

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.) )  
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CONTESTED CASE HEARING

Transcript of Proceedings

VOLUME VII

Held on Thursday, April 27, 2017, before the Land Use  
 Commission, at the Lana'i Community Center, Eighth Street  
 and Lana'i Avenue, Lana'i City, Hawaii, commencing  
 at 9:30 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 a continuation of Docket No. A89-649 Lana'i Resort Partners to hear and consider exceptions and argument from the parties on Hearings Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order on 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 Facts, Conclusions of Law, and Decision and Order filed April 16, 1991, Tax Map Key No. 4-9-002, portion of Lot 49, formerly Tax Map Key 4-9-002, portion of Lot 1.

Yesterday, we concluded the public testimony in this matter. Also, all parties have also concluded their presentations, and we are now in formal deliberations. I would note for the parties and the public that, during the Commission's deliberations, I will not entertain additional input from the parties or the public.

Commissioners also confirmed that they have reviewed the record and read the transcripts for this matter and are prepared to deliberate.

The goal today is to determine, by way of motion, the Commission's decision on whether to adopt the

1 Hearings Officer's Recommended Findings of Fact,  
2 Conclusions of Law, and Decision and Order in this matter  
3 as the Commission's Final Decision or whether to amend it  
4 or reject it or remand it for further proceedings. If a  
5 decision is reached today and based upon the Commission's  
6 guidance, staff will be directed to draft an appropriate  
7 Final Decision and Order reflecting the Commission's  
8 decision.

9 Commissioners, what is your pleasure in this  
10 matter?

11 Commissioner Cabral?

12 COMMISSIONER CABRAL: I would like -- for the  
13 purposes of discussion, I would like to go ahead and make  
14 a motion to adopt the Hearing Officer's Recommendations,  
15 Findings of Fact, Conclusions of Law, and Decision and  
16 Order.

17 COMMISSIONER ESTES: Second.

18 CHAIRMAN ACZON: A motion has been made by  
19 Commissioner Cabral and seconded by Commissioner Estes.

20 Any discussion? Don't be shy.

21 Vice Chair Wong.

22 VICE CHAIR WONG: Chair, you know, we did have  
23 some filings from Petitioner and other parties regarding  
24 exceptions to the Findings of Fact. And I believe we  
25 should start and discuss about these exceptions and see

1 where we go from there.

2 CHAIRMAN ACZON: Commissioners, let's -- any  
3 objections to that?

4 VICE CHAIR WONG: Well --

5 COMMISSIONER CHANG: Chair?

6 CHAIRMAN ACZON: Yes.

7 COMMISSIONER CHANG: First, we have to act on  
8 the motion, and then we're going to -- were we just going  
9 to deliberate now?

10 CHAIRMAN ACZON: We can just deliberate.

11 COMMISSIONER CHANG: All right.

12 CHAIRMAN ACZON: So it's open, open discussion.  
13 Anybody else?

14 VICE CHAIR WONG: Chair.

15 CHAIRMAN ACZON: Vice Chair Wong.

16 VICE CHAIR WONG: So if you don't mind, we do  
17 have, going from Petitioner, going down, we have, let's  
18 say, Petitioner's exceptions to the Hearings Officer's  
19 recommended FOF and, you know, the rest. So I was  
20 wondering if you wanted to go through it step by step or  
21 take portions of it and -- or if not, throw it out. It's  
22 up to the Commission itself, but, you know, there is the  
23 Petitioner's exceptions here. And I was wondering if you  
24 wanted to stipulate certain Findings of Fact of our  
25 Hearings Officer and just take the ones that every -- we

1 have the exceptions for and then go from there. Or how do  
2 you want to do it?

3 CHAIRMAN ACZON: What is the pleasure -- I don't  
4 mind that. We can start going through some of the  
5 exceptions.

6 VICE CHAIR WONG: Well, if there's no exceptions  
7 to a certain -- do you want to start just from -- sorry.

8 CHAIRMAN ACZON: It's quite a bit.

9 VICE CHAIR WONG: But do you want to start from  
10 Findings of Facts?

11 CHAIRMAN ACZON: From the Petitioner?

12 VICE CHAIR WONG: Finding of Fact 69 in the  
13 Petition -- the Petitioner's exceptions, so that's  
14 starting at page four. I think we all have a copy of  
15 that. That was on our desks.

16 So for those of the public that's not here, if  
17 you don't mind me reading it, just for everyone's  
18 information.

19 Finding of Fact 69 is the objection to  
20 incomplete Findings of Facts. This is what the  
21 Petitioners said. "Although the concept of the Findings  
22 of Fact 69 is not objectionable, additional findings are  
23 needed to complete the record. Petitioner suggests the  
24 following Findings of Fact be included in the Commission's  
25 Decision and Order." So that Finding of Fact with regard

1 to the water with chloride concentrations above 250 parts  
2 per million may also be considered as potable.

3 Mr. Hearings Officer, do you want to start with  
4 that Finding of Fact?

5 CHAIRMAN ACZON: Commissioners, for all the  
6 discussions, I just want to make sure that everybody  
7 agreed on the Petitioner's exceptions.

8 Are there any objections on these? Or do you  
9 guys -- do you need more discussion on these?

10 Commissioner Okuda.

11 COMMISSIONER OKUDA: Chair, if I can raise a  
12 preliminary matter. I'm not sure if we have a complete  
13 record at this point in time, and I don't want my comments  
14 to indicate that I prejudged the result one way or the  
15 other. But I think, just out of not only abundance of  
16 caution, but also based on the mandates of the Supreme  
17 Court and the Court of Appeals, I believe we still need  
18 some additional information. And whether the rest of the  
19 Commissioners agree or not, of course, everyone has their  
20 own view of it, and, you know, I'm not saying I'm totally  
21 right. But if I can explain my position on this. And I'm  
22 going to follow it up with a motion to remand to the  
23 Hearings Officer for further proceedings to gain  
24 additional information. And if I can just summarize, it  
25 goes to the issue of whether or not the water out of these

1 wells is drinkable or not and whether or not the water is  
2 brackish or not. Okay.

3 And the basis for what I'm saying is, looking at  
4 what the Hawaii Supreme Court has remanded this case to us  
5 for, in the Lana'i Company, Inc. versus Land Use  
6 Commission, that's 105 Hawaii 296 at 39C, the parallel  
7 citation is 97 Pacific 3rd 372 at 395, the Supreme Court  
8 said that "The case is remanded to the Court with  
9 instructions that the Court remand this case to the LUC  
10 for clarification of its finding for further of -- excuse  
11 me -- to the LUC for clarification of its findings for  
12 further hearings, if necessary, as to whether LCI used  
13 potable water from the high level aquifer in violation of  
14 Condition No. 10." And the Lana'ians for Sensible Growth  
15 versus Lana'i Resorts, LLC basically says the same thing  
16 at the unpublished decision at No. 9.

17 Now, the reason why I'm asking for additional  
18 evidence on this is the Supreme Court, at footnote 8, gave  
19 the definition of "potable water" as this: "The term for,  
20 quote, potable, close quote, water is ordinarily defined  
21 as, quote, suitable for drinking." And at footnote 10,  
22 the Supreme Court said, "Quote, brackish, close quotes, is  
23 defined as, quote, somewhat salty, distasteful, close  
24 quote." Now, these are basically factual determinations  
25 that need to be made. I believe the record shows that the



1 water coming out of these wells are not something that, if  
2 any of us were to drink, we're going to be suffering a  
3 health hazard from a contaminant or something like that.  
4 It's really a question, when you evaluate the water, does  
5 it fall within these definitions as set forth by the  
6 Supreme Court, or does it not fall within the definitions  
7 as set forth by the Supreme Court. And at this point in  
8 time, I don't believe there's sufficient evidence in the  
9 record, frankly, about whether or not the water is  
10 suitable for drinking or whether it's distasteful or not.

11 Frankly, if the water is poured into a glass for  
12 us, we as, the fact finders, can drink the water and  
13 consider that fact in making this determination. Now, I'm  
14 not saying that's the fact just in isolation because I  
15 know we all looked at the transcript, we've heard the  
16 testimony of the people who live here, we've heard the  
17 testimony, read the testimony of people on both sides of  
18 this issue. I think we all agree that the people who have  
19 testified have real, genuine concerns on both sides of the  
20 issue, of how this issue should be decided. And everyone  
21 should be commended for coming and making their position  
22 known. But the reason why I'd like to have a complete  
23 record is so that we can put this issue to rest once and  
24 for all, and not come back later on on something based on  
25 an incomplete record. So I'll make a motion to --

1           CHAIRMAN ACZON: Before you do that, before you  
2 make a motion, I need to ask Commissioner Cabral if she's  
3 willing to withdraw her motion.

4           COMMISSIONER CABRAL: I'd like to not withdraw  
5 my motion. Instead, I'd like to reach that statement of  
6 having a solid conclusion, see if we can build on my  
7 motion or perhaps -- and I'm not sure of the protocol. So  
8 instead, procedurally, I have some questions. So right  
9 now, I think I'd like to move to go into executive session  
10 to understand the procedure involved here because I have  
11 questions for the Board's attorney and questions  
12 pertaining to the Boards powers, duties, privileges,  
13 immunities and liabilities.

14          CHAIRMAN ACZON: Commissioner Okuda, is that  
15 something that you want to make an amendment instead to  
16 the motion?

17          COMMISSIONER OKUDA: Yes. And I should have  
18 clarified that. I agree with Commissioner Cabral, that  
19 the motion shouldn't be withdrawn so that we stay in  
20 discussions. But I'll make a motion to have this case  
21 remanded for either further proceedings before --

22          CHAIRMAN ACZON: Yes, Commissioner Okuda, we  
23 cannot make another motion until we handle the --

24          VICE CHAIR WONG: Chair, second the executive  
25 session. I second for executive session.

1 CHAIRMAN ACZON: It's moved by Commissioner  
2 Cabral and it's seconded by Commissioner Wong to go into  
3 executive session. Those in favor say "aye."

4 (The Commissioners responded affirmatively.)

5 CHAIRMAN ACZON: Opposed?

6 (No response.)

7 (Recess taken from 9:44 a.m. to 9:49 a.m.)

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

9 Commissioners, resume the discussions.

10 Commissioner Chang.

11 COMMISSIONER CHANG: I think Mr. Okuda -- I  
12 think his question is a really important question. I,  
13 too, struggle with what is the issue before the  
14 Commission. We need to look at the decisions that were  
15 made by the LUC Commission in 1991, specifically, "Is the  
16 Petitioner in violation of Condition 10?" And it's really  
17 important, what was the scope of the hearing and looking  
18 at Minute Order No. 6. I realize that perhaps not all the  
19 parties agree, but it ultimately disposed of in the  
20 hearings.

21 But I do know Commissioner Okuda's question  
22 about needing additional studies or doing -- reopening,  
23 because I think that's what I'm hearing is reopening to do  
24 a study. I think there was representation yesterday by  
25 LSG that the study was done, but there isn't a

1 comprehensive study done. So perhaps in looking into the  
2 existing record, what the results of that was. But I  
3 think there is a fundamental question as to what is the  
4 issue before us today. Is it -- and as I understand, it  
5 is to determine whether Lana'i Resorts is in violation of  
6 Condition 10. And looking at the Hearings Officer's  
7 proposed findings, recommendations and Decision and Order,  
8 which addresses specifically those issues. And additional  
9 hearings and additional witnesses, my understanding is, on  
10 remand, the last time it was remanded was because, in  
11 particular, LSG was not given an opportunity to present  
12 evidence and the hearing -- and the Commission didn't  
13 appoint a hearing officer. So we corrected that by  
14 appointing a hearing officer, by taking evidence,  
15 permitting all the parties to present a full and complete  
16 record.

17           So, you know, I'd like to make sure that we, as  
18 Commissioners, are kind of all on the same page as to what  
19 is -- you know: What are we looking at today? What is  
20 the basis of our -- of our reviewable record and the issue  
21 before us? Because I'm thinking chairman Okuda's question  
22 makes me anxious. But I think it's a valid one. To me,  
23 it's fine -- for the record, if a study was done, what  
24 were the results of that. So I would like to have a clear  
25 understanding from the rest of the Commission: What are

1 their understandings of our role in this proceeding and  
2 what is it that we're looking at.

3 CHAIRMAN ACZON: Thank you, Commissioner Chang.  
4 Any Commissioners want to chime in on that?  
5 Vice Chair Wong.

6 VICE CHAIR WONG: So, you know, everyone has put  
7 in a lot of time on this issue, some more than others,  
8 because it was 20 years ago. But, you know, there is a  
9 lot of facts, and there are exceptions, the Petitioner and  
10 others filed exceptions. So I just was wondering, for the  
11 Commission itself, is that enough information? As  
12 Commissioner Okuda said, it may not be for him and maybe  
13 also Commissioner Chang. So are we -- does the other  
14 Commissioners have enough information to work on? Or  
15 where are we headed? So that's what I want to know.  
16 Because I don't want to waste everyone's time here by  
17 saying "We're going to drag this stuff on till whenever."  
18 Or we're going to say, "This is what we're going to do  
19 now," and then go back to work and work -- you know, go  
20 back to work. Or are we going to stay here and let you  
21 sit on these uncomfortable chairs? I mean, I just want to  
22 know: What are we going to do? Are we going through the  
23 findings of fact exceptions? Or what are we doing now?  
24 That's my question.

25 CHAIRMAN ACZON: Anybody else?

1 Commissioner Okuda.

2 COMMISSIONER OKUDA: Chair, if I may maybe  
3 clarify what I was looking for. My request as far as  
4 complete record was basically simply this: I think it's  
5 relevant to the proceeding if somebody just pours a glass  
6 of water for each of us and we drink the water and  
7 consider that as part of the evidence in the  
8 deliberations. That's simply it. And I leave that to the  
9 other Commissioners to determine whether they think it's  
10 necessary, given this record, or not.

11 CHAIRMAN ACZON: Commissioners?

12 Commissioner Chang.

13 COMMISSIONER CHANG: I, too, am resisting the  
14 temptation. Is it -- is that what we need to do, is just  
15 go up, you know, take from Wells 1 and 9 a glass, and if  
16 we can drink it, it's potable? But I don't think so. I  
17 mean, I think it is looking at: What did the LUC intend  
18 when they docketed this order in 1991? What does the  
19 condition mean? Whether Lana'i Resorts is in compliance  
20 with that condition. So I don't know if it's as easy as  
21 just "Let's go get the water. Let's go get a glass and  
22 drink it." But I also -- I do also want to do this right.  
23 I don't think anybody wants to be back here again, so, you  
24 know, let's make sure that we --

25 CHAIRMAN ACZON: Thank you.

1 Commissioner Estes.

2 COMMISSIONER ESTES: I oftentimes agree with  
3 Commissioner Okuda. But, to me, drinking that water, it's  
4 not going to prove anything. What do I know? I mean, I  
5 can say I drank it. What does that prove?

6 CHAIRMAN ACZON: Thank you.

7 Commissioners, remember, we need to act on these  
8 motions before we can move to another matter.

9 Anybody else?

10 Vice Chair Wong?

11 VICE CHAIR WONG: No, no. Go ahead.

12 CHAIRMAN ACZON: Commissioner Chang.

13 COMMISSIONER CHANG: I guess I'm just acting on  
14 the motion -- acting on Commissioner Cabral's motion or  
15 what Commissioner Okuda --

16 CHAIRMAN ACZON: There's only one motion on the  
17 floor. We need to act on this motion before we can --

18 COMMISSIONER CHANG: But I thought that that's  
19 part of what the deliberation is.

20 CHAIRMAN ACZON: Yes.

21 COMMISSIONER CHANG: So, I guess the question  
22 is, you know, are we going to be looking at -- what's the  
23 best way to move forward on this? Looking at the  
24 exceptions that were proposed by the various parties? And  
25 then come to providing the Hearing Officer with some

1 guidance and formalizing that in a motion? I guess I'm  
2 just wondering if we need more discussion on the  
3 exceptions before we actually follow to approve the  
4 motion.

5 CHAIRMAN ACZON: It's up to the Commissioners if  
6 they want to go through with that. We're still in  
7 discussion, so everything is on the table right now. So  
8 unless there's another motion coming, Commissioner Cabral  
9 has to decide if she wants to withdraw her motion or not  
10 or if we need to act on her motion.

11 Commissioner Estes.

12 COMMISSIONER ESTES: Okay. There's a motion on  
13 the floor. If we choose, we can amend it; is that not  
14 correct?

15 CHAIRMAN ACZON: That's correct.

16 COMMISSIONER ESTES: We can't put another motion  
17 on the floor without dealing with this motion?

18 CHAIRMAN ACZON: That's correct. We can choose  
19 to amend the motion or vote on the motion or continue  
20 discussion.

21 Commissioner Chang.

22 COMMISSIONER CHANG: As I understand  
23 Commissioner Cabral's motion, it is to adopt the Hearing  
24 Officer's Proposed Findings of Fact, Conclusions of Law,  
25 and recommended Order as is, that is --



1 CHAIRMAN ACZON: That's correct.

2 COMMISSIONER CHANG: -- Commissioner Cabral's  
3 motion?

4 CHAIRMAN ACZON: That's correct. So  
5 Commissioners can either vote on it or amend it or  
6 continue discussion, like we're having now.

7 COMMISSIONER CABRAL: I am open to amendments to  
8 that to make it more clarified to consider the exceptions  
9 that might be -- make an improvement or a better  
10 understanding of that. I'm definitely open to good  
11 amendments.

12 CHAIRMAN ACZON: Thank you.

13 Commissioner Estes, you seconded the motion to  
14 Commissioner Cabral, so you need to --

15 COMMISSIONER ESTES: You withdraw?

16 COMMISSIONER CABRAL: No, I'm open to  
17 amendments.

18 CHAIRMAN ACZON: She's open to amendments, so  
19 Commissioner Estes, are you open to amendments?

20 COMMISSIONER ESTES: Sure.

21 CHAIRMAN ACZON: All right. Okay.

22 Vice Chair Wong.

23 VICE CHAIR WONG: So we have the -- again, we  
24 have the exceptions from all parties involved. And I  
25 started to work on Petitioner's exceptions to the Hearings

1 Officer's Findings of Facts, Conclusions of Law, and  
2 Decision and Order. So I wanted to know the Commission's  
3 pleasure, if they want to review everyone's -- every  
4 party's exceptions one at a time, so Petitioner's  
5 exceptions, each exception, then, you know, County,  
6 State's, then LSG's, and review each one. Or take  
7 portions of, let's say, Petitioner's, say we'll take it as  
8 is but talk about only those exceptions that we're not  
9 comfortable with or decline. How does the Commission want  
10 to do that? Or do we want to just do something else?

11 CHAIRMAN ACZON: Maybe if we take the suggestion  
12 of Vice Chair Wong, so if you would like to amend the  
13 motion to include the Petitioner's exceptions, then we can  
14 work on that. If that doesn't work, we can do -- work on  
15 the LSG's exceptions. So it's up to the Commission. We  
16 can go talk about the Petitioner's exceptions first. Take  
17 out what are approved and take out what is not approved.

18 Commissioner Chang.

19 COMMISSIONER CHANG: My understanding reading --  
20 and I'm hoping I read all the material -- but there's  
21 primarily the Petitioner's exceptions, Petitioner's  
22 proposed amendments, the County and OP --

23 CHAIRMAN ACZON: OP has --

24 COMMISSIONER CHANG: OP joined in with a few  
25 changes, and LSG has come in with some primary exceptions

1 to the Petitioner's.

2 So, Commissioner Wong, I appreciate you going  
3 through sort of in chronological order. But it seems that  
4 the Petitioner has come in with their exceptions. And  
5 then we have primarily LSG who had some responses to those  
6 exceptions. And it might be appropriate or prudent if we  
7 took those Petitioner's exceptions and, in particular,  
8 those areas where LSG had responses to.

9 CHAIRMAN ACZON: Are you making an amendment to  
10 the motion?

11 COMMISSIONER CHANG: Yes, I would amend  
12 Commissioner Cabral's motion to adopt -- I think this is a  
13 little awkward. My understanding is the motion is really  
14 just to permit additional discussion, so that we are  
15 making a motion to adopt -- to amend Commissioner Cabral's  
16 motion, which was to adopt the Hearing Officer's proposal  
17 in total.

18 CHAIRMAN ACZON: Yes.

19 COMMISSIONER CHANG: But rather to amend it with  
20 these exceptions and reviewing it in light of LSG's  
21 responses.

22 CHAIRMAN ACZON: That's correct. You can state  
23 the amendment.

24 COMMISSIONER CHANG: So the amendment is really  
25 for the purposes to continue on with further

1 deliberations.

2 CHAIRMAN ACZON: You can say that, yes.

3 COMMISSIONER CHANG: I guess this is -- we are  
4 kind of -- obviously, we want to have more discussion on  
5 this.

6 CHAIRMAN ACZON: Yes. So would you like to  
7 offer an amendment, so we can have a second, and then  
8 proceed?

9 COMMISSIONER CABRAL: That's acceptable to me  
10 if, procedurally, that is the correct movement.

11 COMMISSIONER CHANG: If -- so long as it permits  
12 us to continue the discussion. So I guess we will  
13 continue to amend, and as we make specific recommendations  
14 to the Hearing Officer, make it -- ultimately, we are  
15 going to make changes to the Hearing Officer's proposal.  
16 My preference is that we would remand it back to the  
17 Hearing Officer to work with the parties. So are we going  
18 to continue to make amendments as we go through the  
19 exceptions? I guess that's what I'm wondering, what the  
20 procedural question is. Rather than acting upon the  
21 motion at this time.

22 CHAIRMAN ACZON: Well, like I said, we're still  
23 in discussion. We can continue discussion as long as the  
24 Commissioners want to until we voted upon the motion --  
25 Commissioner Cabral's motion or Commissioner Cabral

1 withdraws her motion. So we can continue discussion or we  
2 can make amendments, because Commissioner Cabral has  
3 expressed that she doesn't mind amendments.

4 VICE CHAIR WONG: Chair, can we have a recess  
5 for now, please? Can we just move for a recess?

6 CHAIRMAN ACZON: Recess.

7 (Recess taken from 10:06 a.m. to 10:15 a.m.)

8 CHAIRMAN ACZON: We're back on the record. We  
9 have approved the discussions.

10 Commissioner Chang.

11 COMMISSIONER CHANG: I apologize, Commissioners,  
12 Commission, and everybody else here. I perhaps was not as  
13 articulate as perhaps I should have been. I think we have  
14 a motion, which was to adopt the Hearing Officer's -- it  
15 had been seconded. So now we are in discussion and asked  
16 to look at the exceptions that had been raised by the  
17 Petitioner, as well as the responses by the parties. So  
18 I'd like to continue on with the discussion.

19 And I'm thinking at least the first one that I'd  
20 like to decide is Finding of Fact 69. And this dealt  
21 with -- it reads, "Finding of Fact 69 as proposed by the  
22 Hearing Officer, water with chloride concentrations above  
23 250 ppm may also be considered potable. Testimony by Roy  
24 Hardy, November 10, 2016 at 230, You cannot determine  
25 potability just based on chlorides." And Petitioner

1 Lana'i Resorts has proposed to add some additional facts,  
2 Findings of Facts, proposed. They've been numbered 70 to  
3 71 to 72, in particular adding Tom Nance's testimony and  
4 comments as an expert witness and hydrologist, who also  
5 provided testimony at the hearing. And that is the  
6 Petitioner's proposal. As I read, LSG has come in with  
7 some objections to the proposed additional Findings of  
8 Facts.

9           And I wanted to have some discussion on that.  
10 Because I understand the objections by LSG, one of them is  
11 based upon -- I think it was the County's proposed  
12 Findings of Fact which was directly contradicted by the  
13 Department of Health and the Department of Water Supply  
14 for the Maui County. And I also read the Maui County's  
15 responses to the exception, and as I understand theirs  
16 is -- this is the Maui County's -- their response to  
17 Intervenor LSG's exception. And I'm hoping the specific  
18 responses -- but they do reference -- the County says that  
19 LSG's reference to the County is that came into  
20 operation -- that order came into operation after the  
21 effective date and contains no restrictions on golf  
22 courses operation prior to its effective date. So I'd  
23 like to have some discussions with the Commissioners as to  
24 whether we should add -- whether the additional Findings  
25 of Facts proposed by the Petitioner is necessary for -- as

1 proposed by the Hearing Officer's findings, whether it's  
2 necessary and that it's helpful for the record. So that's  
3 what I'd like to discuss.

4 CHAIRMAN ACZON: Is there any agreement,  
5 Commissioners?

6 Commissioner Cabral.

7 COMMISSIONER CABRAL: I agree that we need to go  
8 ahead and proceed with these exceptions. And based on  
9 what appears to be the factual information provided after  
10 the initial Findings of Facts was submitted by Jonathan,  
11 then I would be willing to adopt an amendment to agree  
12 with this exception to No. 69 of the findings.

13 CHAIRMAN ACZON: We're not making any amendment.  
14 We're just having discussion. So we're just going to go  
15 through all those discussions, and we'll kind of put it  
16 together later.

17 Any other issues? Any other sections you guys  
18 want to talk about?

19 Vice Chair Wong.

20 VICE CHAIR WONG: Commissioner Chang, you know,  
21 we were talking about Petitioner's exceptions to Finding  
22 of Fact 69 --

23 COMMISSIONER CHANG: Yes.

24 VICE CHAIR WONG: -- do you believe it's needed  
25 to add that to this -- or would that add to the Hearings

1 Officer's recommendations, a different effect?

2 COMMISSIONER CHANG: In my view, I think it's  
3 helpful. I mean, I think that an expert witness whose  
4 expertise would validate does add to the ultimate  
5 conclusion. So, in my mind, it is important to have a  
6 good set of facts to support the ultimate conclusion.

7 And LSG's exceptions, I just wanted to see if  
8 there have been a kind of response to their own -- but if  
9 that's not an appropriate -- whether reference to Maui  
10 County is not appropriate as phrased.

11 So that I'm comfortable. I think it does help  
12 the record to have a good set of findings to support the  
13 ultimate conclusion. And there was no objections by  
14 either OP or the County of Maui to these additional  
15 findings.

16 CHAIRMAN ACZON: Vice Chair Wong.

17 VICE CHAIR WONG: Okay. I'll take that. I'm  
18 sorry. I'm confused.

19 CHAIRMAN ACZON: Anybody else?

20 COMMISSIONER CHANG: I'd like to just -- I think  
21 all the parties spent a lot of time, so I'd really like to  
22 take a look at, in particular, LSG's -- looking at their  
23 objections. And I just wanted to make sure that we were  
24 considering theirs as well.

25 CHAIRMAN ACZON: Okay. Next? Anybody else?



1 Vice Chair Wong.

2 VICE CHAIR WONG: So next one that the  
3 Petitioner terms is Finding of Fact No. 77 states --  
4 Petitioner's exception, regarding the DOH also defines the  
5 term that's --

6 CHAIRMAN ACZON: Page what?

7 VICE CHAIR WONG: That's 77. They have an  
8 objection or mischaracterization -- that Petitioner states  
9 that there's an objection, mischaracterization of DOH's  
10 testimony, Joanna Seto, a witness called by the Office of  
11 Planning, directly contradicted the Finding of Fact.  
12 Petitioner suggests that the following Finding of Fact be  
13 included to Commission's D and O to accurately reflect  
14 DOH's position. I was wondering if you wanted to start  
15 talking about that item next.

16 CHAIRMAN ACZON: Sure. Go ahead.

17 VICE CHAIR WONG: Okay. So I know that the  
18 Petitioner has recommended two new Finding of Facts for  
19 this No. 77. One is "However, Engineering Program Manager  
20 for the DOH Safe Drinking Water Branch Joanna Seto  
21 testified that the terms 'potable' and 'non-potable' do  
22 not exist in the state or federal primary drinking water  
23 regulations, the terms 'potable' or 'non-potable' are not  
24 used by SDWB, Exhibit OP No. 4." The new Finding of Fact  
25 No. 2, "At the hearing, Miss Seto confirmed that the

1 federal Safe Drinking Water Act does not define or use the  
2 terms 'potable' or 'on-potable' and that the SDWB does not  
3 define the terms 'potable' or 'non-potable.'" I know that  
4 OP does support this portion, if I read correctly, and  
5 that LSG objects to this mischaracterization of DOH's  
6 testimony, if I'm correct, on this exception. So what is  
7 the Commission's intention on this exception?

8 CHAIRMAN ACZON: Are you suggesting to include  
9 it?

10 VICE CHAIR WONG: I was suggesting to include  
11 it.

12 CHAIRMAN ACZON: Any objections from  
13 Commissioners? The Chair has no objection.

14 Next one.

15 VICE CHAIR WONG: I think the next one will be a  
16 correction to the -- sorry. For the public, this is  
17 regarding Finding of Fact No. 90, regarding Jamile's  
18 testimony on primary contaminants. I think there was just  
19 a misstatement of which Hawaii Administrative Rules was  
20 being used.

21 CHAIRMAN ACZON: What are you referring to?

22 VICE CHAIR WONG: Finding of Fact No. 90.

23 CHAIRMAN ACZON: Go ahead.

24 VICE CHAIR WONG: So I think the HAR, Hawaii  
25 Administrative Rules, was misstated. I think all parties

1 agreed that it's supposed to be HAR 11-20-4, so I would  
2 like to change that in the Finding of Facts from the  
3 Hearings Officer.

4 COMMISSIONER CHANG: No objection.

5 CHAIRMAN ACZON: Commissioners?

6 COMMISSIONER CHANG: I concur now. That's a  
7 correction of the Hawaii Administrative Rules.

8 CHAIRMAN ACZON: Okay. Next one?

9 VICE CHAIR WONG: Does the Chair want me to just  
10 go over each one -- let me get some water -- no, no. So  
11 Finding of Fact No. 93, Condition 10. I believe it's just  
12 grammatical, and all parties agreed that it's grammatical,  
13 and that just should be -- let's see. Sorry. "To" and  
14 "be" should be included, if that's correct. Okay. It's a  
15 little more complicated. Let me just read the  
16 Petitioner's statement. Finding of Fact No. 93,  
17 separate -- "Separate from the specific implied meanings  
18 of the words 'potable' and 'brackish' in Condition 10 and  
19 the references to Wells 1 and 9 in the original record it  
20 is reasonable to conclude that the water from Wells 1 and  
21 9 may be considered to be potable. However, as detailed  
22 further below, the evidence in the record and construction  
23 of Condition 10 indicates a meaning contrary to these more  
24 common sense meanings of the words 'potable' and  
25 'brackish,' and how they apply to Wells 1 and 9." Am I

1 reading it correctly?

2 CHAIRMAN ACZON: Yes.

3 VICE CHAIR WONG: That's what it says. Okay.

4 So replacing "reasonable" with "plausible" and also adding  
5 "to be." Is that correct?

6 Sorry. I'm still reading.

7 Insert the words "plausible" and "to be."

8 CHAIRMAN ACZON: Insert it to what was  
9 "reasonable"?

10 VICE CHAIR WONG: Okay. "However, as detailed  
11 further in the next section, the evidence in the record  
12 and language of Condition 10 indicates a meaning different  
13 from the definitions discussed above." So it's more -- I  
14 think it's more substance issue, and that LSG just states  
15 that it's just grammatically unnecessary. I think that's  
16 the way I'm reading both parties' statements.

17 When I questioned Commissioner Chang as far as  
18 the meaning --

19 CHAIRMAN ACZON: Commissioners?

20 COMMISSIONER CHANG: I think it's a little bit  
21 more than -- I know I'm kind of struggling with this one  
22 because I think it's more than just a grammatical change.  
23 Replacing "reasonable" with "plausible." "Reasonable" is  
24 kind of a term of art. And I'm not really familiar that  
25 the change and the necessity for the change or the purpose

1 of the change, and I'm trying to look for the  
2 Petitioner's -- I know that they provided -- detailed  
3 information was provided for the Commissioners.

4 Do you have that before you, Commissioner Wong?

5 VICE CHAIR WONG: Yes, I do.

6 COMMISSIONER CHANG: And what was the reasoning?

7 VICE CHAIR WONG: Sorry. So the Petitioner  
8 objects to the terms "reasonable" and "common sense" and  
9 suggests the word "plausible."

10 COMMISSIONER CHANG: But I do notice LSG's  
11 primary objection to the language when they said it was  
12 unnecessary because it was really -- it was mostly a  
13 grammatical correction. They didn't find -- they didn't  
14 say they objected changing "plausible" -- "reasonable" to  
15 "plausible." I'm trying to see --

16 Do you know whether -- I don't think the County  
17 had any objections.

18 Does OP have any clarifications on that?  
19 There's just too much paper.

20 COMMISSIONER CABRAL: I'll state that I don't  
21 think the changing of the word makes enough of a  
22 difference. I can appreciate that language is important.  
23 At the same time, if we're going to debate and still hear  
24 about every single word and how it's used, I need to move  
25 over to Lana'i here. So I think we need to stay more to

1 the point.

2 CHAIRMAN ACZON: So no agreement on 93?

3 COMMISSIONER CABRAL: Right, to 93. I do agree  
4 that there's a grammatical problem and inserting, as LSG  
5 says, we need to remove the "to" and put the "be" in  
6 there. That would be acceptable. But changing  
7 "plausible" for "reasonable," I think is, again, what's  
8 going to be argued forever, regardless.

9 CHAIRMAN ACZON: Commissioners? No agreement?

10 VICE CHAIR WONG: No agreement.

11 CHAIRMAN ACZON: Okay. Next one.

12 VICE CHAIR WONG: Chair, the next one is -- let  
13 me get that -- Finding of Fact No. 128.

14 CHAIRMAN ACZON: Where are you looking at?

15 VICE CHAIR WONG: I'm looking at 128.

16 CHAIRMAN ACZON: Page 7?

17 VICE CHAIR WONG: Page 7. This is Petitioner's  
18 exception, the basis for everything else. So 128 --  
19 Hearings Officer's 128 states: "Dr. Thomas testified  
20 that, in his professional opinion and based on his  
21 studies, he found no such evidence that support the  
22 leakage theory and no evidence that any leakage is  
23 occurring." And I guess the Petitioner believes the  
24 findings are not complete on this. They have a whole  
25 bunch of new findings of fact up to number 12. And I'm

1 not going to go over all 12. But I just want to state  
2 that they want to add new Findings of Facts 1 to 12. And  
3 I think it goes from page 7 to page 9.

4 CHAIRMAN ACZON: Page 9. All right.

5 Commissioners, just take a moment to go through  
6 the 12.

7 COMMISSIONER CHANG: As I'm --

8 CHAIRMAN ACZON: Commissioner Chang.

9 COMMISSIONER CHANG: Yeah, thank you. I'm  
10 looking at LSG's objections, and they are objecting to the  
11 additional findings. One, I think they find that  
12 Dr. Thomas' testimony is not credible and that he has not  
13 developed a numerical groundwater model for Lana'i, and he  
14 has not conducted an independent mapping of the Lana'i  
15 groundwater dike complexes.

16 I think Dr. Thomas, he is, as I understood the  
17 record, he is -- but I don't know -- I guess this is why I  
18 appreciate having the Hearing Officer look into this,  
19 whether these additional studies or the fact that he  
20 didn't complete these independent groundwater mapping. I  
21 don't know whether that's relevant or not. But LSG has  
22 raised that point that he's -- maybe he may be qualified  
23 or he may have some expertise, but he's not qualified  
24 based upon lack of knowledge. And I'm not clear enough  
25 about whether -- how important that is for purposes of the

1 ultimate determination. I know -- I recall Minute No. 6  
2 did talk about one of the issues in the hearing was -- I  
3 think it was leakage. I think it is important to have a  
4 good record on this issue of leakage because that is one  
5 of the issues to be reviewed.

6 CHAIRMAN ACZON: Would it be better to go one by  
7 one just looking at -- like, step one, proposed number  
8 one, everybody agree or disagree to this one? You can  
9 just check it off?

10 COMMISSIONER CABRAL: I think that, in the big  
11 picture here, I think we should go through the initial  
12 exceptions and see which ones we can absolutely agree on  
13 and then spend more concentrated time on those that might  
14 be in question. Okay. And we can put a question mark by  
15 this one, and we can come back to it next week.

16 CHAIRMAN ACZON: Any objections, Commissioners?

17 COMMISSIONER CHANG: I'm sorry. I guess I would  
18 like to know -- I think, again, because Minute Order 6,  
19 one of the last points was "Is there leakage?" I'd like to  
20 know whether -- looking at LSG's objections, I don't feel  
21 comfortable enough to know whether those are reasonable,  
22 that he had to do all these studies to render an opinion.  
23 And I guess the Hearing Officer -- but I'm just -- so  
24 that's my last comment on that. We'll move on to the next  
25 one.



1 CHAIRMAN ACZON: Okay.

2 VICE CHAIR WONG: Chair.

3 CHAIRMAN ACZON: Commissioner Wong.

4 VICE CHAIR WONG: The next one is -- I'm going  
5 to take Finding of Facts 137 and 138 together just because  
6 it appears that both Petitioner and LSG has been taken  
7 almost as together in terms of remaining or deleting. So  
8 Finding of Fact 137 states: "The Petitioner, as compared  
9 to its predecessor entity Castle & Cooke, has employed  
10 approximately 20 additional workers in natural resources  
11 management, with a projected 2017 budget of close to  
12 2 million, not including capital expenditures."

13 Finding of Fact 138: "Mr. Donoho offered no  
14 quantification of the amount of current conservation  
15 efforts compared to similar landowners, nor compared to  
16 the conservation needs identified in Water Use and  
17 Development Plan for the island."

18 It appears as though the Petitioner wants 137 to  
19 remain and 138 to be deleted. LSG -- I'm sorry. I've got  
20 to go back now. And if I read it correctly, LSG wants --  
21 suggests that --

22 COMMISSIONER CHANG: Just --

23 VICE CHAIR WONG: Yeah.

24 COMMISSIONER CHANG: As I understand it, I think  
25 LSG's objection was that it's not relevant. And I guess

1 actually I'm wondering what is the relevancy of the number  
2 of employees and how much they're spending to the issue  
3 about Condition 10. I think it's good to know, but I,  
4 too, am wondering what is the relevancy of that.

5 VICE CHAIR WONG: So do we take out FOF --  
6 Finding of Facts 137 and 138? We take out both?

7 COMMISSIONER CHANG: I mean, I particularly  
8 don't see the relevancy for this particular proceeding,  
9 and I'm comfortable with removing these proposed findings.  
10 But that's just me.

11 CHAIRMAN ACZON: Okay. Any comments? Argument?  
12 Okay. We'll take out 137 and 138.

13 Next one?

14 VICE CHAIR WONG: The next one is Finding of  
15 Fact 141. "Mr. Hardy testified that the Periodic Water  
16 Reports produced since the 1990 CWRM Resubmittal show no  
17 changes that pose a threat to the water resources on the  
18 island. The only change is that the pumpage is now lower  
19 than it was when pineapple agricultural uses were  
20 ongoing."

21 COMMISSIONER CHANG: As I read LSG's objections,  
22 "A finding of harm is unnecessary and irrelevant to  
23 whether potable water is used in violation of Condition  
24 No. 10." In my view, I think Condition No. 10, if we go  
25 back -- the intent of the Land Use Commission for coming

1 up with Condition No. 10, looking at the full record, I  
2 think there was a question as to whether -- not wanting to  
3 harm available water, to properly manage the water on  
4 Lana'i, so it might be -- I think that that is a relevant  
5 finding.

6 CHAIRMAN ACZON: Agree?

7 Commissioner Cabral.

8 COMMISSIONER CABRAL: I agree. I think that's  
9 the whole point of everything, is that we want to make  
10 sure that the aquifer is protected. So I think that that  
11 is a relevant exception to be clarified.

12 CHAIRMAN ACZON: Okay. Commissioner Wong?

13 Commissioner Okuda.

14 COMMISSIONER OKUDA: I'd like to just state  
15 something for the record. I'm not sure if the Appellate  
16 Court has authorized us to go behind Condition No. 10. I  
17 think the direction was to look at Condition No. 10,  
18 determine whether or not there was compliance or  
19 noncompliance with Condition No. 10 and also take in  
20 additional testimony as set forth in the decision. So  
21 that's just my statement.

22 CHAIRMAN ACZON: Thank you, Commissioner Okuda.

23 MS. ERICKSON: I also wanted to note, for the  
24 Commission, that the Hawaii Supreme Court cases have  
25 indicated that it's their preference that findings of fact

1 not be mere focusing on testimony, so you may want to  
2 consider making that known as you consider the Findings of  
3 Facts because that is the Supreme Court's preference.

4 CHAIRMAN ACZON: Thank you.

5 What's the next one, Commissioner, on 141?

6 VICE CHAIR WONG: Can I just -- sorry. When the  
7 A.G., our counselor, was speaking --

8 Can you please restate that. I'm so sorry.

9 COMMISSIONER CABRAL: I'd like clarification,  
10 and I was paying attention. Please be louder.

11 MS. ERICKSON: So, for example, in the Finding  
12 of Fact 141, it says "Mr. Hardy testified that the  
13 Periodic Water Reports produced since the 1990 CWRM  
14 Resubmittal show no changes." The Supreme Court cases  
15 have indicated that their preference would be the finding  
16 of fact should probably read "Periodic Water Report  
17 produced since 1990," without basically quoting and saying  
18 "Mr. Hardy testified."

19 COMMISSIONER CABRAL: Okay.

20 VICE CHAIR WONG: So that's, I guess, the way --  
21 I'm sorry -- make that change, to state that instead of  
22 Mr. Hardy in our findings of fact when it goes back --

23 MS. ERICKSON: I think you should probably --  
24 you can put it in the motion.

25 VICE CHAIR WONG: Okay. So one of the things to

1 remind me when you make a motion somehow. Okay. Thank  
2 you.

3 CHAIRMAN ACZON: So we're just taking out  
4 "Mr. Hardy testified"?

5 MS. ERICKSON: That's an example, yeah.

6 CHAIRMAN ACZON: Thank you, Ms. Erickson.

7 COMMISSIONER CHANG: And maybe, Mr. Chair, with  
8 the guidance from our A.G., maybe we need to make sure  
9 that all of the findings are reflective of that guidance  
10 from the Supreme Court cases.

11 CHAIRMAN ACZON: That would be beneficial.

12 Okay. Next one.

13 VICE CHAIR WONG: Chair, the next one is Finding  
14 of Fact 142. "Under questioning by the Hearings Officer,  
15 LSG's witness Mr. Gima stated that he is unaware of and  
16 did not allege there was harm posed by the use of Wells 1  
17 and 9 to irrigate the Manele Golf Course." And the  
18 Petitioner has put in 1, 2, 3, 4, 5, 6 new findings of  
19 facts.

20 Chair, can we revisit this one -- because I  
21 think we have some issues with this Findings of Fact --  
22 and go to the next one?

23 CHAIRMAN ACZON: That's fine. We can come back.

24 VICE CHAIR WONG: Findings of Fact No. 143, "No  
25 party has identified any potentially competing public

1 trust uses of the water drawn from or possibly affected by  
2 the draw from Wells 1 or 9, other than the domestic needs  
3 of the general public."

4 COMMISSIONER CHANG: I'm sorry. Commissioner  
5 Wong, what finding are you looking at?

6 VICE CHAIR WONG: 143.

7 COMMISSIONER CHANG: Oh, 143.

8 VICE CHAIR WONG: It appears that --

9 CHAIRMAN ACZON: It's page 6 on LSG's  
10 exceptions.

11 COMMISSIONER CHANG: Commissioners, we've heard  
12 some of the comments yesterday, and I appreciate the fact  
13 that LSG, they've included, in their responses, that it's  
14 not relevant, that the public trust doctrine has been  
15 already addressed in the original, and I don't think it's  
16 necessary to include that in this record. That the  
17 Commission in 1991, as part of Condition 9 -- 10,  
18 addressed the public trust doctrine so -- and I think, you  
19 know, hearing all the parties early yesterday about  
20 wanting to keep this order very tight that, to me, if it's  
21 not relevant and necessary to reach the ultimate  
22 conclusion, then we really should not include it in the  
23 new findings and conclusions. So I think I would agree  
24 with LSG, that it's not relevant and it should be deleted.

25 CHAIRMAN ACZON: May I call a recess? Thank

1 you.

2 The Chair would call for a five-minute recess.

3 (Recess taken from 10:52 a.m. to 11:02 a.m.)

4 CHAIRMAN ACZON: We're back on record.

5 Vice Chair Wong.

6 VICE CHAIR WONG: Chair, I forgot two  
7 exceptions. I should have went to Findings of Facts 10  
8 and 11. So please indulge me on these. I forgot those  
9 because I wanted to jump into the big ones.

10 Findings of Fact 10, "On July 13, 1993,  
11 Petitioner stated in a letter to the Commission the  
12 following: At the Land Use Commission hearing on May 12,  
13 1993, on the petition of Lana'i Resort Partners in Docket  
14 No. A92-674, Commissioner Nip and Commissioner Hoe  
15 expressed their recollections from the representations of  
16 the Petitioner in Docket No. 89-649 that water for the  
17 Manele Golf Course would be from a source other than the  
18 high level aquifer on Lana'i and questioned whether  
19 Petitioner's intended use of non-potable brackish water  
20 from Wells 1 and 9 within the high level aquifer for  
21 irrigation of the Manele Golf Course might constitute a  
22 departure from the intent of Commission's Condition No. 10  
23 for which a motion by Petitioner for an amendment or  
24 clarification may be appropriate." That's on page three.  
25 Sorry.

1 CHAIRMAN ACZON: Page three and four?

2 VICE CHAIR WONG: Yeah, page three and four.

3 Condition -- Finding of Fact No. 11 states, "The  
4 transcript of July 13, 1993 was not otherwise introduced  
5 into the record on this remand." So I think that Finding  
6 of Fact No. 10 is already part of the remand record, but I  
7 think it's Volume 4, number 254, pages 1069 to 1076, for  
8 Finding of Fact No. 10. So I was wondering if --

9 CHAIRMAN ACZON: Commissioners, comments?

10 Commissioner Chang.

11 COMMISSIONER CHANG: You know, I am concerned.  
12 I want the record to be the one -- I think Commissioner  
13 Okuda made a comment about not going outside the record.  
14 And I am guilty for not reading all the records that the  
15 Hearing Officer went through. So I would like to make  
16 that a point that the Hearing Officer confirm that the  
17 information that was provided, that he's included in the  
18 finding, is part of the record.

19 MS. ERICKSON: Actually, Commissioner Chang, the  
20 staff and I confirmed that this letter is part of it.

21 COMMISSIONER CHANG: Okay, okay. Then thank you  
22 very much.

23 VICE CHAIR WONG: So we should -- I think you  
24 should, I guess, release that exception from the  
25 Petitioner, just at least check that, because it's already



1 part of the record.

2 COMMISSIONER CHANG: Keep it in the finding?

3 VICE CHAIR WONG: Yeah.

4 CHAIRMAN ACZON: Any objection on that one?

5 Okay.

6 VICE CHAIR WONG: Finding of Fact No. 11, Chair,  
7 I think the date is wrong, July 13, 1993, should be  
8 May 13, 1993, Finding of Fact 11.

9 CHAIRMAN ACZON: What's the correct date?

10 VICE CHAIR WONG: It's on page four, Finding of  
11 Fact 11.

12 MS. ERICKSON: And, again, the staff and I  
13 checked that because the letter was dated July, the one  
14 that's referred to in paragraph 10, and the hearing was in  
15 May.

16 CHAIRMAN ACZON: Change the date to May.

17 Go ahead. Going back to --

18 VICE CHAIR WONG: Back to 144, page 12. 144  
19 says, "While the scientific information on the potential  
20 long-term effect of withdrawals from Wells 1 and 9 on  
21 drinking water wells on the island is ambiguous, no party  
22 has raised a reasonable allegation of harm against that or  
23 any other public trust use of water." And then Petitioner  
24 has put in one Finding of Fact No. 1, 2, and 3.

25 COMMISSIONER CHANG: Commissioner Wong, we're

1 looking at Finding of Fact 144? Is that what you're  
2 looking at?

3 VICE CHAIR WONG: Yes.

4 COMMISSIONER CHANG: I guess, you know, LSG also  
5 made a comment that this is not relevant. It may  
6 ultimately be relevant, you know, for Lana'i Resorts to  
7 look at this. But I think for purposes of our -- what's  
8 before us and the fact that the public trust has been  
9 satisfied in the original LUC order, that I don't -- I  
10 don't think that it's relevant. And therefore, I'm in  
11 favor to delete them.

12 CHAIRMAN ACZON: Okay to delete, Commissioners?  
13 Commissioner Cabral?

14 COMMISSIONER CABRAL: Yes. I'm kind of  
15 concerned about that, in that, one way or the other, I'm  
16 wondering if it's really our -- if it's our job to delete  
17 it or if it's our job to provide further clarification  
18 of -- by way of some clear reference in our decision. I  
19 don't know what our -- I guess I question our job more so  
20 than the final decision here.

21 CHAIRMAN ACZON: We don't agree?

22 VICE CHAIR WONG: Yeah, I think -- I believe  
23 that 144 should stay in, but that -- I don't think there's  
24 any harm in it, right? I mean, that's the way I read it.

25 COMMISSIONER CABRAL: Or perhaps you would want

1 that to be further examined.

2 COMMISSIONER CHANG: I guess, for me, it relates  
3 to the public trust. And you know, I would agree with  
4 LSG. I think that that issue has been addressed. And  
5 so -- but maybe it's more appropriate to ask the Hearing  
6 Officer for clarification. But, again, in my view, the --  
7 this record -- we should -- I don't know if we would be  
8 able to try to keep it to what is relevant for purposes of  
9 addressing the issue before us and not relitigating or  
10 reopening issues that have already been resolved or  
11 addressed.

12 CHAIRMAN ACZON: Disagree?

13 COMMISSIONER CABRAL: We further discuss.

14 CHAIRMAN ACZON: Okay. Move on. We got to move  
15 on.

16 VICE CHAIR WONG: But Chair, I think we should  
17 still -- there's the Petitioner's portion of Conclusions  
18 of Law that was also added. But I think we should go back  
19 to the Findings of Facts first, and then go into the  
20 Conclusions of Law. So I think we had no agreement on  
21 Finding of Fact No. 93. And that's the grammatical issue.

22 COMMISSIONER CHANG: Yes. And I guess, if I can  
23 just make my point, is I think it might be more than  
24 grammatical. I mean, changing "reasonable" -- "plausible"  
25 to "reasonable." You know, "reasonable," maybe it might

1 be a legal term of art. I don't know what the parties  
2 intended on this one, and maybe that might be something  
3 more appropriate for the Hearing Officer. But on the  
4 other hand, there really were no objections from any of  
5 the other parties. So maybe the language is okay. So I  
6 don't see any objections other than just the grammar.

7 VICE CHAIR WONG: So shall we leave it as that  
8 with the Findings of Fact? Or leave that to the  
9 exceptions?

10 COMMISSIONER CHANG: If there were no  
11 objections, leave it.

12 CHAIRMAN ACZON: Leave it?

13 VICE CHAIR WONG: Leave the Hearings Officer or  
14 leave --

15 COMMISSIONER CHANG: Leave the Petitioner's.

16 VICE CHAIR WONG: Leave the Petitioner's?

17 COMMISSIONER CABRAL: To accept?

18 VICE CHAIR WONG: To accept the Petitioner's  
19 exception.

20 CHAIRMAN ACZON: I believe you did 142.

21 VICE CHAIR WONG: Oh, I'm sorry.

22 COMMISSIONER CHANG: Yeah, that's the hard one.

23 VICE CHAIR WONG: I thought we did 128, also.

24 COMMISSIONER CHANG: 128.

25 VICE CHAIR WONG: 128 first.

1           COMMISSIONER CHANG: And Mr. Chair, my comment  
2 related to the Hearing Officer's Minute Order 6, leakage  
3 was an important -- given the scope of the hearing. So I  
4 think information related to leakage is important.  
5 Looking at LSG's objection, it related to whether  
6 Dr. Thomas's testimony was relevant and credible. The one  
7 that I found Dr. Thomas -- the fact that he's independent,  
8 I thought that was kind of significant. But whether all  
9 of the additional findings of fact as proposed by the  
10 Petitioner is necessary, that's what I'm not clear about.  
11 I think they are proposing 1, 2, 3, 4 --

12           CHAIRMAN ACZON: 12.

13           COMMISSIONER CHANG: 12 additional findings,  
14 yeah.

15           CHAIRMAN ACZON: That's correct. So you only  
16 have an issue on number 6?

17           COMMISSIONER CHANG: No. Actually, it would be  
18 all of -- all of the proposed findings. To me, in my  
19 opinion, they're all in or they're all out. Either  
20 they're relevant and necessary, or it's not. I think  
21 Dr. Thomas is -- he's a credible witness to the extent  
22 that he's a third party. But whether all the additional  
23 information is necessary without -- LSG, you know,  
24 apparently, their position is that he hasn't -- he hasn't  
25 done a numerical groundwater for Lana'i; he hasn't -- but

1 there's still some additional -- they are arguing that he  
2 should -- for him to come up with this opinion, he really  
3 should do the additional tests. I don't know whether  
4 that's really necessarily required, but that's what they  
5 had added to --

6 CHAIRMAN ACZON: Any comments from the  
7 Commissioners? What's the pleasure?

8 Vice Chair Wong.

9 VICE CHAIR WONG: I would suggest that we leave  
10 the statement as is.

11 CHAIRMAN ACZON: Any objection on that? No  
12 objection.

13 Next one? 142?

14 COMMISSIONER CHANG: This witness -- this is a  
15 very -- I'm pondering over this a lot because of some of  
16 the comments that were made yesterday about the  
17 mischaracterization of Mr. Gima's testimony. Although I  
18 do find that the statements are critical and LSG then --  
19 they initiated the OSC, they've been involved for many  
20 years on this. The issues related to whether there's  
21 harm. In my view, it is relevant. And if he didn't say  
22 this, as was proposed yesterday, that it's a  
23 mischaracterization, then it shouldn't be in there. But  
24 if he did say this, then I think it's relevant.

25 VICE CHAIR WONG: So getting back -- so LSG said

1     that's irrelevant?

2                 COMMISSIONER CHANG:  No.  Nobody said it's  
3     irrelevant.  They just said it's a mischaracterization of  
4     his statements.

5                 VICE CHAIR WONG:  I'm sorry.  Who stated --

6                 COMMISSIONER CHANG:  -- Mr. Gima's statement --

7                 VICE CHAIR WONG:  No --

8                 COMMISSIONER CHANG:  -- Mr. Kopper during  
9     yesterday's argument by counsel, there was an exchange.  
10    And I think Mr. Kopper said that Mr. Kudo's statement  
11    about Mr. Gima's statements during the hearing were a  
12    mischaracterization.  So -- but I think Mr. Gima, his  
13    statements are relevant.  But I also don't want to have a  
14    mischaracterization in the record.  So if he didn't say  
15    this, it should be confirmed.  If he did say it, the  
16    record should reflect what was said.  That's all I'm  
17    suggesting.

18                CHAIRMAN ACZON:  Commissioner Okuda.

19                COMMISSIONER OKUDA:  Thank you, Mr. Chair.  I  
20    don't believe that whether use of water from the wells,  
21    whether it causes harm as defined in the proposed  
22    findings, whether or not that's really relevant or not.  I  
23    think the definition of relevance by the case law is  
24    something that makes it more probable than not with  
25    respect to an issue of substance or significance in the

1 case. In this case, I believe our directive is just to  
2 determine whether or not Condition 10 has been violated or  
3 not. Whether or not Condition 10 causes harm or not,  
4 that's, I, believe, outside of the scope of the remand.  
5 And so testimony, one way or the other, about whether or  
6 not use of water from the wells causes a harm or not, I  
7 don't believe that's within the scope of the remand. It's  
8 simply, is this water -- it's simply reviewing the  
9 condition.

10 VICE CHAIR WONG: So the question is: Should we  
11 just take out that condition 142?

12 COMMISSIONER OKUDA: Well, my suggestion would  
13 be if it's -- if it's dealing with an issue which is not  
14 relevant -- and I don't think it is -- then the finding  
15 about the harm is -- it shouldn't be included as  
16 surplusage in the findings.

17 VICE CHAIR WONG: So I'm going back to the  
18 Hearing Officer's Findings of Facts. It states: "Under  
19 questioning by the Hearings Officer, LSG's witness  
20 Mr. Gima stated that he is unaware of and did not allege  
21 there was harm posed by the use of Wells 1 and 9 to  
22 irrigate the Manele Golf Course." And it's in the  
23 transcript, November 16, 2016, at page 753.

24 Now, we have Petitioner's statement that they  
25 want to change it, and LSG's statements -- sorry -- that's



1 not -- it's irrelevant and unnecessary. So do we want to  
2 just leave it as is?

3 CHAIRMAN ACZON: Do you see any harm in leaving  
4 it as is?

5 COMMISSIONER CHANG: I appreciate Commissioner  
6 Okuda's comment. And I would agree that, probably any  
7 other person, harm is not relevant. But Mr. Gima  
8 represents LSG. And LSG -- and this was the underlying  
9 basis for Condition 10, was -- that the harm that it could  
10 cause by pumping these wells to irrigate Manele Golf  
11 Course. So if Mr. Gima was anybody else, was a member of  
12 the public, I would agree -- I would totally agree with  
13 Mr. Okuda, that that's not relevant. But Mr. Gima, he  
14 is -- they're the party that brought the Order to Show  
15 Cause, and they were involved in the proceedings from the  
16 beginning, that since it's the statement with respect to  
17 whether pumping -- a harm by pumping Wells 1 and 9 to  
18 irrigate Manele Golf Course is relevant.

19 CHAIRMAN ACZON: So would you agree to leave it  
20 as it is?

21 Commissioner Okuda.

22 COMMISSIONER OKUDA: Chair, if I can just pose a  
23 clarification. From my understanding, I very well could  
24 be wrong. Just so that we have a clean record.

25 CHAIRMAN ACZON: Go ahead.

1           COMMISSIONER OKUDA: I don't believe LSG brought  
2 the OSC. I believe they intervened in the case after the  
3 Order to Show Cause. But please don't take my comment  
4 here about clarification of the record to mean that I  
5 agree with LSG's position or disagree. It's simply that I  
6 think it's important for everyone that the procedural  
7 history be noted.

8           CHAIRMAN ACZON: Duly noted.

9           COMMISSIONER CHANG: My only point is I don't  
10 want to mischaracterize Mr. Gima's testimony --

11          CHAIRMAN ACZON: I understand.

12          COMMISSIONER CHANG: -- so I guess, has our  
13 staff been tasked to verifying -- the reference is only to  
14 transcript. So if -- if we quoted words versus there  
15 being a summary as what he said. Because I don't want to  
16 mischaracterize what was said.

17          CHAIRMAN ACZON: What do you want to do about  
18 that? So -- but that's -- the question is: Do we leave  
19 142 as is? That's the question. Any objection on that?

20          COMMISSIONER CHANG: My only objection is that  
21 his statement is in quotes, that the record reflects this  
22 is what Mr. Gima said. And -- because what I think is  
23 relevant, what I think is a quoted statement. So it  
24 should be -- so that we're not characterizing him, that it  
25 be put in quotes from the record. Is it?

1 VICE CHAIR WONG: A question.

2 CHAIRMAN ACZON: Commissioner Wong.

3 VICE CHAIR WONG: I believe it's the -- our  
4 counsel stated something about the Supreme Court, thinking  
5 about the preference in quotes or something. And I was  
6 wondering if we can have some clarification if we can use  
7 that. Because we're talking about the Periodic Water  
8 Reports. Instead of Mr. -- I forget the person's name --  
9 states about the Periodic Water Reports, how it would work  
10 with that.

11 MS. ERICKSON: Perhaps during the next break,  
12 the staff and I can go check that for you and then compare  
13 the language --

14 COMMISSIONER CHANG: Check for it.

15 CHAIRMAN ACZON: So we declare that?

16 COMMISSIONER CHANG: Subject to staff  
17 reconfirming.

18 CHAIRMAN ACZON: Is that it?

19 VICE CHAIR WONG: Do we have --

20 COMMISSIONER CABRAL: Well, we have the public  
21 trust --

22 CHAIRMAN ACZON: Turn your microphone on for the  
23 court reporter.

24 COMMISSIONER CABRAL: I'm sorry. Well, we have  
25 the public trust doctrine items, I think, that we just --

1 we did not -- which was quoted, I think. 144 was part of  
2 that. And then on page 14 of this document, No. 17, 18  
3 and 21 of the public trust document if you want to address  
4 those.

5 CHAIRMAN ACZON: Yeah, why don't we go over that  
6 then.

7 Vice Chair Wong.

8 VICE CHAIR WONG: So this is the Conclusions of  
9 Law from the Petitioner. Number -- it appears it's 17,  
10 states: "The use of water for irrigation of the golf  
11 course should be examined using a 'reasonable and  
12 beneficial use standard' against other public and private  
13 uses of water." And the Petitioner is grouping it with  
14 No. 18, that says, "The Petitioner has, as identified in  
15 the Findings of Fact, identified its actual needs, made  
16 its uses more efficient over time, pursued the development  
17 of other alternative sources of water and demonstrated  
18 that its use of water is beneficial."

19 COMMISSIONER CHANG: And Chair, I think if we  
20 are going to -- thank you -- delete Findings of Fact 143  
21 and 144 related to the public trust, then the Conclusions  
22 of Law 17 and 18 should also be deleted because there's  
23 no --

24 CHAIRMAN ACZON: Deleted?

25 COMMISSIONER CHANG: -- for it. And I would

1 agree with LSG, the issues related to the public trust  
2 doctrine are not relevant to this current proceeding and  
3 should, therefore, be deleted from the proposed Order.

4 CHAIRMAN ACZON: Do we have agreement,  
5 Commissioners? Agree? We shall delete Conclusions of Law  
6 17 and 18.

7 21?

8 VICE CHAIR WONG: Chair, this is the last  
9 portion from the Petitioner, Conclusion of Law 21. "No  
10 party has requested any motion, nor in this proceeding  
11 does the Commission have the power, to require the  
12 Petitioner to conduct further monitoring designed to  
13 identify any potential impacts on current and cumulative  
14 impacts of these withdrawals on public trust uses of  
15 water. Such an action would, in the absence of anything  
16 other than indications of very long-term harm, be prudent  
17 protection for the public trust." And they want to  
18 change -- they want to delete this.

19 COMMISSIONER CHANG: And Chair, to be consistent  
20 with our previous recommendations to delete references to  
21 the public trust, I would concur with the Petitioner that  
22 that be deleted.

23 CHAIRMAN ACZON: Commissioners? Agreement? Do  
24 you have agreement? Okay.

25 I think that's the last one.

1           VICE CHAIR WONG: Now, Chair, I think we have --  
2 I'm sorry. I'm looking for the County's one right now.

3           So County has changes in Findings of Facts  
4 No. 36. "County substantively agrees with this finding  
5 of" -- they want to amend No. 36 Findings of Fact. And  
6 I'm sorry, I've got to read it for the public, No. 36.

7           MS. ERICKSON: Commissioner Wong --

8           VICE CHAIR WONG: Yes.

9           MS. ERICKSON: -- just for clarification, that  
10 Finding of Fact, this is from the partial stipulation.

11           VICE CHAIR WONG: Oh, okay. Thank you. I was  
12 looking at another one.

13           Okay. This part is from the partial stip. This  
14 is the partial stipulation page 9. So the partial  
15 stipulation says: "During the instant hearing, the  
16 president and secretary of LSG, Reynold Butch Gima,  
17 testified on behalf of LSG or LSG's position. According  
18 to Mr. Gima, LSG's position is that no water from the high  
19 level aquifer can be used to irrigate the golf course.  
20 Because Wells 1 and 9 are within the high level aquifer,  
21 Wells 1 and 9 cannot be used to irrigate the golf course."  
22 And it appears that they want to just add some wording.  
23 So instead, they're saying, "According to Mr. Gima, LSG's  
24 position is that no water from the high level aquifer can  
25 be used to irrigate the golf course and that," add the

1 words "and that." They want to insert the words "and that  
2 because Wells 1 and 9 are within the high level aquifer."

3 CHAIRMAN ACZON: Are we in agreement?

4 MR. ROWE: Those comments that were made were  
5 made --

6 CHAIRMAN ACZON: Excuse me. We're not accepting  
7 any --

8 COMMISSIONER CHANG: Can we get a clarification?  
9 Because, yeah, is that what the County's position is?  
10 Chair? Because it looks like -- I don't want put  
11 something in that's not there.

12 CHAIRMAN ACZON: We'll allow for leave, but just  
13 limit the comments because we don't want to go --

14 COMMISSIONER CHANG: I appreciate that.

15 MR. ROWE: Right, so we, as far as the Hearings  
16 Officer's recommendation, we joined into the suggestions  
17 and exceptions of Lana'i Resorts. What he's referring to  
18 were in our stipulation, which were somewhat adopted by  
19 the Hearings Officer and somewhat not. So they're not  
20 directly related to the Hearings Officer's recommendation.

21 CHAIRMAN ACZON: Okay. Thank you.

22 Commissioner Chang.

23 COMMISSIONER CHANG: What I saw was that the  
24 County submitted their response to Intervenor's -- Lana'i  
25 exceptions to Hearing Officer's Recommended Findings of

1 Facts, Conclusions of Law, and Decision and Order. And  
2 the only -- the only issue I saw that the County raised  
3 was: "The County joins in the responses to Intervenor's  
4 Lana'ians for Sensible Growth's Exceptions, filed by  
5 Petitioner Lana'i Resorts, on April 25th. In addition,  
6 the County specifically contests the representations made  
7 by the Intervenor's that the water being used by Petitioner  
8 for golf course irrigation, quote, meets the County of  
9 Maui's definition of potable water in the context of golf  
10 course irrigation, close quote. Intervenor's Exceptions,  
11 page two.

12 "As stated in the County's response and  
13 objections to Intervenor's Conclusions of Law presumably  
14 referenced by the Intervenor's in making this statement,  
15 Chapter 14.08 only applies to golf courses which came into  
16 operation after the effective date of the ordinance in  
17 2009, and contains no restrictions on golf courses in  
18 operation prior to the effective date." So as I'm reading  
19 the -- I don't think they're proposing any changes. Any  
20 changes? I think they wanted to clarify that they --  
21 just to clarify a point that was made by the LSG's  
22 exceptions.

23 VICE CHAIR WONG: So Chair --

24 CHAIRMAN ACZON: Go ahead.

25 VICE CHAIR WONG: Do we want to -- sorry,



1 County -- but do we want to just skip over County's entire  
2 statement for now? Because I don't think it's -- we've  
3 been going through OP.

4 CHAIRMAN ACZON: Commissioners?

5 COMMISSIONER CHANG: Yes, I agree.

6 COMMISSIONER CABRAL: I agree.

7 VICE CHAIR WONG: So going to OP's --

8 I need a recess to get OP's one. We've been  
9 going back and forth, just like with everyone else's.

10 CHAIRMAN ACZON: Okay. Three minutes.

11 (Recess taken from 11:35 a.m. to 11:46 a.m.)

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

13 We're going to do the OP exceptions. And then  
14 after that, we're going to break for lunch. So that we  
15 can summarize everything that we can talk about. Okay.

16 Vice Chair Wong.

17 VICE CHAIR WONG: So Office of Planning has two:  
18 One is Findings of Fact 62. "On February 20, 1971,  
19 Petitioner filed a Proposed Finding of Fact, Conclusion of  
20 Law, and Decision and Order, stipulated to by OP. It  
21 proposed a Condition 10 that later survived exactly as  
22 Condition 10 of the Commission's Final Decision and  
23 Order."

24 COMMISSIONER CHANG: Commissioner Wong, were  
25 there any responses from any of the other parties? I'm

1       sorry. I don't have that before me. Could you refresh  
2       me? What was that finding, again?

3               VICE CHAIR WONG: Finding of Fact 62.

4               COMMISSIONER CHANG: Excuse me.

5               CHAIRMAN ACZON: Page three of OP's exception.  
6       Everybody has it?

7       Commissioner Cabral.

8               COMMISSIONER CABRAL: I would speak in favor of  
9       that. I think that that might be something to do with the  
10      problem with clarification on Condition No. 10 that -- and  
11      we were looking at trying to clarify, as OP is suggesting,  
12      that we continue -- that the conditions of 10 are in line  
13      with what the current practice is. So, therefore, accept  
14      OP's suggestion here in Finding of Fact 62, their  
15      recommendation.

16              CHAIRMAN ACZON: Any objections? None.

17              Okay. We're accepting OP's Finding of Fact 62.

18              Next one?

19              Are we going on --

20              142A?

21              VICE CHAIR WONG: 142A. "Office of Planning has  
22      proposed Finding of Fact 142A that states as follows: The  
23      leakage theory is inconsistent with language of Condition  
24      10 and the findings of fact and oral testimony from the  
25      District Boundary Amendment proceeding in which brackish

1 water was described as non-potable, and in which brackish  
2 water from Wells 1 and 9 were proposed for irrigation of  
3 the Manele Golf Course."

4 CHAIRMAN ACZON: Comments?

5 COMMISSIONER ESTES: I support that.

6 CHAIRMAN ACZON: Any objections? I guess we're  
7 in agreement to include -- to accept OP's Findings of Fact  
8 142A.

9 Is that it? Are we through?

10 COMMISSIONER CHANG: Commissioner Wong --

11 VICE CHAIR WONG: Yes.

12 COMMISSIONER CHANG: -- as you were going  
13 through, I want to make sure we've gone through the  
14 Petitioner's, we've gone through the County, we've gone  
15 through OP. I believe we have addressed the exceptions,  
16 responses by LSG. But could you make sure? You've been  
17 kind of frazzled now. We've addressed those on the  
18 context of the Petitioner's, so I just want to make sure  
19 we've addressed their exceptions.

20 VICE CHAIR WONG: Right now, I'm looking at --  
21 I'm looking at -- I don't see anything, so I'm trying to  
22 go as fast as possible. So if you don't mind, I guess  
23 LSG's, and maybe just do the rest of the work that we went  
24 through.

25 CHAIRMAN ACZON: I thought we did them side by

1 side with Petitioner's and LSG's exceptions.

2 VICE CHAIR WONG: Yeah. But I just want to make  
3 sure that LSG didn't do any exceptions.

4 COMMISSIONER CHANG: I have it before me, and  
5 I'm hoping this is correct. On the 25th, exceptions to  
6 Finding of Fact 69, I believe we addressed that. Finding  
7 of Fact 77 --

8 COMMISSIONER CABRAL: Okay, wait. What page are  
9 you on for LSG's?

10 COMMISSIONER CHANG: I'm looking at two of their  
11 objections.

12 COMMISSIONER CABRAL: Okay.

13 COMMISSIONER CHANG: So first one is Finding of  
14 Fact 69, and I believe we addressed that. The next  
15 exception was Finding of Fact 77. I believe we addressed  
16 that.

17 COMMISSIONER CABRAL: Yes.

18 COMMISSIONER CHANG: Next one is Finding of Fact  
19 90, and I believe we addressed that. Finding of Fact 93,  
20 and I believe we addressed that. Finding of Fact 128, we  
21 addressed that. Finding of Fact 137 and 138, we addressed  
22 that. And then Finding of Fact 141, we addressed that.  
23 Finding of Fact 142, staff was going to confirm that.  
24 Finding of Fact 143 and 144 related to public trust; we  
25 addressed that. And then Conclusions of Law 17 and 18, we

1 addressed that.

2 So I believe we've addressed all of the  
3 exceptions filed by the parties.

4 CHAIRMAN ACZON: Everybody concur? Okay.

5 Thank you, Commissioner Chang.

6 We're back to -- is there anything else,  
7 Commissioners?

8 Commissioner Wong.

9 VICE CHAIR WONG: Still just -- you want to go  
10 lunch, make sure I've got everyone's, so if you don't  
11 mind. I'll work through lunch.

12 COMMISSIONER CHANG: I apologize. Can we take a  
13 quick lunch? Am I sounding like I'm pushing?

14 COMMISSIONER CABRAL: Yes.

15 COMMISSIONER CHANG: Okay.

16 COMMISSIONER CABRAL: I agree. I second that  
17 motion.

18 COMMISSIONER CHANG: Oh, you second the motion.

19 CHAIRMAN ACZON: Okay.

20 Mr. Yee.

21 MR. YEE: Sorry, Chair. If I can be permitted  
22 to make one brief comment. I believe the document you  
23 were referring to, you were referring to LSG's exceptions.  
24 It's LSG's objections to Lana'i Resorts' exceptions. LSG  
25 did submit separate exceptions to the Hearings Officer's

1 report, and that is a separate document.

2 COMMISSIONER CHANG: Thank you very much.

3 COMMISSIONER CABRAL: And that was completed  
4 April 18?

5 VICE CHAIR WONG: I think I know which ones  
6 Mr. Yee is talking about. It is dated April 18.

7 COMMISSIONER CHANG: Thank you. Okay.

8 CHAIRMAN ACZON: Those are covered. Okay.  
9 Let's take a break. And we will be back at 12:30.

10 Half an hour. Is that good enough?

11 (Recess taken from 11:57 a.m. to 12:38 p.m.)

12 CHAIRMAN ACZON: Okay. We're back on the  
13 record. We're going to go over with LSG's exceptions, and  
14 we'll go from there.

15 Vice Chair Wong.

16 VICE CHAIR WONG: Chair, I believe that we  
17 reviewed LSG's exceptions to all of the previous things  
18 that we dealt with. I believe that all of the  
19 Commissioners have reviewed everyone's exceptions. That  
20 includes the Petitioner's, County's, Office of Planning's  
21 and LSG's. So I believe we've completed our review.

22 CHAIRMAN ACZON: Commissioner Chang.

23 COMMISSIONER CHANG: Yes. Chair, if I may  
24 respond. I did look at Intervenor Lana'ians for Sensible  
25 Growth's exceptions to the Hearing Officer's Recommended

1 Findings of Facts, Conclusions of Law, and Decision and  
2 Order, dated April 18, 2017. And I just concluded that we  
3 did -- we addressed their exceptions, at times agreeing  
4 with them and deleting certain sections, for example,  
5 those relating to the public trust doctrine, and other  
6 times we did not agree. I think a lot of the exceptions  
7 were a difference of opinion with respect to the types of  
8 fundamental issues. But I do believe that we addressed  
9 LSG's exceptions, like we did all the other parties.

10 CHAIRMAN ACZON: Thank you.

11 Commissioners, are there any further discussions  
12 in this?

13 Vice Chair Wong.

14 VICE CHAIR WONG: Chair, I would like to make a  
15 friendly amendment to the motions that's on the floor  
16 right now regarding the Hearings Officer's Recommended  
17 Findings of Facts, Conclusions of Law, and Decision and  
18 Order that's -- and I'll go through them. And this is to  
19 authorize the staff to make corrections that were  
20 grammatical or spelling as need be, consistent with the  
21 Supreme Court ruling. So Finding of Fact 11, correct the  
22 transcript dated to May 13, 1993. Finding of Fact 62 to  
23 amend the language to include Office of Planning's changes  
24 on OP's response to Petitioner's exceptions. Finding of  
25 Fact 69, no changes, but add additional three Findings of

1 Facts that were proposed by Petitioner's exception.  
2 Finding of Fact 77, no change, but add additional two  
3 Findings of Fact as proposed by Petitioner's exception.  
4 Finding of Fact 90, correct the references to  
5 Administrative Rules to HAR 11-20-4. Finding of Fact 93,  
6 accept the changes to grammar relating to Petitioner's  
7 exception. And delete Finding of Fact No. 137. Delete  
8 Finding of Fact 138. Amend Finding of Fact 142. Directly  
9 quote Mr. Gima's testimony from hearing transcript dated  
10 November 16, 2016 and place it within quotes. Finding of  
11 Fact -- we are going to add Finding of Fact 142A per OP's  
12 response to Petitioner's exception. Delete Finding of  
13 Fact 143. Delete Finding of Fact 144. Delete Conclusion  
14 of Law 17. Delete Conclusion of Law 18. And delete  
15 Conclusion of Law 21.

16 CHAIRMAN ACZON: You heard that?

17 Commissioner Cabral, do you agree with the  
18 amendments?

19 COMMISSIONER CABRAL: I will accept those  
20 amendments.

21 CHAIRMAN ACZON: Commissioner Estes?

22 COMMISSIONER ESTES: Accepted.

23 CHAIRMAN ACZON: Okay. We're in discussion.  
24 Commissioner Chang.

25 COMMISSIONER CHANG: I just have one



1 clarification regarding Commissioner Wong's amendment.  
2 With respect to having staff review and make consistent  
3 the grammar and spelling, he also added "responding and  
4 make findings consistent with the Supreme Court rulings."  
5 I guess I wanted that to be very clear, it's only with  
6 respect to the guidance provided by the Attorney General,  
7 but it is not to go and look at the Supreme Court rules,  
8 but only to the extent of the guidance that we got from  
9 the Attorney General about not quoting or anything. So I  
10 wanted that to be clear that we were not asking staff to  
11 go make these findings consistent with the Supreme Court  
12 rulings.

13 CHAIRMAN ACZON: Thank you. Duly noted.

14 Anybody else? Commissioners?

15 Commissioner Cabral, and then Commissioner  
16 Okuda.

17 COMMISSIONER CABRAL: I just wanted to have a  
18 double-check on the exception that was from the  
19 Petitioner's document, exceptions 1 to 8. I have a series  
20 of notes that I crossed off and went on and on and on.  
21 And then I did finally say "leave as is." But I wanted to  
22 just double-check and make sure everybody is in agreement  
23 that we're not paying any attention to the Petitioner's  
24 exception 1 to 8, and that's because of -- I see, in my  
25 scribbled notes, that we debated that one. But Scott, of

1 our staff, came up with "leave as is." Everybody else is  
2 in agreement with that? Okay.

3 CHAIRMAN ACZON: Commissioner Okuda.

4 COMMISSIONER OKUDA: Thank you, Chair. Chair, I  
5 join in the request or the changes that were recited by  
6 fellow Commissioners here. For the record, however -- and  
7 again, please don't take these statements as indicating  
8 how I would ultimately vote on this matter -- but I  
9 believe the proposed findings still do not address the  
10 Supreme Court footnote 8, which deals with the definition  
11 of potable water as ordinarily defined as, quote, suitable  
12 for drinking. I believe there should be a clear Finding  
13 of Fact supported by substantial evidence in the record  
14 about whether or not the water coming off of these wells  
15 are suitable for drinking.

16 And number two, the proposed findings do not  
17 include a finding to address the definition of "brackish"  
18 as stated in the Supreme Court decision at footnote 10,  
19 which is defined in the footnote as, quote, somewhat  
20 salty, distasteful. That should also be a finding made in  
21 the Findings of Facts, supported by substantial evidence  
22 in the record. And again, I don't make these comments or  
23 observations to indicate how I would vote on the ultimate  
24 question here. But I believe it is important to have  
25 these two definitions clearly and specifically addressed

1 in the findings because the Supreme Court did include them  
2 in the opinion as definitions in footnotes 8 and 10.

3 CHAIRMAN ACZON: Understood. Thank you,  
4 Commissioner Okuda.

5 Vice Chair Wong.

6 VICE CHAIR WONG: Going back to Commissioner  
7 Cabral's statement, I believe Finding of Fact 128, we're  
8 not touching at all; it will stay in without adding or  
9 deleting. It's just staying as is. I think that's what  
10 "as is" means.

11 CHAIRMAN ACZON: Thank you.

12 Anybody else?

13 Okay. If there is no further discussion.  
14 Mr. Orodenger, please poll the Commissioners.

15 MR. ORODENER: Thank you, Mr. Chair. The  
16 motion on the floor is to accept the Hearings Officer's  
17 Recommended Findings of Facts and Conclusions of Law with  
18 amendments as per the Commission's review of the parties'  
19 exceptions.

20 Commissioner Cabral?

21 COMMISSIONER CABRAL: Aye.

22 MR. ORODENER: Commissioner Estes?

23 COMMISSIONER ESTES: Aye.

24 MR. ORODENER: Commissioner Wong?

25 VICE CHAIR WONG: Aye.

1 MR. ORODENKER: Commissioner Chang?

2 COMMISSIONER CHANG: Aye.

3 MR. ORODENKER: Commissioner Okuda?

4 COMMISSIONER OKUDA: No.

5 MR. ORODENKER: Chair Aczon?

6 CHAIRMAN ACZON: Aye.

7 MR. ORODENKER: Mr. Chair, the motion carries  
8 with five votes and one "no."

9 CHAIRMAN ACZON: I believe the motion passed.  
10 Okay. So votes, five in favor and one objection.

11 VICE CHAIR WONG: Chair, I'd to move into  
12 executive session to consult with the Board's attorney on  
13 questions and issues pertaining to the Board's powers,  
14 duties, privileges, immunities and liabilities on these  
15 issues.

16 CHAIRMAN ACZON: Any second?

17 COMMISSIONER CABRAL: I'll second.

18 CHAIRMAN ACZON: Move and seconded. Those in  
19 favor say "aye."

20 (The Commissioners responded affirmatively.)

21 CHAIRMAN ACZON: Opposed?

22 (No response.)

23 CHAIRMAN ACZON: Motion carries.

24 (Recess taken from 12:59 p.m. to 1:01 p.m.)

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

1           After the votes were taken, with five in favor  
2 of the motion and one objected. The motion passed. And  
3 I'm instructing the staff to prepare the Final Decision  
4 and Order to be voted on in Maui, tentatively on May 31.

5           May 31. So we will send out notices to  
6 everybody.

7           Commissioners, is there any other business for  
8 the day?

9           VICE CHAIR WONG: Just for the public, what  
10 happened, just for your information, but because you've  
11 been sitting there wondering -- I hope not -- so that  
12 whatever happens, it passed. Okay. We still have to do a  
13 final order. That's going to be on Maui. But as of  
14 today, it passed, five to one. Just for those of you who  
15 don't understand what happened. Thank you.

16           CHAIRMAN ACZON: Thank you. There being no  
17 further business, I declare this meeting adjourned.

18           (The proceedings concluded at 1:01 p.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 I, CYNTHIA L. MURPHY, a Hawaii Certified  
6 Shorthand Reporter, do hereby certify.

7 That on the 27th day of April, 2017, at  
8 9:30 a.m., the foregoing hearing, Docket No. A89-649, was  
9 taken down by me in computerized machine shorthand and was  
10 thereafter reduced to print under my supervision;

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

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

17 Dated this 22nd day of May, 2017, in Honolulu,  
18 Hawaii.

19 \_\_\_\_\_  
20 Cynthia L. Murphy, RPR, CSR No. 167  
21 Certified Shorthand Reporter  
22 State of Hawaii  
23  
24  
25