BEFORE THE LAND USE COMMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of: LĀNA'I RESORTS, LLC To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna'i, should revert to its former Agricultural and/or Rural land use classification due to Petitioner's failure to comply with Condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991. Tax Map Key No. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.).	)	DOCKET NO. A89-649 LAND USE COMMISSION'S FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER; AND CERTIFICATE OF SERVICE

LAND USE COMMISSION'S
FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER;
AND
CERTIFICATE OF SERVICE

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State Land Use Commission, Honolulu Hawai'i

6/1/17 by

Executive Officer

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LAND USE COMMISSION'S FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

On April 26-27, 2017, the Land Use Commission, State of Hawaii ("Commission") held an action meeting in Lāna'i City, Lāna'i, to hear argument on exceptions to the Hearings Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order, which was adopted by the Commission and treated by the Commission and the parties as the Commission's Proposed Findings of Fact, Conclusions of Law, and Decision and Order ("Proposed Decision"). The Commission heard oral arguments from each of the parties regarding exceptions to the Proposed Decision and responses thereto. Thereafter a motion was made and seconded to adopt the Commission's Proposed Decision as its Final Decision with amendments. The motion received five aye votes, one nay, one excused, and one recused (Commissioner Hiranaga), and therefore passed pursuant to HAR § 15-15-13(a) and Hawai'i Revised Statutes §92-15.

PROCEDURAL MATTERS AFTER FILING OF HEARINGS OFFICER'S RECOMMENDED DECISION

1. On April 18, 2017 Intervenor Lāna'ians for Sensible Growth ("LSG") [1] filed Exceptions to Hearings Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order.
2. On April 18, 2017 Lāna'i Resorts, LLC (dba Pūlama Lāna'i)[2] ("Petitioner") filed Petitioner's Exceptions to Hearing Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order; and Appendix "A."
3. On April 18, 2017, the Commission mailed the April 26-27 meeting notice and agenda to all parties, and the Statewide and Maui mailing lists.
4. On April 25, 2017, Petitioner filed Petitioner's Response to Intervenor LSG's Exceptions to Hearing Officer's Findings of Fact, Conclusions of Law, and Decision and Order.
5. On April 25, 2017, Intervenor LSG filed Intervenor's Response to Petitioner's Exceptions to Hearing Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order.
6. On April 25, 2017, the State Office of Planning ("OP") filed OP's Response to Petitioner's Exceptions to Hearing Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order; and OP's Response to Intervenor LSG's Exceptions to Hearings Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order.

[1] On November 9, 2016, the Hearings Officer with no objection from the parties granted a Motion for Substitution of Parties, which substituted Lāna'ians for Sensible Growth for the previous intervenor Lanaians for Sensible Growth.
[2] The Petitioner's name and ownership has changed throughout the proceedings, from Castle & Cooke Resorts, LLC; to the current Lāna'i Resorts, LLC (dba Pūlama Lāna'i). For clarity, all entities will hereinafter collectively be referred to as the "Petitioner."

7. On April 25, 2017, the County of Maui Planning Department ("County") filed County's Response to Petitioner's Exceptions to Hearings Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order; and, County's Response to Intervenor LSG's Exceptions to Hearings Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order.
8. On April 26-27, 2017, the Commission held an action meeting in Lāna'i City, Lāna'i. The Commission received oral and/or written public testimony at the hearing from the following individuals: Tome Roelens; Lynn McCrory; Lesley Kaneshiro; Roger Alconcel (with a list of names and signatures); Kepā Maly; Margaret Villaro; Aileen Pua Manuel; Noemi Barbadillo; and Larry Plunkett.
9. On May 23, 2017, the Commission mailed the May 31, 2017 meeting notice and agenda to all parties, and the Statewide and Maui mailing lists.

The Commission, having adopted the Hearings Officer's Recommended Decision as the Commission's Proposed Decision, having examined the public and witness testimony, evidence, pleadings, and arguments of counsel presented by the Petitioner; OP; the County; and Intervenor LSG, and having received and heard argument on exceptions to the Proposed Decision and responses thereto, hereby makes the following Findings of Fact, Conclusions of Law, and Decision and Order ("Final Decision").

Hawaiian diacriticals are used unless quoting a source that did not use them. They are used in a manner consistent with Place Names of Hawai'i (Pukui, Elbert, and Mo'okini 1974).

FINDINGS OF FACT

PROCEDURAL MATTERS

A. Original Docket

1. The subject property is that certain parcel of land consisting of approximately 138.577 acres situate at Mānele, Lāna'i, Hawai'i, identified in this docket as Tax Map Key No.: 4-9-002:049 (por.) (formerly Tax Map Key No.: 4-9-002:001 (por.)), and currently identified as Tax Map Key Nos: 4-9-017:008 (por.), 009 (por.), and 010 (por.) and 4-9-002:001 (por.) ("Property").

2. On November 29, 1989, the Petitioner filed a petition for a district boundary amendment to the Commission for a development project at Mānele Bay.

3. On February 9, 1990, the Commission received a Petition to Intervene from the Office of Hawaiian Affairs (OHA), LSG, Solomon Kaopuiki, John D. Gray, and Martha Evans (Petition to Intervene, February 9, 1990).

4. On March 9, 1990, the LUC permitted OHA and LSG to intervene, and denied intervention by Solomon Kaopuiki, John D. Gray, and Martha Evans (Order Granting in Part and Denying in Part Petition to Intervene, March 9, 1990).

5. The Commission held hearings on the original docket matter on February 23, March 8 - 9, June 28, July 12 - 13, and August 30, 1990; and January 10 and April 11, 1991.

6. The Property was reclassified from the Rural and Agricultural Districts to the Urban District pursuant to the Commission's April 16, 1991 "Findings of Fact, Conclusions of Law, and Decision and Order" ("1991 Order"). The 1991 Order reclassified approximately 110.243 acres of land from the Rural District to the Urban District, and approximately 38.334 acres of land from the Agricultural District to the Urban District for the development of an eighteen-hole golf course, and related uses.

7. Condition No. 10 of the 1991 Order reads as follows:

"10. Petitioner shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.

In addition, Petitioner shall comply with the requirements imposed upon the Petitioner by the State Commission on Water Resource Management as outlined in the State Commission on Water Resource Management's Resubmittal - Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990." (1991 Order, Condition No. 10, at 45).

8. Subsequently, the proposed golf course, amenities, and related infrastructure were constructed, including a system for delivering water from Wells 1 and 9 to irrigate the golf course.

9. The Property has continued to be utilized for the Mānele Golf Course, and other related uses including a clubhouse, to the present.

B. Order To Show Cause

10. On July 13, 1993, Petitioner stated in a letter to the Commission the following: "At the Land Use Commission ("Commission") hearing on May 12, 1993 on the petition of Lanai Resort Partners ("Petitioner") in Docket No. A92-674 (Manele Residential), Commissioner Nip and Commissioner Hoe expressed their recollections from the representations of the Petitioner in Docket No. A89-649 that water for the Manele golf course would be from a source other than the high level aquifer on Lanai and questioned whether Petitioner's intended use of non-potable brackish water from Wells 1 and 9 within the high level aquifer for irrigation of the Manele golf course might constitute a departure from the intent

of Commission's condition No. 10 for which a motion by Petitioner for an amendment or clarification may be appropriate. (Docket No. A92-674 Transcript 5/13/93: pages 97-111)." (Letter from James Funaki for Petitioner to the Commission, July 13, 1993).

11. The transcript of May 13, 1993 and the record from Docket No. A992-674 were not otherwise introduced into the record of Docket No. A89-694, i.e., this docket.

12. On October 13, 1993, the Commission issued an "Order to Show Cause" ("OSC") commanding Petitioner to appear before the Commission to "show cause why [the Property] should not revert to its former land use classification or be changed to a more appropriate classification," based on "reason to believe that [Petitioner] failed to perform according to Condition No. 10 of the [1991 Order.]" (OSC, at 1 - 2.)

13. The Commission held hearings on the OSC and other matters related to this docket on December 14 - 15, 1993, February 10, June 16, October 6 – 7, December 15 -16, 1994, May 25, 1995, February 1 – 2, and May 16, 1996.

14. On May 17, 1996, the Commission entered its "Findings of Fact, Conclusions of Law, and Decision and Order" on the OSC ("1996 OSC Order"), ordering Petitioner to comply with Condition No. 10 and "immediately cease and desist any use of water from the high level aquifer for golf course irrigation requirements." (1996 OSC Order, at 9 - 10.)

15. Petitioner appealed the 1996 OSC Order to the Circuit Court, which reversed the Commission's 1996 OSC Order.

16. On May 20, 1999, LSG filed a notice of appeal to the Hawai'i Supreme Court. On May 21, 1999, the Commission filed its notice of appeal.

C. Hawai'i Supreme Court Ruling

17. On September 17, 2004, the Hawai'i Supreme Court concluded that the Commission's "1996 [OSC] Order was clearly erroneous in deciding that [Petitioner] violated Condition No. 10 of the 1991 Order for using water from the high level aquifer[.]" *Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 308, 97 P.3d 372, 384 (2004) ("Lāna'i Co., Inc.").*

18. The Supreme Court concluded that Petitioner "was not prohibited from using all water from the high level aquifer by Condition 10." *Lanai Co., Inc., 105 Hawai'i at 314, 97 P.3d at 390.*

19. The Supreme Court's ruling was based on (1) the plain language of Condition No. 10, (2) the use of "potable" and "non-potable" as separate and distinct terms in other parts of the order, (3) the Commission's rejection of LSG's proposed 1991 condition, and (4) the map submitted to the Commission which clearly indicated that Well No. 1 was inside the high-level aquifer." *Lanai Co., Inc., 105 Hawai'i at 308, 97 P.3d at 384.*

20. In rejecting the arguments of the Commission on appeal, the Hawai'i Supreme Court specifically noted that "In this light, the 1991 Order cannot be construed to mean what the LUC may have intended but did not express." *Lana'i Co., Inc., 105 Hawai'i at 314, 97 P.3d at 390.*

21. The Supreme Court remanded this case to the Commission "for clarification of its findings, or for further hearings if necessary, as to whether [Petitioner] used potable water from the high level aquifer, in violation of Condition No. 10." *Id. at 319, 97 P.3d at 395.*

D. First Remand

22. Following the Supreme Court's remand, the Commission conducted further hearings on remand and motions on February 3, May 18, June 7 – 8, 2006, February 16, May 18, June 21, August 23, 2007, and January 8, 2010.

23. On May 26, 2006, the Commission ordered the parties to prepare to address a number of issues in hearings to be held on June 7 - 9, 2006. (Second Prehearing Order on Remand From the Hawai'i Supreme Court of the [LUC's] Findings of Fact, Conclusions of Law, and Decision and Order Dated May 17, 1996 ["Second Prehearing Order"]).

24. The hearings held on June 7 and 8, 2006 were for parties to respond to the Second Prehearing Order. The Commission canceled the final day of the hearing (June 9, 2006) for lack of quorum. Because of the cancellation, LSG was not able to present live witness testimony to the Commission. (Transcripts of June 7 and June 8, 2006).

25. At a May 18, 2007 hearing, a motion was made and passed to appoint Commission Member Kyong-Su Im as a hearings officer for the remaining remand proceedings. (Transcript of May 18, 2007, at 118 – 119).

26. There is no indication in the record that Mr. Im held any hearings with the parties.

27. There are indications in the record that settlement discussions were held among the parties around this time, possibly in lieu of further hearings, but these were unsuccessful.

28. On July 16, 2007, the Petitioner filed a "Motion for Modification of Condition No. 10 and Dissolution of [the 1996 Order]".

29. On January 25, 2010, the Commission entered its "Order Vacating [the 1996 OSC Order]; Denying Office of Planning's Revised Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order Filed April 16, 1991; and Granting [Petitioner's] Motion for Modification of Condition No. 10, with Modifications" ("2010 Order").

30. The effect of this 2010 Order was to end the first remanded proceedings and change Condition 10 to prevent only water containing a chloride concentration of less than 250 mg/L from being used for golf course irrigation. (2010 Order).

31. LSG appealed the 2010 Order to the circuit court and on November 8, 2012, the circuit court vacated the 2010 Order. The circuit court entered its Final Judgment on March 19, 2013.

32. The Petitioner filed their notice of appeal on March 28, 2013 of the circuit court's 2012 judgment.

E. Intermediate Court of Appeals

33. On March 21, 2016, the Intermediate Court of Appeals ("ICA") upheld the circuit court, vacated the Commission's 2010 Order, and remanded this case back to the Commission. *Lanaians for Sensible Growth v. Lanai Resorts, LLC, 137 Hawai'i 298, 369 P.3d 881 (App. 2016).*

34. The ICA vacated the 2010 order in part because LSG had not been allowed to present live witness testimony on remand. The ICA stated "Therefore, we come to the same conclusion as the circuit court: 'the 'further hearings' LUC conducted pursuant to [the Second Prehearing Order] dated May 26, 2006 did not result in LSG being afforded a full and fair opportunity to have its evidence heard and considered post-remand,' 'Such a process does not satisfy the appearance of justice[.]'" *Id.*

F. Second Remand

35. On June 24, 2016, the Commission entered its "Order Appointing Hearings Officer," appointing their first Vice Chair Jonathan Likeke Scheuer, Ph.D. as the Hearings Officer for the hearing in the above-captioned docket.

36. The Hearings Officer entered Minute Order Nos. 1-9, for the purpose of setting hearing dates, clarifying the issues, considering pre-hearing motions, and discussing deadlines and other procedural matters.

37. Pursuant to Minute Order No. 3, the Hearings Officer and the parties held a site visit on Lāna'i on August 18, 2016.

38. Pursuant to Minute Order No. 6, the Hearings Officer directed the parties to prepare to address the following issues at the hearing:

"1. The scope of the remand is limited to the use of wells 1 and 9 to irrigate the golf course and whether such use violates condition 10 of the LUC Decision and Order dated April 6, 1991. Evidence will be accepted with regard to wells 1 and 9 from the date of the 1991 Decision and Order until present. If the use of any other wells in the aquifer has relevance to the issue of whether the use of wells 1 and 9 to irrigate the golf course results in a violation of condition 10, evidence of such may be considered. However, allegations that the use of additional wells not a part of the 1996 proceedings (i.e., the original order to show cause proceedings) are in and of themselves a violation of Condition 10 are not a part of the remand.

2. Has Lāna'i Resorts utilized potable water from the high-level groundwater aquifer to irrigate the golf course?

3. What does the phrase "potable" mean in condition 10?

4. Is there leakage of potable water to the wells in the Pālāwai Basin and if so does such leakage constitute utilization of potable water as prohibited by condition 10?"

39. Pursuant to Minute Order No. 7, the Hearings Officer gave written notice of the hearings to be conducted on November 9 - 10, 2016, at the Lāna'i Community Center, Lāna'i City, Lāna'i, and on November 15 - 16, 2016, at the Maui Arts and Cultural Center – Haynes Meeting Room, Kahului, Maui. In response to a request from LSG and in order to provide the public an opportunity to opine, the minute order also gave notice that public testimony was to be taken prior to the evidentiary portion of the hearing on November 9, 2016.

40. On November 9, 2016, the Hearings Officer commenced the hearing in Lāna'i City, Lāna'i. Benjamin A. Kudo, Esq., Clara Park, Esq., and Sarah M. Simmons, Esq. appeared on behalf of Petitioner. Bryan C. Yee, Esq. and Leo R. Asuncion, Jr. appeared on behalf of OP. Michael Hopper, Esq., Caleb Rowe, Esq., William Spence, and Danny Dias appeared on behalf of the County. David Kauila Kopper, Esq., Li'ulā Nakama, Esq., and Reynold "Butch" Gima appeared on behalf of LSG.

41. At this hearing, the Hearings Officer entered into the record the written testimonies received on the matter and heard public testimony from David Gardner, Donna Domingo, Richard Brooke, La'ikealoha Hanog, Tom Roelens, Rachel Sprague, Lida Teneva, Dennis Velasco, Gabe Johnson, Ann Suzuki-Hough, Kendric Kimizuka, Roger Alconcel, Noemi Barbadillo, Michael Inouye, Gerald Rabaino, Fairfax Reilly, Rick Dunwell, Bruno Amby, Simon Tajiri, Ken Dunford, Winifred Basques, Caron Green, David Green, Jim Clemens, David Theno, Jennifer French, Anela Evans, Charles Palumbo, Ron McComber, Benjamin Ostrander, Donna Stokes, Alberta De Jetley, and Bradley Bunn. The Hearings Officer also accepted into the record attached to the written testimony of Ms. Domingo more than five hundred form letters individually signed that requested that the Commission not revert the boundary amendment for the Property.

42. Following the receipt of public testimony, "Intervenor Lanaians for Sensible Growth's Motion for Substitution of Parties" filed June 28, 2016 was granted with no objections from the parties. The Hearings Officer then entered the exhibits of Petitioner, OP, the County, and LSG into the record of this proceeding and heard opening statements from the parties.

43. On November 9 and 10, 2016, the Hearings Officer heard testimony from the following witnesses: OP's witnesses Joanna Seto from the State of Hawai'i Department of Health, Safe Drinking Water Branch (expert witness in state water quality) (by telephone with

agreement of the parties); Leo R. Asuncion, Jr., OP Director (expert witness in land use and environmental planning), and W. Roy Hardy from the State of Hawai'i Department of Land and Natural Resources, Commission on Water Resource Management ("CWRM") (expert witness in water resources and hydrology); Petitioner's witnesses John Stubbart (expert witness in water systems management and operation), Donald Thomas, Ph.D. (expert witness in chemistry and geochemistry, with emphases in hydrology, geology, and geophysics), and Seril Shimizu; and LSG's witness Sally Kaye. At the conclusion of witness testimony on November 10, the Hearings Officer recessed the hearing and continued the matter to November 15 and 16, 2016.

44. On November 15 and 16, 2016, the Hearings Officer resumed the hearing in Kahului, Maui. Benjamin A. Kudo, Esq., Clara Park, Esq., and Sarah M. Simmons, Esq. appeared on behalf of Petitioner. Bryan C. Yee, Esq. and Rodney Y. Funakoshi appeared on behalf of OP. Michael Hopper, Esq., Caleb Rowe, Esq., William Spence, and Danny Dias appeared on behalf of the County. David Kauila Kopper, Esq. and Li'ulā Nakama, Esq., appeared on behalf of LSG.

45. The Hearings Officer heard testimony from the following witnesses: Petitioner's witnesses Tom Nance (expert witness in hydrology, water resource development, and water sampling and analysis), Allan Schildknecht (expert witness in golf course irrigation management), Mike Donoho (expert witness in natural resource management), Bruce Plasch, Ph.D. (expert witness in economic analysis), and Kurt Matsumoto; from the County's witnesses Dave Taylor, Director of the County of Maui Department of Water Supply (expert witness in water supply) and William Spence, Director of the County of Maui Department of Planning (expert witness in planning and land use); and from LSG's witness Reynold "Butch" Gima.

46. At the conclusion of witness testimony on November 16, 2016, the Hearings Officer closed the evidentiary portion of the hearing. Pursuant to Minute Order No. 8, the Hearings Officer held a continued hearing solely for the purpose of closing argument on December 8, 2016, at the Maui Arts and Cultural Center – Haynes Meeting Room, Kahului, Maui.

PETITIONER'S REPRESENTATIONS REGARDING WATER 1990-1991

47. On March 9, 1990, Mr. Thomas Leppert, employee of the Petitioner, was called as a witness by and on behalf of the Petitioner and had been sworn in under oath. On that day he stated when being questioned by the Petitioner about potential water sources, and referring to the Property and proposed golf course, "...we are not using the high-level aquifer for the use of this golf course. We don't think that's appropriate." (Transcripts of March 9, 1990, at 27).

48. Mr. Leppert further stated under direct examination, when reading from a proposed condition from the County for the proposed golf course, " 'C. That unclaimed storm runoff, brackish water, reclaimed sewage effluent should be encouraged for use towards the irrigation of the golf course.' We concur with that condition." (Transcripts of March 9, 1990, at 27 - 28).

49. Under cross-examination by counsel for LSG, Mr. Leppert stated that the brackish water for Mānele would be from wells. (Transcripts of March 9, 1990, at 78)

50. Under cross examination from OP, Mr. Leppert affirmatively answered the question "And will you agree to fund and design and construct all the necessary water facility improvements, including source development and transmission to provide adequate quantities of potable and nonpotable water to service the subject property, in addition, utilizing only alternative sources of water, in other words brackish or effluent for golf course irrigation purposes?" (Transcripts of July 12, 1990, at 82 - 83).

51. On July 12, 1990, Mr. James Kumagai, consultant to the Petitioner, was called as a witness by and on behalf of the Petitioner and was sworn in under oath and determined to be an expert in, among other areas, environmental engineering.

52. Mr. Kumagai offered direct testimony on the construction of new wells on the island, and testified that "Now, Well 9 has proved to have higher chlorides than what we had anticipated, it's somewhere around 500, 600 milligrams or parts per million of chlorides. It's brackish and we consider that right now nonpotable, but suitable for landscape irrigation." (Transcripts of July 12, 1990, at 113).

53. Later still under direct, Mr. Kumagai was questioned about the specific use of water from Well 9, and responded "Yes, our suggestion has been to consider this well to provide the irrigation water source for the Cavendish course only, for essentially nothing mauka of the Cavendish course." (Transcripts of July 12, 1990, at 115). (The Cavendish course is a golf course for island residents not the subject of these proceedings).

54. Mr. Kumagai testified on cross examination from OP that Petitioner's focus on drilling wells to develop brackish water was in the Pālāwai Basin, and he stated that in comparison "And we also know that further down closer to Manele it's very brackish, that if we try to tap into that water, we're going to have to get very low yielding pumps, either that or go into desalination." (Transcripts of July 12, 1990, at 157).

55. Mr. Kumagai testified on cross examination from LSG counsel Arnold Lum, with the following exchange: "Q: I also noted when I was going through those Water Resource Commission reports, which I assume you've looked at also, that the Commission's staff hydrologist indicated that the chloride content for Well 1, which as we previously noted, is about .1 MGD in yield, is 407 milligrams per liter, and I was wondering whether that particular well is factored into your current or your existing sustainable yield figure, given

that it is over the 250 milligram per liter safe drinkable limitation established? A: Well 1 is factored in, up to now the output from Well 1goes to irrigation, is blended with the other water, and so essentially the consequence of the high chlorides in Well 1 is inconsequential, from that standpoint." (Transcripts of July 12, 1990, at 172-173).

56. Mr. Kumagai further testified on cross examination from LSG counsel Arnold Lum, with the following exchange: "Q: Maybe I can move on to alternate sources of water. You testified earlier that you'd probably sink seven wells similar to Well number 10 in the Palawai basin area, and that would be the water source that could be used to irrigate the Manele golf course, is that correct? A: No, I said that if we are faced with today of making a decision to go with a Well 10 area, then it would probably take seven wells to provide requirements, if. I'm saying the strategy we're working on is to seek a better source of water then what Well ten, in that vicinity, can provide." (Transcripts of July 12, 1990, at 186).

57. Mr. Kumagai further clarified on cross-examination from LSG counsel that Well 10 and other potential wells in the vicinity were "Nonpotable outside of the high level aquifer source." (Transcripts of July 12, 1990, at 187).

58. On August 30, 1990, Dr. John Mink, a consultant to the Petitioner was called as a witness by and on behalf of the Petitioner and was sworn in under oath and determined to be an expert in hydrology. Over the course of his direct testimony and cross examination, Dr. Mink did not contradict a question from the LUC chair that the wells to be developed for brackish water would be developed in the basal aquifer, as opposed to the high level aquifer (e.g. cross examination of Dr. Mink by LUC chair, Transcript of August 30, 1990 at 65).

59. On January 10, 1991, Mr. Leppert again gave direct testimony, and had the following exchange with Petitioner's counsel: "Q: Will the petitioner be able to develop the nonpotable water sources necessary for the irrigation of the Manele golf course? A: Yes sir. In fact where we stand today we have ample supply. If you look at the brackish or nonpotable wells that we have, well number one has the capacity slightly below six hundred thousand gallons per day. Well number nine which is in Palawai basin is slightly below three hundred thousand gallons per day." (Transcript of January 10, 1991 at 38).

60. On cross examination of Mr. Leppert, LSG's counsel Alan Murakami asked "I'm not real familiar with the location of those wells that are being tested. ...These are all the nonpotable sources?" Mr. Leppert, referring to Wells 1, 9, and 13 stated "Those are nonpotable, yes, sir." Mr. Murakami did not ask for any clarification of what was meant by nonpotable or their location relative to the high level or basal aquifers. (Transcript of January 10, 1991 at 52 - 53).

61. On February 20, 1991, LSG filed proposed conditions for the district boundary amendment, including a condition requiring that "The petitioner shall ensure that no high level groundwater aquifer will be used for golf course maintenance or operation (other than water for human consumption) and that all irrigation of the golf course shall be through alternative non-potable water sources." LSG stated in this filing that this and other proposed conditions reflected the understandings of a Memorandum of Agreement between Petitioner, LSG and OHA dated November 5, 1990, resolving their differences.

62. On February 20, 1991, the Petitioner filed a proposed Findings of Fact, Conclusions of Law, and Decision and Order, stipulated to by OP. It proposed a condition 10 that later survived exactly as Condition 10 of the Commission's final Decision and Order.

63. On February 26, 1991, the Petitioner filed a response to LSG's proposed conditions, noting also the existence of a Memorandum of Agreement among OHA, LSG, and the Petitioner, which they indicated had a date of October 10, 1990. Petitioner objected to any inclusion of conditions covered by that agreement, including the proposed condition on golf course irrigation.

64. The record in this case has no indication that LSG filed any exceptions or response to the proposed stipulated conditions from Petitioner and OP.

65. On April 11, 1991 at the hearing where the Commission considered granting the proposed district boundary amendment, Commissioners asked for clarifications on various proposed conditions, but according to the transcript none raised any questions on Condition 10, regarding its wording, meaning, or otherwise. (Transcript of April 11, 1991).

THE MEANING OF THE WORDS "POTABLE" AND "BRACKISH"

A. IN USAGE OUTSIDE CONDITION 10

66. The common sense definition of the word "potable" is drinkable. (Testimony of Roy Hardy, Transcript of November 10, 2016, at 215).

67. Webster's Dictionary defines "brackish" as "somewhat salty, distasteful." *Lanai Co., Inc., 105 Hawai'i at 299 n.10, 97 P.3d at 375 n .10.*

68. Water with chloride concentrations above 250 ppm or mg/L[3]is considered "brackish". (Testimony of Roy Hardy, November 10, 2016, at 220 and 230).

69. Water with chloride concentrations above 250 ppm may also be considered "potable". (Testimony of Roy Hardy, November 10, 2016, at 230) ("You cannot determine potability just based on chlorides").

[3] milligrams per Liter. Throughout the record and this document; mg/l, mg/L, and ppm, are used interchangeably.

70. Based on the Environmental Protection Agency's ("EPA") secondary standards, brackish water is water having chlorides of 250mg/L or above. This standard has been the generally accepted level in use for the development of drinking water wells in the State of Hawai`i. (Testimony of Tom Nance, Tr., 11/15/2016, at 421:18 – 423:6)

71. The WRPP[4] states that in practice, county water departments generally limit chloride levels of water within their municipal system to less than 160 mg/L, or at most, under the EPA's secondary standard of 250 mg/L. (Id;Testimony of Tom Nance and Roy Hardy, Tr., 11/10/2016, at 250:20 – 251:2) Therefore, Wells 1 and 9 would not be accepted by the County as potable wells. (Tr., 11/15/2016, at 412:24 – 413:2)

72. Water with chloride levels at or above 250 mg/L causes complaints from customers, taste issues, and issues with the water system itself such as corrosion and deposits in the pipelines. For example, the corrosiveness of the water in Well 9 causes frequent problems with the submersible pumps in the well. (Testimony of Tom Nance, Tr., 11/15/2016, at 411:8-23; 422:1 – 423:24)

73. CWRM does not have a position on the definition of the term "potable." (Testimony of Roy Hardy, Transcript of November 10, 2016, at 251).

74. The CWRM defers to the State of Hawai'i Department of Health ("DOH") to determine whether water is safe to drink. (Testimony of Roy Hardy, November 10, 2016, at 240; HRS § 174C-66).

75. The DOH regulates "public water systems" which deliver potable water for domestic consumption. (Hawai'i Administrative Rules, HAR § 11-20-2).

[4] Water Resource Protection Plan

76. The DOH implements standards for water suitable for human consumption which considers whether maximum levels of certain contaminants have been reached. (HAR §§ 11-20-3 to 11-20-7.5).

77. HAR Chapter 11-20 mirrors the National Primary Drinking Water Regulations set by the U.S. Environmental Protection Agency ("EPA") that also determines whether water is suitable for drinking by way of setting maximum contaminant levels. (40 CFR § 141).

78. Both the DOH's regulations, as well as the EPA's National Primary Drinking Water Regulations, set maximum contaminant levels "at a level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." (HRS § 340E-2; 40 CFR § 141.2) (defining "maximum contaminant level").

79. If water satisfies the regulations set forth in HAR Chapter 11-20, the DOH will allow that water to be used for domestic purposes, including drinking. (Testimony of Joanna Seto, Transcript of November 9, 2016, at 137).

80. The DOH also defines the term "potable water" to mean "water free from impurities in amounts sufficient to cause disease or harmful physiological effects" in its administrative rules concerning the protection of public water systems from contaminants and pollutants. (HAR § 11-21-2).

81. The terms 'potable' and 'non-potable' do not exist in State or federal primary drinking water regulations, and the terms 'potable' and non-potable' are not used by SDWB. (Testimony of Joanna Seto, Engineering Program Manager for the DOH Safe Drinking Water Branch ("SDWB"), Exhibit OP No. 4)

82. The federal Safe Drinking Water Act does not define or use the terms "potable" or "non-potable," and the SDWB does not define the terms "potable" or "non-potable." (Testimony of Joanna Seto, Tr., 11/9/2016. At 134:24 – 135:8)

83. Chlorides are not considered a primary contaminant and are not regulated by health-based standards by the EPA. (Intervener's Ex. I-12)

84. Chlorides are considered a secondary contaminant that affects only the "aesthetic qualities" of drinking water. (Intervener's Ex. I-12).

85. The DOH would allow public water systems to provide water in excess of 250 mg/L chlorides for domestic use. (Transcript of November 9, 2016, at 138).

86. The DOH has stated that "there are water systems that have served drinking water in excess of 250 mg/L." (Intervener's Ex. I-12).

87. It is "typical" for county water supplies to use water pumped at or above 250 ppm in their domestic water systems, blended into other water. (Testimony of Roy Hardy, Transcript of November 10, 2016 at 250 - 251).

88. Currently, potable wells on O'ahu are producing water over 250 ppm chlorides. *Id.*

89. Maui wells in service in the past have probably produced water with over 250 ppm chlorides. (Testimony of Dave Taylor, Director of the Department of Water Supply for Maui County, Transcript of November 16, 2016, at 681).

90. On or about October 18, 2006, at a regular meeting of the Lāna'i Planning Commission, Cliff Jamile, former Director of Utilities of Lāna'i Water Company, testified before that Commission that Wells 1, 9, and 14 were tested for potability, and that the wells were contaminant free: "[T]he EPA sets certain guidelines, sets certain requirements that we have to comply with, and that is the first stage contaminant list in there. There must be about 25 to 30- contaminant that we have to test for including E.D.B., DBCP, TCP, you know, and all of these things. So we send those to the lab . . . and the lab runs those test exactly as they are supposed to do in accordance with EPA's requirements and test

methods. And so far as I know, well I do know for sure that wells #1, 9, and 14 were tested and no contaminants were found present in the water." (Intervener's Ex. I-21 at 12).

91. Sally Kaye, former Lāna'i Planning Commission member and chairperson who was present at the October 18, 2006 meeting, testified that the draft "minutes" of the October 18, 2006 meeting, received into evidence as Ex. I-21, were prepared according to the Lāna'i Planning Commission's regular practice of transcribing verbatim planning commission meetings from a taped recording and allowing members of the planning commission to review them to ensure accuracy. (Transcript of November 10, 2016 at 324).

92. The October 18, 2006 meeting minutes, contained in Ex. I-21, were formally adopted by the Lāna'i Planning Commission at its February 2, 2007 meeting. (Transcript of November 10, 2016 at 335).

93. Intervener's Ex. I-21 is identical to the form of the minutes adopted by the Lāna'i Planning Commission on February 2, 2007. (Transcript of November 10, 2016 at 350-1).

94. Mrs. Kaye testified that Intervener's Ex. I-21, and Mr. Jamile's testimony at page 12 therein, accurately reflects what was said at the October 18, 2006 meeting. (Transcript of November 10, 2016 at 327).

95. Mr. Jamile's testimony refers to primary contaminants regulated by HAR §11-20-4.

96. Mr. Jamile's testimony in Intervener's Ex. I-21 indicates that Wells 1, 9 and 14 were tested for potability under state and/or federal standards, and that the water from those wells tested as meeting those standards. (Intervener's Ex. I-21 at 12-13).

97. Based on the above facts, it is possible for water with chloride concentrations of greater than 250 ppm to be used as potable water, including the water from Wells 1 and 9, either directly or blended with other potable sources, depending on the level of chlorides, and so long as other drinking water standards are met.

98. Separate from the specific implied meanings of the words "potable" and "brackish" in Condition 10 and the references to Wells 1 and 9 in the original record it is reasonable to conclude that the water from Wells 1 and 9 may be considered to be "potable". However, as detailed further below, the evidence in the record and construction of Condition 10 indicates a meaning contrary to these more common sense meanings of the words potable and brackish, and how they apply to Wells 1 and 9.

B. IN USAGE IN CONDITION 10

99. The transcripts from the hearings leading to the 1991 Order contained multiple uses of the words "brackish," "potable," and "nonpotable," and at least one reference to a "safe drinkable limitation" standard of 250 parts per million (ppm) chlorides. (e.g. Transcript of July 12, 1990, at 172-173).

100. The 1991 Order did not include a specific definition of the word "potable," nor did it provide a specific definition of "brackish."

101. The Petitioner at times used the words brackish and nonpotable interchangeably (e.g. Mr. Leppert: "... look at the brackish or nonpotable wells that we have..."). (Transcript of January 10, 1991 at 38).

102. Representations by various witnesses for the Petitioner during the initial hearings on this docket were at times inconsistent and/or contradictory on matters relevant to this remand. For instance, as addressed elsewhere in the Findings of Fact, one witness did not challenge a question from the LUC chair that brackish water wells for the golf course would be solely developed in the basal aquifer rather than the high level aquifer (cross examination of Dr. Mink by LUC chair, Transcript of August 30, 1990 at 65). Later, another witness, Mr. Kumagai, stated that Wells 1 and 9 would likely be used, which were in the Pālāwai Basin in the high level aquifer (Transcript of January 10, 1991 at 38). Mr. Kumagai also did not

affirmatively point out that these wells were in the high level aquifer. These contradictory representations could confuse the Commission and parties as to the specific representations being made by the Petitioner.

103. The wells in the Pālāwai basin draw the only known high-level ground water in the state that is brackish, as opposed to fresh. (Testimony of Tom Nance, Transcript of November 15, 2016, at 386).

104. Because of the unique existence of brackish high-level water in the Pālāwai Basin, in the original hearing, people who were discussing high-level groundwater might have assumed that, as with the rest of Hawai'i, high-level groundwater referred solely to freshwater rather than brackish water. (Transcript of November 15, 2016, at 464).

105. In the final day of the evidentiary hearing in 1991, an attorney for LSG did not question a reference by a Petitioner witness to Wells 1 and 9 as nonpotable, nor question their location as relative to the high level or basal aquifers. (Transcript of January 10, 1991 at 52 - 53).

106. While two years later two members of the Commission questioned what the specific wording of Condition 10 meant and if it had been complied with (Letter from James Funaki for Petitioner to the Commission, July 13, 1993), they did not do so at the time Condition 10 was adopted. (Transcript of April 11, 1991).

107. By including the category of "brackish" water as a specific example (in an e.g. clause) as an "alternate source" of water, Condition 10 clearly indicated that in the ***specific*** context of this Docket and Condition 10, "brackish" water was considered ***not to be potable***, but rather a source of water "alternate" to the "potable" water supplies of the island: ("Petitioner shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable

sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.") (1991 Order, Condition 10).

WELLS 1, 9, AND IRRIGATION OF THE GOLF COURSE AT MĀNELE

108. The 1991 Order references the subject wells, Wells 1 and 9, as brackish wells.

109. In Finding of Fact ("FOF") 48 of the 1991 Order, the Commission found, "Petitioner proposes to provide alternate sources of water for golf course irrigation by developing the brackish water supply. According to Petitioner, Well Nos. 9 and 12 . . . have been tested but are not yet operational. . . . Currently available also is brackish water from Well No. 1 which is operational and which has a capacity of about 600,000 gpd." (1991 Order, FOF 48, at 14 - 15).

110. FOF 89 states, "Petitioner is now in the process of developing the brackish water supply for irrigation of the proposed golf course. According to Petitioner, Well No. 1, which is operational and available, and Well Nos. 9, 10 and 12, which have been subjected to full testing, have aggregate brackish source capacity in excess of the projected requirements of 624,000 gpd to 800,000 gpd for the Manele golf course." (1991 Order, FOF 89, at 27 - 28).

111. FOF 91 states, "Petitioner intends to irrigate the golf course with nonpotable water, leaving only the clubhouse which will use potable water, the requirement for which should be insignificant." (1991 Order, FOF 91, at 28).

112. The 1991 Order's characterization of Wells 1 and 9 as "brackish water supply for irrigation of the proposed golf course," and the calculation of the wells' capacity to meet the projected requirements of the Mānele golf course, indicates that Wells 1 and 9 were intended to serve as "alternative non-potable sources of water" under Condition No. 10.

113. Well 1 was drilled in 1945 and put into service around the early 1950's. (Transcript of November 9, 2016, at 164).

114. From 1948 to present, the documented chloride levels of the water from Well 1 have always been greater than 250 mg/L. (Petitioner's Exhibits 24, 43B).

115. Well 9 was drilled in 1990 and connected to the brackish water system around 1992. (Transcript of November 9, 2016, at 165).

116. From 1993 to present, the documented chloride levels of the water from Well 9 have always been greater than 250 mg/L. (Petitioner's Exhibits 24, 43C).

117. During the 1991 Order proceedings, the Petitioner submitted exhibits that showed Well 1 on a map and depicted Well 1 as being located within the high-level aquifer in the Pālāwai Basin. (1991 Order proceedings, Petitioner's Exhibit 14, at pp. 8; App. 2; Exhibit 37 at p. 43).

118. No party presented any evidence that the chloride levels of either Well 1 or 9 has ever dropped below 250 mg/L.

119. Lāna'i Water Company operates a potable water system and a brackish water system. The two systems are separate. Wells 1 and 9, as well as Wells 14 and 15, make up the brackish water irrigation system. (Transcript of November 9, 2016, at 156, 158 – 9).

120. Wells 1, 9, 14, and 15 and reclaimed sewage effluent are the sole sources of irrigation water for the Mānele Golf Course. (Transcripts of November 9, 2016 at 167 and November 10, 2016 at 197).

121. During the time period at issue in the 1996 OSC Order, Wells 1 and 9 and reclaimed sewage effluent were the sole sources of irrigation water for the Mānele Golf Course. (Transcript of November 15, 2016, at 406).

122. There is no evidence in the record that water from any other wells, including the potable wells in the potable water system, has ever been used to irrigate the Mānele Golf Course. (Transcripts of November 9, 2016, at 164, November 10, 2016, at 366).

123. Although reclaimed sewage effluent is also being used as a source of water for golf course irrigation, Lāna'i Water Company's wastewater treatment plant generates roughly 40,000 to 60,000 gallons of effluent per day, which is approximately 10 per cent of the golf course's irrigation needs. (Transcript of November 9, 2016, at 172 – 173).

124. The Petitioner pursued developing a desalination plant to desalinate seawater for irrigation of the golf course, with estimated capital costs in excess of $100 million. (Testimony of Kurt Matsumoto, Transcript of November 16, 2016 at 631).

125. The Petitioner is no longer pursuing development of a desalination plant as an alternative source of water for the golf course. (Testimony of Kurt Matsumoto, Transcript of November 16, 2016 at 649).

POTENTIAL LEAKAGE AND RELATED USE OF POTABLE WATER

126. The entirety of the record contains inconclusive evidence as to the degree to which the pumping of water from Wells 1 and 9 in the Pālāwai Basin may cause the leakage of water from other areas of the high level aquifer that are currently used for potable drinking water.

127. The record does not have any indication that the existing pumping of Wells 1 and 9 has caused leakage that has actually harmed existing or planned uses of water for domestic purposes on the island.

128. According to "Darcy's Law," the rate of flow across a hydraulic medium increases as the difference in water level or pressure increases. (Interevener's Ex. I-14).

129. Pumping can cause increased flow into the area that is being pumped. (Testimony of Roy Hardy, Transcript of November 10, 2016, at 234).

130. Mr. Hardy developed a numerical ground water model for the island of Lāna'i, in part at the request of the Land Use Commission, which was published in 1995. (Intervener's Ex. I-14).

131. One scenario of the model looked at the pumping of only Wells 1 and 9 over time at a rate of .650 million gallons per day (mgd), and, according to the model, would be coming from higher elevations and should be better quality." (Testimony of Roy Hardy, Transcripts of November 10, 2016 at 234 – 235).

132. Donald Thomas, Ph.D., qualified as an expert in chemistry and geochemistry with emphases in hydrology, geology, and geophysics, is currently conducting a research project on Lāna'i relating to groundwater geochemistry, and as part of his project, he has researched the hydrology and groundwater resources of Lāna'i, but that research has not been peer-reviewed. (Transcript of November 10, 2016, at 319).

133. Dr. Thomas testified that in his professional opinion and based on his studies, he found no sound evidence that supports the leakage theory, and no evidence that any leakage is occurring. (*Id.*, at 274 – 277, 289).

134. Mr. Nance has performed several pump tests to detect whether leakage is occurring. Mr. Nance performed an extended pump test of Wells 3A and 7. He found that the rate of the wells' recovery to static water level was slow, which could indicate minimal leakage or recharge. (Transcript of November 15, 2016, at 398).

135. Mr. Nance also performed extended pump tests in which Wells 1 and 2 were pumped continuously, while the water level of nearby Well 2 and Shaft 3 (respectively) were recorded. The tests showed no connection, even between Well 2 and Shaft 3 that are only approximately 150 feet apart. (*Id.*, at 403).

136. During the 1991 Order proceedings, a Petitioner's expert, John F. Mink, Ph.D., testified that leakage between dike compartments might be a naturally occurring feature of the aquifer. (Transcript, of August 30, 1990 LUC hearing, at pp. 9 - 12).

EFFICIENCY AND WATER MANAGEMENT

137. Groundwater on the island of Lāna'i is not designated as a Ground Water Management Area by CWRM under HRS 174C ("Water Code").

138. Using brackish water for golf course irrigation was a common industry practice before 1991 through today, and the use of brackish water is a reasonable practice consistent with best management practices for golf course irrigation. (Testimony of Mr. Schildknecht, Transcript of November 15, 2015, at 504). Additionally, the golf course was originally designed for water conservation, incorporating non-irrigated areas that have since been expanded to further reduce water use. (*Id.* at 501).

139. Water conservation is a priority at the golf course. The Mānele Golf Course was originally designed to conserve water, and since then the course has made further changes to reduce water usage. These changes include reducing the amount of landscaped area, changing the type of turf grass, and updating its irrigation system. (Testimony of Seril Shimizu, golf course superintendent at the Manele golf course, Transcript of November 10, 2015, at 354 – 361).

140. Due to the current Petitioner's efforts, water usage at the Mānele Golf Course has dropped by 18 to 20 percent from 2009 to 2015. (*Id.*, at 364 – 365).

141. Petitioner is developing a watershed protection plan, maintaining and adding increment fencing around the watershed, working on the removal of grazing animals such as axis deer and mouflon sheep, replacing invasive species with native species, implementing fire protection measures, designating a no-development area in the watershed, and partnering with the U.S. Fish and Wildlife Service and other agencies. (Testimony of Mike Donoho, an employee of Petitioner, Transcript of November 15, 2016 at 532 – 533, 535, 537, 545 – 546).

142. The Mānele Golf Course is crucial to the Petitioner's operations and economic viability. The golf course provides an amenity and attraction that is necessary because Lāna'i is more isolated and has fewer attractions compared to other resort locations. (Testimony of Kurt Matsumoto, Transcript of November 16, 2016 at 618- 624).

143. The use of water for the golf course is a private, commercial use. The Periodic Water Reports produced since the 1990 CWRM Resubmittal show no changes that pose a threat to the water resources on the island. The only change is that pumpage is now lower than it was when pineapple agricultural uses were ongoing. (Testimony of Roy Hardy, Transcript of November 10, 2016 at 224 – 225).

144. Under questioning by the Hearings Officer, LSG's witness Mr. Gima stated that he "can't come up with any objective criteria or measurable means to say that something has specifically been harmed" by the use of Wells 1 and 9 to irrigate the Mānele Golf Course. (Transcript of November 16, 2016, at 753)

145. The leakage theory is inconsistent with the language of Condition 10 and the findings of fact and oral testimony from the district boundary amendment proceedings in which brackish water was described as non-potable, and in which brackish water from Wells 1 and 9 were proposed for irrigation of the Mānele Golf Course. (OP's Response to Petitioner's Exceptions dated April 25, 2017; pg. 4)

RULING ON PROPOSED FINDINGS OF FACT

Any of the findings of fact submitted by Petitioner or any other party not already ruled upon, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as

a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

A. Principles of Construction

1. The general principles of construction, which apply to statutes, also apply to administrative agencies. *International Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Telephone Company, 68 Haw. 316, 323, 713 P.2d 943, 950 (1986).*

2. Where a term is plain and unambiguous, it must be interpreted by its "plain and obvious meaning." *Chang v. Buffington, 125 Hawai'i 186, 193, 256 P.3d 694, 701 (2011).*

3. The Commission cannot "depart[] from the plain and unambiguous language" unless there is an "indication in the regulation that the term . . . be given a special interpretation other than its common and general meaning." *Singleton v. Liquor Comm'n, 111 Hawai'i 234, 244, 140 P.3d 1014, 1024 (2006).*

4. It is clear that in this instance, the term "potable" has a special interpretation other than its common or general meaning. By including the category of "brackish" water as a specific example (in an e.g. clause) as an "alternate source" of water, Condition 10 clearly indicated that in the ***specific*** context of this Docket and Condition 10, "brackish" water was considered not to be potable, but rather a source of water "alternate" to the "potable" water supplies of the island: ("Petitioner shall not utilize the potable water from the high-level groundwater aquifer for the golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.") (1991 Order).

B. The Public Trust Doctrine

5. Article XI, Section 1 of the Hawai'i State Constitution requires the State to "conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air,

minerals and energy sources," and to "promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." "All public natural resources are held in trust by the State for the benefit of the people."

6. Article XI, Section 7 of the Hawai'i State Constitution requires the State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people" and provide a water resources agency that shall "set overall water conservation, quality and use polices; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources."

7. These sections "incorporate the notion of the public trust into our constitution." *In re Water Use Permit Applications, 94 Hawai'i. 97, 131, 9 P.3d 409, 443 (2000) ("Waiāhole I").*

8. "Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state." *Waiāhole I, 94 Hawai'i. at 141, 9 P.3d at 453.*

9. Hawai'i has a bifurcated system of water rights between designated and non-designated water management areas, and in the latter areas, water withdrawals are regulated under both common law principles and provisions of the Water Code. *In re Waiola O Moloka'i, Inc., 103 Hawai'i 401, 433, 83 P.3d 664, 696 (2004).*

10. The correlative rights rule is a common law rule that states that individuals who own land overlying a ground water source or aquifer have correlative rights to the waters and are entitled to a reasonable use of the waters, with due regard to the rights of co-owners in the

same waters. *City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929), overruled on other grounds, In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000).*

11. However, regardless of the existence of correlative or other rights, Public Trust Doctrine must be applied by agencies or subdivisions of the state when they make a decision related to the management of water resources, regardless if the area in question is a Water Management Area under the Water Code or not. *Kauai Springs, Inc. v. Planning Comm'n of County of Kaua'i, 133 Hawai'i, 141, 324 P.3d 951. (2014).*

12. Government bodies are "precluded from allowing an applicant's proposed use to impact the public trust in the absence of an affirmative showing that the use does not conflict with those principles and purposes." *Kauai Springs, Inc. v. Planning Comm'n of County of Kaua'i, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014).*

13. The Commission "has a constitutional mandate to consider the negative affect of the [Petitioner's] pumping on Lāna'i" and must consider whether Petitioner's use negatively affects past, current or future uses of potable water from the high-level aquifer. (*Intervenor [LSG's] Motion for Clarification of Scope of Hearing, or in the Alternative, for an Order to Show Cause*, filed September 14, 2016, at p. 7.)

14. The Petitioner bears the burden to demonstrate that its past and present use of high-level aquifer water to irrigate its golf course does not violate Condition 10. *Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454* ("[T]he burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust").

15. The Petitioner does not assert that its proposed use is one of the four protected Public Trust use categories of water: the maintenance of waters in their natural state; the protection of domestic water use; the protection of water in the exercise of Native Hawaiian and

traditional and customary rights; and, reservations for and actual uses of water on tracts held in trust by the Department of Hawaiian Home Lands.

16. Rather, the Petitioner's use of water for irrigation of the golf course is a private, commercial use of water, subject to a "...high level of scrutiny." *Kauai Springs, Inc. v. Planning Comm'n of County of Kaua'i, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014).*

17. While the scientific information on the potential long-term effect of withdrawals from Wells 1 and 9 on drinking water wells on the island is ambiguous, no party has raised a reasonable allegation of harm against that or any other public trust use of water.

18. The precautionary principle should be applied to situations where there is scientific uncertainty, but only where there is a reasonable allegation of harm. "Where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. . . . In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource." *Waiāhole I, 94 Hawai'i. at 154, 9 P.3d at 466.*

19. The Commission concludes Petitioner has made an affirmative showing that its use of Wells 1 and 9 to irrigate the Mānele Golf Course does not conflict and is consistent with public trust principles and purposes.

20. The Commission concludes that it has observed and carried out its public trust duties in this case, as set forth under Article XI, Sections 1 and 7 of the Hawai'i State Constitution.

DECISION AND ORDER

IT IS HEREBY ORDERED that (1) Petitioner has proved its compliance with Condition No. 10 by a preponderance of the evidence, and therefore the 1996 OSC Order is hereby

VACATED, and (2) the Commission's "Order to Show Cause" entered October 13, 1993 has been resolved.

Pursuant to Chapter 205, HRS, and the Land Use Commission Rules under Chapter 15-15, Hawai'i Administrative Rules (HAR), Article XI, Sections 1 and 7 of the Hawai'i State Constitution, and upon consideration of the Commission decision-making criteria under HRS § 205-17, this Commission finds upon a clear preponderance of the evidence that Petitioner has performed according to Condition No. 10 of the 1991 Order.

The language of Condition 10 has proved to be confusing and contentious for over two decades. Because of the sometimes conflicting statements leading up to the 1991 Order, reasonable Commissioners or observers may have read the language of Condition 10 to have different meanings. However, as explained herein, the opportunity to clarify those meanings largely passed when the hearings for the 1991 Order were over and the Order was issued. Thus while there is substantial evidence on the record that a "common sense" meaning of the word "potable" could include the waters drawn from Wells 1 and 9, the specific language of Condition 10 excluded that common sense meaning and specifically excluded from "potability" brackish water of a kind that is used elsewhere in these islands for drinking.

The Petitioner has provided substantial credible evidence that the water being used to irrigate the Mānele Golf Course was and is brackish under the specific meaning of the language in Condition 10 in the 1991 Order, and therefore an allowable alternate source of water.

Furthermore, there is no evidence or reasonable allegation of harmful leakage of potable water into the wells in the Pālāwai Basin.

ADOPTION OF ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, Hawai'i, this 1ST, day of June, 2017, per motion on May 31, 2017.

APPROVED AS TO FORM

Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAI'I

By
EDMUND ACZON
Chairperson and Commissioner

Filed and effective on: 6/1, 2017.

Certified by:
DANIEL E. ORODENKER
Executive Officer
State Land Use Commission

BEFORE THE LAND USE COMMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of: LĀNA'I RESORTS, LLC To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna'i, should revert to its former Agricultural and/or Rural land use classification due to Petitioner's failure to comply with Condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991. Tax Map Key No. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.).	DOCKET NO. A89-649 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that the Land Use Commission's Final Findings of Fact, Conclusions of Law, and Decision and Order was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted, and upon all parties by electronic mail:

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Dated: Honolulu, Hawai'i, June 1, 2017

DANIEL E. ORODENKER
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