG K. NAKAMURA

APPROVED AS TO FORM:

DOUGLAS CHIN

JULIE CHINA

*Attorneys for State of Hawai'i, Board of Land
and Natural Resources, Department of Land
and Natural Resources, and Suzanne D. Case,
in her official capacity as Chairperson*

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*E. KALANI FLORES v. BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES;
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