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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of LANAI RESORT PARTNERS, To Consider an Order to Show Cause as to whether certain land located at Manele, Lanai, should revert to its former Agricultural and/or Rural land use classification or be changed to a more appropriate 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.: 4-9-02: Por. 49 (Formerly Tax Map Key No. 4-9-02: Por. 1)	Docket No. A89-649 INTERVENOR LANAIANS FOR SENSIBLE GROWTH'S POSITIONAL STATEMENT; CERTIFICATE OF SERVICE

INTERVENOR LANAIANS FOR SENSIBLE GROWTH'S POSITIONAL STATEMENT

I. INTRODUCTION

Lanai Resorts is using the only source of Lāna'i's drinking water to irrigate a golf course. The Land Use Commission is bound by the public trust to protect drinking water as a vital public trust purpose of the highest order. The Commission cannot be neutral: it actually must be partial and biased, as the public trust doctrine requires the Commission to favor the protection of domestic water use over competing commercial use of water for financial gain.

Twenty five years ago, this Commission did act to protect Lāna'i's groundwater resources. The Commission prohibited the Resort from using potable water from Lāna'i's high

level aquifer to irrigate its golf course at Mānele Bay as a condition of granting a boundary amendment for the Resort's project. This condition, known as "Condition 10," prohibits the Resort from doing as it is now; using potable water from Lāna'i's high level aquifer to irrigate its golf course.

There is no dispute that the Resort is using high level aquifer water to irrigate its golf course. Over the course of this dispute, the Resort has admitted that Wells 1, 9, and 14, located in the Palawai Basin, a portion of the high level aquifer, is being used to irrigate the golf course at Mānele. This leaves only one simple issue: whether the Resort's irrigation water is "potable water" as prohibited by Condition 10. Unequivocally and undeniably, the Resort's irrigation water is potable.

The Commission must first define the term "potable water." Because Condition 10 is unambiguous, this Commission is bound by the plain meaning of its terms. The Supreme Court, in an earlier appeal in this case, determined that the plain meaning of "potable water" is "water suitable for drinking." This definition complies with every relevant legal regulatory scheme on water quality in place not only now but 25 years ago when Condition 10 was imposed. Potable water means water that can be drunk.

Throughout this case, the Resort has advocated for a standard of potability which ignores the plain definition of the term and the various legal regulatory systems governing public water systems. Instead, the Resort contends that an arbitrary level of chloride concentration of 250 mg/L should be used to determine potability. This argument has no merit. First, the Commission never defined "potable water" in a manner different than the prevailing common and legal definitions of the term. Second, neither this Commission nor the Resort can read an unwritten term or definition into Condition 10; an agency's orders must provide fair notice of all conditions and requirements by explicitly stating them. Third, water with chloride levels well above 250 mg/L can be drunk: Maui County services its clients with water containing higher chloride concentrations than the water used by the Resort to irrigate its golf course. Chlorides are not considered a contaminant that renders water dangerous to drink. Fourth, the public trust doctrine requires this Commission to use a definition of "potable" which would favor the protection of domestic water as a public trust resource. Defining "potable water" consistent with county, state, and federal clean water regulations ensures that domestic water use is protected

over commercial use of water for financial gain. There is no sound basis in logic, fact, or law which suggests that an arbitrary definition of potable needs to govern this case.

The Resort is in fact using water which can be drunk to irrigate its golf course. For the last 25 years, there has never been any evidence that there are any contaminants in the Palawai Basin wells which prevents the water from being consumed. The chloride levels of the water, which is not an indicator of potability but aesthetic taste, is also low enough to be drunk. The water could also be easily blended with other water from the high level aquifer if needed to improve taste. The water is potable.

Not only is the water coming out of the Resort's Palawai Basin wells potable, but the pumpage of these wells have caused a greater than normal downgradient flow of high level fresh water with low chloride levels to the Palawai Basin. The flow is so great that over the years the Palawai Basin wells have become sweeter. Well 1 in the Palawai Basin began at over 800 mg/L and today has gone down to 274 mg/L. The sweetening of this well due to pumping demonstrates that more fresh water is flowing into the Palawai Basin than if there was no pumping from these wells.

This proceeding is a show cause proceeding, where the Resort bears the burden to conclusively prove that it is complying with Condition 10. In interpreting Condition 10's restrictions, the Commission must keep in mind the protection of Lāna'i's high level aquifer for domestic consumption and, wherever uncertainties exist, favor an interpretation of Condition 10 which would ensure protection of the public trust resource.

II. BACKGROUND

On November 29, 1989, Lanai Resort Partners, the predecessor-in-interest to Lāna'i Resorts, LLC (the "Resort"), filed a petition for a district boundary amendment to the State of Hawai`i Land Use Commission for its development project at Mānele Bay. *See* Land Use Commission Docket No. A89-649. Lanaians For Sensible Growth ("LSG"), Office of Hawaiian Affairs, and individual petitioners moved to intervene in the petition proceedings. On March 9, 1990, the Commission allowed Office of Hawaiian Affairs, and LSG to intervene. The individual petitioners were denied participation as their interests were deemed to be represented by LSG and OHA.

After intervening, LSG, OHA, and the Resort entered into a Memorandum Agreement wherein the Resort represented that they would not use **any** water from the high level aquifer on

Lāna'i to irrigate the golf course at Mānele. Based on this promise and representation, LSG and OHA withdrew its opposition to the 1989 Petition.

On April 16, 1991, the Commission approved the petition, imposing several conditions when it reclassified Appellant's property to allow construction of the golf course ("1991 Order"). One of these conditions, Condition No. 10, provides:

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

The Condition was based on repeated representations by the Resort to the Commission that no water from the high level aquifer would be used to irrigate the golf course.[1] Neither Condition 10 nor the 1991 Order contain any definition of "potable" which alters the plain meaning and prevailing legal definition of "potable."

After the Commission entered its 1991 Order, the Maui County Council temporarily enacted Maui County Code ("MCC") § 20.24.20, which defines "potable for golf course purposes as containing less than 250 mg/L chlorides." However MCC § 20.24.20 did not supersede state and federal potable water standards or the 1991 Order. Around the same time the Maui County Council also passed a requirement prohibiting the Resort from using any water in Lāna'i's high level aquifer.

Despite these restrictions, the Resort began construction of the golf course in 1993. The Maui County Council, LSG, the Planning Director, and the Maui Corporation Counsel all separately notified the Resort that they were in violation of their golf course irrigation conditions and commitments. Construction continued, and Maui County issued a cease and desist order to the Resort and fined them for their use of high level water for golf course irrigation.

The Commission issued an Order to Show cause on October 13, 1993 ordering the Resort to demonstrate why the Mānele property reclassified by the 1991 Order should not revert to its former classification due to the failure to comply with Condition 10 of the 1991 Order. Over the

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[1] *See Lanai Co. v. Land Use Comm'n*, 105 Hawai'i 296, 302, 97 P.3d 372, 378 (2004) (noting the representations by the Resort that no water from the high level aquifer would be used to irrigate the golf course at Mānele.); HRS § 205-17 (Requiring the Commission to consider "[t]he representations and commitments made by the petitioner in securing a boundary change.")

course of the next two years, the LUC held contested case hearings to give the Resort every opportunity to present evidence. On May 17, 1996, and after exhaustive hearings, the Commission issued its findings of fact and conclusions of law ("1996 Order"). Based on the evidence presented and the Resort's admissions, the Commission found that the Resort was irrigating its golf course with water from Wells 1 and 9, which are located in the Palawai Basin, a portion of the high level aquifer.[2] The Commission also noted that the pumping of Wells 1 and 9 cause water from the upper levels of the aquifer to leak into the Palawai wells, and that the Resort never performed a comprehensive test on the potability of the water from Wells 1 and 9.[3] The Commission held that the Resort violated Condition 10 by using water from Wells 1 and 9 to irrigate its golf course, and ordered a compliance plan to be prepared by the Resort 60 days from the date of the 1996 Order.

After various levels of appeals, the Hawai'i Supreme Court reversed and vacated the Commission's 1996 Order.[4] The Supreme Court held that the term "'potable water' is ordinarily defined as 'suitable for drinking.'"[5] The Court also held that the plain language of the 1991 Order and Condition 10 governs, not the subjective intent of the Commission.[6] The Supreme Court recognized that there was evidence that potable water was leaking into the high level wells located in the Palawai basin, and that the Commission must clarify and determine whether the leakage of water into the basin wells is caused by the Resort's pumping, and whether such leakage constitutes the "use" of potable water. The Supreme Court "remanded to the [lower] court with instructions that the court remand this case to the LUC for clarification of its findings, or for further hearings if necessary, as to whether LCI used potable water from the high level aquifer, in violation of Condition No. 10."[7]

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[2] 1996 Order at 6.

[3] *Id.* at 8.

[4] *Lanai Co. v. Land Use Comm'n*, 105 Hawai'i 296 (2004).

[5] *Id.* at 299, n 8.

[6] *Id.* at 314-316 ("Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies.")

[7] *Id.* at 319.

On remand, the Commission elected to hold a contested case hearing to determine whether the Resort was using potable water in violation of Condition 10.[8] The contested case hearing was held on June 7 and 8, 2006, but after all other parties were able to present their case, LSG was denied the same opportunity.[9] *Id.* After three and a half years, the Commission declined to rule on whether Condition 10 was violated and instead issued an order vacating and modifying Condition 10 based on the Commission's concerns that it could not discern what was intended by Condition 10 in 1991. The Commission changed Condition 10 to prevent only water containing a chloride concentration of less than 250 mg/L from being used for golf course irrigation.[10] After the Circuit Court on appeal reversed the Commission's decision and the Resort appealed, the Intermediate Court of Appeals affirmed the Circuit Court's decision remanding this case back to the Commission for *de novo* proceedings consistent with the remand from *Lanai Co.*

In its decision, the Intermediate Court of Appeals made a binding determination that "the purpose of the remand [from the Supreme Court] was not . . . to force the LUC to clarify what was intended by [the Commission in imposing] Condition No. 10 . . . the LUC was given a clear task by the supreme court; clarify its findings and conclusions regarding whether Lāna'i Resorts violated the prohibition against the use of potable water in Condition 10, or to conduct further hearings[.]" Because the Commission elected to conduct further proceedings, it erred in 2010 by disposing of this matter by an order without first allowing LSG to present its case.

III. THE RESORT USES POTABLE WATER TO IRRIGATE ITS GOLF COURSE

A. POTABLE WATER MEANS DRINKABLE WATER

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[8] *Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai'i 298 (App. 2016).

[9] *Id.*

[10] The Resort has repeatedly argued, without scientific basis, that the potability of water should be determined by chloride concentration even though, county, state, and federal regulations do not consider chloride concentration to be a contaminant which renders water undrinkable.

Where a term is plain and unambiguous, it must be interpreted by its "plain and obvious meaning."[11] The unspoken intent of the agency should not be considered in interpreting the agency's decision.[12] There is no ambiguity in the term "potable water"; it means water that can be drunk. The Supreme Court of Hawai'i has already issued a binding determination in this case that "[t]he term for 'potable water' is ordinarily defined as 'suitable for drinking.'"[13] Condition 10, and the 1991 Order, does not define "potable" differently than its plain meaning, which therefore must control in this case.

All of the applicable laws in place now, as well as at the time Condition 10 was imposed, define drinking water based on the presence of contaminants, **not chlorides**. The County of Maui defines potable as follows:

> "Potable water" **means water that meets the standards established by the department of health as suitable for cooking or drinking purposes.** A supply of water that at one time met the standards established by the department of health as potable water may not be used for golf course irrigation or other nondomestic uses, regardless of whether it is rendered nonpotable through such activities including, but not limited to, mixing or blending with any source of nonpotable water, storage in ponds or reservoirs, transmission through ditch systems, or exceeding the established pump capacity for a groundwater well.[14]

The Hawaii Department of Health's standards for water suitable for human consumption looks at whether maximum contaminant levels have been reached, and does not consider chloride level in determining whether water is suitable for consumption.[15] The Department of Health's standards mirror the National Primary Drinking Water Regulations and determines whether water is suitable for drinking by way of setting maximum contaminant levels. Chlorides are not one of the contaminants set forth in these regulatory schemes.[16]

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[11] *Chang v. Buffington*, 125 Hawai'i 186, 193, 256 P.3d 694, 701 (2011); *Lāna'i Company* at 314-316; *see* HRS § 1-14.

[12] *Id.*

[13] *Id.* at at 299, n 8.

[14] MCC § 14.08.20.

[15] HAR §§ 11-20-3 to 11-20-7.5.

[16] 40 CFR § 141.

Chlorides are not a component of potability but are instead considered a secondary contaminant that affects only the "aesthetic qualities" of drinking water.[17] In fact, the federal regulations regarding chloride levels are not federally enforceable and are only suggestions for "reasonable goals for drinking water quality." Water with chloride levels above 250 mg/L is drinkable. In fact, Maui County services some users with water over 300 mg/L chlorides without blending it with other water.[18] Maui County also uses potable water at even higher levels, up to 400 mg /L, blended with other potable water to improve the taste.[19]

It cannot be argued that the Commission intended to institute an unspoken, arbitrary standard for potability based on whether water contains less than 250 mg/ L chlorides. The Hearings Officer does not need to, and should not, go further than Condition 10 to determine the intent of the 1991 Commission in using the term "potable water." The "plain language" of the Commission's decision controls.[20] If chlorides were used as the benchmark of potability instead of the plain meaning of potability, the LUC would be enforcing a construction of Condition 10 that was not expressly adopted.

Even if the term "potable water" is considered ambiguous, the Commission must nonetheless define it in such a way that favors the protection of natural resources. Domestic water use is a recognized purpose of Hawai'i's water resources trust. "[R]esource protection, with its numerous derivative public uses, benefits, and values, as an important underlying purpose of the reserved water resources trust."[21] Specifically, domestic use of water is a "vital" purpose of the state water resources trust.[22] Under the public trust, the state has both the

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[17] 40 CFR § 143.1.

[18] *See* CROA pdf 21 at 557-59.

[19] *Id.*

[20] *Lanai Co.*, 105 Hawai'i at 314 ("Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies.").

[21] *In re Water Use Permit Applications*, 94 Hawai'i 97, 136, 9 P.3d 409, 448 (2000).

[22] Conversely," the public trust has never been understood to safeguard rights of exclusive use for private commercial gain." *Id*, at 138.

authority and duty to preserve the rights of present and future generations in the waters of the state. The state also bears an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible[ ]."[23] Therefore, "as a public trustee . . . the agency must not relegate itself to the role of a mere umpire . . . but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."[24] In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.[25] By defining "potable water" as broadly as possible (and including all water suitable for consumption as defined by the Department of Health), the Commission will be ensuring that this vital public trust resource will be protected.

B. The Resort is Directly Using Potable Water to Irrigate Its Golf Course

The water pumped by Lāna'i Resorts from its wells, including Wells 1 and 9, is potable. There has been no evidence that any of the water pumped from these wells are somehow contaminated to a level that renders it undrinkable.[26]

The Resort cannot argue that chloride levels renders the water from these wells non-potable. Chlorides are not considered as an indicator of potability; it affects only taste.

Further, the chloride levels in wells 1 and 9 have dropped dramatically. The most recent reported chloride levels for Well 1 report consistently below 300 mg/L and as low as 274 mg/L.[27] Based on the Resort's own reported data, the water produced from Well 1 contains less chlorides than that provided to some Maui County customers. Well 9 reports levels below 400 mg /L, which could be blended with other water to improve issues with the aesthetic taste of the water as is done in other parts of Maui County. This water is drinkable.

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[23] *Id.* at 141.

[24] *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 406, 363 P.3d 224, 254 (2015), quoting *Kelly v. 1250 Oceanside Partners,* 111 Hawai'i 231, 140 P.3d 985 (2006).

[25] *In re Water Use Permit Applications,* 94 Hawai'i at 154.

[26] Because this matter is a proceeding for the Resort to show cause, they bear the burden to prove compliance with the 1991 Order.

[27] According to the pumpage reports compiled and held by the Commission on Water Resource Management.

C. The Leakage of Potable Water To The Wells In The Palawai Basin Also Constitutes the Use of Potable Water

Potable water from the higher wells in the high level aquifer are being taken from the wells in the Palawai Basin. On Lāna'i there is a general movement of water from the center of the island toward the ocean. In the high level aquifer, water flows from dike compartments with high water levels to those with lower water levels as part of this movement. The rate of movement is in part controlled by the different water levels between the dike compartments. This necessarily means that pumpage from wells 1, 9, and 14 has caused greater amounts of water to flow to the basin wells from the upper wells than they naturally would.

Chloride levels from the Resort's wells conclusively prove this point. In 1948, chloride levels in Well 1 was 816 mg per L. These levels have fallen to as low as 274 mg/l. In order to reduce the chloride content of water pumped from Well No. 1 from 816 to its present levels, water from the upper level wells in the high level aquifer constitute approximately 67 percent of the water being pumped out of Well 1. The chloride content of wells 9 and 14 have also dropped due to the pumpage from these wells.

The pumpage of the Resorts wells in the Palawai Basin has caused the movement of water from the upper level wells into the basin which would not have occurred but for the pumpage in the Basin. This is a use of potable water prohibited by Condition 10.[28]

IV. CONCLUSION

Condition 10's purpose is to protect Lāna'i's only source of drinking water. The Resort's Palawai Basin wells produce drinkable water. Allowing this water to be used for irrigation contravenes the purpose of Condition 10 as well as the Resort's repeated promises and representations that they would not use **any** water from Lāna'i's high level aquifer for golf course irrigation. The Resort must be held to the highest standards of compliance with the Commission's conditions in order to protect Lāna'i's precious natural resources.

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[28] *See Lanai Co.*, 105 Hawai'i at 316.

DATED: Honolulu, Hawaii, August 12, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served upon the following parties at their last known address by U.S. Mail, postage pre-paid on August 12, 2016.

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