

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of) DOCKET NO. A89-649
)
 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.))
 _____)

CONTESTED CASE HEARING

Transcript of Proceedings

VOLUME VI

Held on Wednesday, April 25, 2017, before the Land Use
 Commission, at the Lana'i Community Center, Eighth Street
 and Lana'i Avenue, Lana'i City, Hawaii, commencing
 at 10:00 a.m.

REPORTED BY: Cynthia L. Murphy
 Certified Shorthand Reporter
 CSR 167, RPR

1 APPEARANCES:

2 EDMUND ACZON, Chairman, Hearings Officer
3 ARNOLD WONG, Vice Chair

4 COMMISSIONERS:

5 LINDA ESTES
6 DAWN N.S. CHANG
7 GARY OKUDA
8 KENT HIRANAGA

9 DIANE ERICKSON, ESQ.
10 Deputy Attorney General

11 STAFF:

12 DAN ORODENKER, Executive Officer
13 RILEY HAKODA, Chief Officer/Planner
14 SCOTT DERRICKSON, Staff Planner

15 BRYAN C. YEE, ESQ.
16 Deputy Attorney General
17 State Office of Planning

18 BENJAMIN A. KUDO, ESQ.
19 SARAH SIMMONS, ESQ.
20 HARRILYNN KAMEENUI, Pulama Lana'i
21 For Petitioner Lana'i Resort Partners

22 CALEB ROWE, ESQ.
23 MICHAEL HOPPER, ESQ.
24 Department of the Corporation Counsel
25 County of Maui, Department of Planning

WILLIAM SPENCE, Director
Department of Planning, Maui County

DANNY DIAS, Planner
Department of Planning, Maui County

DAVID KEITH KAUILA KOPPER, ESQ.
LI'ULA NAKAMA, ESQ.
Native Hawaiian Legal Corporation
For Intervenors Lana'ians for Sensible Growth

ALSO PRESENT:
Butch Gima, President, Lana'ians for Sensible Growth

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CHAIRMAN ACZON: Good morning. This is the April 26 Land Use Commission Meeting.

The first order will be the adoption of minutes for the April 12, 2017 meeting.

Are there any corrections or comments on that? If not, is there a motion to adopt the minutes?

COMMISSIONER CABRAL: So moved.

VICE CHAIR WONG: Second.

CHAIRMAN ACZON: A motion has been made by Commissioner Estes (sic) and seconded by Vice Chair Wong to adopt the minutes for the April 12, 2017 meeting.

All in favor say "aye."

VICE CHAIR WONG: Aye.

CHAIRMAN ACZON: All in favor say "aye."

(The Commissioners responded affirmatively.)

CHAIRMAN ACZON: Opposed?

(No response.)

CHAIRMAN ACZON: The motion carries.

The minutes are not for the audience. I just wanted to wake everybody up.

Next on the agenda is the tentative meeting schedule. Mr. Orodénker?

MR. ORODENKER: Thank you, Mr. Chair.

Our next meeting is May 18th and 19th on Maui

1 for the Kau'ono'ulu Ranch matter.

2 On May 24th and 25th, we will be in Honolulu
3 for the Waimanalo Gulch permit.

4 June 14 and -- June 14, we will be on -- once
5 again, be on Maui for Kau'Ono'Ulu Ranch.

6 June 15, we will be on Kaua'i at Island School.

7 And on the 28th and 29th of June, we'll also be
8 on Kaua'i for the Lima Ola project.

9 And then the schedule from there is tentative.

10 CHAIRMAN ACZON: Commissioners, any questions
11 about the schedule?

12 Thank you, Mr. Orodenker.

13 This is a hearing on Docket No. A89-649 Lana'i
14 Resort Partners to hear and consider exceptions and
15 arguments of the parties on Hearings Officer's Recommended
16 Findings of Facts, Conclusions of Law, and Decision and
17 Order on further matters relating to an Order to Show
18 Cause as to whether certain land located at Manele,
19 Lana'i, should revert to its former Agricultural and/or
20 Rural land use classification due to Petitioner's failure
21 to comply with Condition No. 10 of the Land Use
22 Commission's Findings of Fact, Conclusions of Law, and
23 Decision and Conclusions of Law, and Decision and Order
24 filed April 16, 1991, Tax Map Key No. 4-9-002 portion of
25 Lot 49, formerly Tax Map Key No. 4-9-002 portion of Lot 1.

1 Would the party please identify themselves for
2 the record.

3 MR. KUDO: Appearing on behalf of the
4 Petitioner, Pulama Lana'i -- Lana'i Resorts, Ben Kudo,
5 Sarah Simmons, and Harrilynn Kameenui with Pulama Lana'i.

6 MR. HOPPER: Michael Hopper, Deputy Corporation
7 Counsel, representing the Maui County Department of
8 Planning. With me is Deputy Corporation Counsel, Caleb
9 Rowe, and Planning Director William Spence and Planner
10 Danny Dias.

11 MR. YEE: Good morning. Deputy Attorney General
12 Brian Yee on behalf of the Office of Planning.

13 MR. KOPPER: Good morning. David Kopper on
14 behalf of Lana'ians for Sensible Growth. And here with me
15 is President Butch Gima.

16 CHAIRMAN ACZON: Thank you.

17 Pursuant to a motion duly made and seconded, and
18 unanimously carried at a meeting of the Land Use
19 Commission on May 18, 2016, Commissioner Jonathan Likeke
20 Scheuer was appointed Hearings Officer for the hearing in
21 the above-referenced docket required by the Final Judgment
22 of the Circuit Court of the First Court entered March 19,
23 2013, as affirmed by the Memorandum Opinion issued by the
24 Intermediate Court of Appeals on March 21, 2016, and
25 Judgment entered April 18, 2016.

1 Hearings Officer Scheuer held pre-hearing
2 conferences in regards to this matter on July 5,
3 September 9 and September 30, 2016, and conducted a site
4 visit on Lana'i on August 18, 2016.

5 From June 27, 2016, to December 17, 2016, the
6 Hearings Officer issued nine Minute Orders and
7 miscellaneous correspondence to the Parties and also
8 received the Parties' original and amended exhibit and
9 witness lists, rebuttal exhibits and witness lists,
10 position statements, and other associated filings.

11 On November 9 and 10, 2016, the Hearings Officer
12 held hearings on this Docket at the Lana'i Community
13 Center in Lana'i City, Lana'i.

14 On November 15 and 16, 2016, and December 8,
15 2016, the Hearings Officer held hearings on this Docket at
16 the Maui Arts and Cultural Center in Kahului, Maui.

17 On December 29, 2016, the following were filed:
18 Petitioner's Partial Stipulation and proposed Findings of
19 Fact, Conclusions of Law, and Decision and Order and
20 Intervenor LSG's proposed Findings of Fact, Conclusions of
21 Law, and Decision and Order.

22 On January 6, 2017, the following were filed:
23 Intervenor LSG's Partial Stipulation and proposed Findings
24 of Fact, Conclusions of Law, and Decision and Order; OP's
25 Response to Intervenor LSG's proposed Findings of Fact,

1 Conclusions of Law, and Decision and Order; OP's Response
2 to Lana'i Resort's proposed Findings of Fact, Conclusions
3 of Law, and Decision and Order; and Petitioner's
4 Exceptions to Intervenor LSG's proposed Findings of Fact,
5 Conclusions of Law, and Decision and Order.

6 On January 9, 2017, the County of Maui's
7 Response to Intervenor LSG's proposed Findings of Facts,
8 Conclusions of Law, and Decision and Order; and Response
9 to Lana'i Resort proposed Findings of Fact, Conclusions of
10 Law, and Decision and Order were filed.

11 On April 4, 2017, a copy of the Hearings
12 Officer's Recommended Findings of Fact, Conclusions of
13 Law, and Decision and Order was mailed to the Parties and
14 posted to the Commission's website; and on April 12, 2017,
15 LUC site visit and agenda notice was mailed to the Parties
16 and the Statewide and Maui County mailing list.

17 On April 12, 2017, the Commission conducted a
18 site visit to Lana'i.

19 On April 18, the Commission mailed the
20 April 26-27, 2017 meeting agenda notice to the Parties,
21 and those on the Statewide and Maui County mailing lists;
22 and received Petitioner and Intervenor's Exceptions to the
23 Hearings Officer's Recommended findings of Fact,
24 Conclusions of Law, and Decision and Order.

25 On April 25, 2017, the Commission received

1 Petitioner, OP, County and Intervenor LSG's comments and
2 objections to exceptions to the Hearings Officer's
3 proposed Findings of Fact, Conclusions of Law, and
4 Decision and Order.

5 VICE CHAIR WONG: Chair?

6 CHAIRMAN ACZON: Yes.

7 VICE CHAIR WONG: Motion to move into executive
8 session to consult with the Board's attorney on questions
9 and issues pertaining to the Board's powers, duties,
10 privileges, immunities and liabilities.

11 CHAIRMAN ACZON: Is there any second?

12 COMMISSIONER CABRAL: I'd like to second that.

13 CHAIRMAN ACZON: It's moved and seconded to go
14 into executive session. Those in favor say "aye."

15 (The Commissioners responded affirmatively.)

16 CHAIRMAN ACZON: Opposed?

17 (No response.)

18 CHAIRMAN ACZON: Motion carries.

19 VICE CHAIR WONG: You guys stay here. We're
20 going to go out.

21 (Recess taken from 10:09 a.m. to 10:27 a.m.)

22 CHAIRMAN ACZON: We are back on the record.

23 Commissioners, is there a motion to accept for
24 further action and discussions the Hearings Officer's
25 Recommended Findings of Fact and Conclusions of Law as the

1 Commission's proposed Findings of Fact and Conclusions of
2 Law? Any motion?

3 VICE CHAIR WONG: Moved.

4 CHAIRMAN ACZON: Any second?

5 COMMISSIONER CABRAL: I'll second.

6 CHAIRMAN ACZON: It's being moved by Vice Chair
7 Wong and seconded by Commissioner Cabral to accept for
8 further action and discussions the Hearings Officer's
9 Recommended Findings of Fact and Conclusions of Law as the
10 Commission's proposed Findings of Fact and Conclusions of
11 Law.

12 Those in favor say "aye."

13 (The Commissioners responded affirmatively.)

14 CHAIRMAN ACZON: Opposed?

15 (No response.)

16 CHAIRMAN ACZON: Motion carries. Thank you.

17 This meeting is to hear exceptions based on the
18 treatment of the Hearings Officer's Recommended Findings
19 of Fact, Conclusions of Law, and Decision and Order by the
20 Commission as its proposed Decision and Order.

21 Will the Parties please so confirm their
22 agreement and understanding of this.

23 Mr. Kudo?

24 MR. KUDO: Yes, we understand.

25 CHAIRMAN ACZON: Mr. Hopper?

1 MR. HOPPER: Just to clarify, you've taken a
2 motion to adopt and will continue to hear from the
3 parties?

4 CHAIRMAN ACZON: For further discussions.

5 MR. HOPPER: Then we understand.

6 CHAIRMAN ACZON: Mr. Yee?

7 MR. YEE: We understand and we accept.

8 CHAIRMAN ACZON: Mr. Kopper?

9 MR. KOPPER: Are we subject to a planned, I
10 guess, going over personal disclosures?

11 CHAIRMAN ACZON: Yes.

12 MR. KOPPER: Okay. So we accept and understand.

13 CHAIRMAN ACZON: Thank you. I understand that
14 several Commissioners have disclosures to make.

15 Commissioner Okuda?

16 COMMISSIONER OKUDA: Thank you, Mr. Chair. I
17 would like to make the following disclosures:

18 No. 1: In the past, myself and my firm
19 represented the family of Alan Murakami, who at that
20 time -- and I'm not sure whether it's at this time -- was
21 director of litigation for the Native Hawaiian Legal
22 Corporation.

23 No. 2: Mr. Kudo's cousin, Robin Takaochi
24 (phonetic spelling), is a sometimes client of mine.

25 No. 3: Michael Gibson, who is a partner with

1 Mr. Kudo, was nominated by me to be potentially a mediator
2 in a pending case.

3 No. 4: Mr. Kudo's client, Paul Tomar,
4 represented a party adverse to our client in a divorce
5 action titled Alcon vs. Alcon.

6 And finally, Mr. Kudo's partner, Michael Gibson,
7 represented a party, Alexander & Baldwin, against our
8 client who we represented, that client being the late
9 Palani Vaughn.

10 CHAIRMAN ACZON: Is that all?

11 Are there any objections?

12 COMMISSIONER OKUDA: That's all.

13 CHAIRMAN ACZON: Are there any objections to
14 Commissioner Okuda's continued participation in the
15 proceedings?

16 Parties?

17 MR. KUDO: No objection.

18 MR. HOPPER: No objection.

19 MR. YEE: No objection.

20 MR. KOPPER: No objection from Lana'ians for
21 Sensible Growth.

22 CHAIRMAN ACZON: Let's hear from Commissioner
23 Hiranaga.

24 COMMISSIONER HIRANAGA: Mr. Chair, I'd just like
25 to disclose that my wife is a vendor for Manele Bay Hotel.

1 CHAIRMAN ACZON: Are there any objections to
2 Commissioner Hiranaga's continued participation?

3 MR. KUDO: No objection.

4 MR. HOPPER: No objection.

5 MR. YEE: No objection.

6 MR. KOPPER: If I may ask a question to clarify.
7 Does your wife render services in exchange for
8 compensation?

9 COMMISSIONER HIRANAGA: Yes, she does.

10 MR. KOPPER: Lana'ians for Sensible Growth would
11 like to thank Mr. Hiranaga -- Commissioner Hiranaga for
12 taking time from his family to be here. However, because
13 of the rendering of services for compensation, we believe
14 that there is a substantial financial interest under 84-14
15 of the State Ethics Code. So we would object to his
16 participation in this matter.

17 CHAIRMAN ACZON: The Chair calls for a
18 two-minute recess.

19 (Recess taken from 10:32 a.m. to 10:33 a.m.)

20 CHAIRMAN ACZON: Okay. We're back on the
21 record. Commissioner Hiranaga has a statement.

22 COMMISSIONER HIRANAGA: I guess, recognizing the
23 objection, I will be recusing myself.

24 CHAIRMAN ACZON: Thank you, Mr. Hiranaga.

25 Commissioner Chang?

1 COMMISSIONER CHANG: Thank you, Mr. Chair. I'd
2 like to make two disclosures:

3 One, I have done some work in the past for
4 Pulama Lana'i on a couple of matters. I am no longer
5 working with Pulama Lana'i.

6 Second, the Native Hawaiian Legal Corporation
7 has represented -- has represented my family in a Hookano
8 family matter on some quiet title actions. Although I am
9 no longer involved in that matter.

10 CHAIRMAN ACZON: Are there any objections to
11 Commissioner Chang's continued participation?

12 MR. KUDO: No objection.

13 MR. HOPPER: No objection.

14 MR. YEE: The Office of Planning has no
15 objection. And we would further note that, in our view,
16 incidental relations to the Parties do not require the
17 recusal of individual Commissioners. It's our position
18 that the ethics rules do say that one may not use a State
19 position or -- to create a financial or personal gain, but
20 that incidental relations with the various parties does
21 not require recusal. We understand that Commissioners may
22 choose to do so. We certainly don't object if a
23 Commissioner chooses to exercise that right. But it is
24 also important, we think, that the Commission have its
25 members present and be willing to make decisions despite

1 objections from the Parties. And with that, we have no
2 objection to the further participation of Commissioner
3 Chang.

4 CHAIRMAN ACZON: Thank you, Mr. Yee, for that
5 clarification.

6 Mr. Kopper?

7 MR. KOPPER: If I can ask a question of
8 Commissioner Chang.

9 Hi, good morning. Are you still a licensed
10 attorney?

11 COMMISSIONER CHANG: Yes, I am.

12 MR. KOPPER: And, again, I'd like to make clear,
13 you know, there's this -- we do have objections. There's
14 this case, Mauna Kea Anaina Hou, and it tells us that the
15 appearance of impropriety is just as important as actual.
16 And so, making that caveat, we believe Ms. Chang has had
17 an employment interest, as defined by HRS Chapter 84, with
18 the resort while this docket has been ongoing. The type
19 of services she provides in her personal employment makes
20 it highly likely to be involved regarding the future.

21 There were past involvements with Native
22 Hawaiian Legal Corporation, both as a client and what I
23 would characterize as adversarial. As a licensed
24 attorney, she is also bound by her professional
25 responsibility, and I see that this matter -- her

1 employment to be substantially related to the concerns of
2 the economic activity of the resort.

3 And finally, because this is a quasi-judicial
4 proceeding, again, pursuant to the Mauna Kea Anaina Hou
5 case, this proceeding is treated as a trial and the
6 Commissioners as judges. And given the importance of the
7 issues and rights involved in this contested case hearing,
8 it would be logical and fair to hold agency officials
9 involved in such a proceeding in the same or similar
10 standard that governs judges with regards to conflicts of
11 interest. And I think the disclosures we heard today
12 would qualify for disqualification or recusal under the
13 standards that governs judges. Thank you.

14 COMMISSIONER CABRAL: Based on that --

15 CHAIRMAN ACZON: Commissioner Cabral?

16 COMMISSIONER CABRAL: I think I need
17 consultation and would like to make a motion to go back
18 into executive session to consult with the Board's
19 attorney on questions and issues pertaining to the Board's
20 power, duties, privileges, immunities and liabilities.
21 Thank you.

22 CHAIRMAN ACZON: Any second?

23 VICE CHAIR WONG: Second.

24 CHAIRMAN ACZON: It has been moved by
25 Commissioner Cabral and seconded by Vice Chair Wong to go

1 into executive session.

2 Those in favor say "aye."

3 (The Commissioners responded affirmatively.)

4 CHAIRMAN ACZON: Opposed?

5 (No response.)

6 (Recess taken from 10:38 a.m. to 10:47 a.m.)

7 CHAIRMAN ACZON: We're back on the record.

8 Our legal counsel has a statement regarding
9 Commissioner Hiranaga.

10 MS. ERICKSON: I just wanted to inform the
11 parties that Commissioner Hiranaga consulted with me about
12 his wife's employment, and I did advise him to consult
13 with the Ethics Commission. He did so, and the Ethics
14 Commission advised him that he did not need necessarily
15 to recuse himself. However, he has done so.

16 CHAIRMAN ACZON: Thank you.

17 Regarding Commissioner Chang, let me just ask
18 the other Parties, any comments on Mr. Kopper's
19 objections?

20 Mr. Kudo?

21 MR. KUDO: As some of you know, this case has
22 been going on for a couple of decades now. And I think
23 everyone's concern is that we don't want to be continuing
24 this case for another 10 or 20 years. And so any
25 possibility of appeal has to be considered seriously.

1 I would love to have Commissioner Chang serve on
2 this Commission and participate in its decision, but I
3 believe that, given the possibility of an appeal to this
4 decision, I would rather be safe and moot out any chance
5 of this Commission's decision being overturned by the
6 Supreme Court on the basis of a Commissioner who may be in
7 conflict of interest. That's my position, is that I would
8 rather side on the side of caution rather than having
9 Commissioner Chang participate, just simply to remove that
10 opportunity.

11 I know that leaves us with only five
12 Commissioners remaining, and so there's a risk there as
13 well. But I think, weighing all of the factors in this
14 situation, we would probably side with the side of caution
15 and have Commissioner Chang recuse herself.

16 CHAIRMAN ACZON: Thank you, Mr. Kudo.

17 Mr. Hopper?

18 MR. HOPPER: I think the County believes that
19 it's a matter for consultation with the Commission's
20 attorney based on the ethical rules in play. I think --
21 and so that's, I think, where the decision-making would
22 come from. Having said that, I think the County generally
23 appreciates the Commissioner's time and thinks that the
24 best decisions are those with as many Commissioners who
25 are lawfully able to vote actually vote.

1 So, again, whatever decision that the
2 Commissioner, in consultation with legal counsel, makes is
3 acceptable with the County. And we just wanted to note
4 that for the record.

5 CHAIRMAN ACZON: Thank you, Mr. Hopper.

6 Mr. Yee?

7 MR. YEE: First, the Office of Planning has a
8 slightly different viewpoint than Lana'i Resorts. I
9 understand and appreciate Lana'i Resort's desire to
10 resolve this disputed case. The Office of Planning has a
11 broader view. We looked at every case. And we think it's
12 important that, if you think you need to disqualify
13 yourself, then you should disqualify yourself. If you
14 think you should not have to disqualify yourself, you
15 should not disqualify yourself. If there's an appeal,
16 there's an appeal, and we fight that appeal when we get up
17 to the courts. So while we appreciate the desire to avoid
18 risk, the Office of Planning thinks you should just make
19 the best decision you can and take the risks as they fall.

20 With respect to the substantive question before
21 you, our understanding is there were cases, the cases are
22 over, the relationship is completed, and there is no --
23 well, put differently, I think LSG has argued that -- it's
24 speculated that there might be a future relationship. But
25 that is pure speculation. There is not a current ongoing

1 case. On that basis, we see no reason why Commissioner
2 Chang must disqualify herself or recuse herself from this
3 case. That's it.

4 CHAIRMAN ACZON: Thank you. I just want to take
5 a moment to confer with Commissioner Chang and counsel.
6 And the Chair calls for a two-minute break.

7 (Recess taken from 10:53 a.m. to 10:55 a.m.)

8 CHAIRMAN ACZON: We're back on the record.

9 I call on Commissioner Chang for some
10 clarification.

11 COMMISSIONER CHANG: Thank you, Mr. Chair. I
12 would like to clarify that the work that I did do for
13 Pulama Lana'i, it was not in the context of a legal -- I
14 was not representing them in a case. It was as a
15 consultant on matters related to historic properties. So
16 it was not in that context. So I just wanted to clarify
17 that for the record.

18 Thank you, Mr. Chair.

19 CHAIRMAN ACZON: Thank you, Commissioner Chang.

20 After discussion with Counsel, the Chair
21 determines that the objection to Commissioner Chang's
22 participation is speculative. And therefore, Commissioner
23 Chang will not be able to recuse herself. Thank you.

24 Let me briefly run over the procedures for the
25 day. First, I will first call for those desiring to

1 provide public testimony for this docket to identify
2 themselves. All such individuals will be called in turn
3 to our witness box where they will be sworn in prior to
4 their testimony.

5 Secondly, the Chair will allow each party no
6 more than 30 minutes to present oral argument in support
7 of its exceptions to the Commission's proposed decision
8 and/or respond to exceptions by other parties. The
9 Petitioner may reserve a portion of this time for
10 rebuttal.

11 At the conclusion of oral argument, and after
12 questions from the Commissioners and the answers thereto,
13 the Commission will conduct formal deliberation on this
14 matter.

15 Are there any questions on our procedure for
16 today?

17 MR. KUDO: No questions from the Petitioner.

18 MR. HOPPER: No questions.

19 MR. YEE: No questions.

20 MR. KOPPER: I'm sorry. I'm having a hard time
21 hearing on this side of the table. But did I hear that
22 there's going to be public testimony, followed by oral
23 argument?

24 CHAIRMAN ACZON: That's correct.

25 MR. KOPPER: Okay. Thank you. No questions.

1 CHAIRMAN ACZON: Hearing none, before I call on
2 public witnesses, let me remind you that all of the public
3 testimony from previous hearings was transcribed and is
4 part of the record. For those that are testifying again,
5 the Commission would appreciate it if you could confine
6 your testimony to new information.

7 Because the Commission needs time to conduct its
8 deliberations, a three-minute time limit will be enforced
9 for all of those testifying.

10 Are there any individuals desiring to provide
11 public testimony on this docket item?

12 MR. ORODENKER: Yet, Mr. Chair. We have 13
13 people signed up to give testimony.

14 CHAIRMAN ACZON: Please call the first
15 testifier.

16 MR. ORODENKER: The first testifier is Kepa
17 Maly. Followed by Ms. Manuel.

18 CHAIRMAN ACZON: May I swear you in first? Do
19 you swear or affirm that the testimony that you are about
20 to give is the truth?

21 MR. KEPALY: I do.

22 KEPALY,
23 called as a public witness, after having been first duly
24 sworn, testified as follows:

25 CHAIRMAN ACZON: Thank you. Please state your

1 name and address for the record. And you may proceed.

2 MR. MALY: Aloha, Commissioners. My name is
3 Kepa Maly. My address is P.O. Box 631599, Lana'i City.
4 452 Ohia Drive.

5 Thank you for the opportunity to speak before
6 you for a few moments. I've prepared written material and
7 submitted something in writing in November when the
8 Hearings Officer was here. I just wanted to sort of touch
9 bases. I'm here as a resident, someone who actually has a
10 life -- close, life-long relationship with Lana'i. I'm a
11 cultural historian ethnographer. And my role on Lana'i
12 has revolved with the broad family or community's history.

13 Oftentimes, the history of Lana'i is summarized
14 as being 70 years as a pineapple plantation; and of
15 course, more recently, close to 30 years in sort of a
16 resort-driven economy. The history is much richer and
17 deeper than that. And while we often hear the name
18 Lana'i, just the use of place names is really important.
19 Lana'i is the traditional pronunciation. And interesting,
20 I was thinking of this today, maybe even a part of the
21 contention that we're going through is that we're not
22 speaking some of these names, these historic place names,
23 in a proper way.

24 In reality, the use of the word "Manele" for the
25 name of the area that's under consideration is wrong also.

1 Manele is a separate area, Hulopo'e. What I wanted to
2 share is that the history is deep, it's rich, it's
3 connected to a legacy of nearly a thousand years of
4 Hawaiian residency. Our place names, in going through --
5 because I translate Hawaiian records, language records
6 and -- of history of places and compiled a large volume
7 for Lana'i, we've gathered more than 300 place names for
8 the island, and of those, we could say that at least 45 of
9 those place names are directly tied to the occurrence of
10 water in some form on Lana'i.

11 Within the area that you're -- within the area
12 that we're particularly interested in, today there are at
13 least nine names that talk about the importance of water
14 resources from the peak of the mountain to actually an
15 area where the water exits into sea, what was captured
16 initially by native people, native families of Lana'i.
17 And I just want to share with you one quick example of
18 this. In the proper place called Manele, there's a spring
19 that exits out in the ocean. Periodically, you can see
20 the water welling in the shore offshore. And through
21 folks, shared with, as they were growing up, their kupuna
22 taught them that they would gather from the spring by
23 diving into the ocean with the gourd and capturing water
24 to have fresh or potable, in their standard, potable
25 water, and say "Maika'i Manele i ka wai kaohi ipu" is a

1 reflection of that old practice of diving into the ocean
2 with the gourd, capturing freshwater in the gourd, having
3 water to sustain oneself.

4 So water is a very significant, as we know, part
5 of the history of this island. To me, what's most
6 fascinating is this, that, as I've said, we were 70 years
7 of pineapple plantation; barely scratches the surface of
8 this island. But it's given us a flavor, a seasoning,
9 where we are today. What I feel is really important is
10 that that legacy of plantation and that legacy of the
11 first sort of 25 years of resort is a legacy that is
12 changing, in many ways positively. For the first time, we
13 have people working in the field on traditional cultural
14 properties, and we have people working in the field to
15 care for and restore the natural -- some of that what's
16 restorable, the natural balance of our ecosystem.

17 CHAIRMAN ACZON: Please summarize.

18 MR. MALY: Pardon me?

19 CHAIRMAN ACZON: Please summarize.

20 MR. MALY: Yeah. So, basically, the bottom line
21 is we're in the new place, and I believe that we have the
22 opportunity for the community, for the landowner, for
23 agencies, to form new partnerships and drafted in ways
24 that stewardship would allow this -- this action to move
25 forward. And I just -- I feel that we have a history that

1 is rich and connected to this place and we have the
2 opportunity to be good stewards.

3 CHAIRMAN ACZON: Thank you.

4 MR. MALY: Thank you.

5 CHAIRMAN ACZON: Any questions?

6 MR. KUDO: No questions.

7 MR. HOPPER: No questions.

8 CHAIRMAN ACZON: Mr. Yee?

9 MR. YEE: No questions.

10 CHAIRMAN ACZON: Mr. Kopper?

11 MR. KOPPER: Just a few. Thank you, sir. We
12 appreciate your sharing with us. To clarify, are you an
13 employee of Pulama Lana'i?

14 MR. MALY: I am an employee of Pulama Lana'i,
15 but also the executive director of a community nonprofit
16 that predates Pulama Lana'i.

17 MR. KOPPER: And thank you for your work with
18 that.

19 And are you on the clock with Pulama Lana'i at
20 this moment?

21 MR. MALY: 24 hours a day, you could say. But
22 no, we don't get compensated for that.

23 MR. KOPPER: Okay. Thank you.

24 CHAIRMAN ACZON: Commissioners, any questions?

25 Thank you.

1 (The witness was excused.)

2 CHAIRMAN ACZON: Next witness?

3 MR. ORODENKER: The next witness is Pua Manuel.
4 Followed by Margaret "Fudge" Villaro.

5 CHAIRMAN ACZON: May I swear you in?

6 MS. MANUEL: Yes.

7 CHAIRMAN ACZON: Do you swear or affirm that the
8 testimony that you are about to give is the truth?

9 MS. MANUEL: Yes.

10 AILEEN PUA MANUEL,
11 called as a public witness, after having been first duly
12 sworn, testified as follows:

13 CHAIRMAN ACZON: Thank you. Please state your
14 name and address for the record.

15 MS. MANUEL: My name is Aileen Pua Manuel, and I
16 reside at 1529 Ohohia Street in Lana'i City.

17 CHAIRMAN ACZON: Please proceed.

18 MS. MANUEL: Thank you. Dear Land Use Chair and
19 Commissioners, good morning. My name is Aileen Pua
20 Manuel. My testimony this morning is as a resident of
21 Lana'i. Having been born and raised on Lana'i during the
22 '70s, I am grateful for the humble lifestyle I lived back
23 then. It taught my siblings and I to live and make do
24 with what was available to us then. At the same time, we
25 were also taught by our parents to accept the changes that

1 would be imposed on us whether we agreed with it or not,
2 but also to be respectful and mindful of the benefits that
3 it would bring, of the challenges that would still lie
4 ahead.

5 As the ownership of Lana'i has passed on from
6 Castle and Cooke to Pulama Lana'i, it's been over two
7 decades since the water use dispute for the Manele Golf
8 Course still remains. In my opinion, both Pulama Lana'i
9 and Lana'ians for Sensible Growth have had enough time to
10 present their findings. And I would like to see this
11 matter come to a conclusion. As such, it is my belief
12 that Pulama Lana'i has done their due diligence in
13 presenting to the LUC Commission with accurate information
14 relating to the water use, enough for the LUC Commission
15 to make their ruling today.

16 In conclusion, I strongly support the Hearings
17 Officer's recommendation and hope that you will approve it
18 in this hearing. Thank you for allowing me the
19 opportunity to speak before you. Mahalo.

20 CHAIRMAN ACZON: Thank you.

21 Any questions for Miss Manuel?

22 MR. KUDO: No questions.

23 MR. HOPPER: (Shakes head).

24 CHAIRMAN ACZON: Mr. Yee?

25 MR. YEE: No questions.

1 CHAIRMAN ACZON: Mr. Kopper?

2 MR. KOPPER: No questions.

3 CHAIRMAN ACZON: Thank you, Miss Manuel.

4 (The witness was excused.)

5 CHAIRMAN ACZON: Next?

6 MR. ORODENKER: Next is Margaret Villaro,
7 followed by Larry Plunkett.

8 MS. MANUEL: Actually, I will be speaking on
9 behalf of Ms. Margaret Villaro.

10 CHAIRMAN ACZON: Please be quick.

11 (The following testimony of Margaret Villaro was
12 presented as follows:)

13 MS. MANUEL: "Dear LUC Commissioners, my name is
14 Margaret Villaro, and I am the safety manager for the
15 Pulama Lana'i. Born and raised in Honolulu, I have lived
16 here on Lana'i since August 2013 and have a tremendous
17 amount of appreciation for the community and the people
18 here on Lana'i.

19 "Pulama Lana'i has a mission to develop, advance
20 and nurture a sustainable future for the island of Lana'i.
21 Since I have been on Lana'i, I can see every effort that
22 has been put into place, how we are all as one working as
23 a team to carry out this mission.

24 "I am in full support for Pulama Lana'i and the
25 usage of water for the Manele Golf Course and believe that

1 we are using it in a sustainable manner and will benefit
2 the island and the community. Thank you."

3 CHAIRMAN ACZON: Thank you. Any questions?

4 MR. KUDO: No.

5 MR. HOPPER: No.

6 MR. YEE: No questions.

7 MR. KOPPER: (Shakes head).

8 CHAIRMAN ACZON: Thank you.

9 Just remind everyone who submitted written
10 testimony, we have copies of all those testimonies.

11 Next witness.

12 MR. ORODENKER: Next witness is Larry Plunkett.
13 Followed by Noemi Barbadillo.

14 CHAIRMAN ACZON: May I swear you in?

15 MR. LARRY PLUNKETT: Yes.

16 CHAIRMAN ACZON: Do you affirm that the
17 testimony that you are about to give is the truth?

18 MR. PLUNKETT: Yes.

19 LARRY PLUNKETT,
20 called as a public witness, after having been first duly
21 sworn, testified as follows:

22 CHAIRMAN ACZON: Please state your name and
23 address for the record.

24 MR. PLUNKETT: Larry Plunkett. 36 Paina Place.

25 CHAIRMAN ACZON: Please proceed.

1 MR. PLUNKETT: Good morning, Commissioners. My
2 name is Larry Plunkett. I'm the assistant maintenance
3 manager for Pulama Lana'i. I was born and raised on the
4 island of Lana'i.

5 Standing here with me are a few of my team
6 members of Pulama Lana'i who serve as the maintenance
7 team. Together we have at least 75 years combined service
8 with the current and previous land owner.

9 The majority of us have worked for the prior
10 landowner, and comparing the previous and current
11 landowner, we are confident that the current landowner is
12 doing what is right for the company and the community and
13 the future of Lana'i. We are proud to represent Pulama
14 Lana'i and stand behind its decisions on the way the
15 company is currently using the water to irrigate the golf
16 course.

17 We believe that the company is doing what is
18 right and will continue to do what is right, especially
19 when it deals with the water and the golf course. I,
20 along with my team of maintenance workers, support the
21 Hearing Officer's recommendation that has been filed in
22 this case. Thank you.

23 CHAIRMAN ACZON: Any questions?

24 MR. KUDO: No questions.

25 MR. HOPPER: No.

1 MR. YEE: No questions.

2 MR. KOPPER: Briefly. Thank you for coming down
3 with your team. So you and your team are employees of
4 Pulama Lana'i, correct?

5 MR. PLUNKETT: Correct. And judging by their
6 uniforms, looks like they're ready to get back out.

7 MR. KOPPER: I assume you guys are on the clock,
8 right?

9 MR. PLUNKETT: Yes.

10 CHAIRMAN ACZON: Thank you. Commissioners?
11 Thank you.

12 (The witness was excused.)

13 CHAIRMAN ACZON: Next witness?

14 MR. ORODENKER: Thank you. Next witness is
15 Noemi Barbadillo, followed by Kendric Kimizuka.

16 CHAIRMAN ACZON: Do you swear that the testimony
17 that you are about to give is the truth?

18 MS. NOEMI BARBADILLO: Yes, I do.

19 NOEMI BARBADILLO,
20 called as a public witness, after having been first duly
21 sworn, testified as follows:

22 CHAIRMAN ACZON: Thank you. Please state your
23 name and address for the record.

24 MS. BARBADILLO: My name is Noemi Barbadillo.
25 My address is P. O. Box 630165, Lana'i City, Hawaii.

1 CHAIRMAN ACZON: Please proceed.

2 MS. BARBADILLO: Good morning. I grew up on
3 Lana'i and spent most of my career on the island. I
4 support the Hearing Officer's recommendation that has been
5 filed in this case. I returned home four years ago after
6 being away for about 12 years. One of the main reasons I
7 returned was the opportunity to work for Pulama Lana'i.
8 The company today is much different from the one I left in
9 2001. The company constantly tries its best to be
10 transparent, keep the employees and community informed and
11 involved, and is working very hard to protect Lana'i for
12 us and all the future generations. I believe in Pulama
13 Lana'i and all the work that it is doing. I support the
14 prime use of the water for the golf course. I
15 believe that they have the best interest of its residents,
16 community and employees at heart.

17 Thank you to the Hearing Officer for your
18 recommendation. I support your recommendation and hope
19 the entire Commission will do so as well.

20 CHAIRMAN ACZON: Any questions?

21 MR. KUDO: No questions.

22 MR. HOPPER: No questions.

23 MR. YEE: No questions.

24 MR. KOPPER: No questions.

25 CHAIRMAN ACZON: Thank you.

1 (The witness was excused.)

2 MR. ORODENKER: Next witness is Kendric
3 Kimizuka.

4 CHAIRMAN ACZON: Do you swear that the testimony
5 that you are about to give is the truth?

6 MR. KENDRIC KIMIZUKA: Yes, I do.

7 KENDRIC KIMIZUKA,
8 called as a public witness, after having been first duly
9 sworn, testified as follows:

10 CHAIRMAN ACZON: Please state your name and
11 address for the record.

12 MR. KIMIZUKA: Kendric Kimizuka, P.O. Box
13 631755, Lana'i City, Hawaii.

14 CHAIRMAN ACZON: Please proceed.

15 MR. KIMIZUKA: Good morning. My name is Kendric
16 Kimizuka. I'm the head professional here at Manele Golf
17 Course. Today the golf course employs roughly 50
18 employees so that we are a very strong, important part of
19 a resort that currently employs about 700 employees that
20 will all be affected by your decision and your ruling
21 today.

22 Our golf course is ranked as one of the top golf
23 courses in the state of Hawaii and one of the top golf
24 courses in the nation. This is something that we are
25 extremely and very proud of, and we are able to provide a

1 very unique and special world class playing experience for
2 golfers. We feel that we are great stewards of the land.
3 We feel that we have not violated any of the conditions,
4 and we hope that you rule as such. Thank you.

5 CHAIRMAN ACZON: Thank you.

6 Any questions?

7 MR. KUDO: No questions.

8 MR. HOPPER: No questions.

9 MR. YEE: No questions.

10 MR. KOPPER: No questions.

11 (The witness was excused.)

12 MR. ORODENKER: Next witness is Tammy Sanches.

13 CHAIRMAN ACZON: Do you affirm that the
14 testimony that you are about to give is the truth?

15 MS. TAMMY SANCHES: Yes, I do.

16 TAMMY SANCHES,
17 called as a public witness, after having been first duly
18 sworn, testified as follows:

19 CHAIRMAN ACZON: Please state your name and
20 address for the record.

21 MS. SANCHES: My name is Tammy Sanches. My
22 address is 254 Hoalauna Place, Lana'i City, Hawaii.

23 CHAIRMAN ACZON: You may proceed.

24 MS. SANCHES: Good morning, Commissioners. My
25 name is Tammy Sanches, and I'm a third generation

1 Lana'ian. I was born and raised here on Lana'i and have
2 seen the changes that our island has gone through in the
3 past years.

4 In the past four-and-a-half years, there have
5 been great improvements on our island: Homes and
6 buildings have been renovated and upgraded. Residents who
7 were unemployed are now working. The swimming pool was
8 reopened and just recently refreshed. We now have a
9 quarantine station where all plants are held to prevent
10 influx of invasive species. And Hawaiian archeological
11 sites are preserved and protected. All of these
12 improvements were implemented by Pulama Lana'i.

13 Pulama Lana'i's mission includes development,
14 advance and nurture a sustainable future for the island of
15 Lana'i. We are stewards of our land and our community,
16 and we are mindful of the legacy we leave behind for
17 future generations. I feel that Pulama Lana'i has kept
18 true to their mission. A very positive outcome of the
19 improvements is that there's an awareness to the community
20 that we need to take care of our island and that we all
21 share in this responsibility. This all being said, I do
22 not believe that Pulama Lana'i would use resources in a
23 wasteful manner. Doing so would oppose their values and
24 proven actions to date.

25 I fully support Pulama Lana'i of the usage of

1 the water for Manele Golf Course and believe that they are
2 using it in a sustainable manner that will benefit the
3 island and its people in generations to follow. I ask
4 that you vote in favor of the recommendation that was to
5 you by the Hearings Officer. Thank you.

6 CHAIRMAN ACZON: Any questions?

7 MR. KUDO: No questions.

8 MR. HOPPER: No questions.

9 MR. YEE: No questions.

10 MR. KOPPER: No questions.

11 CHAIRMAN ACZON: Thank you.

12 (The witness was excused.)

13 CHAIRMAN ACZON: Next witness.

14 MR. ORODENKER: Next witness is Ella Yumol.

15 CHAIRMAN ACZON: Do you swear that the testimony
16 that you are about to give is the truth?

17 MS. ELLA YUMOL: Yes.

18 ELLA YUMOL,
19 called as a public witness, after having been first duly
20 sworn, testified as follows:

21 CHAIRMAN ACZON: Please state your name and
22 address for the record.

23 MS. YUMOL: My name is Ella Yumol, and my
24 address is P. O. Box 630706, Lana'i City, Hawaii.

25 CHAIRMAN ACZON: You may proceed.

1 MS. YUMOL: Dear LUC Commissioners, my name is
2 Ella Yumol, and I'm a resident here on Lana'i. I moved to
3 Lana'i in 1987 at the age of seven, when Lana'i was still
4 the largest pineapple plantation in the world. I'm a
5 graduate of Lana'i High and Elementary School. And like
6 most kids on Lana'i, I could not wait to leave the island
7 after graduation, only to find myself moving back home a
8 few years later, and I have been here since. There's just
9 something about Lana'i that draws you back home.

10 I've been working at Pulama Lana'i now for four
11 years, currently as the HR manager. One of the values
12 that we believe in is E Malama Aina, to care for, protect,
13 preserve and enhance our island in all ways. As an
14 employee and as a resident of Lana'i, I feel I have a
15 great responsibility to serve in our tightknit community.
16 I actively participate in the La Hana Event, which is a
17 community stewardship program, and have been to Waiaopae
18 numerous times to help restore the fishpond and have also
19 been to Kaunolu to help clean up the trails.

20 I fully support Pulama Lana'i, and I agree with
21 the Hearing Officer's recommendation. I believe Pulama
22 Lana'i is mindful of the decisions that are made and are
23 sensitive to the needs of our community. Thank you for
24 allowing me the time to speak before you.

25 CHAIRMAN ACZON: Thank you.

1 Any questions?

2 MR. KUDO: No questions.

3 MR. HOPPER: No questions.

4 MR. YEE: No questions.

5 MR. KOPPER: No questions.

6 (The witness was excused.)

7 CHAIRMAN ACZON: Next witness.

8 MR. ORODENKER: Next witness is Lynn McCrory.

9 CHAIRMAN ACZON: Do you swear that the testimony
10 that you are about to give is the truth?

11 MS. LYNN McCRORY: I do.

12 LYNN McCRORY,
13 called as a public witness, after having been first duly
14 sworn, testified as follows:

15 CHAIRMAN ACZON: Please state your name and
16 address for the record.

17 MS. McCRORY: My name is Lynn McCrory, 733
18 Bishop Street, Suite 2000, Honolulu, Hawaii. And I am the
19 senior vice president of government affairs to Pulama
20 Lana'i, and I volunteered to testify on some of the
21 reports that we give on water both to government and the
22 community.

23 CHAIRMAN ACZON: Please proceed.

24 MS. McCRORY: I'm sorry?

25 CHAIRMAN ACZON: Please proceed.

1 MS. McCRORY: You have my written testimony, so
2 I'll just quickly summarize it.

3 CHAIRMAN ACZON: Thank you.

4 MS. McCRORY: We have both quarterly and
5 semi-annual reports that go to the County of Maui and also
6 go to the State Land Use Commission and public state
7 agencies. These are written for a complete understanding
8 of what water is used at Manele, how it's used, where it's
9 used, as well as pumpage and a variety of other
10 information is given.

11 The other thing we do is that we do community
12 meetings before we go out for permits. And when we do
13 this, what we're asking the community is what you think of
14 what we're going to plan. And part of that discussion
15 with them is a discussion of water; in other words, what
16 water is currently being used, what water is projected to
17 be used. And the last few times that we had projects that
18 have gone in front of the Commission, they have used less
19 water. They're very careful in terms of what plants do we
20 put in, the level of irrigation, and so forth. These
21 community meetings have between 30 and 60 people out
22 there. They're actually occurring monthly. The
23 population of Lana'i is 3200, so we get some pretty good
24 meetings. I do admit we have pastries, which may be a
25 little bit of enticement. But the community does come

1 out.

2 So what I wanted to say is we're covering both
3 ends. We're fulfilling the conditions and we're reporting
4 the conditions; we go to the Planning Commission. All
5 that information is given on what's occurring at Manele
6 and other places. And at the same time, when we go
7 forward in the future, we talk with the community first.
8 Thank you.

9 CHAIRMAN ACZON: Thank you.

10 Any questions?

11 MR. KUDO: No questions.

12 MR. YEE: No questions.

13 CHAIRMAN ACZON: Mr. Hopper?

14 MR. HOPPER: No questions.

15 MR. KOPPER: No questions.

16 CHAIRMAN ACZON: Commissioners?

17 COMMISSIONER CABRAL: I have a couple questions.

18 CHAIRMAN ACZON: Commissioner Cabral.

19 COMMISSIONER CABRAL: Thank you.

20 You answered one of them I was very interested
21 in. The population, you said, is 3,200 on the island.
22 And then how many people work for the company that
23 you're --

24 MS. McCRORY: With Pulama Lana'i?

25 COMMISSIONER CABRAL: Yes.

1 MS. McCRORY: I believe it's about 270 -- 300.

2 COMMISSIONER CABRAL: About 300. Okay. Thank
3 you very much.

4 COMMISSIONER CHANG: I have one question.

5 CHAIRMAN ACZON: Commissioner Chang.

6 COMMISSIONER CHANG: Good morning.

7 MS. McCRORY: Good morning.

8 COMMISSIONER CHANG: On these public meetings,
9 or community meetings, do you send out notices? Do
10 members of Lana'ians for Sensible Growth come to the
11 meetings?

12 MS. McCRORY: Yes.

13 COMMISSIONER CHANG: Thank you.

14 MS. McCRORY: Yes.

15 COMMISSIONER CHANG: Okay.

16 MR. KOPPER: I have follow-up questions.

17 CHAIRMAN ACZON: Go ahead.

18 MR. KOPPER: Hi. Thank you.

19 You mentioned about two to three hundred work at
20 Pulama. How many residents are employed with the resort?

21 MS. McCRORY: With Four Seasons?

22 MR. KOPPER: Sure, yes.

23 MS. McCRORY: I believe it's about 700.

24 MR. KOPPER: About 700. And any other
25 subsidiaries owned or managed by Pulama Lana'i?

1 MS. McCRORY: I think everything is covered --

2 MR. KOPPER: Okay. Thank you.

3 CHAIRMAN ACZON: Anybody else? Thank you.

4 (The witness was excused.)

5 MR. ORODENKER: Next witness is Lesley
6 Kaneshiro.

7 CHAIRMAN ACZON: Do you affirm that the
8 testimony that you are about to give is the truth?

9 MS. LESLEY KANESHIRO: Yes, I do.

10 LESLEY KANESHIRO,
11 called as a public witness, after having been first duly
12 sworn, testified as follows:

13 CHAIRMAN ACZON: Thank you. Please state your
14 name and address.

15 MS. KANESHIRO: My name is Lesley Kaneshiro, and
16 I reside at 733 Bishop Street, Honolulu, Hawaii, 96813.

17 CHAIRMAN ACZON: Please proceed.

18 MS. KANESHIRO: Good morning, Commissioners. My
19 name is Lesley Kaneshiro. I'm the senior vice president
20 of operations for Pulama Lana'i. I have worked and lived
21 on Lana'i about 50 percent of my time since December 2012.
22 I support the Hearing Officer's recommendation that has
23 been filed in this case. I believe in Pulama Lana'i and
24 all the positive improvements that have happened on the
25 island since I started.

1 Overseeing all the operations on the island, our
2 team has worked hard to improve the lifestyle of the
3 residents here. People living here know that residential
4 housing is very tight. Since 2012, our company has
5 renovated 220 units that were in disrepair and not
6 properly maintained. Thirty of these homes were added to
7 the inventory of rental units and provided families with a
8 place to live. These homes were rebuilt by our Lana'i
9 Builders division, and they were built to look like an
10 original plantation house. Our Facilities Maintenance
11 department renovated 190 rooms -- homes and apartments
12 over the past five years. The repairs and upgrades were
13 done when units were vacated and provided us an
14 opportunity to catch up on maintenance that was not done
15 for many years.

16 The company has also worked to bring services to
17 Lana'i that previously may not have existed on the island.
18 We worked and helped to find commercial space and helped
19 businesses get settled in easier. In the past five years,
20 we've been able to attract the pharmacy, the hospice, the
21 dentist, a physical therapist, and, most recently, the
22 Women Helping Women shelter. These are all services that
23 support the community and were greatly needed here.

24 I believe that Pulama Lana'i has the best
25 interests of the residents, community and employees at

1 heart and will continue to do what's right. I'm proud to
2 represent Pulama Lana'i, and I support the current use of
3 water for the golf course. I thank the Hearings Officer
4 for his recommendation, and I hope that the entire
5 Commission will do so as well. Thank you.

6 CHAIRMAN ACZON: Thank you.

7 Any questions?

8 MR. KUDO: No questions.

9 CHAIRMAN ACZON: Commissioners?

10 Thank you.

11 (The witness was excused.)

12 MR. ORODENKER: Next witness is Ludvig Simonsen
13 on behalf of Tom Roelens.

14 MR. TOM ROELEN: This is Tom Roelens.

15 CHAIRMAN ACZON: Do you affirm that the
16 testimony that you are about to give is the truth?

17 MR. ROELEN: Yes.

18 TOM ROELEN,
19 called as a public witness, after having been first duly
20 sworn, testified as follows:

21 CHAIRMAN ACZON: Please state your name and
22 address for the record.

23 MR. ROELEN: Tom Roelens, P.O. Box 631380,
24 Lana'i City.

25 CHAIRMAN ACZON: Thank you. Please proceed.

1 MR. ROELENS: My name is Tom Roelens. I'm the
2 general manager of Four Seasons Resorts here on the
3 island. I have been in this position and a resident of
4 the island since March 2008. I was fortunate to be a part
5 of the senior team that transitioned the golf course
6 employees to Four Seasons management in early 2014.

7 Manele Golf Course has always been an important
8 part of marketing the Four Seasons concept on Lana'i. But
9 now that Four Seasons manages the golf corse, we have been
10 able to get the word out about how truly special the
11 Manele Golf Course is and what an important part of the
12 resort the golf course is. Since taking over the
13 management of Manele Golf Course in early '14, our golf
14 team, under the direction of Scott Ashworth, Director of
15 Golf, has worked extremely hard on the conditions of the
16 golf course as well as the service that we provide to our
17 guests there. This wonderful effort has led to world
18 class playing conditions and service levels that have even
19 elevated the Manele Golf experience to a new level.

20 We directly employ over 40 people from the
21 island of Lana'i on the Manele Golf Course. The continued
22 success and operation of the Manele Course has a direct
23 impact on the lives of those that work at the Manele Golf
24 Course, as well as many of our employees have worked for
25 Manele Golf Course for over 20 years. Their job has

1 provided the income that has allowed their families to
2 continue to live on Lana'i. The continued operation of
3 Manele Golf Course also helps drive, at the beach resort,
4 our occupancy which has a direct effect on those that work
5 at the hotel as well.

6 The survival of the Manele Golf Course relies on
7 the ability to continue to use the water it has been using
8 for over 20 years. We take pride in being great stewards
9 of the land and using water responsibly. Our team has
10 worked to reduce the amount of water being used on the
11 golf course and has taken extraordinary measures to
12 hand-water where necessary so as not to overwater areas
13 that do not need the water. We have recently also begun a
14 project to implement a new irrigation system that will
15 continue to allow us to be more efficient in how we use
16 water on the golf course. This is a big investment of
17 resources but one that we know will have positive,
18 long-lasting effects for all involved.

19 The Manele Golf Course provides the employment
20 directly or indirectly for many of us who live on Lana'i.
21 If we were to lose this source of water for the golf
22 course, it would most likely mean the end of the Manele
23 Golf Course and, therefore, have a negative economic
24 impact for many of our island residents, not just those
25 employed by the golf course or Four Seasons.

1 I am strongly in favor of allowing Manele Golf
2 Course the continued use of the water that it has been
3 using for the past plus 20 years and believe that we are
4 using it in a sustainable manner that will benefit the
5 island and its people. I also strongly support the
6 Hearings Officer's recommendation in this case.

7 Mahalo for allowing me the time to speak about
8 my feelings on this matter. Thank you.

9 CHAIRMAN ACZON: Thank you. Any questions?

10 MR. KUDO: No questions.

11 MR. HOPPER: No questions.

12 MR. YEE: No questions.

13 CHAIRMAN ACZON: Mr. Kopper?

14 MR. KOPPER: Just a few quick ones. Thank you
15 for coming. Are you aware that the closure of the golf
16 course is not an issue in this hearing?

17 MR. ROELEN: I think it is at risk if we do not
18 have the water.

19 MR. KOPPER: Well, I'll represent that it is not
20 an issue in this hearing.

21 Are you aware that Lana'ians for Sensible Growth
22 has never asked for the golf course to be closed in this
23 hearing?

24 MR. ROELEN: I do not see that -- I see the
25 risk of having to close Manele Golf Course.

1 MR. KOPPER: Thank you.

2 CHAIRMAN ACZON: Commissioners, any questions?

3 Thank you.

4 (The witness was excused.)

5 CHAIRMAN ACZON: Next testifier?

6 MR. ORODENKER: Roger Alconcel.

7 CHAIRMAN ACZON: Do you affirm that the
8 testimony that you are about to give is the truth?

9 MR. ROGER ALCONCEL: Yes.

10 ROGER ALCONCEL,
11 called as a public witness, after having been first duly
12 sworn, testified as follows:

13 CHAIRMAN ACZON: Please state your name and
14 address for the record.

15 MR. ALCONCEL: Roger Alconcel. 1382 Lana'i
16 Avenue.

17 CHAIRMAN ACZON: You may proceed.

18 MR. ALCONCEL: My name is Roger Alconcel, a
19 resident of Lana'i. I'm in favor of supporting Pulama
20 Lana'i's decision on continuing to use the water for
21 Manele Bay Golf Course as it is being used today. I
22 support the Hearings Officer's recommendation that has
23 been filed in this case. I have a list of names signed by
24 Lana'i residents who are also in favor of this
25 recommendation but were not able to come and testify with

1 me because they're working.

2 CHAIRMAN ACZON: Any questions?

3 MR. KUDO: No questions.

4 CHAIRMAN ACZON: Commissioners?

5 Thank you for your presence.

6 (The witness was excused.)

7 CHAIRMAN ACZON: Next?

8 MR. ORODENKER: John Bernier.

9 CHAIRMAN ACZON: Do you affirm that the
10 testimony that you are about to give is the truth?

11 MR. JOHN BERNIER: Yes, I do.

12 JOHN BERNIER,
13 called as a public witness, after having been first duly
14 sworn, testified as follows:

15 CHAIRMAN ACZON: Thank you. Please state your
16 name and address for the record.

17 MR. BERNIER: My name is John Bernier at P.O.
18 Box 630231, Lana'i City.

19 CHAIRMAN ACZON: Please proceed.

20 MR. BERNIER: Okay. I've been on Lana'i for
21 about 13 years. And presently, I'm my third iteration in
22 my careers, and I'm a substitute teacher at Lana'i High
23 and Elementary. Fortunately, they did not call me in
24 today.

25 I support the use of brackish water for

1 irrigation down in the Manele area. I see that as an
2 accepted use. When we talk about brackish water, brackish
3 water, to me, is non-potable. The pool that we now have
4 here in Lana'i is a saltwater pool, which is roughly
5 brackish in concentration of salt. If you go down there
6 and take a taste of it, it's not something anyone would
7 want to drink.

8 So the question is: Does this use of brackish
9 water for irrigation have any negative impact on the
10 potable water system here on Lana'i? In my 13 years in
11 which the golf course has been irrigated down there, I
12 have seen, from the data that I have looked at, no
13 negative impacts. And I know that Pulama is doing much
14 better in trying to mitigate the loss of water, and it's
15 only going in a positive direction, in my opinion.

16 So it seems -- if its use of non-potable water
17 benefits Lana'i, in my opinion, yes, it's an economic
18 benefit. And you know, I think there are probably other
19 uses that non-potable water can be used for on this
20 island, but that, I think, is an upgrade benefit. So, in
21 summary, I think Pulama has been a good steward of the
22 water, the non-potable water, and they're only getting
23 better. Thank you very much.

24 CHAIRMAN ACZON: Thank you. Any questions?

25 MR. KUDO: No questions.

1 MR. HOPPER: No questions.

2 MR. YEE: No questions.

3 CHAIRMAN ACZON: Mr. Kopper?

4 MR. KOPPER: None.

5 CHAIRMAN ACZON: Commissioners? Thank you.

6 (The witness was excused.)

7 CHAIRMAN ACZON: Anybody else who wishes to give
8 testimony?

9 Please come to the front.

10 MS. WINIFRED BASQUES: Hui! Pehea 'oe. Maika'i
11 no.

12 CHAIRMAN ACZON: Do you affirm that the
13 testimony that you are about to give is the truth?

14 MS. BASQUES: Yes.

15 WINIFRED BASQUES,
16 called as a public witness, after having been first duly
17 sworn, testified as follows:

18 CHAIRMAN ACZON: Thank you. Please state your
19 name and address for the record.

20 MS. BASQUES: Mahalo. My name is Winifred
21 Basques. I relocated from Honolulu in 1963 and been on
22 this island 54 years February 28. Okay.

23 Talking about water, can I ask you folks a
24 question? If supposing you living on one ahupua'a, okay,
25 Lana'i has two mokus: the Ko'olau and the Kona. There are

1 13 ahupua'a. Now, if, for instance, if you living on one
2 ahupua'a, you have the loi. Loi means taro. You been
3 there for centuries, your family been there, your kupunas
4 been there. When the ua comes down from the -- up there
5 (indicating), whose water is it? Whose water is it? It
6 ain't nobody's water but the man up there.

7 Now, think about it. Look in the Bible. What
8 does it say from Genesis to Revelations? It tells you
9 everything. Okay.

10 Now I'm going to talk to you about the AMAC. I
11 am a representative of Ahu Moku Advisory Council for the
12 Department of DLNR. I go to lobby in Honolulu from 2004
13 until now. I talk to the legislators and try my House
14 representatives. And I talk about interests that belong
15 to this island. They cannot imagine what goes on here
16 when they have -- excuse the word -- landowners think they
17 come here and do what they want to do because of the
18 money. Money doesn't mean anything.

19 I live on this island now 54 years.
20 Sustainability. I'm a hunter. 53 years, I've been
21 hunting on this island. To live on this island, you have
22 to have sustainability, okay. You live off the land. My
23 husband grows vegetables in the small little area where I
24 live, okay. The thing is that, if you go to the store and
25 buy all your vegetables and everything else, it going cost

1 you big time, big money.

2 But I'm telling you this because, one, I am the
3 po'o for Lana'i. There are eight po'o's on different
4 islands goes to a meeting in Honolulu every year to lobby
5 with the representatives, with the House. I see Lilikoe,
6 Faye Hanohano, Ken Ito and as well as Kalani English. And
7 I talk to them, and they can imagine what goes on on the
8 smallest island when there's a person who lives here, say
9 they live here --

10 CHAIRMAN ACZON: Please summarize. The three
11 minutes is up.

12 MS. BASQUES: Okay. Thank you. But the thing
13 is that when somebody comes here, say, "I bought this
14 island," oh -- excuse the word -- no. The one up there.
15 He created heaven and earth. He does everything. He
16 furnish all the living style, as well as his people here.
17 But I tell you, I do not work for Pulama Lana'i. I'm a
18 sustainable Hawaii, Department of Health. I retired from
19 Lana'i --

20 CHAIRMAN ACZON: Thank you.

21 MS. BASQUES: -- 22 years as a paramedic.

22 CHAIRMAN ACZON: Thank you.

23 MS. BASQUES: Mahalo.

24 CHAIRMAN ACZON: Any questions?

25 MS. BASQUES: Any questions?

1 CHAIRMAN ACZON: Commissioners?

2 MS. BASQUES: Are you sure?

3 CHAIRMAN ACZON: No questions. Thank you very
4 much.

5 MS. BASQUES: Mahalo.

6 (The witness was excused.)

7 CHAIRMAN ACZON: This formally concludes public
8 testimony on this matter.

9 The Chair calls for a five-minute recess.

10 (Recess taken from 11:39 a.m. to 11:57 a.m.)

11 CHAIRMAN ACZON: Can I have your attention,
12 please? Can I have your attention please? In looking at
13 the agenda, I think this is the right time to break for
14 lunch, so we'll see you back at 1:00 o'clock.

15 (Recess taken from 11:59 a.m. to 1:00 p.m.)

16 CHAIRMAN ACZON: We're back on the record. I
17 just want to remind everybody that our testimony portion
18 has concluded, and we will start with the parties'
19 presentations.

20 Mr. Kudo, please proceed with your argument.

21 By the way, Commissioners, if you could please
22 hold up your questions until everybody makes their
23 presentation. I'll just remind the parties they have 30
24 minutes.

25 MR. KUDO: Thank you, Mr. Chairman. Lana'i

1 Resorts, doing business as Pulama Lana'i, is the successor
2 petitioner in this case. And we support the
3 recommendations of the Hearings Officer, Dr. Jonathan
4 Scheuer, and his conclusion that, based on the evidence
5 presented by the parties, that the Petitioner has the
6 right and is not in violation of Condition 10 of the
7 Commission's Decision and Order, dated April 16, 1991.

8 As most of you may be aware, this case began in
9 November of 1989 and has gone through division appeals and
10 been remanded back to this Commission several times for
11 contested case hearings. The hearings we just concluded
12 in November of last year was the fourth set of contested
13 case hearings on this case covering the spans of 28 years.
14 I may be wrong, but to my recollection, this case is
15 probably the longest ongoing docket in the history of this
16 Commission since your inception in 1960.

17 Due to the rather litigious nature of this case,
18 we have offered, through the exceptions we filed,
19 additional Findings of Facts and Conclusions of Law which
20 we believe will make the Hearings Officer's
21 recommendations less likely to be overturned or challenged
22 on appeal. As you may know, any decision of this
23 Commission must meet certain legal standards of
24 evidentiary support and completeness so as not to be found
25 to be arbitrary, capricious or clearly erroneous. So, for

1 instance, if the decision of this Commission is not
2 sufficiently supported by specific Findings of Facts based
3 on the evidentiary record, the decision of the Commission
4 could be invalidated. I believe most of us here would
5 like to avoid this if possible so we can bring an end to
6 this case and close the Order to Show Cause proceedings
7 which began in 1993. To that end, we have made a request
8 to this Commission to adopt additional Findings of Facts,
9 if you are inclined to agree with the conclusion of the
10 Hearings Officer, in order to make his recommendation
11 better able to withstand any judicial challenge. Pulama
12 Lana'i inherited this controversy in 2008 when it acquired
13 Castle & Cooke's interest in the island. We hope that
14 this will all end here now so that we can continue to
15 support the livelihood of its residents and bring to
16 fruition the shared vision of a sustainable island
17 community.

18 During this contested case, we have, as well as
19 the Hearings Officer and your able Commission staff,
20 attempted to avoid any procedural errors or mistakes. We
21 have also attempted to keep the issues narrow to the
22 specific remanded issues called out by the Intermediate
23 Court of Appeals and the Hawaii Supreme Court. There have
24 been no efforts made to modify the language of this
25 Commission's Condition 10, which a prior Commission

1 attempted to do, resulting in the reversal of its
2 decision.

3 We have allowed all parties to complete their
4 case and denied no witness the ability to testify. All
5 that remains is to make sure that your Decision and Order
6 is sufficiently supported in key areas so it is not being
7 arbitrarily capricious or clearly erroneous. To that end,
8 if you are inclined to find that the Petitioner has not
9 violated Condition 10, we respectfully ask that you adopt
10 the exceptions we filed to the Hearing Officer's
11 recommendation, which has been joined to by the County of
12 Maui and the State Office of Planning.

13 In light of the very voluminous record in this
14 case and the thousands of pages of transcripts and
15 exhibits, we have chosen not to go into the specific facts
16 of the case, but to give you a broader spectrum of what is
17 at stake. There is, however, one aspect of this case
18 which I should mention. During the last concluding days
19 of the hearing, Mr. Kopper's chief witness, Reynold Butch
20 Gima, president and secretary of LSG, took the stand.
21 Mr. Gima has participated in these very proceedings and
22 actively opposed the Petitioner's position for its entire
23 duration even prior to 1989.

24 During Mr. Gima's testimony, he was asked
25 whether he had been personally involved in the drafting of

1 a 2011 County of Maui Water Use and Development Plan.
2 This plan is adopted also by the State Commission of Water
3 Resource Management and is part of the State Water Plan
4 under Chapter 174C HRS. Mr. Gima answered that he had
5 been involved with that particular document's drafting
6 and the authoring and the final adoption of that document
7 for a period of more than 10 years as a charter member of
8 the Lana'i Water Advisory Committee.

9 We drew Mr. Gima's attention to page 29 of the
10 Water Use Development Plan appendix, which contains the
11 definition of various terms contained within that
12 document. One of the defined terms was the word "brackish
13 water," which was defined as water which had a chloride
14 content in excess of 250 milligrams per liter as
15 established by the Environmental Protection
16 Administration. Evidence in the administrative records
17 clearly indicated that for years the water from Wells 1
18 and 9, the wells in question in this particular case, have
19 served as irrigation sources of water for the Manele Golf
20 Course, have and still have chlorides well in excess of
21 250 milligrams per liter.

22 Mr. Gima admitted that, based on the definition
23 contained in the Water Use Development Plan, a document
24 which he helped prepare and worked on for 10 years, that
25 the water in Wells 1 and 9 were brackish water. When

1 Mr. Gima was asked if the water from Wells 1 and 9 were
2 potable, he declined to answer and instead said that he
3 was not going to make the call but that the Commission
4 should do so.

5 Mr. Gima was further questioned by the Hearings
6 Officer, Mr. Scheuer, about LSG's continuing allegations,
7 since the beginning of the Order to Show Cause proceedings
8 in 1993, that the use of Wells 1 and 9 posed a threat to
9 the high level aquifer on the island. In response,
10 Mr. Gima admitted that there was no threat being posed to
11 the high level aquifer water source from Petitioner's use
12 of brackish water Wells 1 and 9.

13 I bring this to your attention because, at the
14 very core of this case, which began in 1993, was LSG's
15 consistent position that the use of water from Wells 1 and
16 9 threatened the high level aquifer and that Wells 1 and 9
17 were brackish -- were not brackish wells, but potable
18 wells. According to LSG, finding the Petitioner to be in
19 violation of Condition 10 would eliminate the threat to
20 the high level aquifer by forcing the shutdown of Wells 1
21 and 9.

22 Needless to say, the reversal of LSG's position
23 through the cross-examination testimony of its charter
24 member and president, Mr. Gima, shocked all of us at the
25 hearing. It constituted an open admission that the Order

1 to Show Cause proceeding, which began in 1993 and
2 continues to this very day, had no merit, no basis, and
3 perhaps should never have been brought in the first place.

4 This Commission has spent the last 28 years
5 administering this case with significant dollars spent,
6 hundreds of hours committed to by three or four
7 generations of Commissioners that preceded you. And LSG
8 admits that there was no threat and that the waters in
9 Wells 1 and 9 are indeed brackish.

10 So why was this case ever brought? Since I was
11 not personally involved with this case from its inception,
12 I cannot answer that question. However, I do know that we
13 need to bring this case to a close. We, therefore, ask
14 that you consider adopting the exceptions that we have
15 proposed to the Hearings Officer's recommendation, which
16 is also supported by the County of Maui and the State
17 Office of Planning.

18 Before I close, I would like to personally
19 acknowledge the many hours of voluntary time that
20 Dr. Scheuer spent on this case. The sheer volume of the
21 administrative record in the contested case hearing was
22 probably beyond what he ever expected. To that, we
23 express our gratitude to him for his diligence and hard
24 work, and respectfully ask for your favorable
25 consideration to accept the Hearings Officer's

1 recommendation in this case. Thank you very much.

2 CHAIRMAN ACZON: Thank you.

3 Mr. Hopper?

4 MR. HOPPER: Thank you, Mr. Chair and members of
5 the Land Use Commission. The County of Maui supports the
6 Hearings Officer's recommendation with the modifications
7 and additions that were brought forward in Pulama Lana'i's
8 exceptions to that as filed. The County of Maui joins in
9 those exceptions. The County concurs with the result that
10 the Hearings Officer reached, but believes that the
11 modifications and additions posed by the Petitioner will
12 bring greater clarity and substance to the Order. The
13 Order was drafted, as you know, after multiple days of
14 hearings and the opportunity of all the parties to present
15 witnesses. And the parties presented multiple witnesses.

16 Now, ultimately, it's up to this Commission to
17 determine whether or not the Petitioner is in compliance
18 with the conditions. The County believes that the
19 evidence in this proceeding has indicated that Pulama
20 Lana'i is in compliance with Condition 10, and that
21 condition prohibits the use of potable water from a high
22 level aquifer for golf course irrigation purposes for the
23 Manele Golf Course. The condition also states that the
24 Petitioner must instead use alternative non-potable
25 sources of water to irrigate the golf course, e.g.

1 brackish water. And the County believes another
2 reasonable reading of this condition is that brackish is
3 considered non-potable water; in fact, an alternative to
4 potable water, at least in the context of the Commission's
5 Order.

6 Based on the record in this case, which you have
7 before you, Wells 1 and 9, which the Petitioner is
8 currently using to irrigate the golf course, contains
9 brackish water. The record shows that the Commission's
10 own Decision and Order that it originally approved for a
11 Condition Boundary Amendment in this case are the de facto
12 findings that Wells 1 and 9 contained brackish water. The
13 County believes that the use of this water is
14 consistent -- of water Wells 1 and 9 is consistent with
15 the Commission's expectations at the time the Decision and
16 Order was originally adopted.

17 The only other issue that the County wanted to
18 address was there has been some discussions of a County
19 ordinance, which is specifically Section 14.08 of the Maui
20 County Code. That ordinance does regulate water use for
21 golf course irrigation. However, as noted in the County's
22 findings in this case, that ordinance only applies to
23 newer golf courses, which were -- they applied for permits
24 or came into existence after the effective date of that
25 ordinance. And that ordinance's effective date is 2009.

1 So Manele Golf Course was in existence long before that
2 ordinance, so that ordinance is not applicable to the
3 Manele Golf Course. In any case, the County also provided
4 testimony of Water Director Dave Taylor, that the current
5 use of water in Wells 1 and 9 was not in violation of that
6 ordinance in any case. So we just wanted to note that for
7 the record. We don't necessarily believe that that's a
8 determinative condition in weighing this case, but it has
9 been mentioned. So since that's a County ordinance, I
10 wanted to clarify that as matter of record.

11 The County respectfully requests that you adopt
12 the proposed Decision and Order that was recommended by
13 the Hearing Officer as modified by the exceptions that
14 were filed by the Petitioner. Thank you.

15 CHAIRMAN ACZON: Thank you, Mr. Hopper.

16 Mr. Yee, please proceed with your arguments.

17 MR. YEE: Thank you. First of all, I appreciate
18 the brevity and succinctness which the first two speakers
19 have taken. I'm sorry, but I prepared a somewhat longer
20 presentation. Having now received that memo, I'll try to
21 keep it shorter. My attempt is to --

22 CHAIRMAN ACZON: Thirty minutes, Mr. Yee.

23 MR. YEE: I will keep it under 30 minutes. But
24 what I'm going to try to do is to explain the Office of
25 Planning's position and recommendation and the basis of

1 that. I would also try to respond briefly to some of the
2 issues brought up to the Hearings Officer's particular
3 Findings of Fact, Conclusions of Law, and Decision and
4 Order, also respond to some -- at least some of the issues
5 raised by LSG on their exceptions to the Hearings
6 Officer's Proposed Decision and Order. And, again, all
7 within 30 minutes.

8 The Office of Planning is recommending that the
9 Land Use Commission find the definition of potable water
10 as used in Condition 10 excludes brackish water; that
11 Petitioner Lana'i Resorts, LLC, the Petitioner, uses
12 brackish water to irrigate the Manele Golf Course; and
13 that the Order to Show Cause should be dismissed as the
14 Petitioner has not violated Condition 10.

15 Many of the parties have turned to the concept
16 of plain meaning. And of course, when we do that, we
17 often go to the dictionary. And the dictionary is giving
18 us different definitions. "Potable" has been defined
19 variously as "suitable to drink," "safe to drink" and
20 "drinkable." Each of these could mean different things.
21 And we also note that these are definitions which these
22 abstract terms define other abstract terms. And so
23 sometimes -- and in this case, we think it just was
24 helpful to have a full understanding of what that term as
25 used in Condition 10.

1 So, for example, LSG says "potable" means "safe
2 to drink," period, that's what it means. And if you meet
3 the EPA standards, that it's safe to drink. If you don't,
4 it's not safe to drink. That's what "potable" means. But
5 the EPA primary standards don't include pharmaceuticals.
6 So some people might think that pharmaceuticals in their
7 water is not safe to drink. Or put differently, maybe it
8 is safe to drink under the EPA standards, but it's not
9 drinkable for me. It's not suitable for drinking. It's
10 not water that I think should be used for our drinking
11 water. And with respect to taste as well, what's
12 drinkable to one person is not drinkable to another.

13 The EPA secondary standard, which are those made
14 for aesthetics and taste, suggest that chlorides are
15 important to some people at least. And that, again, the
16 term "potable" is just not a term used by the Safe
17 Drinking Water Branch; it's not a term -- even though it's
18 in their rules, they don't use the term; and it's not
19 contained in EPA federal regulations. They just don't use
20 that -- those terms because it's difficult with so many
21 different meanings. So dictionary definition, we think,
22 while it's something you could look at, it's ultimately
23 not helpful to make a final determination.

24 What we think you need to look at is the
25 specifics of Condition 10 of the 1991 Decision and Order.

1 And we looked at that very, very closely. And in the
2 important sentence, it says "Petitioner shall not utilize
3 the potable water from the high level groundwater aquifer
4 for golf course irrigation and shall instead develop and
5 utilize only alternative non-potable sources of water,
6 example, brackish water, reclaimed sewage effluent, for
7 golf course irrigation requirements." For the Office of
8 Planning, it's clear from the language, that the
9 Commission prohibited the use of potable water and
10 required the use of alternative non-potable water for golf
11 course irrigation, as equally clear that both brackish
12 water and reclaimed sewage effluent are examples of
13 alternative non-potable water. The only reasonable
14 reading of Condition 10, therefore, is that the term
15 "potable water" excludes brackish water and reclaimed
16 sewage effluent.

17 Now, LSG argues that if you were to find in
18 this way that somehow we created surplusage, that it could
19 create unnecessary terms in the Order. The Office of
20 Planning disagrees. This is all part of one single
21 sentence in which the Land Use Commission said "You shall
22 use potable water" -- I'm sorry -- "You shall not use
23 potable water. You shall use alternative sources."

24 We also note that -- and there are two things:
25 First, what the LUC did is they created a safe harbor;

1 they created a very clear statement to what you can do,
2 not -- maybe there are other things, maybe there are other
3 types of alternative non-potable water, but you have two
4 clear examples of non-potable water that you can use to
5 irrigate the golf course.

6 The second thing this language does is we note
7 that the potable water -- you shall not utilize potable
8 water and that you shall develop and utilize the
9 alternative non-potable source of water. The addition of
10 the term "develop" within the same sentence indicates
11 there's also a requirement to do something, to create some
12 sort of a -- create an infrastructure. So there's a
13 second reason why these two terms are not surplusage. And
14 although we have described just the two sides of the same
15 coin in order to better clarify the definitions for a
16 developer, we also note that there was an additional
17 provision which distinguished potable and non-potable
18 water. One was that you shall not use potable and you
19 shall develop and utilize non-potable sources.

20 In addition to the language of Condition 10, we
21 also looked at the clarity of the 1991 Decision and Order,
22 because you have Findings of Fact that are created more to
23 support the Condition. And so we looked at the Findings
24 of Fact to understand the basis for Condition 10. And
25 what we have found were that there were a number of

1 Findings of Fact that described the Petitioner's intent to
2 utilize brackish water from Wells 1, 9, 10 and 12 in order
3 to irrigate the Manele Golf Course. And we also noted
4 that the Petitioner agreed with Condition 10; that is, the
5 Office of Planning had recommended that this condition be
6 imposed and we proposed language. And the Petitioner
7 agreed or stipulated to the language that was submitted.
8 LSG objected to the language. They said they wanted
9 different language because they wanted to accomplish a
10 different purpose; namely, to effectuate a separate
11 agreement which was very clear in only allowing the use of
12 water outside the high level aquifer. And LSG's proposal
13 was rejected, specifically rejected by the Land Use
14 Commission.

15 The Office of Planning then looks at these facts
16 and say, "Well, so, clearly, the LUC made their decision,
17 and also that the Petitioner has agreed to a condition
18 supported by the Findings of Fact that Wells 1 and 9 will
19 be using brackish water to irrigate the Manele Golf
20 Course." So it all sort of ties together. We know that
21 LSG cites you to four different Findings of Fact which
22 they say suggests nothing other than potability means
23 "safe to drink." And they basically cite four Findings of
24 Fact using the term "non-potable" -- or "potable." And we
25 note a couple of things. First of all, one of the

1 Findings of Facts refers to the Maui Planning Department's
2 position on the use of non-potable water for the
3 irrigation of the Manele Golf Course. And the Maui
4 Planning Commission today has supported the position that
5 non-potable means "brackish" as was used by the LUC in
6 this condition.

7 Three of these Findings of Fact that LSG cites
8 refers to the intent of the Petitioner to utilize
9 non-potable sources, so -- but they failed to remind you
10 that there are other Findings of Facts saying "and they're
11 going to use Wells 1 and 9 to use brackish water to
12 irrigate the Manele Golf Course." So you have Findings of
13 Fact which say the Petitioner will use Wells 1 and 9, they
14 will use the brackish water from Wells 1 and 9 to irrigate
15 the golf course, and they would use non-potable water to
16 irrigate the Manele Golf Course. These are not
17 inconsistent findings. These are all findings showing
18 that the purpose -- and when you then understand Condition
19 10, it means that the Petitioner is saying, "I'm going to
20 be using brackish water from Wells 1 and 9 which are
21 non-potable to irrigate the golf course," which then
22 supports the provisions of Condition 10, reminding you
23 that this is a condition that the Petitioner specifically
24 stipulated to the wording of the Condition 10, stipulated
25 to that. To suggest that the Petitioner could have said

1 "I'm going to use the brackish water from Wells 1 and 9
2 and I'm going to stipulate to language which would prevent
3 us from using Wells 1 and 9" does not make any sense.

4 So when we looked at the actual decision of
5 1991, the Office of Planning comes away with the
6 conclusion that the term "potable water" as used in
7 Condition 10 means -- I believe the term "non-potable"
8 means "brackish," and that "potable" and "non-potable" are
9 mutually exclusive terms.

10 To further support this, we also looked at some
11 of the facts surrounding the testimony in the 1990-1991
12 hearings. And we looked at that other testimony, and
13 there was some -- there were a number of instances in
14 which the term "potable" and "brackish" are used
15 interchangeably by different people from different
16 sources, not just LSG. It included LSG; it included the
17 Petitioner; included the Commissioners. They used the
18 terms "brackish" and "non-potable" to mean the exact same
19 thing.

20 There is one instance in which Mr. Kumagai used
21 the term "alternative source of water" to refer to water
22 outside of the high level aquifer. But that is testimony
23 that is somewhat of an outlier. We don't see that agreed
24 to anywhere else. And Condition 10 specifically says, as
25 the Supreme Court has noted, that Condition 10 does not

1 prohibit the use of all water from the high level aquifer.
2 It only prohibits use of potable water from the high level
3 aquifer. And as I said, "non-potable" and "brackish" were
4 used interchangeably in the testimony and the questioning
5 in the 1990 and 1991 hearings. This also leads the Office
6 of Planning to conclude that the Hearings Officer was
7 correct.

8 We further note that, in 1996, when the
9 Commission issued its first Order to Show Cause, issued
10 its Findings of Fact, it issued Findings of Fact 15 and
11 16, indicating that Wells 1 and 9 are -- provide
12 non-potable brackish water. That's what Finding of Fact
13 16 says. So it says that Wells 1 and 9 provides
14 non-potable brackish water. It indicated that LUC
15 previously found, closer in time to the 1991 decision,
16 that Wells 1 and 9 did indeed use non-potable and brackish
17 water. For the Office of Planning, this was the case;
18 this was what convinced us that the Hearings Officer's
19 decision was correct, that the Petitioner was complying
20 with Condition 10.

21 Now, the parties have raised a number of other
22 factors outside of the 1991 hearing -- the 1990 and 1991
23 hearings and outside of the 1991 decision. So although --
24 you try to stick to the terms of the actual statute in
25 this case's Order, sort of everyone looked outside, and so

1 we did as well. So you go over the EPA standards. And
2 the Hearings Officer goes into great detail -- well, not
3 so greatly, but goes into some detail about the primary
4 standards by EPA. And the primary standards do not
5 include chlorides as one of the contaminants. And that's
6 also reflected in the State Department of Health
7 water forms, in which contaminants -- in which chlorides
8 are not part of what determines whether the water can be
9 introduced -- whether the water could be used in the
10 drinking water supply. That's true.

11 There are secondary standards. These secondary
12 standards are not -- if you don't meet them doesn't mean
13 you cannot use them for the drinking water supply. They
14 are intended for aesthetics and taste. But it does define
15 "brackish" and it -- or it does define chlorides as one of
16 the secondary standards that they look at or that one may
17 look at.

18 We wanted to remind you and we recommended you
19 amend the Hearings Officer's decision to recognize that
20 these EPA standards were done in 2006. So to suggest that
21 the decision in 1991 was based upon EPA standards would be
22 suggesting it's based upon a standard that did not exist
23 at the time. I'm hoping I'm getting the date right. I
24 know it was after 1990 and 1991.

25 We also looked to the Commission of Water

1 Resource Management's Water Resource Protection Plan,
2 which defines freshwater, brackish water and seawater.
3 They do not use the term "potable." And both the
4 Department of Health and the Commission of Water Resource
5 Management made it very clear that is not a term that they
6 are suggesting a definition for. That's up to you. The
7 Department of Health says, "We don't use this term in our
8 practice." Commission of Water Resource Management says,
9 "We defer to the Department of Health, and we are not
10 going to tell the LUC what you meant by that term in
11 Condition 10."

12 But in their documents, they do have definitions
13 of freshwater, brackish water, and seawater. They don't
14 use "potable." They use "freshwater," "brackish water"
15 and "seawater." And freshwater is chloride concentration
16 from zero to 250 milligrams per liter. Brackish is
17 chloride concentration from 251 to 16,999 milligrams per
18 liter. And seawater is basically more than that. So
19 while that may or may not -- whether you think that's a
20 definition of "potable," it is a definition of "brackish."
21 So when we're trying to look at what the term "brackish"
22 means, one of the ways that we look at as well, one of the
23 standard terms that they use is CWRM's, which is at
24 250 milligrams per liter. We also note this was a
25 conclusion -- I think this was the understanding in the

1 Lana'i Water Plan as well.

2 I want to say a little bit about the leakage
3 theory. And the leakage theory is something along the
4 lines of, well, if there's potable -- if you have an
5 entire aquifer, you have the drinking water supply here
6 and your brackish water supply is here, are you using some
7 of the drinking water supply, because some of that
8 drinking water supply would eventually leak or seep into
9 the brackish water supply. And the Hearings Officer drew
10 a number of conclusions regarding the lack of evidence of
11 leakage. And there was a lot of evidence saying, you
12 know, these two were two separate groups -- two separate
13 supplies and that there was no evidence of leakage between
14 the two, and the Hearings Officer made that conclusion.

15 For the Office of Planning, however, that was
16 actually not the determinative basis for us. We did
17 recommend that the Hearings Officer's recommendation be
18 amended basically to reflect that, even if there is some
19 leakage, that leakage did not affect the compliance or
20 noncompliance with Condition 10.

21 Again, remembering that Wells 1 and 9 were
22 already proposed to be used by Petitioner, who
23 particularly agreed to, A, Condition 10. To suggest that
24 because some water might flow or seep into the brackish
25 water levels, and that then makes the use of the brackish

1 water wells the use of potable water is really to create a
2 hidden requirement in your condition. It is -- you know,
3 one of the requirements of the Supreme Court is that your
4 conditions be clear, that you give clear notice to the
5 Petitioner on what is and isn't allowed. For the Office
6 of Planning, if that was the intent, that was not
7 expressed at all in the 1991 Decision and Order. And so
8 we would recommend that you add a specific finding that
9 even if there was leakage -- and we have it before you in
10 our pleadings -- even if there was leakage, that is not a
11 violation of Condition 10.

12 Now, there was a lot of evidence about how much
13 leakage because, to some extent, you're looking at public
14 trust issues. I understand how that could be a concern.
15 The public trust issue, interestingly enough, has come a
16 little bit full circle for the Office of Planning because
17 we started the position of the public trust question was
18 decided at the time of the 1991 decision. And so once you
19 comply with the 1991 decision, you comply with the public
20 trust doctrine and meet all the public trust doctrine
21 requirements.

22 Most recently, LSG appears to say something very
23 similar: That is, you don't need to look at the public
24 trust question; all you have to do is look at whether or
25 not you did or didn't comply with the 1991 decision

1 Condition 10. If I stated it accurately -- I can only
2 give you what I've read or my understanding of what I've
3 read -- then we would agree. The difference perhaps is
4 this: For the Office of Planning, it doesn't matter
5 whether Petitioner did or didn't meet Condition 10. The
6 public trust doctrine would be met regardless. What I
7 don't know is whether LSG's position would be, "Well, if
8 you define potable water -- the water to be brackish, have
9 you met the public trust doctrine?" To the Office of
10 Planning, the answer is "yes." Perhaps it's "yes" as well
11 for LSG. We don't know.

12 The reason there was some confusion is this
13 statement was not fully made to the Office of Planning,
14 was not fully understood by the Office of Planning
15 previously. LSG's position has raised the public trust
16 question.

17 And so the Petitioner brought forth a large
18 amount of evidence basically saying all the wonderful
19 things they've done to protect the water resource, to
20 protect the island, to be good stewards, to make sure
21 there's an adequate water supply. And yes, I understand
22 it makes them look really good, and that did make a
23 difference to the Office of Planning as to whether or not
24 they complied with Condition 10. But it was -- you know,
25 it was -- and so the Hearings Officer included testimony

1 and evidence about it. So, to our mind, the Hearings
2 Officer was responding to the concern as the Hearings
3 Officer understood it from LSG. But there was a public
4 trust question. And therefore, in order to answer the
5 public trust question, he went into some detail about how
6 the public trust is being protected and how this
7 interpretation of Condition 10 doesn't in any way violate
8 that public trust requirement.

9 You know, I think to summarize -- summarize it
10 this way. I was not here in 1990-1991. But I was here
11 during the remand from the Hawaii Supreme Court. And we
12 went through a lot. I mean --

13 CHAIRMAN ACZON: Five minutes.

14 MR. YEE: Thank you. I'll finish in five
15 minutes.

16 We tried to settle. We tried really, really
17 hard to settle. As reflected in the record, we weren't
18 successful. I'm not blaming anyone for it. Sometimes
19 there's just different positions, sometimes positions --
20 parties just can't reach an agreement. They can be
21 perfectly reasonable. But regardless, we didn't reach a
22 settlement.

23 So then the Office of Planning tried to say,
24 "Well, can't we just figure out what those blank
25 conditions should be? Can't we just kind of look at the

1 record, look at the facts, and let's find out what should
2 the Resort be allowed to do, protecting the water supply."
3 We added in some additional conditions. We tried to reach
4 what we thought was right -- you know, ought to be. And
5 we got slammed by the ICA, saying, "That's not what you
6 were supposed to do. You had a remand from the Hawaii
7 Supreme Court. It told you to do this. You didn't do
8 this. Go back and do this. Go back and define 'potable.'
9 Go back and look at Condition 10. Tell me whether, as it
10 was written, was Condition 10 violated." So that's where
11 we are now.

12 We think -- and perhaps this is something
13 probably all parties can agree, it's time for -- we've
14 exhausted every possible alternative route. We need to
15 come up with an answer to the Hawaii Supreme Court's
16 question. We need to give finality and an ending to this
17 matter. Put all of the parties out of their district.
18 And just get a final resolution, one way or the other.
19 Let's go up to the court, let all the parties get a final
20 decision on this. And then, frankly, move on to many,
21 many other important issues to this island, and let's move
22 forward on those issues.

23 For those reasons, the Office of Planning
24 respectfully recommends that you comply -- or you adopt
25 the Hearings Officer's Recommended Order, subject to such

1 other changes you believe will strengthen the entire
2 content of that Order. Thank you.

3 CHAIRMAN ACZON: Thank you, Mr. Yee.

4 Mr. Kopper, please proceed with your argument.

5 MR. KOPPER: How's your fingers? Good.

6 Thank you. It's probably this way in every
7 case, but this case, especially, the truth is important.
8 I think the truth is also like getting a pimple on the
9 middle of your head on prom night -- this is a firsthand
10 experience. You know, it's right there. You can't really
11 hide it. You can try to put some LA Looks and comb your
12 hair over it, put on a hat. But the more you try to cover
13 it up, the more you try to distract people from it, I
14 think the worse you're going to look. And what we have
15 here is a Proposed Order, which is -- it's trying to hide
16 the truth or maybe, more accurately, trying to avoid the
17 only logical conclusion that the evidence, the facts and
18 the truth support. And if you read the Proposed Order,
19 the result doesn't really match the facts or the law. It
20 takes a sharp left turn. And I can tell you if this is
21 the road we're going down, it is going to be a battle.
22 And we're talking about "Let's try to end it." Well, I
23 see it as it isn't going to work.

24 If we go back to 1991, the Commission enacted a
25 Boundary Amendment Condition to prevent the use of potable

1 water to irrigate this golf course. If you were to hand
2 this condition to someone on the street, I think they'd
3 say, "Well, it says: Don't water the golf course with
4 drinking water from this aquifer." Well, the overwhelming
5 evidence -- the overwhelming truth in this case is that
6 Wells 1 and 9, which are in the high level, which are
7 being used to irrigate the golf course, are potable. They
8 produce drinking water.

9 LSG provided evidence, the only evidence, of a
10 comprehensive test of potability done pursuant to state
11 and federal drinking water standards. It's a test that
12 the Supreme Court found was so relevant that it could
13 supercede previous findings by the Commission that these
14 wells are brackish and non-potable. This is something
15 none of the other parties have discussed.

16 The truth is more important than findings that
17 were made based on unsubstantiated claims. We know now,
18 now that the only potability test was done, that the water
19 is drinkable. It tested as potable. We have evidence
20 that the water out of these wells are of similar quality
21 that is served across the state for drinking. It is not
22 like a salty swimming pool. The state of Hawaii drinks
23 its water. In response, the Resort provided no real
24 evidence of potability, nothing to rebut all the
25 substantial evidence on the record. They did not have a

1 test. They did not give the Hearings Officer a sample;
2 they didn't give him a sip. They provided no direct
3 evidence. Instead, for four days, they played hide the
4 facts with evidence such as like we have today, paid
5 employees testifying on the clock, evidence of good deeds,
6 like the creation of jobs, building an economy, building a
7 swimming pool.

8 We were told the doomsday scenario of what would
9 happen if the golf course were to close. The golf course
10 will never close as a result of this case. That is not
11 the position of LSG. It's never -- it's not something the
12 Commission can legally do.

13 So we have the relevant evidence. That is what
14 came out. And just like the Kau'Ono'Ulu Valley works, it
15 worked. We have this Proposed Order.

16 Now, you know, I heard a lot today about LSG,
17 and it feels like being -- as the bad guy here. We're not
18 the prosecution. LSG did not even begin this proceeding.
19 This was begun by the Land Use Commission. We're just
20 here for the truth.

21 And you know, I have a lot of respect for my
22 friend -- he is my friend -- Mr. Kudo. But his
23 mischaracterization of Butch Gima's testimony, which was
24 taken completely out of context, is incredibly shameful
25 coming from a fellow member of the attorney bar, that I

1 hold pretty sacrosanct. LSG, again, did not file this
2 matter, which was the implication. We made no admission
3 regarding the potability of these wells. There was no
4 shocking turn of events. And the reason why none of this
5 was in the Proposed Order, it is not accurate. We've been
6 very consistent. And this illustrates why the matter is
7 still ongoing. They're avoiding the truth.

8 So that what I want to ask you to do in my time
9 remaining is, if you can indulge me, let's clear the
10 slate, throw out what you heard about definitions about
11 statutory interpretations, about laws and -- on the
12 record. Let's go to the relevant facts, let's look at
13 actual record and what's really going on, and you'll see
14 that the case is only about: Can you drink the water in
15 these wells? The only evidence that we have says "Yes,
16 you can."

17 So we're talking about potable, potability. And
18 the law says you define it by its plain meaning. Office
19 of Planning spoke a little about this. And the only
20 definition introduced is definitions that mean water that
21 can be drunk, whether it's suitable for drinking or safe
22 to drink. Office of Planning's witness, the State
23 Commission on Water Resource Management, said that, common
24 sense, it means water that is safe to drink. And the
25 Resort has said, as stated in the Proposed Order, we

1 should go with the meaning of "potable" that is its plain
2 meaning. Well, that is its plain meaning.

3 All of the evidence that we have in this case,
4 all of the relevant evidence, is that Wells 1 and 9 are
5 chemically similar to other waters fit for drinking here
6 in Hawaii. It is suitable; it is safe; it is potable.

7 And that is how simple LSG's case is. And we're
8 only supposed to keep it simple. Right, you take the easy
9 route. All the evidence says the water can be drunk.
10 Now, you don't have to look perfect. You can't. But you
11 can look at other laws on drinking water, on potability,
12 and you'll see that it is consistent with this
13 interpretation.

14 The Department of Health, which regulates public
15 water systems -- and we have two here on Lana'i -- says
16 water is suitable for drinking if it satisfies the
17 department's regulations, which look at maximum
18 contaminant levels, and then you can drink it. They are
19 almost exactly the same for your EPA standards.

20 Now, the County of Maui, in their regulation,
21 which, you know -- or there's a regulation applied which
22 restricts the use of potable water for golf course
23 irrigation. That is not involved here. But we can look
24 to see what County of Maui calls "potable." And potable
25 water in the County of Maui is water that meets the

1 standard to satisfy the Department of Health, that's
2 suitable for cooking and drinking.

3 Now, the Resort says "Don't look at these laws."
4 But yet the Resort looks, Office of Planning, Proposed
5 Order looks at these laws to define chlorides. They say
6 chlorides is 250 milligrams per liter, and they get that
7 from the EPA standards. Well, if you're going to look at
8 those laws for chlorides, you've got to look at it for
9 water that's safe to drink. And so we provided evidence
10 that tested under these standards, and the wells tested as
11 potable. There was no other test to rebut this evidence.
12 These waters can be drunk. And again, that is how simple
13 this case is.

14 Now, to follow the Proposed Order and the
15 Resort's interpretation, their manner of construction
16 requires multiple leaps, multiple steps, to reach their
17 conclusion. You have to look at the record, you have to
18 infer intent, you have to ignore the Supreme Court's
19 decision to stop. And so I can get there -- and I'll
20 speak as fast as I can and as Cynthia can type -- there
21 are six main issues that really make the Proposed Order
22 invalid, and we would encourage you to adopt the Order
23 that LSG proposed.

24 The first issue is this: That there is no
25 recognition that potability and brackishness are not

1 mutually exclusive. Now, the first problem with using the
2 term "brackish" is, unlike "potable," there is no precise
3 chemical threshold for brackishness. For example, the
4 Proposed Order relied on the testimony of Roy Hardy, who
5 was the Office of Planning's witness, with the Commission
6 on Water Resource Management, who testified that water
7 with chloride levels exceeding 250 are brackish, that's
8 brackish water. But Roy Hardy also testified that he
9 believed that the threshold was 300 milligrams per liter.
10 He wrote that in a peer-reviewed study which is in
11 evidence. So we already see the problem with using
12 "brackishness" to determine potability. There's no clear
13 definition. You use Roy Hardy's level, well, Well 1,
14 which is around 280 milligrams per liter chloride, is not
15 brackish. Well, let's assume it's 250 for the sake of
16 argument. Well, we know that "brackishness" and
17 "potability" are not mutually exclusive. And that's
18 because brackishness does not make water unsafe to drink.
19 You can have water that's technically brackish but is
20 palatable and drinkable. And we've offered substantial
21 testimony and evidence to this effect.

22 We know that chlorides are not a public water
23 system contaminant under DOH regulations or the EPA. CWRM
24 told us that it is really wrong to look at chlorides as an
25 indicator of potability. The resort's own witness Dr. Don

1 Thomas testified that, quote, "chlorides is, to me, not an
2 important constituent in determining potability." The DOH
3 would allow public water systems with water that had the
4 same level of chlorides as the level we're talking about
5 here to be served for drinking. It's typical for counties
6 to allow for water with this chloride level for drinking.
7 Currently, there are wells on Oahu which do that.

8 And the County of Maui, in the past, has
9 offered -- served water at 300 milligrams per liter
10 chloride -- that's higher than Well 1 -- for drinking,
11 without any blending, without improving the taste.
12 They've pumped water at 350. That's higher than any of
13 the wells you have here.

14 Even the Resort admits, through the Lana'i Water
15 Company, that chlorides do not matter when you're talking
16 about drinking water. Because they do this test -- it's a
17 regular test that demonstrates the purity of the water and
18 provide the results to their consumers. And that test,
19 the results of which is in the record, does not test or
20 report on chlorides.

21 So if Condition 10 says to only use non-potable
22 alternatives, e.g. brackish, it means what it says. If it
23 is non-potable, you can use it if it's brackish. But if
24 it is potable, you cannot use it. And we know these wells
25 are potable.

1 It brings us to this next issue which comes up,
2 "e.g." What does "e.g." mean? Well, it does not mean
3 "i.e." It's Latin; it's *exempli gratia*, as close as I can
4 pronounce it. And it's just an example, just gives a type
5 of example.

6 Now, we provided legal authority that says the
7 use of the term "e.g." does not create a *per se* exception
8 in all instances. So it does not exclude "brackishness"
9 from the definition of "potable." We know there is no
10 definition of "potable" in this Order. There is no use of
11 the term "potable" in such a way which suggests that
12 "brackishness" is not a part of that. So when we see
13 "e.g. brackish," it's an example. Yeah, again, brackish
14 water can be used but only if it's non-potable. "E.g."
15 does not change that.

16 And that's in line with this next idea that you
17 have to look at the entirety of Condition 10, especially
18 in Hawaii. We have a special rule on regulations about
19 that. So there are other things -- the Resort cannot use
20 potable water from the high level and they shall instead
21 develop and utilize alternative non-potable sources of
22 water, e.g., brackish. So you have the first half about
23 don't use potable; second half, use non-potable. Those
24 things can coexist. They can coexist because brackish
25 water can be either or both, not at the same time. But

1 to -- you need to read this condition in a way that takes
2 us back to the entire regulation. And the only way to do
3 that is if you interpreted it in this way: You can never
4 use potable high level water; but you can use alternative
5 sources, like brackish, if it's non-potable.

6 Now, the fourth issue is something that's been
7 talked about, and that is the reference to Wells 1 and 9
8 as brackishness -- as brackish and non-potable in the 1991
9 Order. So in the Proposed Order's Findings of Fact -- I'm
10 looking at 104 to 106, the Order relies on the 1991 Order
11 and Recommendation that Wells 1 and 9 were intended to be
12 used for golf course irrigation. And we heard some of
13 that from the Office of Planning. But the Resort's intent
14 does not change what the Commission enacted. Now, first,
15 if the Commission intended to allow Wells 1 and 9 to be
16 used for irrigation at all times, it would have said this.
17 But the Commission didn't. They said no, regardless of
18 what the source is, you cannot use potable water. And we
19 know that, as of 1991, in fact throughout this record,
20 there was never a test for potability on these wells. So
21 any representation, I believe, made by the Resort was
22 improperly substantiated, and it's not the best evidence
23 of potability because they never tested it.

24 Now, this is something that hasn't really been
25 discussed. But the Supreme Court in this docket in the

1 Lana'i Company case already foreclosed this argument that
2 you can look at these references to Wells 1 and 9.
3 Because what happened was the Supreme Court recognized
4 that the Land Use Commission found that Wells 1 and 9 were
5 brackish, but they also recognized that no test was
6 performed. And this is exactly what they said at page 315
7 of that decision. So talking about the findings of the
8 Commission that, quote, "Wells No. 1 and 9 provide
9 non-potable brackish water," they didn't believe that that
10 was covered -- and, I quote, "The finding which states
11 that LCI -- refers to resort -- has not performed a
12 comprehensive test to determine the potability of Wells
13 No. 1 and 9. Such findings seem to imply that LCI was
14 using potable water." So that means, through our Supreme
15 Court, a test for potability would be determinative of
16 whether Wells 1 and 9 could be used for golf course
17 irrigation. And a test was done, and the test says
18 they're potable. So we're following the Supreme Court.
19 And it makes sense because it doesn't matter what was
20 believed in 1991 if that wasn't the truth. What actually
21 happened should matter here.

22 The fifth issue I'd like to address is that
23 there's a reliance on the administrative records and
24 specifically on prior representations of the Resort to
25 redefine what "potable" means. So the Proposed Order

1 cites to prior statements by the Resort when the Resort
2 claimed that Wells 1 and 9 were non-potable and they
3 intended to use them for irrigation. Sort of the same
4 issues here.

5 Now, we know, from the Supreme Court, that we
6 cannot construe Condition 10 to mean what may have been
7 intended but wasn't on the face of that condition. And we
8 also know that we're not supposed to look at the
9 administration record. I guess it's analogous to a
10 statutory issue where a regulation is plain and
11 unambiguous, which Condition 10 is. But their -- this
12 reliance on the record is incomplete. Because the
13 Order -- the Order does not have any specific
14 representation by the Resort that the term "brackish"
15 actually means basal groundwater. So what we're talking
16 about is: Are Wells 1 and 9 brackish? Are they potable?

17 Well, the Resort's own expert, James Kumagai,
18 actually testified what this means. And he says, yes,
19 there are alternate sources of water, and alternate
20 sources meaning water sources outside of the high level.
21 That is, of course, the basal water. And we consider that
22 to be brackish. Other sources which we call alternate,
23 water reclamation or reclamation of sewage effluent.
24 That's another. But, basically, it's everything outside
25 of the high level aquifer or outside the influence of that

1 aquifer. And there's transcripts of the record, Volume
2 22, No. 569.

3 So if we're supposed to look at the record to
4 define what "potable" is, we should do it to define
5 "brackish." And if we do that, "brackish" means "basal."
6 "Basal" means "not in the high level aquifer." Then Wells
7 1 and 9 are potable. And again, we have a reliance here
8 on the fact that, well, the Resort believed it intended to
9 use Wells 1 and 9 because they represented they were
10 non-potable. But, again, we know that the Resort never
11 tested the wells for potability. And the wells have now
12 been tested to be conclusively potable.

13 So the final issue that I wanted to touch upon
14 before I closed is this reliance on -- and I think what
15 are irrelevant facts and arguments. You know, the only
16 issue in this case is -- and you can split up the two.
17 One: What is potable water? Two: Is it being used?
18 There is no public trust issues, no golf course closure
19 issues, nothing about water management, harm to the
20 aquifer. There's nothing -- and this comes straight from
21 Order No. 6 from the Hearings Officer. This set up the
22 issue for the contested case hearing.

23 Yes, LSG did bring up the public trust, but not
24 as an affirmative claim, to say your -- the Resort, "Your
25 use of the water is not reasonable or beneficial." That

1 was never raised. Just to the extent that "You are using
2 a public trust resource." The user of that resource bears
3 a burden of proof in these types of cases. And the
4 Hearing Officer, I believe, agreed with that. It is the
5 Resort's burden of proof here, not LSG's, not Office of
6 Planning or County of Maui.

7 So, again, Condition 10 prohibits the use of all
8 high level potable water, regardless of whether it's done
9 efficiently or whether it was done without causing
10 noticeable harm to the aquifer and whether or not the
11 Resort is offering jobs or community programs. And
12 there's a reason for that, too. I think the Commission
13 was quite wise in 1991. There's no reason to wait for
14 harm. If you waited for harm to this island's only source
15 of drinking water -- and that's what the high level water
16 is, it's the only source of drinking water here. And
17 we've waited too long. Let's not wait that long. It is
18 very proactive; although the Commission did not put in a
19 harm test in Condition 10. It just says simply do not use
20 it.

21 And we know that the Resort has entitlements for
22 future developments that could harm 60 years and stay
23 close to the sustainable yield here. So, again, there's
24 no reason to wait for harm. I think that would be
25 imprudent.

1 So just to wrap this up. I know this case has
2 gone on for a long time; it has been drawn out. And there
3 were appeals coming from many different parties in this
4 case. There's nothing we can do about that now. But
5 there's no reason to do something wrong and stand on that
6 just to end the case. I think we should be searching for
7 the truth and search for what's right. So we can choose
8 the path of the Hearings Officer's Proposed Order. You
9 have to jump through the hoops to get to this result; you
10 have to ignore the -- look at the record and ignore the
11 plain language; ignore the potable test; ignore what the
12 Supreme Court actually said. Or we can follow our
13 interpretation and keep it simple. Is the water safe to
14 drink? And the answer is "yes." Don't be persuaded
15 by their -- be persuaded by the actual facts. Thank you.

16 CHAIRMAN ACZON: Thank you, Mr, Kopper.

17 Mr. Kudo, do you have any rebuttal?

18 MR. KUDO: Yes, I do. I want to address
19 something that Mr. Kopper mentioned. With all due
20 respect, I disagree with him. He made a statement that
21 LSG has never held the position that their -- that the
22 pumping of any water from the high level aquifer posed a
23 threat to the island's resources, potable water resources.
24 I think that's not true or not correct. As early as 1990,
25 the first proceeding of this, there is record in the

1 transcript of Mr. Murakami making that statement on the
2 record, the details of which were fleshed out through his
3 witnesses that came out later in that case. And then this
4 was again repeated in detail during the 1993 Order to Show
5 Cause hearing, that is, whatever we were doing with regard
6 to Wells 1 and 9 were posing a threat to the high level
7 aquifer. And if you think about it, why would the
8 Commission -- this Commission impose Condition 10 if that
9 wasn't an issue? Condition 10 was supposed to be
10 addressing that very issue of threatening the high level
11 aquifer from the standpoint of potable water. And this
12 whole case revolves around Condition 10.

13 The second issue that Mr. Kopper raised, which I
14 respectfully disagree with, is he said that the Hearings
15 Officer did not take any notice of Mr. Gima's admission on
16 the record that there was no threat to the high level
17 aquifer. I think that's not correct, because in the
18 Hearings Officer's recommendation to you all, if you look
19 at Finding of Fact 142 -- I'll read that -- Dr. Scheuer's
20 recommendation. Finding of Fact 142: "Under questioning
21 by the Hearings Officer -- Scheuer -- LSG's witness
22 Mr. Gima stated that he is unaware of and did not allege
23 that there was harm posed by the use of Wells 1 and 9 to
24 irrigate the Manele Golf Course." Wells 1 and 9 are
25 located in the high level aquifer. That's the very

1 essence of what we were saying, that Condition 10 was
2 supposed to be addressing a threat that was alleged by LSG
3 since the very beginning of this case, carried forward to
4 the 1993 Order to Show Cause.

5 And lo and behold, in this particular
6 proceeding, Mr. Gima gets on the stand and says there is
7 no threat. There's why we were surprised and shocked at
8 what his statement was. If you look at this language up
9 here that we posted, this is the language that LSG
10 proposed to the Commission for Condition 10. It says that
11 "The Petitioner shall ensure that no high level
12 groundwater aquifer will be used for golf course
13 maintenance or operation, paren, other than water for
14 human consumption, end of paren, and that all irrigation
15 of the golf course shall be through alternative
16 non-potable water sources." This language was rejected by
17 the Commission for the language in Condition 10, which
18 says most of -- literally, it says, "Petitioner shall not
19 utilize potable water from the high level groundwater
20 aquifer for golf course irrigation use and shall instead
21 develop and utilize only alternative non-potable sources
22 of water, paren, e.g. brackish water, reclaimed sewage
23 effluent, for golf course irrigation requirements." And
24 we are using brackish water and sewage effluent to
25 irrigate the Manele Golf Course. In our argument, we said

1 that we are in compliance with this Condition 10, the
2 plain reading of it.

3 Now, the key date for all of us in this case is
4 1991, because that's the year the Commission issued its
5 decision. So when we look at what was around, what was
6 present, what was known by the Commission, it gives us an
7 idea of what they intended by Condition No. 10, or what
8 they were thinking, or what they included, or what they
9 didn't include. All of those laws that Mr. Kopper is
10 referring to: the Safe Drinking Water Act, the Maui County
11 code on golf course irrigation, and the DOH regulations
12 that he is using to define what "drinkable" is and,
13 therefore, "drinkable" meaning "potable" under Webster's
14 Dictionary, all of those laws were not in effect in 1991.
15 In fact, most of those, the earliest ones was, I think, in
16 the year 2003 or so, so ten years later. And my argument
17 is: How can you say that the Commission in 1991
18 contemplated using laws that were not in existence until
19 ten years later? You can't say that, because it wasn't
20 even there. And to me, that's a very deep argument to
21 make.

22 Now, if the laws existed at the time that the
23 Commission was -- when they rendered its decision, I
24 agree. If the laws were even discussed in the
25 administrative proceedings -- which they're not -- I would

1 agree that that was part of their contemplated
2 decision-making process in coming up with Condition No.
3 10. But those laws were not present at the time the
4 Commission developed this language.

5 I think that this other argument that Mr. Kopper
6 raises with regard to: We must distinguish that the term
7 "brackish water" used in the e.g. up there, the "for
8 example," that what they really meant was brackish water
9 that wasn't potable. Now, I will tell you that I think
10 that, under rules of interpretation and statutory
11 interpretation, the people that draft this language, the
12 Commission members, had ample opportunity to say that if
13 they wanted to; that is, they could have said "for
14 example, brackish water that is only non-potable," or
15 "non-potable brackish water" instead of "potable brackish
16 water." But they didn't. They used the generic term
17 "brackish water." And by all definitions currently,
18 "brackish water" means water that has chloride contents
19 greater than 250 milligrams per liter. Wells 1 and 9 has
20 water that was well in excess of that number. And fifth,
21 that the definition was considered to being brackish
22 water.

23 Again, the argument is if you're going to look
24 at something plain and unambiguous, in the plain meaning
25 of something, you can't read into it things that don't

1 exist; you can't read into it things that are conveniently
2 splitting words into "potable" and "non-potable"
3 distinctions that are not present. You must state at face
4 value what it means to you. And I submit to you that the
5 language is clear. The Findings of Fact in the 1990 and
6 1991 proceedings, there are reinforcements because there
7 was clear discussion in those proceedings that Wells 1 and
8 9 would be used for the golf course irrigation at Manele,
9 and they were brackish wells.

10 I don't know what else to say in this case,
11 other than I think, as I said before, we need to come to
12 some decision on this thing. And the key decision was,
13 that was remanded to us, and the key question that was
14 remanded to us by the Supreme Court in 2004 was:
15 Commission, define what is potable. But that was a
16 challenge, because nowhere in the record is "potability"
17 defined. It's not in the record, if you read it. There's
18 no definition at all.

19 So what did we do today to do that, to address
20 the Supreme Court's question? Well, we defined "potable"
21 as to what it's not; that is, we defined what non-potable
22 water is. Because non-potable water is clearly not
23 potable. And non-potable water is defined as brackish or
24 reclaimed sewage effluent. That's the definition
25 fortunately that's in this Commission, because there's no

1 definition of "potability." And I think that that was the
2 best that we could do with regard to defining what the
3 intent was or the definition of that term is in the plain
4 reading of this particular condition. And I submit to you
5 that it is a reasonable interpretation of it; it is
6 supported by the record; and that you should not be swayed
7 by bringing in -- by Mr. Kopper's argument that you should
8 be bringing in laws that were not present at the time that
9 this decision was made by this Commission.

10 And I thank you very much for this. And that
11 concludes my rebuttal.

12 CHAIRMAN ACZON: Thank you, Mr. Kudo.

13 If the parties wishes, now the Chair would like
14 to grant each party five minutes time to rebut. After
15 that, we will take a break, and then the Commissioners
16 will ask questions.

17 MR. HOPPER: We do not have anything to add for
18 this case, Mr. Chair.

19 CHAIRMAN ACZON: Thank you.

20 Mr. Yee?

21 MR. YEE: Never miss an opportunity to talk.
22 Just for the record, couple of relatively small things.
23 One is: My recollection is -- of the Supreme Court
24 opinion was that initially the LUC had said: "The water
25 came from the high level aquifer and that was sufficient

1 to establish a violation of Condition 10. And you were
2 wrong. It requires the water also to be potable and
3 that's prohibited." And the Supreme Court then noted,
4 "You know, LUC, you, on one hand, said they're using
5 non-potable brackish water, and then on the other hand,
6 you're saying there's never been a test for potability."
7 I don't think that undervalues the facts here.

8 So when LSG references one section and then
9 suggests that perhaps the Supreme Court has prohibited you
10 from defining "brackish" as "non-potable," I don't believe
11 that's a correct reading of the Supreme Court opinion.
12 The Supreme Court opinion, I think, it specifically sent
13 it back to the LUC to make that determination.

14 The other thing I wanted to point out is there
15 was -- well, you know, I think -- let me just conclude
16 with that, and we'll rest on the pleadings.

17 CHAIRMAN ACZON: Thank you, Mr. Yee.

18 Mr. Kopper, five minutes.

19 MR. KOPPER: Thank you. And I will be very
20 brief. First, Safe Drinking Water Act was 1974, not 2006.
21 Those laws were in place at the time that Condition 10 was
22 enacted.

23 Now, let's say we were to throw those out, say,
24 okay, the Commission, for whatever reason, does not want
25 to follow HRS 1-16, which commands us to look at laws on

1 the same subject matter. But if we choose not to, well,
2 the plain language of "potable" means "safe to drink."
3 Well, there was no evidence produced that is relevant or
4 credible, relevant at all, that Wells 1 and 9 could not be
5 drunk.

6 And so I think it is important to remember who
7 bears the burden of proof. It's not LSG, it's not County
8 of Maui or Office of Planning. Under case law, it's very
9 clear that the person who's seeking to use natural
10 resources bears the burden to prove its entitlement. So
11 if we go by the term "safe to drink," the Resort will need
12 to provide evidence that the water is somehow not safe to
13 drink. And again, they haven't provided a sample or a
14 test or even a taste for the parties or the Hearings
15 Officer.

16 To go back to what the Supreme Court said, what
17 they recognized was the importance of this fact that there
18 was no comprehensive test to determine the potability of
19 Wells 1 and 9. So they did say, and I quote, "Wells 1 and
20 9 provide non-potable brackish water." That was the
21 finding of the Commission. And then they looked at,
22 quote, "LC" -- which was the Resort -- "has not performed
23 a comprehensive test to determine the potability of Wells
24 1 and 9." Such finding seems to imply that the Resort was
25 using potable water. This is what the Supreme Court said.

1 But if you want to take this at a minimum, take
2 it to mean that this comprehensive test for potability, as
3 the Supreme Court talks about, is relevant. And we have
4 it, and the test says these wells are potable. Thank you.

5 CHAIRMAN ACZON: Thank you, Mr. Kopper.

6 We're -- go ahead.

7 MR. KUDO: Just a point of clarification.
8 Although Mr. Kopper is correct, that the Safe Drinking
9 Water Act was enacted in 1974, that portion of the act
10 which applies to the primary contaminants in groundwater,
11 which is what we're talking about here, was not enacted
12 until 2006.

13 MR. KOPPER: And I need to clarify, I think
14 you're talking about the groundwater rule. You're right,
15 the groundwater rule was enacted. But these were enacted
16 before. And if you look at one of our exhibits, which was
17 a letter from the Department of Health in 1995, in 1995,
18 where we're talking about the EPA standards. So I think
19 if you were just referring to the groundwater rule, I
20 would he's accurate. But that's not the regulations we're
21 discussing.

22 CHAIRMAN ACZON: Thank you. All the parties are
23 duly noted. We'll take a five-minute recess.

24 (Recess taken from 2:15 p.m. to 2:23 p.m.)

25 CHAIRMAN ACZON: We're back on the record.

1 Commissioners, do you have any questions for the
2 parties?

3 Commissioner Okuda.

4 COMMISSIONER OKUDA: Chair, thank you.

5 Mr. Kopper, can you give us the citation for the
6 Hawaii Supreme Court case that you said contained what you
7 had described during your argument?

8 MR. KOPPER: Yes. And so I'm looking at the
9 Lexis version. It should be consistent. It is 105 Hawaii
10 at 316.

11 COMMISSIONER OKUDA: One moment, please. 105
12 Hawaii at 316?

13 MR. KOPPER: Yes.

14 COMMISSIONER OKUDA: Chair, may I ask a few more
15 questions?

16 CHAIRMAN ACZON: Go ahead.

17 COMMISSIONER OKUDA: I have some questions for
18 each of the parties here.

19 What is the standard of review that we are to
20 apply in reviewing Dr. Scheuer's recommended pleading --
21 or decision. Maybe I can first ask what standard of
22 review has to be applied regarding his Findings of Facts,
23 and what is the standard of review that we should apply
24 with respect to things which might be considered
25 conclusions of law. Maybe start with Mr. Kudo, and we can

1 just go down the line.

2 MR. KUDO: I'm not sure if there is a standard
3 of review. I mean, I think that, under your rules, the
4 Hearings Officer issues a recommended decision based on
5 certain Findings of Facts and Conclusions of Law that he
6 or she has reached. Your review of that as to whether you
7 believe that the decision is something that you agree
8 with, and secondly, whether the decision is substantiated
9 by the Findings of Fact and Conclusions of Law that are
10 contained in his recommendation. If you feel that it is,
11 then you can go with his recommendations as is. If you
12 feel it needs to be beefed up, you can add more Findings
13 of Fact and Conclusions of Law that you wish. Conclusions
14 of Laws and Findings of Facts, if you see the first
15 paragraph of Dr. Scheuer's recommendations, it does say
16 that there can be Findings of Facts and Conclusions of Law
17 that are both. And if so, he's considering both. So
18 there's no question of, you know, whether it should be one
19 category or another.

20 That being said, it's up to this Commission
21 whether you accept, reject, amend or modify or remand the
22 case back to the Hearings Officer if there's other things
23 that you need to be looked at for you to reach a consensus
24 of agreement with regard to the Hearings Officer's
25 recommendations or whatever decision you wish to make

1 about it.

2 COMMISSIONER OKUDA: Yeah, maybe -- I apologize
3 for maybe not making myself clear. My question is really:
4 How much deference are we required to give the Hearings
5 Officer's decision? Is this going to be a de novo review,
6 meaning blank slate? And we can just look at everything
7 with a blank slate? Or do we have to give deference; and
8 if so, how much deference? And related to that is what
9 you base your response or answers to be based on, if you
10 have citations that supports your response. And I know
11 this is kind of an unfair question, because people might
12 have a week to prepare for argument if we had been given
13 that. But I'm just trying to find out what you think. Is
14 this a de novo review? Or do we have to -- or are we
15 required to give deference to the Hearings Officer's
16 decisions?

17 MR. KUDO: I have been before various
18 administrative bodies that considered Hearings Officers,
19 both Commissioners, non-Commissioners, outsiders and
20 observers, hearings officers. The administrative body has
21 the power and authority generally to appoint someone to
22 become a hearing officer or hearings officers from the
23 body or outside. It is totally up to the board, the
24 administrative body, to decide to what to do with the
25 recommendations that's made by that hearings officer. If

1 you do not wish to consider whatever he or she has
2 submitted, you can start all over, you can come up with
3 your own decision. I don't think there's any kind of
4 limitation.

5 This is the Commission's decision. You
6 appointed the Hearings Officer to facilitate coming to
7 some type of decision because I gather that all of you
8 didn't want to sit through days and hours of hearings and
9 go through thousands of pages of transcripts and records
10 to come to a decision today. So you delegated this
11 responsibility and appointed, by official order of this
12 Commission, a particular individual to serve as your fact
13 finder. And that fact finder has made certain Findings of
14 Facts, Conclusions of Law, and made his recommendations to
15 you. And so it's entirely up to you what to do with
16 Dr. Scheuer's recommendation since he is your appointee.

17 COMMISSIONER OKUDA: Chair, with your
18 permission, if we can ask the other parties to also
19 respond.

20 CHAIRMAN ACZON: Mr. Hopper.

21 MR. HOPPER: Thank you, Mr. Chair. I don't want
22 to step into the shoes of your attorney general in
23 advising you on the standard that you have under your own
24 rules. But my understanding is consistent with
25 Mr. Kudo's. When you use the term "standard of review," I

1 am familiar with HRS 91-14. There is a standard of review
2 for Circuit Court's administrative rules for contested
3 cases in determining -- in reviewing factual findings and
4 reviewing conclusions of law. And, generally, factual
5 findings are given deference to the Commission and
6 conclusions of law are reviewable by the courts. I don't
7 think that that standard of review is applicable to
8 whether or not you want to adopt or amend the Hearing
9 Officer's Proposed Decision and Order. I think that that
10 standard of review will pop in if there is an appeal and
11 the Circuit Court is then looking at the decision that you
12 have adopted fully.

13 But I think -- again, this could be for your
14 attorney general to advise you on -- if the decision --
15 you can review the Decision and Order, the modifications,
16 you can modify them. But in the end, if this is appealed,
17 the courts will be reviewing whether or not the Order is
18 supported by the factual findings on the record and, of
19 course, supported by the law. So I think, in your
20 consideration, you've got a particular standard of review
21 in HRS 91 for any type of judicial reviews. In the court
22 rules, then it would limit your ability to alter the
23 Decision and Order. So that was my understanding. This
24 is something that is under your rules, and I think that
25 you could ask your Attorney General for advise if there is

1 additional clarification you need.

2 CHAIRMAN ACZON: Thank you, Mr. Hopper.

3 Mr. Yee.

4 MR. YEE: In a sense, it's a de novo review.

5 And I think that is consistent with how other agencies do
6 it. This is not an appeal per se. This is -- really, the
7 final decision is with the Commission. It's simply the
8 Hearings Officer that has made the recommendation to you.
9 The only limitation may be in an attempt to establish the
10 factual records because the factual record is set before
11 the Hearings Officer. But other than that, I think it
12 is -- it's a blank slate; it's a de novo review.

13 CHAIRMAN ACZON: Mr. Kopper?

14 MR. KOPPER: Thanks. Two part answer. First, I
15 think, as a practical matter, maybe -- no -- perhaps as to
16 factual findings, because he was at the contested case
17 hearing, maybe some practical deference. But I'm looking
18 at 15-15-85.1, the LUC's rules, and I don't see anything
19 that would indicate deference.

20 CHAIRMAN ACZON: Anybody else? Commissioners?

21 Commissioner Estes.

22 COMMISSIONER ESTES: This is a question for
23 Mr. Kopper, when you were talking about the golf course
24 water, you used the phrase "similar quality of water," and
25 I think you were comparing it to drinking water. What do

1 you mean by "similar" as opposed to "same"?

2 MR. KOPPER: What I mean by "similar" is that,
3 first, if you look at EPA contaminants, they're looking
4 for drinking water -- and this is on the record -- the
5 water provides when we look at the Department of Health
6 and EPA contaminants, that's what they look at and perhaps
7 some secondary contaminants. You'll see sodium sometimes.

8 And in Wells 1 and 9, they were tested, and they
9 passed that test, the same test that they're given like
10 the potable system here. And then I was also referring to
11 chloride levels. So we have evidence that now the
12 chloride levels, and this is around -- I would say around
13 280 for Well 1 and 300 for Well 9. Currently, on Oahu,
14 there are wells producing water for drinking with chloride
15 levels above 250, and there's evidence -- but it sounds
16 like in the range of 300. We know for a fact that County
17 of Maui produced 300 milligrams per liter chlorides to
18 their users I believe on the Lahaina side, that general
19 side of the island without blending. So straight 300
20 milligrams per liter for drinking and probably 350-400 to
21 blend, to bring the taste down if there was a taste issue.
22 And put something else on the record, blending is
23 something that Lana'i Water Company does with all their
24 water. They also -- it blends together.

25 COMMISSIONER ESTES: Thank you.

1 CHAIRMAN ACZON: Commissioner Okuda.

2 COMMISSIONER OKUDA: Mr. Chair, if I can also
3 ask, with your permission, Chair, all the parties, if the
4 parties can assist us in telling us whether or not this
5 is the scope of our review on remand and cite from the
6 case, which is an unpublished decision, which is the
7 Lana'ians for Sensible Growth case versus Lana'i Resort,
8 LLC, that's cited as 137 Hawaii 298, at page 9, page 9 of
9 the unpublished decision, where it says -- where the ICA
10 said, "The purpose of the remand was not, as Lana'i
11 Resorts purports, quote, to force the LUC to clarify what
12 was intended by Condition 9 (sic), and then, assuming the
13 condition was sufficiently clear, to determine whether the
14 Lana'i Resorts had violated it, close quote. Instead, the
15 LUC was given a clear task by the Supreme Court to clarify
16 its findings and conclusions regarding whether Lana'i
17 Resorts violated the prohibition against the use of
18 potable water in Condition No. 10 or to conduct further
19 hearings if the LUC found additional hearings necessary."
20 And then there's a citation to Lana'i Company 105 Hawaii
21 at 316, 97 Pacific 2d at 392.

22 Chair, if I can request each of the parties to
23 be asked whether or not that statement accurately sets
24 forth the scope of our review on remand; or if it doesn't,
25 if you can tell us what is the scope of our review on

1 remand.

2 MR. KUDO: Then, I think, Commissioner Okuda,
3 you have to read the ICA remand language in conjunction
4 with the 2004 Supreme Court remand as well because the
5 2004 Supreme Court remand was more specific regarding the
6 use of potable water, etc., etc. What is mirrored is that
7 the Court said, "If you folks feel that a hearing is
8 necessary to get more facts to support a decision as to
9 whether we were in violation of Condition 10, you should
10 go ahead and have that hearing," which you did. You did
11 in 2004, followed with the 2004 decision. And then you
12 did it again with this proceeding that ended in November
13 of last year. And based on that, gathered more
14 information to make more findings of fact to support
15 whatever decision you reach. And you also appointed a
16 Hearings Officer to be a fact finder for you. He has made
17 his Findings of Fact and Conclusions of Law and also the
18 recommendation which is before you to consider. Is that
19 kind of what --

20 COMMISSIONER OKUDA: Yes. Thank you for your
21 information.

22 Chair, could the other parties --

23 CHAIRMAN ACZON: Mr. Hopper.

24 MR. HOPPER: Just to add to that, there were
25 several minute orders issued by the Hearings Officer that

1 I think went into a little more specificity over what the
2 Hearing Officer wanted to hear from the parties. I do
3 think that that was consistent with the Supreme Court's
4 remand. But there's also that for you in the record,
5 that's essentially what the Hearing Officer wanted to hear
6 from the parties, a little more specificity on the issues
7 that the Hearing Officer wanted to hear. So I think that
8 would inform the Commissioners a bit more as well, to look
9 at those minute orders for a bit more specificity as far
10 as what the Hearing Officer wanted. And I think that's
11 probably a good kind of road map for how the hearings were
12 conducted.

13 CHAIRMAN ACZON: Mr. Yee.

14 MR. YEE: You know, I read that exact same
15 paragraph a number of times to try to figure out what was
16 intended or what was meant by the ICA. And here's what my
17 conclusion was. The LUC was not being asked to say what
18 was in the minds of people, so what was intended but not
19 expressed. It was asked to decide what does the
20 Commission mean. You are expected to answer, I think,
21 what it says. And to some extent, that involves an
22 interpretation because obviously the parties are not
23 agreeing to what the terms mean. But you're not being
24 asked to clarify what was intended. You're being asked to
25 say what -- to tell the Court what Condition 10 requires

1 and whether or not LSG did or did not meet those
2 requirements. So you are to then clarify your -- you
3 know, the basis by which you decide whether Petitioner has
4 or has not complied with Condition 10.

5 And I will take issue, some of the ICA's
6 characterization that the Hawaii Supreme Court decision is
7 clear. It was not clear to me anyway. Maybe it's just
8 that I'm not smart enough to understand it. It was not
9 clear to me exactly what the Supreme Court sent back to
10 the LUC to do. But the Hearings Officer then came up with
11 the minute order in an attempt to make more clear and more
12 concrete what the scope of the remand was. And the
13 parties, I think, had no objection to the final ultimate
14 decision as to the scope of the hearing and what the
15 parties may -- or would be allowed to argue.

16 CHAIRMAN ACZON: Mr. Kopper.

17 MR. KOPPER: Thank you. I believe it's
18 generally correct, Commissioner Okuda, I would say,
19 subject to the following short paragraph about the terms
20 that LUC decided and its discretion to hold the hearings,
21 but then the hearings became subject to Chapter 91, so it
22 sort of pigeonholed the remand into going through full,
23 complete hearings and instead of just issuing a new
24 order absent hearings. And, also -- and I believe this
25 was briefed with the Hearings Officer -- my understanding

1 is that the scope of the hearing does not need to be
2 communicated like -- and public notice, but only so long
3 as the parties had adequate notice, which I believe was
4 made when the Order No. 6 also permits in looking to the
5 scope.

6 CHAIRMAN ACZON: Commissioner Chang.

7 COMMISSIONER CHANG: Just to follow up as far as
8 Minute Order No. 6. I'd like to know whether there was
9 any objections from any of the parties with respect to
10 Minute Order No. 6. Did all the parties agree to Minute
11 Order No. 6, which was that Mr. Kopper described the
12 Hearing Officer's identification of the scope of the
13 hearing. This is Minute Order No. 6, and it's actually in
14 the Hearings Officer's Findings of Fact. I just wanted to
15 make sure.

16 MR. KOPPER: If I may, since I -- I don't want
17 to speak out of turn, but I think I have it. And my
18 recollection is there was a dispute as to scope at some
19 point or at least the wording of the scope or issues, you
20 know, how that would be worded, and there were briefings
21 done I think mainly between LSG and the Resort. I think
22 the other parties might have filed something as well.
23 There was briefing in it. My recollection is that, as a
24 result of that briefing, was Minute Order 6. There was
25 initially a Minute Order 2, which had some scope language

1 and then another intervening one. So we had briefings as
2 far as those issues.

3 MR. KUDO: I'd like to just say there were at
4 least two or three, as Mr. Kopper said, refinements of the
5 original scope sent out. I believe there were two or
6 three. I forget what number it was. And there was a lot
7 of discussion about this issue. I think all of the
8 parties here -- and they can jump in if I'm wrong -- were
9 really trying to make this Decision and Order as close as
10 possible to being within the scope of the remand because
11 it seemed like the Court was lecturing the Commission
12 about going outside of that scope, and we were very
13 cognizant of that, as well as the issues that were
14 relevant and issues that we shouldn't be touching or doing
15 things, like amending the Commission's wording, that kind
16 of thing. So I think the parties all had the same
17 objective, which was to make this as flawless as possible,
18 and to be very, very -- give a lot of attention to the
19 hearings so that we wouldn't be back again, because the
20 Court said: "We didn't ask you to do that. We asked you
21 to do this."

22 But, you know, in deference to Brian Yee, I
23 think there is, I think, some degree of vagary, you know,
24 with the ICA's instructions. But, you know, we've put
25 together the 2004 remand order as well as the ICA -- we

1 tried to stay within what we felt was the boundaries of
2 the remand and stayed with the issues that were relevant
3 to this particular case and the Decision and Order.

4 MR. ROWE: I would just like to add, there was
5 some mention of the minute orders that were relevant to
6 the issues on remand. Those were number 2, 4 and 6. I
7 think especially Minute Order No. 4 was the controversial
8 one that a lot of briefing was done on. It was in
9 relation to if the Hearings Officer recommended the key
10 issues that the parties thought (inaudible). So just for
11 your information, those were the orders that dealt with
12 the scope.

13 CHAIRMAN ACZON: Mr. Yee.

14 MR. YEE: I believe everyone is correct in their
15 representations.

16 COMMISSIONER CHANG: I request for permission,
17 if I may. To the extent that there's some agreement by
18 the parties as to the scope of the hearing, it really
19 helps at least me, as a Commissioner, review the proposed
20 findings and the process of that review. So it's helped
21 us to understand.

22 CHAIRMAN ACZON: Anybody else? Commissioners?
23 Commissioner Okuda.

24 COMMISSIONER OKUDA: Chair, thank you.

25 Mr. Kopper, you had made some statements in your

1 presentation about wells -- or materials or records
2 showing that Wells 1 and 9, the water from those wells
3 were potable. Can you give a specific citation to where
4 in the record, the lines, specific citations, either
5 transcripts of witness, page, line, or exhibits, which you
6 contend support the statement you made regarding
7 potability, regarding that. Then I will ask the Chair if
8 the other parties can be asked for their comment as far as
9 what you tell us.

10 MR. KOPPER: Sure, if you indulge me while I
11 pull up those citations. But I do have them for you.
12 Just a few seconds.

13 So, first, there was Exhibit I-21, and these are
14 minutes of the October 18, 2006 Lana'i Planning Commission
15 meeting. There was also corroborating testimony from
16 witness Sally Kaye and the rough location of her testimony
17 is at transcript Volume 2, page -- approximately page 324
18 to 350. And it was pointed out to me that some of this
19 may have also been in the Hearing Officer's Proposed
20 Order. But I think our citation might be a little more
21 accurate.

22 COMMISSIONER OKUDA: Thank you.

23 MR. YEE: If I can just direct you, perhaps what
24 you're referring to was -- the Hearings Officer made --
25 and there's dispute, I think, about whether these are

1 appropriate in your final decision. But in the Hearings
2 Officer Proposed Findings of Fact 85 through 91, there's
3 discussion. My recollection, it has to do with whether or
4 not some minutes -- something was said at the Planning
5 Commission meeting. I think there was testimony about
6 some testimony that occurred at the time.

7 CHAIRMAN ACZON: Any comments?

8 MR. KUDO: I think there was a lot of testimony
9 evidence submitted with regard to the development and
10 continued operation and quality of the water of Wells 1
11 and 9. And I have some exhibits here, an example of the
12 scientific data that has been going on. Well 1 was
13 studied in, I think, in 1949, and put into service by
14 1950-51. It was part of the brackish water system and has
15 had salinity in excess of 250. And Well 9 is much higher
16 in salinity. That was later on, in the 1990's, to serve
17 as an irrigation source pursuant to representations made
18 by the Castle & Cooke people at the time, that that well
19 would be used for irrigation. And so there was a lot of
20 evidence put in for the record, including the testimony of
21 our hydrogeologist Tom Nance; our water -- person in
22 charge of our water company, John Stubbart; and public
23 reports every 28 days or so of all wells. And they're on
24 our website and they're also sent to the various parties,
25 including to the Commission of Water Resource Management,

1 etc., etc. There's a lot of scientific information out
2 there which we believe proves that the water is indeed
3 brackish, not potable.

4 MR. KOPPER: I'm sorry. If I can follow up on
5 that, in response to our additional citation. This is
6 from the prior record. I believe it was circa 2010
7 record. So I have it marked as Volume XXXIII33, and it is
8 dated June 8, 2006, pages 201 to 202, testimony of Ellen
9 Kraftsow from the County of Maui. That is my additional
10 citation.

11 CHAIRMAN ACZON: Mr. Okuda.

12 COMMISSIONER OKUDA: Chair, if I can ask or the
13 parties can also be asked: Is there anything in the
14 record where an expert or somebody with -- who you would
15 consider having expert knowledge giving a statement using
16 the word "non-potability" with respect to Wells 1 and 9?
17 In other words, where in the record stated that the water
18 coming out of those wells are non-potable. And let me
19 clarify my question. It's not with respect to salinity or
20 chlorides or anything like that, but actually using the
21 words "potability" or "non-potability." If there's
22 anything in the record.

23 CHAIRMAN ACZON: Mr. Kudo.

24 MR. KUDO: Yes, I think there's quite a number
25 of references made by our witnesses, Tom Nance and John

1 Stubbart. Tom Nance is our hydrogeologist and has been
2 working for many years on the development and operation
3 and maintenance of the wells. And also John Stubbart, who
4 heads up the Lana'i Water Company, and is in charge of
5 both brackish water systems and potable water systems --
6 non-potable and potable water systems.

7 I'm just thinking we did have also a neutral
8 witness who wasn't a witness that we had hired, but is
9 hired by the University of Hawaii, Dr. Thomas, who
10 testified on the leakage theory in particular and the
11 volcanic and geological formation of the island and the
12 water quality being potable and non-potable, brackish,
13 etc. That was also an expert witness that we had testify
14 on water quality. There were numerous references to the
15 term "brackish" and "non-potable."

16 The 1996 Order to Show Cause Order that was
17 issued by this Commission in 1996, states, for the record,
18 that Wells 1 and 9 are non-potable brackish water. That's
19 in their decision Finding of Fact 16, if you want to refer
20 this Commission's finding in 1996.

21 CHAIRMAN ACZON: Anybody else? Mr. Yee.

22 MR. YEE: I just want to note, the scope of the
23 remand was the definition of "potable" as used in
24 Condition 10. So if your question is: Did an expert come
25 to testify was the water from Wells 1 and 9 potable, not

1 looking at Condition 10 -- but I believe Mr. Kudo may have
2 some witnesses. But our Office of Planning's witnesses
3 from the Commission of Water Resource Management and the
4 State Department of Health, both said "We're taking no
5 position on what you, the LUC, meant by 'potable' in
6 Condition 10." So the scope says when you're asking an
7 expert to testify if they can use the word "potable,"
8 you're assuming that expert would have to then express an
9 opinion about what that term meant as used in Condition
10 10. And then the expertise would then have to include
11 some ability to know what Condition 10 means. So the
12 Office of Planning's experts specifically said they were
13 not going to -- "This is not something we can testify
14 about if it's not a term we use. And so we are not
15 testifying about that question."

16 CHAIRMAN ACZON: Mr. Kopper.

17 MR. KOPPER: As I understand that question, I
18 would say "no," because I believe you clarified potability
19 excluding chlorides, if that was your question. So there
20 were comments on the record by the Resort's witnesses that
21 the water may be considered non-potable because of the
22 chloride levels. However -- first I'll take Dr. Don
23 Thomas, whose testimony is cited by Mr. Kudo. He actually
24 testified that to him -- he said, to him, chlorides are
25 not the constituent to be concerned with. And he said

1 that he instead relied on sodium levels. And he waited
2 around and he came back in and said that sodium has real
3 health effects. But he admitted in his testimony, and
4 that is at Volume 2 of the transcripts -- Volume 2 of the
5 transcripts, 308, I think lines 18 to 20, that there are
6 no health-based concerns or regulations in regards to
7 sodium.

8 Now, Mr. Nance testified as to the water quality
9 in Wells 1 and 9 based on turbidity and chlorides. I
10 believe they're secondary standards. I believe he
11 admitted that he did not test the wells for potability,
12 and that is at three transcripts -- so the current
13 volumes, Volume 3, 442, line 10, through page 443, line 4.

14 CHAIRMAN ACZON: Vice Chair Wong.

15 VICE CHAIR WONG: Chair, I want to move into
16 executive session to consult with the Board's attorney on
17 questions and issues pertaining to the Board's powers,
18 duties, privileges, immunities and liabilities on this
19 issue.

20 CHAIRMAN ACZON: Second?

21 COMMISSIONER CABRAL: Second.

22 CHAIRMAN ACZON: Moved by Vice Chair Wong and
23 seconded by Commissioner Cabral to go into executive
24 session. Those in favor say "aye."

25 (The Commissioners responded affirmatively.)

1 CHAIRMAN ACZON: Opposed?

2 (No response.)

3 (Recess taken from 2:56 p.m. to 3:22 p.m.)

4 CHAIRMAN ACZON: We're back on the record.

5 Commissioners, additional questions for the
6 parties? No. Okay.

7 I just want to take a moment. The Chair wants
8 to thank all the parties for your efforts in efficiently
9 presenting your cases.

10 So the Commission will now conduct formal
11 deliberations concerning whether to adopt the proposed
12 Decision and the Commission's Final Decision, either as is
13 or with amendments, reject the proposed Decision and Order
14 or remand it to the Hearings Officer for further
15 proceedings. I would note for the parties and the public
16 that, during the Commission's deliberation, I will not
17 entertain additional input from the parties or the public.

18 Commissioners, let me confirm that each of you
19 has reviewed the records and read the transcripts for this
20 matter and are prepared to deliberate. After I call your
21 name, would you please signify with either an "aye" or a
22 "nay" that you are prepared to deliberate on this matter.

23 Commissioner Cabral.

24 COMMISSIONER CABRAL: Aye.

25 CHAIRMAN ACZON: Commissioner Chang.

1 COMMISSIONER CHANG: Aye.

2 CHAIRMAN ACZON: Commissioner Estes.

3 COMMISSIONER ESTES: Aye.

4 CHAIRMAN ACZON: Commissioner Hiranaga. Oops.

5 Okay.

6 Commissioner Okuda.

7 COMMISSIONER OKUDA: Yes.

8 CHAIRMAN ACZON: Commissioner Wong.

9 VICE CHAIR WONG: Aye.

10 CHAIRMAN ACZON: The Chair is also prepared to
11 deliberate on this matter.

12 It's kind of getting late, so we're going to
13 recess for the day, and we'll continue proceeding tomorrow
14 at 9:30. Thank you.

15 (Recess taken at 3:24 p.m., and the proceedings
16 resumed on April 27, 2017 at 9:30 a.m.)

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1 C E R T I F I C A T E

2 STATE OF HAWAII)
3) SS:
4 CITY AND COUNTY OF HONOLULU)

5

6 I, CYNTHIA L. MURPHY, a Hawaii Certified
7 Shorthand Reporter, do hereby certify.

8

9 That on the 26th day of April, 2017, at
10 10:00 a.m., the foregoing hearing, Docket No. A89-649, was
11 taken down by me in computerized machine shorthand and was
12 thereafter reduced to print under my supervision;

13 That the foregoing represents, to the best of my
14 ability, a true and correct transcript of the proceedings
15 had in the foregoing matter.

16 I further certify that I am not an attorney for
17 any of the parties hereto, nor in any way concerned with
18 the cause.

19 Dated this 22nd day of May, 2017, in Honolulu,
20 Hawaii.

21

22

23 _____
24 Cynthia L. Murphy, RPR, CSR No. 167
25 Certified Shorthand Reporter
State of Hawaii

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