LAND USE COMMISSION

STATE OF HAWAI'I

STATE OFFICE TOWER

LEIOPAPA A KAMEHAMEHA BUILDING

235 SOUTH BERETANIA STREET, ROOM 405

HONOLULU, HAWAII 96813

PREHEARING CONFERENCE

DOCKET NO. A89-649

COMMENCING AT 10:00 A.M.

SEPTEMBER 30, 2016

BEFORE: Ann B. Matsumoto, CSR #377

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of LANA'I RESORT PARTNERS To consider further matters relating to an Order To Show Cause as to whether certain land located at Manele, Lana'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

PREHEARING CONFERENCE

Held on September 30, 2016, at State Office Tower, Leiopapa A Kamehameha Building, 235 South Beretania, Street, Room 405, Honolulu, Hawaii 96813, commencing at 10:00 a.m.

BEFORE: Ann B. Matsumoto, CSR #377

APPEARANCES:

For the Land Use Commission:

JONATHAN LIKELIKE SCHEUER, Hearings Officer
DANIEL E. ORODENKER, Executive Officer
DIANE E. ERICKSON, ESQ., Deputy Attorney General
SCOTT A.K. DERRICKSON, Planner
RILEY K. HAKODA, Chief Clerk/Planner

For Petitioner Lana'i Resort Partners:

BENJAMIN A. KUDO, ESQ., Ashford & Wriston
CLARA PARK, ESQ., Ashford & Wriston

For the State of Hawaii, Office of Planning:

BRYAN C. YEE, Deputy Attorney General
RODNEY FUNAKOSHI, Land Use Planning Administrator

For the County of Maui:

CALEB P. ROWE, Deputy Corporation Counsel

For Intervenor Lana'ians for Sustainable Growth:

DAVID KEITH KAUILA KOPPER, ESQ., Native Hawaiian Legal Corporation
LI'ULA E.K. NAKAMA, Native Hawaiian Legal Corporation

ALSO PRESENT:

For Pulama Lana'i:

HARRILYNN KAMEENUI
ROBERT McCOY

P R O C E E D I N G S

HEARINGS OFFICER SCHEUER: Okay, so let's begin.

It's September 30th. We're here on a prehearing conference in the matter of the Petition of Lana'i Resort Partners.

Everybody, the parties have filed either motions or responses to the motions, so thank you for all of those.

What I'm hoping to do today is very briefly handle one procedural matter, and then have the parties take up argument in support of their motions. And I'd kind of like to break them up by subject matter. For me, that probably the most significant issue is: What is the time period that we're addressing on this remand? Then we can take up, after we've had an argument about that, issues around -- discussion around the issues of leakage and then issues around the definitions of "potable" and "non-potable."

So what I'm proposing this morning is that first I want to talk about whether there was any agreement. The parties were going to discuss how to handle the previous record and come up with a proposed solution to that.

MR. KOPPER: We haven't had any further discussion, but I know we're both going to do that. So I'll make sure we talk about it before the next deadline.

HEARINGS OFFICER SCHEUER: Okay. So then because the -- so that's dispensed of. So in terms of the substance of the motions that everybody filed, to me, the three biggest issues that I want to hear argument about, first of all, is the issue of what is the time period which we're addressing on this remand. Is it from 1991 to '93, or is it more expansive?

And I want to have argument about that issue first, finish that off, then move to the discussion of arguments about whether the issue of leakage is part of this remand or not, which the parties differed on. And then finally, differing opinions on the scope of the remand related to the definition of "potable" and "non-potable." Is that clear to the parties? Ben? Mr. Kudo. Sorry.

MR. KUDO: I think the way that the motions -- at least our motion is more procedural than it is substantive. In other words, I thought that today we wouldn't be discussing the merits of the leakage theory or not. We would be talking about what issues we need to prepare for at the hearing so that we can get our witness list, exhibit list, and prepare our case.

HEARINGS OFFICER SCHEUER: So if I may? Let me try again to be clear, because I'm in agreement that this is an issue on procedure and not on merits.

MR. KUDO: Right.

HEARINGS OFFICER SCHEUER: I read in particular Lanai Resort's motions as trying to say procedurally the issue of leakage should not be taken up. So maybe I have misread that.

MR. KUDO: Yeah. I think that we didn't mean to say that leakage was not an issue in the case. I think all we said was that to pursue that theory -- and this is as close to the substantive. We're not going to argue (inaudible) -- would lead to no conclusion that would be useful to the decision in this case, but that being just an argument that we made.

The way I see this case, if I may, is that there are basically three issues. And the motions that were filed are actually a motion and a response. So it's -- if we argue the three issues, we'll cover everything in both motions at the same time.

The first is Minute Order No. 4 and the additional issues, and the question is whether we should add those additional issues. And I think it's pretty uniform amongst all the parties that we feel that those additional issues are not necessary. But we do thank the Hearings Officer for --

HEARINGS OFFICER SCHEUER: That's okay.

MR. KUDO: -- trying to -- organizing -- clarify

our jumbled case here. But we think that Minute Order 2, however, is quite clear and succinct, that the parties can proceed on the issues as framed in Minute Order 2. Okay, that's No. 1.

No. 2 is: In regard to Minute Order No. 2 and the way the issues are stated, we are just suggesting to the Hearings Officer that perhaps we should think about stating them in the positive rather than the negative. Because if you state it in the negative, it's hard for us to meet a burden to prove a negative. And so -- and I'm prepared to discuss that issue as well.

The third issue which you brought up, which I think is the most important issue here, is the -- what we consider to be an expansion of the remand order by including Wells 14 and 15, which were developed years after the 1996 order to show cause hearing. And LSG has an opposing view. We have an opposing view on that, and we're willing to, I think, discuss that today.

So those are the three issues. I think on the first issue, I don't think there's any disagreement amongst the parties that we don't need Minute Order No. 4 as to additional issues. Minute Order No. 2's issues are sufficient.

As far as No. 2 and No. 3, I think LSG and ourselves have a disagreement on that. And that's what I

think the main arguments will be this morning on those motions. That's my reading.

HEARINGS OFFICER SCHEUER: So I propose, almost to think this through, to talk about timing first then the leakage issue, then procedural issues around the definition of "potable" or "non-potable."

Do you have a response?

MR. KOPPER: No, I'm fine with that. But however you want to proceed. We can make our argument.

HEARINGS OFFICER SCHEUER: I'm good for whatever works for the parties here. I'm trying to get some structure to what was raised in the motion and the responses. So --

MR. YEE: We'll defer to the Hearings Officer.

HEARINGS OFFICER SCHEUER: Well, yes. So for the record, yes, it's very clear nobody liked Minute Order 4. I'm quite clear about that.

MR. DERRICKSON: Excuse me. Just please, everyone, make sure when you're giving a kind of response that you're speaking up and maybe aiming your voice this way.

MR. ORODENKER: What would also be good is if you identify yourself before you start to speak so she can -- so that the court reporter has the benefit.

MR. DERRICKSON: She's good, but she's not

familiar with everyone.

HEARINGS OFFICER SCHEUER: So I'd like to begin by discussing the issue of timing. I think that is the most critical issue before us, so I want to make sure that we focus on that. We can start on the discussion over what period of time this remands covers, focus on that procedural issues, and then we'll go on to the other things. So do you want to begin?

MR. KUDO: The issue of whether these remanded proceedings should cover a period beyond the original period, which was 1991 to 1993, we have to remember that in 1993 the Commission issued an order that commanded petitioner Castle & Cooke to appear before it to demonstrate why the land should not be reverted because of an alleged violation of Condition No. 10. In that particular order that was issued in October 13, 1993, by the Commission, it speaks to the past, that is, up to 1993, that actions preceding 1993 have led to a belief and were the basis of allegations that Condition 10 was being violated. So the scope of the order itself, to begin with, was limited to 1991 to 1993.

The order to show cause hearings lasted till 1996. And during that period, if you look at the record, it only talks about things that were occurring since the reclassification was approved in 1991 through the relevant

period of 1993 and maybe possibly thereafter.

There was no discussion or any kind of mention in the original order, or during the 1996 proceedings, of future actions by the petitioner or any other well, because they didn't know what was coming up.

HEARINGS OFFICER SCHEUER: And were they addressing -- in your understanding, were they addressing issues to 1996 till the time of the hearing?

MR. KUDO: It was addressing the issues up to 1993, which served as a basis for the probable cause hearing. That is, up to 1993, whether your actions rose to a level enough to warrant a contested case hearing to determine whether the land should be converted.

So the evidence that was submitted in that proceeding was focused on the actions of Castle & Cooke between that relevant period. Okay.

And what we're saying is that we as the counsel for the petitioner, who inherited this particular situation for good or for bad, in 2012 when we bought the island and the water company, et cetera, our very concern, that we don't want this thing to keep going on and on and on. So we're very committed to not making any kind of error in the way that these hearings are conducted, so that we don't come back and have this thing come back to another remanded set of hearings three to five years from

now. Before, it was six years. Now it's about three to four years, because we go directly to the Supreme Court.

And so as much as possible, I would beg the indulgence of the Hearings Officer to keep the matters before this hearing to what was relevant during the 1993 to '96 hearings. Those were the order to show cause hearings. And we are remanded back to those hearings. We're not remanded to the present. We're remanded back by the Supreme Court, in 2004, to look at those issues and to determine whether the petitioner had violated Condition No. 10.

So anything that occurred up through that period, the relevant period of those hearings, is relevant. And -- but anything that has occurred after that is new. So if you're going to take up another violation that occurred in 1997 or '98 or 2004, there needs to be another hearing, and that's a de novo proceeding. And the first thing you would have to do, obviously, is to have a probable cause hearing. Because no evidence was ever brought in on those things. You don't even know if it rises to the level in which a contested case hearing is warranted. You cannot just reach forward and grab things that are 20 -- 10, 15 years ahead of where that particular proceeding ended in 1996 and bring it back to 1993.

And so I think that we really strongly believe

that if we did that, that would be committing error. And even if the Commission, which we believe -- someone argued that the Commission is the body, and we agree with that, that that is the only body that can issue an order to show cause. The Hearings Officer started saying that doesn't have the unilateral ability to issue an order to show cause, and so --

HEARINGS OFFICER SCHEUER: I would be happy to say it.

MR. KUDO: So if an order to show cause was issued on 14 and 15, it would have to be the active Commission. There would have to be a probable cause hearing on that, and then you would proceed forward. If you combine that with this, then what you're doing is you're combining a de novo proceeding with a remanded hearing. And it makes the issues very complex. We have enough complexity to deal with. I don't want to add to the probability that we will be reversed on appeal if this thing is appealed. And so I'd like to stay within the box.

Basically, the Supreme Court said go back to 1993 and determine what the decision should be. Make finding, clarify your findings and conclusions, and make your decision. Well, it's with -- again, with regard to that relevant period, I'd like to stay within that box. I don't want to increase the box and take the chance that

you'd be constituting a reversible error and against the wishes of the Supreme Court in 2004 and the --

HEARINGS OFFICER SCHEUER: So, sorry, just to -- and, you know, this could be my not fully being able to recall every detail of your motions. But I believe your motions indicated it was limited to the period of 1991 to 1993.

MR. KUDO: Yes.

HEARINGS OFFICER SCHEUER: But what I'm hearing in your oral argument right now is that that certainly is up through 1996, up through the conclusion of the hearing that is the subject of the remand.

MR. KUDO: It does, because there were testimony and evidence submitted up through 1996, when the order was actually issued.

HEARINGS OFFICER SCHEUER: So my -- this current understanding, it's up to '96, is the position of Lanai Resort?

MR. KUDO: Yes.

HEARINGS OFFICER SCHEUER: Okay. Thank you.

MR. KOPPER: I'm David Kopper for Lana'ians for Sensible Growth.

So I think we should be clear that it's the resort, for the first time in over 20-year life of this case, which is asking the Hearings Officer and the

Commission to limit the scope. Okay, this was never brought up, to my knowledge, in any other hearings. It's not brought up in the Lanai Company decision. It was not brought up in 2006, when the Commission developed the issue for that case. It was not brought up in 1993, as the resort just conceded.

So this is a new issue. I want to make sure that we're not clarifying it as we're asking for the scope to be expanded, because we're not.

The scope of the hearing has never been limited. And I think to do so, to limit it just to '91 or '93 or '96, we'll be ignoring over 20-plus years of potential violations of the condition. And as you know, the Commission is duty-bound to preserve the public trust, and we can't just simply turn a blind eye to these potential violations.

But I'd like to talk about the law. The resort has repeatedly made this argument about reversible error. And let's be clear. What they're saying is: If you don't do what we tell you to, we're going to appeal. And I think that's a threat, especially in light of the Mauna Kea case and all these other decisions that, you know, it may seem scary, but there really is no merit there.

For example, in their September 13 motion they

make this argument: Well, it's reversible error if you consider anything outside 1991 to 993, because an order to show cause issued in 1993 did not give us proper notice. So it's a due process argument.

Well, the Supreme Court has already disagreed and conclusively ruled on this. We provided the Pilaa case, which hasn't been opposed or distinguished by the resort. And in Pilaa, the Supreme Court held that the DLNR had the authority and discretion to hold a contested case hearing which was broader than the formal Chapter 91-9 notice, so long as the parties were adequately apprised of the topic of the contested case hearing.

So in this case, the order to show cause is the 91-9 notice. That's what is required by Chapter 91, and that's the formal notice. But we know from Pilaa that the actual notice of the subject of the contested case hearing can be something separate and informal. And we've had that. First I would argue the whole life of this case is the notice, because that has always been the scope of the hearing. But when we look at Minute Order No. 2, it is not limited to the period. It's very clear it includes all violations. That notice satisfies the Supreme Court's requirement in Pilaa.

There's also the 'Aina Le'a case. Now, the resort wants to distinguish this case by saying: Oh, well, that

was a unique proceeding. It was a special ruling show cause hearing. But when you look at the description of the order to show cause in the 'Aina Le'a, it is very similar, if not identical, to the show cause order here in this case. It's clear. And the Supreme Court there says, you know, it makes sense. If the Commission's going to have -- and I'm paraphrasing. But if the Commission's going to have broad authority to make conditions, then you need to have broad authority to enforce them, or to investigate whether those conditions are being violated.

So we know their argument that it's reversible error if you go beyond the show cause order. It has no merit so long as they're adequately apprised. And we know that there is no prejudice, because only 30 days' notice is required prior to a show cause hearing under the LUC's rules. So there's no prejudice to be suffered by the resort, especially given the whole life of this case it's never been limited.

HEARINGS OFFICER SCHEUER: Sorry. Can I just ask you? I mean, I don't doubt that the form of the order, the show cause order, was quite similar if not identical in 'Aina Le'a versus here. The LUC often turns to previous documents and copies them. But that's not really the distinguishing point that Lanai Resorts was bringing between the two, right? The distinguishing point was that

the ongoing hearings had gone to appeal and sort of in essence been frozen in time for the appeal, for Bridge 'Aina Le'a versus this instance.

MR. KOPPER: That's a great point. I agree that that is another issue they raise. And so that would be -- I'm calling it the new issue. After their first argument has clearly been debunked by Pilaa and 'Aina Le'a, now is the new argument: Well, here we have a remand order, right? And Lanai Company is -- used the past tense in their decision. So they take the use of the past tense by Lanai Company and the past tense used in the order to show cause, and they cite a case called Chun versus Board Of Trustees.

Now, this is a distinguishable case with a narrow holding. But what Chun said was that you have to comply with the strict mandate of a remand order from the appellate courts. And you cannot vary. And that's their argument. Because Lanai Company used the past tense, somehow the past tense restricts the scope of this case to '91 to '93, or now it's 1996.

Well, first, Lanai Company never did that. Never ruled as to the scope of the hearing. Never ruled as to the time frame. They never ruled that only the period from 1991 to 1993 is relevant. Second, the Chun case they cite -- and I may be nerding out a little bit, but it

really is unique. It involves a very specialized situation where sometimes appellate courts can remand very specific issues to lower courts, giving them limited jurisdiction only to address that issue. For example, in criminal cases. Appellate courts can send down issues of sentencing to the lower courts. They don't have jurisdiction to start a new trial and see if he's guilty or not. Sentencing him back up.

In the Chun case, that was (inaudible). This is completely different. My colleague says that we need to have -- you know, in order to address anything outside of '93, it has to be de novo review. But this proceeding is de novo. November 8, 2012, Judge Sakamoto issued his remand order. His remand order remanded this matter to the Land Use Commission for de novo proceedings. It says "de novo" right in his remand order.

That order was appealed by the resort for different issues. It was affirmed in full by the ICA and was never further appealed after that. So Judge Sakamoto's remand order stands. He says this is a de novo review. And that's what we have.

Further, if we look back at the Lanai Company decision, it's --

HEARINGS OFFICER SCHEUER: De novo review or de novo remand?

MR. KOPPER: For a de novo proceedings. Right. It's not a review, because a review would be -- it's a de novo proceeding. That's what Sakamoto said in his remand order.

HEARINGS OFFICER SCHEUER: Okay.

MR. KOPPER: And it's in the text.

And then we have the decision of the Lanai Company court itself. They gave the Commission the option. You can simply clarify your findings from the 1993-96 proceedings, or you can hold new hearings. Well, we know that the Land Use Commission met. And even though both parties, the resort and LSG, argued, "Hey, just do it on the record," the Land Use Commission said no. We're going to have new proceedings so we can have new evidence and a full record. This is de novo.

Now, I'm not saying we don't have to follow the Supreme Court. What I'm saying is their strict construction has no basis in the law. And I want to give you actual law. So just very briefly to read in the record, I have the opinion in Waiahole III. This was decided, 2010, by the Intermediate Court of Appeals. And unlike the Chun case, this is a remand, obviously multiple remand, and administrative appeals.

And this is at page -- looks like Lexis calls it 45. "On remand, it is the duty of a tribunal to comply

strictly with the mandate of the appellate court according to its true intent and meaning as determined by the directions of the reviewing court.

"However, on remand, the tribunal is free to decide issues not covered in the mandate and issues that were not decided explicitly or by necessary implication. In addition, even where an issue has been addressed by the appellate court and is covered by the mandate, the tribunal on remand may reconsider the issue based on new evidence for changed circumstances."

Now, first, we already know that the Land Use Commission, as the resort concedes, considered facts after the 1993 show cause order. So they went beyond it, up until 1996. And we know that because aside from the concession, there's evidence that the pump test, which happened in '96, was offered and considered by the Commission and et cetera.

So if the Commission has the ability to go beyond the 1993 show cause order in the first instance, then that means it could do that subsequent, so long as it's not limited by the Supreme Court's remand order in 2004.

And we know from this case, Waiahole, that they are not, especially when there's new facts. And of course there's new facts. We have wells that didn't exist at the time of the Supreme Court's decision. They couldn't have

considered it. The '90s Commission couldn't have considered it. But now they can. And Waiahole makes very clear that you can do it. Pilaa says that we can expand the scope. It's something that the Hearings Officer can do. And it is also something that we should do.

The resort said that they don't want this to go on and on forever. But what would happen if we decide that you simply cannot address these continued violations? Do we have to have show cause proceedings, new motions every week to address ongoing violations?

I mean, when we think about it, if you know something is prohibited, for example, if you know it's possible you could be violating Condition 10 by having Wells 1 and 9, and you go ahead and you drill Wells 14 and 15, you have notice that the use of that water is subject to the restrictions of Condition 10.

And it really doesn't make sense to have multiple proceedings. And then what are we going to have if we have different hearings officers and different results? It's a mess. Or maybe we have the same results, and then there's going to be issues of prejudging, prejudging concerns. Is the first hearing wagging the dog of the following hearings?

You know, and it makes sense. It's a public trust resource. That, I think, urges addressing all possible

violations. Now, we have the law that says you can do it. It appears that the Commission has always done it. There's no reason to deviate now and to limit the proceedings as the resort requests.

HEARINGS OFFICER SCHEUER: Who wants to go?

MR. ROWE: I'll go. Deputy Corporation Counsel Caleb Rowe on behalf of the County of Maui. The county doesn't really take a strong position on what the scope of the hearing is. I think the only thing that we wanted to note is I believe LSG had mentioned that the Hearings Officer, if they decide to limit the scope from '91 to '93, should issue additional show cause orders for continuing violations. And procedurally we think that that would be an error. Under 15-15-93 of the Hawaii Administrative Rules, the Commission has the ability to issue orders to show cause, and the county's unaware of anything that delegated that authority of the Hearings Officer.

So we don't really have an issue as to the scope, but we do think that it would be procedurally erroneous to issue new orders to show cause for ongoing violations if it is determined that it should be only '91 to '93.

HEARINGS OFFICER SCHEUER: It would be erroneous? I'm sorry. Just to restate what you said to make sure I was clear --

MR. ROWE: Yes.

HEARINGS OFFICER SCHEUER: -- it wouldn't be erroneous to issue new orders to show cause; it would be erroneous for the Hearings Officer --

MR. ROWE: Correct.

HEARINGS OFFICER SCHEUER: -- to do so?

MR. ROWE: Correct. Correct.

HEARINGS OFFICER SCHEUER: Okay. I'm sorry.

MR. YEE: Good morning. Deputy Attorney General Brian Yee on behalf of the Office Of Planning. With me is Rodney Funakoshi from the Office of Planning.

We essentially agree with the County of Maui on this matter. We defer to the Hearings Officer as to the chronological scope of the hearing. And we agree that if you believe a further order to show cause is necessary, that that should be done by the Land Use Commission itself. Thank you.

HEARINGS OFFICER SCHEUER: Yes.

MR. KUDO: Can I respond?

HEARINGS OFFICER SCHEUER: Yes, please.

MR. KUDO: I think that the Pilaa case and the Bridge 'Aina Le'a case were both cases that did not deal with the remand situation. So I think that's a very important distinguishing feature of it. The remand in this particular proceeding that stems from the 2004

decision of the Supreme Court is quite specific as to what the hearings, if any, are called to do. And that is for clarification of its findings or its conclusions with regard to Condition 10, as to whether violations occurred. It's not -- it's not a remand for anything that you want. It's a -- it's very specific with regard to clarification of the findings of fact or conclusions of law that the Commission will render in its decision, ultimate decision. That's what the purpose of the remand is for.

And all I'm saying, Mr. Hearings Officer, is that we need to be mindful to stay within the ambits of that order and not turn this into a de novo hearing and start to expand not only the time period but anything else that might be occurring in that time period, which could include things besides Wells 14 and 15, for all I know.

So again, I'm just being very cautious that we not trip over our own feet in trying to conduct these hearings in a manner that the court has ordered us to do, and to stay within those, those limitations, so that we don't get -- we don't have to repeat this thing four or five years from now. That's all I'm saying.

HEARINGS OFFICER SCHEUER: So can I ask you one --

MR. KUDO: Sure.

HEARINGS OFFICER SCHEUER: -- follow-up question? You know, originally you said '91 to '93. Now

it's -- well, it's '96. I understand the differences but -- and then you brought in this concern about whether wells -- the subsequent wells would be included. You don't distinguish, however, between a possibility that you could have a continued hearing that would take new evidence on Wells 1 and 9 to the present day; but not additional wells?

MR. KUDO: A new hearing? Yeah.

HEARINGS OFFICER SCHEUER: No, no, no, no. Sorry. Let me try again. You said first, '91 to '93 is the period, right?

MR. KUDO: Correct.

HEARINGS OFFICER SCHEUER: We discussed earlier, and you said, well, it's really '91 to '96 to the conclusion of the order to show cause hearing. And that's the boundaries of it. And then you also brought up, subsequent to that 1996 date, you had Wells -- I'm going get the numbers wrong.

MR. KUDO: 14.

HEARINGS OFFICER SCHEUER: -- 14 and 15. Are you also saying that even though it still deals with Wells 1 and 9 you couldn't -- we couldn't discuss new information regarding Wells 1 and 9 post-1996?

MR. KUDO: No, I'm not saying that. I'm not saying that. I think that in regard to meeting our burden

of proof, I think that's what -- I think that's what you're saying. In regard to the upcoming hearing and what we intend to show, we know that Wells 1 and 9 were within the relevant period. So we will be producing what -- our evidence to show that Wells 1 and 9, not only during the relevant period but up until today, are operating in a very similar manner, and the improvements that we put into the system to make it more efficient, et cetera, et cetera.

So because -- they were the subject in 1993 of the order to show cause, so we feel that it's relevant with regard to what we've done for the last 27 years.

Now, I know that David has mentioned that this thing has been going on for a long time and we continue to do this, but it's -- yes, we have, but it's because of the consequences of these constant remands. We're on the third set of hearings on the same issue over a 27-year period. So we would like to show with regard to Wells 1 and 9 what we have done.

Now, to that, there's a little distinguishing. This relates to the other issue that I was talking about, and it gets into the burden of proof issue. What we are trying to do is to put on evidence to tell you and to prove that what we're doing is permissible, that is, that we have complied with Condition 10. Not that we have

violated it, but that we have complied. I'm stating it in the positive and not the negative. And that is a --

HEARINGS OFFICER SCHEUER: I understand the distinguishing point you make.

MR. KUDO: And so it is an achievable burden for us to show you that we've complied with the condition. It is somewhat problematic to show you that we have not complied with something or --

HEARINGS OFFICER SCHEUER: So I understand that. I want -- can we go back up? Because now I'm a little more confused perhaps. You said that you want to bring up evidence regarding Wells 1 and 9 through to the present date.

MR. KUDO: If the Hearings Officer wants to listen to it. Because we've done the same thing, basically. Nothing has changed.

HEARINGS OFFICER SCHEUER: So I -- please feel free to respond. But I'm confused whether really, truly what you're trying to bracket the hearings in on is the time period or the wells.

MR. KUDO: The wells, actually, are more important. And this goes to the leakage theory argument. If the leakage theory is -- is a theory that has been proffered by LSG, basically to make all waters in the high-level aquifer potable so you can't use anything,

right? So in order to respond to that, we have to show what is occurring with regard to Wells 1 and 9 over a long period of time. Because part of the leakage theory is that over a period of time the facility fee will go down, the water level, et cetera, et cetera. And there's induced leakage into the non-potable compartments, et cetera. So since we have that data, we can show it, show that data to you over a longer period of time, since we have that, to disprove the theory.

I mean, if we -- if you feel that adds relevance, which -- which we feel is relevant if you believe the leakage theory to be relevant. I mean, so to that end, yes, we'd like to introduce more data and evidence to show that whatever theory is being proffered by LSG in support of their leakage theory, or that potable is brackish and brackish is potable, or whatever argument they're making, is not true. And -- and I think it's helpful for the Hearings Officer to see whether what they have speculated --

HEARINGS OFFICER SCHEUER: Yeah.

MR. KUDO: -- to have occurred in 1993 actually did occur or not.

HEARINGS OFFICER SCHEUER: I understand how longer-term data would help understand the relationship between the pumping of Wells 1 and 9 and chloride and

other measurements in those wells and this one place.

What I'm -- I'm just -- I'm still focused on what I originally said we were going to try and first address, as like what was presented first as a time issue, right? As Lanai Resort's saying, this really -- this remand should be focused on 1991 to '93. And I'm not trying to -- you know, there's no tone or anything with what I'm saying.

And then it's like, okay, it's actually '91 to '96. Now what I'm actually hearing is it's not really a time period issue, it's a which wells issue.

MR. KUDO: Let me clarify that.

HEARINGS OFFICER SCHEUER: So maybe I'm misunderstanding. So --

MR. KUDO: The order to show cause is specific with regard to actions by the petitioner that allegedly led to a belief that there may be a violation of Condition 10. And the relevant period of those actions was 1991 to '93. What occurred in that period was the drilling of Wells 1 and 9. But during the hearings in '96, et cetera, and post that, various theories were brought up to -- such as the leakage theory, to show that and demonstrate that there's no such thing as non-potable water in the high-level aquifer.

Since Wells 1 and 9 are the subject of the action,

and we have the data to show that the leakage theory is not a plausible theory in terms of inducing leakage from the -- from the potable high-level aquifers to the non-potable compartments, we would like to show that so that what was testified to in the '96 hearings can be shown to be not conclusive. So to that end, yes.

I think that it is relevant to see whether or what somebody has alleged to -- would occur in the future has actually occurred or not, because we have that data. I think it's relevant to the plausibility or the credibility of any theory or cause of action that the proponents are putting out, which is -- which was they have.

So to that end, yes. It would entail data that -- of those wells post-1996 simply to disprove those theories.

I think, though, in addition, there is in the element in this case -- because LSG has now raised a new issue, which is the public trust issue. It was never raised before. But they're raising the public trust issue. If you believe that to be a relevant argument, then our case is also geared to address that argument as well. That issue was never raised in the 1993 to '96 hearings or in the order to show cause. But if that is a new theory that they're -- they're alleging, we would like the ability to at least defend that. Because otherwise,

how are we going to meet our burden? And the way that we're going to show that is we are exercising our correlative rights and that our use of the water is both reasonable and beneficial.

To that end, we have witnesses and exhibits that are going to testify to that end. Because that's how you balance the public trust, is to show that your use is reasonable and beneficial, you're exercising constitutionally protected rights.

But for them arguing that, we would not have to raise all those things. But we did because they were raising those issues.

HEARINGS OFFICER SCHEUER: Okay. Do you want to respond further?

MR. KUDO: Very briefly, I promise I can say what he said a lot faster. I believe his point is, no, the scope of the hearing is '91 to '93, but they want to offer evidence that goes outside of that. And there hasn't been anything that made me -- that showed the resort conceded otherwise. And again, that position just has no basis in the law. Of course, the show cause order was based on what happened from 1991 to 1993, because that's all that happened up until that time.

That belief and violation is what triggered this proceeding. Once the proceeding is triggered, anything

going forward is fair game. And the cases we cite make that very clear, whether it's on remand or not.

Very briefly, just to address the issue about the neutral cause order, I think it's clear that that's not our primary request. Again, notice to the scope of the hearing, which really hasn't changed, it's always been open to what we want to confirm, but it can be addressed in your minute order. A new show cause hearing is an alternative. I disagree with the County of Maui and Office of Planning. 15-15-60 allows a hearing officer or presiding officer to rule on any motion which does not invoke a final determination. But, you know, we don't need to get that far. It may confuse the issues. I think it's much simpler to just stick with a new minute order.

HEARINGS OFFICER SCHEUER: I'll say generally -- I'll just say at this point I'm -- given opposing the motion and the responses and in the oral argument, I'm not inclined to make a lot of oral admissions today about how I'm going to rule on things. And I do think the issue --

(Off the record.)

HEARINGS OFFICER SCHEUER: I'm not going to give much oral indication today of what's going to be in the next minute order. I think I will indicate, though, that I agree with the Office of Planning and the county that I do not believe it's within my power to issue a new order

to show cause. That would have to go back to the Land Use Commission. But, of course, that issue is subsequent to any decision I'll make regarding the time or other definition of the scope of things.

Mr. Kudo, did you address sufficiently your concerns you wanted to discuss around the leakage theory?

MR. KUDO: Actually, I wasn't prepared to argue the leakage theory today.

HEARINGS OFFICER SCHEUER: Okay.

MR. KUDO: But I was prepared to address the second issue, which is the characterization of the issues in a way that we can meet the burden for the --

HEARINGS OFFICER SCHEUER: Whether positive or negative?

MR. KUDO: Yeah.

HEARINGS OFFICER SCHEUER: You'd like to further address that?

MR. KUDO: Yes.

HEARINGS OFFICER SCHEUER: Okay.

MR. KUDO: We do ask the Hearings Officer to consider recasting the issues as set forth in Minute Order No. 2. Because the way they're stated now, we are tasked to prove a negative. That is, that we did not do something, that we did not use potable water from the high-level groundwater aquifer to irrigate Manele Golf

Course.

Normally the petitioner has the burden of proof in an order to show cause. However, the burden, depending on how the issue is phrased, can be at odds with the common law principles regarding evidence. The principles of evidence dictate that burdens be stated in a manner to prove a positive rather than a negative proposition. And -- and I -- this is a quote from a Pennsylvania case.

It says: It is a well-recognized principle of evidence that he who has the positive of any proposition is the party called upon to offer proof. It is seldom, if ever, the duty of the litigant to prove a negative until his opponent has come forward to approve the opposing positive. This is because a party required to prove the negative is saddled with virtually an impossible burden.

This is why courts generally do not require litigants to prove a negative, because meeting that burden is very difficult. We are tasked, as the issues are framed in Minute Order No. 2, to prove by the preponderance of the evidence that we did not use potable water from a high-level groundwater aquifer. This is a negative proposition. That is, we must prove that we did not do something alleged to be a violation of the state Land Use Commission decision and order.

If a defendant in a criminal trial is tasked with

the burden to prove that he did not commit a crime, this is virtually an impossible task for him to meet. That is why it is the prosecutor's burden to prove that the defendant did in fact commit the alleged crime beyond a reasonable doubt.

So what occurs when there is a situation under common law that presents a negative burden? Under the common law principles of evidence, the burden then shifts to those claiming the violation. So therefore, in the instant situation, if we are asked to prove a negative burden, it then shifts -- the burden then shifts to the intervenor, Lana'ians for Sensible Growth, to show in fact that a violation of Condition 10 has occurred. It is now their burden, not ours, to meet. All that we can do to respond to a negative burden is to say we didn't do that.

HEARINGS OFFICER SCHEUER: I mean, then you're really familiar with the line of Hawaii Supreme Court water cases that have sort of addressed this from -- sorry. You're very familiar with the whole line of Hawaii Supreme Court water cases that have really extensively discussed who holds the burdens, whether it's extractive users of public trust resources or whether it's entities that are seeking to defend and protect public trust resources from potential harm. I'm having a -- trying to address how what you're saying jibes with that line of

cases from the Supreme Court.

MR. KUDO: I think what the court does, though, is they try their very best to phrase the issue, or the alleged violation, in a positive way. So therefore, in this particular situation, rather than stating that we have to prove that we did not do something bad, it is easier for us to prove and more -- more practical for us to prove something that says we did comply with the condition, therefore we did not commit a violation.

You know, it's the other side of the coin, you know. And it's kind of similar in boards and commissions, if you think about it. Whenever a board or commission has to take action, which is generally through a motion of some sort, the motion generally is stated in the positive, not in the negative.

So, for instance, if I was appearing before you to ask for an approval or a permit, and you were inclined not to give it to me, you would not raise a motion to deny the permit. Because if that motion, for instance, failed, then what does that do to my application or my request? You still haven't acted on it. It therefore then requires a subsequent motion to approve, an affirmative act to approve it. Because a motion to deny that fails does nothing.

So therefore, even Robert's Rules of Order prefers

that all motions be made, main motions be made in the positive, not in the negative. It's the same with regard to burdens of proof. If you have a burden of proof, you want to be able to prove that you did in fact do something, not that you didn't do something.

So all I'm saying is that the flip side of that issue is, rather than saying we did not use potable water, to say that we used non-potable water, which is clearly specified in Condition 10 as an allowable use. Or if you don't prefer that, to take a larger view and just say that we must prove that we complied with Condition 10.

Because what we'll do then is to show that we used non-potable brackish water, which is set forth under Condition 10 as an allowable use. So that's basically what we're saying.

HEARINGS OFFICER SCHEUER: I hear you.

MR. KUDO: Yeah.

HEARINGS OFFICER SCHEUER: Thank you.

Mr. Kopper, do you want to respond?

MR. KOPPER: Sure. As I think how to respond to that, the first note I want to make is -- and I do feel like LSG is being treated as some sort of de facto prosecutor here.

I mean, first, we can agree the resort has the burden to prove their case. Second, we're -- LSG is a

party with the same interests as Maui County or Office of Planning. It was the Commission that had a good-faith belief that a condition was being violated. And I think that's a point missing from these common law cases, is the Commission has brought authority, especially in areas of public trust, brought authority to make and enact these conditions, and brought authority to investigate and enforce when those conditions are being violated. And that's why it's framed the way it is framed.

And when we're looking at an order to show cause, which is really the question is, is the resort violating Condition 10 in some way, to then change the query into is the resort complying with Condition 10 in some respects, ignores the possible violations.

So -- well, first, simply, when we just look at Lanai Company again, the remand was this: Quote, we remand the issue of whether the resort has violated Condition 10 by utilizing potable water from a high-level aquifer. We know we have to satisfy the Supreme Court's remand. There's nothing in their proposed issues which addresses the use, legal use, of potable water.

But to illustrate really what happens when you switch the proposed issues, I think an example illustrates a problem with their approach. Completely hypothetical, let us say that the Hearings Officer and the Commission

find that Well 1 produces and has always produced potable water, and Well 9 produces and has always produced non-potable water.

Okay. We know that's a violation of Condition 10. Well 1 is being used here to irrigate the golf course. It produces potable water. It's a violation. But if we use the resort's proposed issue -- and I believe this would be their issue No. B -- they would avoid a violation, because they are, of course, in part using non-potable water. And that's the problem when you turn an inquiry in a violation into an inquiry about compliance and are you complying in some manner.

And, you know, I think when we have condition -- the conditions -- sorry -- the issues proposed by Minute Order No. 2, it makes a lot more sense. The burden is clear. We only have -- especially for limited Wells 1 and 9. There's two wells. It's not as if there's a thousand wells and they have the onerous burden of proving the potability of each well. There's two. It's easy for you to tell us is it -- prove to us is it potable or not, are you violating Condition 10 or not. It's not that complicated.

HEARINGS OFFICER SCHEUER: Okay. You're not going to dive in?

MR. ROWE: No.

HEARINGS OFFICER SCHEUER: Okay.

MR. YEE: I'll go quickly over it, because I know you don't want us to dwell on it. We do appreciate the fact that you tried to explain the issues and focus what the particular questions are. I think in doing so, it appears that people have viewed the way you framed it as an indication of a decision. That is, the way you frame an issue sort of commands the answer. And so the different parties have viewed the question differently, because it sort of helps their sides to win.

So perhaps in retrospect, it might have been easier to simply go back to the language of the order to show cause and the language of the remand order to simply saying this is the scope of the hearing. And it really encompasses both. I mean, if you look at the order to show cause itself, it says -- essentially what the petitioner -- what petitioner Lanai Resort says, which is you failed to use alternative non-potable sources of water.

If you look at the remand order, it says the -- the Land Use Commission didn't determine whether Lanai -- the petitioner used potable water.

So you do have two people, both the order to show cause and the Supreme Court, using different terms. And I don't think that was intended to limit the arguments of a

party. I don't think the way the Supreme Court phrased it was intended to reach a particular result. I think it was just the way they happened to write it down on the piece of paper.

Having said that, if you want to set out what the scope of the issues that you want the parties to address are, the Office of Planning's happy to address any issues that you list. We do so with the understanding that we are entitled to argue that you are wrong in saying that this is an issue or that entitled to say the evidence doesn't demonstrate this. The only thing that we did specifically reference was the Minute Order No. 4, the way that was referenced.

And I will say just -- I read the ICA decision and that particular paragraph relating to whether or not the Commission is not supposed to look at what it meant. And I read it, and I read it, and I read it, because it was very confusing to me.

And my conclusion was that because the LUC amended the condition, amended Condition 10 to clarify what they meant, the ICA said, no, you cannot do that.

I have to disagree with it, but it doesn't matter what I think. The ICA said we could not do that. And so they were justifying their decision to reverse the LUC's decision to amend Condition 10.

I do not think they were saying that -- I'm sorry. So let me just -- so I think what they were saying is: You cannot try -- try to restate what you intended to say. You already said it. Condition 10 is already there. You cannot change Condition 10 to say what you meant to say.

But I don't think that they were saying you can't figure out what Condition 10 says. So given what condition says, what Condition 10 says, I think it's all right for -- and I think it has to be. That's my conclusion anyway; that you have to come to some conclusion about what Condition 10 as it is currently stated, what is its requirement, what does it mean. And if you conclude that it's unclear, then you conclude it's unclear. But that's -- that's -- I think that is all right.

And so consequently, we -- if you wanted to go forward with the issues elicited in Minute Order No. 4, you change the way you said it. If you want it deleted, that's perfectly fine with us. In fact, if you want to delete the provisions in Minute 2 and 4, we're all right with that. We'll defer to you as to the way you want to phrase the issues itself. Subject only to the -- what the ICA said with respect to intent and what was meant. Thank you.

HEARINGS OFFICER SCHEUER: Thank you. Okay.

MR. KUDO: I just want to add something short here.

HEARINGS OFFICER SCHEUER: Yes.

MR. KUDO: I just want to add something short.

The Commission, the Land Use Commission in the 2004 Supreme Court appeal, took the position consistent with ours. It is that it was our burden to show that we were using non-potable water. And that's stated in the Supreme Court decision.

The LUC posits that in order to prove that it was fulfilling its obligations under Condition 10, LCI had to demonstrate that water being used to irrigate the golf course was not-potable. And that's in Footnote 45 in the Supreme Court decision, 2004. So the position of the Commission is consistent with our position here today. I just wanted to say.

HEARINGS OFFICER SCHEUER: Let's take a break.

(Break was taken.)

HEARINGS OFFICER SCHEUER: Before we go on with discussions over definitions of "potability" and "non-potability," which I believe is the last thing to address today, I was going to ask Mr. Kudo to introduce, I believe, two company representatives you have with you.

MR. KUDO: Also, I would be remiss in not introducing my co-counsel here, Clara Park, to my right.

My co-counsel Clara Park. And in the back there, two people from Pulama Lana'i, Rob McCoy and Harrilynn Kameenui.

HEARINGS OFFICER SCHEUER: Thank you.

The last thing that the motions and responses addressed from Minute Orders 2 and 4 were statements about relationship of the scope of the hearing to definitions of "potability" and "non-potability." So I wanted to give the parties and opportunity, if they wish, to offer oral arguments on that.

MR. KUDO: Me?

HEARINGS OFFICER SCHEUER: Yes. Company first.

MR. KUDO: We have nothing further to offer in regard to that. I think we briefed it sufficiently in both our position statement as well as the motion. We feel that the definitions should stay as basically the plain reading of the words in the context of the 1993 order to show cause hearings and the administrative record created at that time. And that we will rest on our arguments as set forth in our pleadings.

HEARINGS OFFICER SCHEUER: Thank you. Lana'ians for Sensible Growth?

MR. KOPPER: I agree that -- we're good? Thanks.

I do agree that we should -- that the query is on the plain meaning of "potable" and "non-potable" in

Condition 10. By ruling as it did, the Supreme Court necessarily found that those terms are not ambiguous. And when terms are not ambiguous, you go by their plain meaning. And, of course, in our moving papers we discuss those, the plain meaning of the terms "potable."

And just two things I wanted to emphasize. First is the nature and relationship of the term "potable" to the term "brackish." I think as evident by the resort's proposed issues, Issue B, which sort of conflates "brackish" and "non-potable" so as to say all brackish water is non-potable. Potable water, I think by its general definition, and that's -- it is for the Hearings Officer to decide based on the plain language of Condition 10, but the general definition is water that can be drunk. And the character -- potability goes to the characteristics of water regarding its drinkability, while brackishness goes to its taste. Right? The general definition of brackish is salty, somewhat distasteful.

I think it's clear that brackish water can be potable and it could be non-potable. And it's something that we should keep in mind. And when you look at the -- whether it's the legal definitions by the County of Maui, or the state, or the federal government, saltiness is not considered when we're talking about what's drinkable. It just simply isn't.

I think even the Supreme Court recognizes this relationship. They noted that the Land Use Commission did consider Wells 1 and 9 to be brackish, but that there were other findings that indicate that Wells 1 and 9 were potable water, especially because of the lack of any comprehensive tests performed by the resort as to the potability. And the only way the Supreme Court could have ruled as it did is if water could be both brackish and potable. I think that's just the one thing we need to keep in mind.

The other is just to -- again, to remind the Hearings Officer, and I concede you have much more knowledge in this than I would represent, but this is a public trust issue, and it really requires the tribunal to essentially be biased, not biased towards LSG or any other parties but biased toward protection of the water resources. And using the definition of "potability," that simply is whether the water's drinkable or not, and not getting bogged down in is it 250 milligrams per liter chloride, is it salty or not, you know, those sort of considerations distract the Hearings Officer and the Commission from if this water is part of the high-level aquifer and if it can be drinkable it's a public trust resource.

MR. ROWE: You know, the county does have a

definition of "potable" as part of the Maui County code, and we spoke about that a little bit in our position statement. You know, I don't think necessarily we're saying that's what it -- necessarily that's what the definition of "brackish" -- or of "potable" is. We just kind of used it. It can be used as a reference by the -- by the Hearings Officer. And we're also prepared to have the Director of Water Supply come and testify as to how we enforce, enforce that definition.

As far as these motions, the only thing that we, I think, would like to add as to the definition of "potable" is the references to the intent of the Commission that were contained in Minute Order No. 4.

The county is just a little bit weary of using the term "intent" in a minute order just because of the ICA's opinion.

HEARINGS OFFICER SCHEUER: Okay. Regardless of the arguments by the Office of Planning earlier?

MR. ROWE: Correct.

HEARINGS OFFICER SCHEUER: Can I ask you about -- just very quickly about the county code that was referenced?

MR. ROWE: Mm-hmm.

HEARINGS OFFICER SCHEUER: That's a -- you know, without doing my own independent research, that's a code

that governs the delivery of water by the county?

MR. ROWE: I believe so, yes.

HEARINGS OFFICER SCHEUER: So not like, for instance, like in the Lahaina Kaanapali Water system, which is the major provider but is a private provider of water; you don't regulate chlorides in their delivery, do you?

MR. ROWE: I believe the definition that we provided actually specifically references watering of golf courses. But I'd have to go back and double-check exactly what we submitted. I don't have that with me.

HEARINGS OFFICER SCHEUER: I'm just trying to understand the sort of -- the scope of the authority of that definition.

MR. ROWE: I believe so. I believe that that's reference to the deliveries made by the County of Maui.

HEARINGS OFFICER SCHEUER: Okay. Thanks.

MR. YEE: The Office of Planning just wants to be -- to clarify. We think our position is consistent with the County of Maui with respect with trying to reconcile the ICA decision. And I know it's going to take a while to sort of filter all this through, but essentially what we're saying is you cannot ask what was meant. All you can ask is: What does this condition mean? And there is a difference. And we think that

difference is important.

With respect to two other issues I just want to raise, the Office of Planning does not necessarily agree that you look solely at the plain meaning of the term "potable" and "non-potable." As we noted in a prior prehearing, the question is: What do those terms mean within the context of Condition 10?

And the second is: With respect to the public trust issue, the Office of Planning has put forth an argument in our position statement that this was an issue that was decided at the time Condition 10 was imposed. So now is not the time to change Condition 10 because someone thinks that the public trust may demand a different result. Condition 10 is whatever it says now. And that decision cannot change simply because of a policy argument that it's a better result or better for some interest or another.

Having said that, we are prepared to make these arguments at the close of evidence. And so we are not opposed to allowing NHLC or LSG to make whatever argument it wants in this issue. We simply wanted to note that we have a difference of opinion about it that we will address later. Thank you.

HEARINGS OFFICER SCHEUER: Thank you.

Okay. Anything further from the parties?

I think, yeah, I'm going to work with counsel and the LUC staff, endeavor to have a minute order out by Monday that will certainly in some way reference, address, and/or supersede Minute Orders 2 and 4.

Anything else logistically from the staff that we need to mention? Accommodations for the second dates of hearings on Maui, Riley?

MR. HAKODA: We have procured a group rate at the Courtyard Marriott and provided a link. I know David has already indicated that they're staying at a different hotel. But petitioner and LUC and OP have that link. So the majority of us will be at the Courtyard Marriott. The meeting site is at the Maui Arts & Cultural Center. I believe it's the Alex Higashi room. I'm not sure. We'll let you know.

MR. KOPPER: Yes. Do we have a tentative start time on those days?

MR. HAKODA: Probably about 9:30, ten o'clock.

MR. KOPPER: Okay. I don't have a position on it, but I know there's a concern that any interested persons on Lana'i could either attend or somehow videoconference. I don't know offhand what the capabilities are. I was informed that there was videoconferencing somewhere. If it's all right with you, I'd like to investigate that. And if it's easy, maybe work with you on setting something

up. I just want to make sure that the Lana'i community has opportunity to observe if that's possible.

HEARINGS OFFICER SCHEUER: So you're referring to the Maui hearings, whether or not there's some chance for people from Lana'i to be able to somehow observe? And you're --

MR. KOPPER: Correct.

HEARINGS OFFICER SCHEUER: You're indicating live?

MR. KOPPER: Right, observe live. Or at least have it late enough that they could come over and attend. And it sounds like that the 9:30, I think there's an early -- early ferry. So anyway, it's just something I don't have an answer or position yet, but I know it's a concern from --

HEARINGS OFFICER SCHEUER: Okay.

MR. KOPPER: -- some of my clients that are here in the community.

MR. HAKODA: Would ten o'clock work?

MR. KOPPER: We can hold on the 9:30. We'll look into -- I was told there was a way to do some sort of live conferencing so --

HEARINGS OFFICER SCHEUER: We'll work on it. And I think we can be done with the -- I think you can stop reporting on -- recording on things now. I think we've captured the arguments for the parties, yes. Thank you

very much.

(Concluded at 11:22 a.m.)

C E R T I F I C A T E

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

I, ANN B. MATSUMOTO, Certified Shorthand Reporter, do hereby certify:

That the above proceeding, held on Friday, September 30, 2016, at 10:00 a.m., was reported by me;

That the proceeding was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

I further certify that I am not an attorney for any of the parties hereto, nor in any way concerned with the cause named in this caption.

Dated this 5th day of October 2016, in Honolulu, Hawaii.

_____
ANN B. MATSUMOTO, CSR 377
Registered Professional Reporter