

LAND USE COMMISSION  
MINUTES OF MEETING

August 23, 2007

Four Seasons Resort Lana`i  
Manele Bay  
Kaunolu Mauka Conference Room  
Lana`i, Hawaii

COMMISSIONERS PRESENT: Thomas Contrades  
Vladimir Devens  
Lisa Judge  
Duane Kanuha  
Ransom Piltz  
Nicholas Teves  
Reuben Wong

STAFF PRESENT: Diane Erickson, Deputy Attorney General  
Anthony Ching, Executive Officer  
Cameron Lowry, Staff Planner  
Sandra Matsushima, Chief Clerk  
Holly Hackett, Court Reporter  
Walter Mensching, Audio Technician

Chair Judge called the meeting to order at 11:05 a.m.

## ADOPTION OF MINUTES

Commissioner Devens noted an amendment to the minutes of August 9, 2007, page 13, fourth paragraph. Commissioner Devens asked that the record reflect that Mr. Aburano did agree that the proposed order accurately reflected the substance of the Commission's decision.

Commissioner Wong then moved to adopt the minutes of August 9 and 10, 2007 as amended. The motion was seconded by Commissioner Contrades. The minutes were approved by voice votes.

## TENTATIVE MEETING SCHEDULE

Mr. Ching reported that on September 6 and 7, staff will report on any comments by the counties and the OP to staff's proposed administrative rule changes. He also indicated that staff would also provide its recommendation regarding the changes that had previously been offered by the OP. Mr. Ching noted that the September 20 and 21 meetings would be switched to Kauai on Thursday and Maui on Friday. The neighbor island commissioners will be asked to consider an overnight on Oahu in order to take an early flight to Maui to allow the meeting to commence at 9:00 a.m. While the October 18 and 19 dates are still listed on the schedule, it is currently an open date.

Chair Judge asked for clarification on the venue for the September 20 and 21 meeting dates.

Mr. Ching noted that the venues are proposed to be switched. On Thursday, September 20, the LUC will now be meeting on Kauai; on September 21 the LUC will be on Maui.

There were no further questions posed for Mr. Ching by the Commission.

## A89-649 LANAI RESORT PARTNERS

Chair Judge stated that this was a meeting on Docket No. A89-649 Lanai Resort Partners to consider:

- the Office of Planning's Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order Filed April 16, 1991; and

- Castle & Cooke Resorts, LLC's Motion for Modification of Condition No. 10 and Dissolution of 1996 Cease and Desist Order.

### APPEARANCES

Bruce Lamon, Esq., represented Petitioner

Alan Murakami, Esq., represented Intervenor

Anthony T.J. Quan, Esq., represented Intervenor

Jane Lovell, Esq., represented the County of Maui Department of Planning

Bryan Yee, Esq., represented the State Office of Planning

Abe Mitsuda, State Office of Planning

Mary Alice Evans, State Office of Planning

Commissioner Devens noted a disclosure that he had previously been involved in litigation which involved Castle & Cooke. That matter has since been resolved. Commissioner Devens added that this would not affect his ability to be fair and impartial in this matter. The parties had no objections to Commissioner Devens' continued participation in this matter.

### Public Witness

1. Ron McOmbler

Mr. McOmbler stated that although he is the president of LSG, he was not representing LSG, noting that he was testifying today as a concerned resident of Lanai City. Mr. McOmbler added that he is an active member on the Water Use Development Committee Plan and has been involved in Lanai water issues from day one. Mr. McOmbler discussed the Memorandum of Agreement (MOA), the water advisory board meetings, community impacts, the fog drip study, and the monthly water reports on the water wells. Mr. McOmbler asked that the LUC consider this matter carefully as water is a precious commodity on Lanai.

Chair Judge asked what the purpose of the Lanai Advisory Committee was.

Mr. McOmbler stated that the board is putting together the water development plan mandated by the Water Commission. Board members are from Maui, Molokai, and Lanai. Mr. McOmbler added that they are unique because Lanai has a Water Use Development Plan and a Watershed Protection Plan. Also, Lanai has the only private water system in Maui County and only two water wells that supply drinking water.

After a brief discussion, there were no further questions posed for Mr. McOmber by the parties or the Commission.

### EXECUTIVE SESSION

Commissioner Teves moved to go into executive session under §92-5(a)(4), Hawaii Revised Statutes, to consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. Commissioner Devens seconded the motion. Said motion was approved by a show of hands.

The Commission entered into executive session at 11:45 a.m.

A lunch recess was taken subsequently and the open meeting reconvened at 12:45 p.m.

### OP's Presentation

Mr. Yee briefly summarized the background on the case and referenced the aerial survey map. Mr. Yee discussed wells number 1, 9, and 14, and described wells number 10 and 12 that are no longer being used. Mr. Yee also described the basal aquifer and the Lanai dike system. Mr. Yee then discussed Condition No. 10 and OP's two provisions; a new Condition No. 10 and Condition No. 10a.

### County's Presentation

Ms. Lovell stated that the LUC basically have two choices. They could either 1) go back and review a voluminous record to figure out what the former Commissioners' intent was at that time in terms of the definition of potable and/or brackish water; or 2) amend the language of Condition No. 10 to make it clear so that there can no longer be any questions as to what the former Commissioners' meant in their condition. Ms. Lovell added that the county has joined the OP in their proposal and stated that not only would this end the litigation, but also offers an incentive for the parties to bring together a water use development plan.

A recess break was taken at 1:30 p.m. The meeting reconvened at 1:45 p.m.

Commissioner Devens left the meeting at this time.

### Petitioner's Presentation

Mr. Lamon stated that the company has made extraordinary efforts to interact with the community and develop common ground. Mr. Lamon added that they are asking for a change to Condition No. 10 to define the term "potable" and referenced the Maui County's code definition, which they believed would provide a clear, proper, and enforceable definition for potable water.

### Intervenor's Presentation

Mr. Murakami stated that they believed that there is a need to go back to the early 1990's to review the history of this matter. Mr. Murakami discussed concerns of the 1990 MOA and the controversy of water use.

A recess break was taken at 2:45 p.m. The meeting reconvened at 3:00 p.m.

### Rebuttal

Mr. Yee argued that the proposed Condition No. 10 would not prevent or impact either the enforcement or implementation of any existing documents (i.e., the MOA or the water development plan). Mr. Yee also agreed that the LUC would need to take a more conservative tact wherever there was confusion or uncertainty regarding these issues.

Ms. Lovell stated that what we are dealing with is a request from the Supreme Court to define the word "potable" in a way that is clear and unambiguous. Ms. Lovell added her belief that using the Maui County's definition of potable water (taken from EPA secondary standards) is clear and sets a standard that everyone will know whether it's been violated or not.

Mr. Lamon stated that the main argument is that in the 1991 order, there were conflicting findings by the parties. LSG submitted a proposed finding that no water from the high-level aquifer would be used for the golf course. Mr. Lamon noted that the LUC had specifically rejected that proposed finding by the LSG. Mr. Lamon also noted that there is nothing in the record that supports the MOA that Mr. Murakami discussed.

Commissioner Wong asked Mr. Murakami whether any water, potable or non-potable, should be taken from the high-level aquifer for golf course irrigation and if this was the same argument that LSG had made before the Supreme Court.

Mr. Murakami concurred that they had made that same argument before the Supreme Court. Mr. Murakami added that they believed that all the water in the high-level aquifer was potable. Mr. Murakami added that it was okay to use non-potable water for golf course irrigation, however, under Condition No. 10, they believed that it should be from alternative sources.

Commissioner Wong asked Mr. Yee whether he agreed that no potable water should be used for golf course irrigation.

Mr. Yee replied in the affirmative, although they were unsure whether or not potable water was being used from the high-level aquifer for golf course irrigation, as the definition of potable has not yet been determined by the LUC.

Commissioner Wong posed further questions to Mr. Yee regarding water use limits, the powers of the Water Commission, the Maui County's ordinance describing specific chloride levels for irrigation water used on golf courses, county water standards, and the definition of potability.

Commissioner Wong asked if the petitioner would be in violation of the Maui County ordinance if they used water that did not meet the county's standard for potability.

Mr. Yee replied in the affirmative. However, Mr. Yee was unsure if the petitioner would be in violation of Condition No. 10 if they used water that did not meet the county's standard for potability.

Commissioner Wong commented that it appeared to be a matter of interpreting the Supreme Court's ruling. Commissioner Wong added that the ruling suggests that the cease and desist order was improperly granted because the finding of fact was incorrect. In addition, it is up to the LUC to determine whether additional hearings was necessary on the cease and desist order.

Commissioner Wong then posed questions to Mr. Lamon and asked whether the petitioner agreed that potable water should not be used for the golf course purposes.

Mr. Lamon replied in the affirmative.

Commissioner Wong then asked Mr. Lamon whether potable or non-potable water found at another source could be used for the golf course.

Mr. Lamon replied that he believed that would be correct. Mr. Lamon added that, however, the Maui ordinance prohibits all potable water use on golf courses.

Commissioner Wong commented that issues regarding limiting a specific amount of water use or a cap should be reserved for the Water Commission, as opposed to the LUC. Commissioner Wong then posed questions to Mr. Lamon regarding the cease and desist order and the motions filed by the OP and the petitioner.

Commissioner Wong posed questions to Mr. Murakami regarding the LSG's belief that the petitioner is in violation of Condition No. 10 by using potable water for irrigation of the golf course.

Mr. Murakami asserted that the petitioner is using potable water from the high-level aquifer for the golf course irrigation, under the EPA standards then and today, and that the standard applies for the State of Hawaii. Mr. Murakami added that back in 1991, it was understood that the petitioner shall develop and utilize only alternative non-potable water sources for the golf course.

Commissioner Piltz posed questions regarding the non-potable brackish wells, and whether the enactment of the county ordinance preceded the LUC's decision in 1991.

Commissioner Piltz asked Ms. Lovell whether accepting OP's and the County's motion would remedy this situation.

Ms. Lovell replied in the affirmative adding that this is a standard for county golf course irrigation and is specific. This represents a policy decision by the Maui County Council and is also an EPA secondary standard. Ms. Lovell added that by accepting this standard, there would be definition whether the standards have been met or not.

Commissioner Piltz then suggested that the LUC should accept this recommendation since it appeared to be a remedy for this matter.

Mr. Murakami stated that the problem with accepting the OP and County's motion is that this represents Maui County's arbitrary definition and would not conform to the DOH's standards. Mr. Murakami added that LSG was requesting that the LUC impose a statewide standard that existed at the time of the condition and which clearly differs from the county's standards.

Commissioner Wong wondered whether a person who uses potable water for golf course irrigation would be in violation of the Maui ordinance.

Ms. Lovell stated that this ordinance was adopted specifically for the Manele district to not use potable water from the high-level aquifer. Ms. Lovell added that this ordinance is consistent with Condition No. 10 and that the county has the power to enforce that provision if someone was found in violation. Ms. Lovell also commented that given the Supreme Court's instructions to the LUC, it would behoove the LUC to try to go back and figure out what was the original meaning of potable, and to synchronize the condition with the county ordinance would be a way to resolve this dispute.

Vice Chair Kanuha commented that some positive suggestions were made today, however, he was uncertain whether that approach would work towards resolving the Supreme Court's remand. Vice Chair Kanuha then moved to defer action on this matter and allow time to consult with their counsel. The motion was seconded by Commissioner Teves.

Chair Judge posed a few questions to Mr. Yee regarding the State of Hawaii's statutory definition of potable water.

Mr. Yee noted that he understood that there is no State of Hawaii term for "potable water." The DOH has a standard for safe drinking water, however, chloride levels are not included in those standards.

Chair Judge posed a few questions related to the Maui County's standards for chloride levels, and water suitable for golf course irrigation. Chair Judge also had concerns regarding the Water Use Development Plan, its process, and timeframe for adoption.

A recess break was taken at 4:15 p.m. The meeting reconvened at 4:30 p.m.



Chair Judge asked whether the Commissioners had any further legal questions for their counsel to address. Seeing none, Mr. Ching then took the roll call vote.

The Commission was polled as follows:

Ayes: Kanuha, Teves, Wong, Piltz, Contrades, and Judge.

The motion passed with 6 yes, 1 absent.

Chair Judge noted for the record that two commissioners (Formby and Hamamoto) have recently resigned from the LUC.

Mr. Lamon asked that the parties be permitted to submit a brief with respect to the questions posed by Commissioner Kanuha.

Chair Judge repeated her understanding that the parties were to brief the LUC as to whether the acceptance of either motion would resolve the issue on remand and eliminate the need for further hearings by the LUC. Chair Judge further clarified that the briefs should address the questions of whether the 1996 cease and desist order would be dissolved or vacated with the adoption of a modified Condition No. 10.

After a brief discussion, Chair Judge noted that the deadline for the parties to file their briefs on this matter would be on the close of business, September 24, 2007.

Ms. Lovell requested that the County of Maui be allowed to file electronically to meet this deadline.

Chair Judge stated that all parties may file their briefs electronically to meet their deadlines, however, they would need to follow up with mailed hard copies.

The meeting adjourned at 4:40 p.m.

*(Please refer to LUC Transcript of August 23, 2007 for more details on this matter.)*