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LAND USE COMMISSION
STATE OF HAWAII

2016 SEP 14 P 1: 12

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 MOTION FOR CLARIFICATION OF SCOPE OF HEARING, OR IN THE ALTERNATIVE, FOR AN ORDER TO SHOW CAUSE; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF COUNSEL; EXHIBIT "A"; CERTIFICATE OF SERVICE NON-HEARING MOTION

INTERVENOR LANAIANS FOR SENSIBLE GROWTH'S MOTION FOR CLARIFICATION OF SCOPE OF HEARING, OR IN THE ALTERNATIVE, FOR <u>AN ORDER TO SHOW CAUSE</u>

Pursuant to HAR §§ 15-15-57 and 70, Intervenor Lanaians For Sensible Growth moves the presiding Hearings Officer for an order clarifying the scope of the hearing in this docket. Specifically, Intervenor seeks an order:

(I) Confirming that the contested case hearing scheduled to commence on November 9, 2016 will address the following issues:

1. Does Lāna'i Resorts use potable water from the high-level groundwater acquifer to irrigate the golf course?

2. Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water?
3. What is the definition of Potable?
4. Any other issues relevant to the violation of Condition 10 and any reversion or other relief deemed appropriate by the Commission; and

(II) Confirming that all alleged violations of Condition 10 of the Commission's 1991 Findings of Fact, Conclusions of Law, and Decision and Order in this Docket from the Order's issuance till the present will be addressed by the hearing scheduled to commence on November 9, 2016.

In the alternative, and pursuant to HAR § 15-15-93, Intervenor requests that the presiding Hearings Officer,[1] or the Commission, issue an additional Order to Show Cause to include all continuing violations of Condition 10 till the present.

This Motion is supported by the memorandum in support, the attached declaration, the records and files herein, and all argument and evidence presented at the hearing on this Motion.

DATED: Honolulu, Hawaii, September 14, 2016.

DAVID KAULA KOPPER
LI`ULĀ NAKAMA
Attorneys for Intervenor
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[1] Appointed hearings officers have the ability to "rule upon all . . . motions which do not involve a final determination of the proceedings." HAR § 15-15-60; *see* HAR § 15-15-70 (m)(Orders granting, denying, or otherwise disposing of motions . . . may be signed by . . . the presiding officer, or the hearings officer[.]")

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 MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

In order to address legal claims raised by the Resort in its recently filed positional statement, and to ensure that the contested case hearing in this docket produces a complete, valid, and binding decision and order, Lanaians for Sensible Growth is seeking the Hearing Officer's assistance through the issuance of an order clarifying the scope of the pending contested case hearing.

Recently, the Resort has raised, apparently for the first time, an erroneous contention that the hearing in this matter is limited to only their use of Wells 1 and 9 from 1991 to 1993. If the Resort's position was taken to its logical conclusion, then the Commission would have to continuously issue new show cause orders in all pending show cause proceedings in order to ensure that they are able to address all violations of boundary amendment conditions in one complete and final proceeding. Well settled case law conclusively addresses this situation and allows for the present contested case hearing to address all of the Resort's violations of Condition 10 without the issuance of a new order to show cause.

To the extent a new order to show cause is needed, the Hearings Officer, or the Commission, has ample time with which to issue a new show cause order and consolidate it with the pending November 9, 2016 contested case hearing. Regardless, it is in all of the parties' best interest to have one contested case hearing which resolves all issues surrounding the Resort's violations of Condition 10 once and for all.

II. FACTS[1]

On November 29, 1989, Lanai Resort Partners, the predecessor-in-interest to Lānaʻi Resorts, LLC (individually and collectively, 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.

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 Commission issued an Order to Show cause on October 13, 1993 (1993 OSC) 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. The 1993 OSC was broad, and gave notice to the Resort that their "fail[ure] to perform according to Condition No. 10" was the subject of the show cause hearing. On May 17, 1996, and after exhaustive hearings, the Commission issued its findings of fact and conclusions of law ("1996 Order"), finding that the Resort was in violation of Condition 10. Since then, there have been multiple appeals and remands of this matter.

After the Intermediate Court of Appeal's most recent remand in this docket, the Hearings Officer held a pre hearing conference on July 5, 2016 to "clarify the issues" on remand. Counsel for the Resort was present. After taking comments and argument on the issues, the Hearings Officer issued Minute Order No. 2, holding that

[1] The procedural history of this case is set forth more fully in LSG's Positional Statement filed August 10, 2016.

1. The issues to be covered during the hearing are:
    a. Does Lāna'i Resorts use potable water from the high-level groundwater aquifer to irrigate the golf course?
    b. Is any source of the irrigation water for the golf course within the high level groundwater aquifer?
    c. Is that water "potable" or not?
    d. Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water?
    e. What is the definition of "potable"?

July 6, 2016 Minute Order No. 2. The Hearings Officer did not limit the scope of the hearing to any specific wells or time frame. Counsel for the Resort did not object at anytime to the proposed scope of the proceedings.

The Resort then later changed their position on the scope of these proceedings in its positional statement, raising for the first time on remand its contention that the scope of the proceedings should be limited to any violations which occurred from 1991 to 1993, and only to Wells 1 and 9, thereby excluding their potentially violative use of the water from the high level aquifer from 1993 to the present, including the pumping of new wells located in the high level aquifer which did not exist in 1993. Now they claim that "the specific facts and circumstances that will be presented during this hearing pertain to the circumstances that existed from 1991 to 1993, the period in which the alleged violation of Condition 10 by LCI should have occurred." Petitioner Lāna'i Resorts LLC's Statement of Position at 2.

Throughout this case, the Resort argued as if the scope of this proceeding encompassed all of their continuing use of high level aquifer water to irrigate its golf course. For example, they relied on a 1996 Pump Test of Wells 1 and 9 throughout this case, and used the chloride levels of the water pumped in that test as the baseline in determining whether they are using potable water to irrigate its golf course. *See* Doc. No. A89-649, Petition Castle and Cooke Resorts, LLC's Memorandum Re Effect of Granting Motion for Modification of Condition No 10 and Dissolution of 1996 Cease and Desist Order Upon Remand Proceedings; Appellate Castle and Cooke's Answering Brief, Civ. No 10-1-0415-02 at 20. The Resort also subjected Well 14, which wasn't in existence in 1993, to the reach of these proceedings and argued that the use of Well 14 to irrigate its golf course complies with Condition 10. *Id.*

On September 2, 2016, and in response to the positions taken by the parties in their positional statements, the Hearings Officer proposed the following additional issues to address in the contested case hearing in this matter:

a) What did the Commission mean by the word "potable" in Condition 10 of the Decision and Order dated April 16, 1991?

b) Based on the entirety of the record, was the intention of Condition 10 to ensure that:

   i. There would merely be no direct use of potable water by the golf course; or,

   ii. In addition to prohibiting use of potable water for irrigation, there should be no implementation of irrigation that would negatively affect potable water from the high level aquifer?

c) Does the pumping of water for golf course irrigation negatively affect past, current or future uses of potable water from the high level aquifer?

III. ARGUMENT

A. ISSUES TO BE DECIDED AT THE CONTESTED CASE HEARING

1. LSG's Proposed Issues For Contested Case Hearing

Consistent with the Supreme Court of Hawai'i's order in *Lāna'i Company v. Land Use Comm'n*, 105 Haw. 296 (2004), the July 6, 2016 Minute Order No. 2 proposed the following issues to be addressed at the contested case hearing in this matter:

a. Does Lāna'i Resorts use potable water from the high-level groundwater aquifer to irrigate the golf course?
b. Is any source of the irrigation water for the golf course within the high level groundwater aquifer?
c. Is that water "potable" or not?
d. Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water?
e. What is the definition of "potable"?

LSG agrees that these issues concisely summarize the Supreme Court's remand instructions in *Lāna'i Company*. There is no need to substantially deviate from Minute Order No. 2. For clarity, however, and as the Resort has conceded, issue "b" is not necessary and was rendered moot by the Supreme Court. Petitioner Lāna'i Resorts, LLC's Statement of Position filed August 12, 2016 at 13. Further, issue "c" is redundant of issue "a." Therefore, LSG proposes

that the issues previously labeled as "b" and "c" be stricken and that the following issues from Minute Order No. 2 be addressed at the contested case hearing:

1. Does Lānaʻi Resorts use potable water from the high-level groundwater aquifer to irrigate the golf course?
2. Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water?
3. What is the definition of "potable"?
4. Any other issues relevant to the violation of Condition 10 and any reversion or other relief deemed appropriate by the Commission

2. Proposed Issues From Minute Order No. 4

LSG recognizes the wisdom and use of the additional hearing issues proposed by Minute Order No. 4. However, the Hearings Officer's concerns can be addressed by simply ruling that the relevant issues are those set forth above, based on the following response.

Proposed issue: What did the Commission mean by the word "potable" in Condition 10 of the Decision and Order dated April 16, 1991?

This proposed issue addresses the concern of the Maui Planning Department regarding "the lack of clarity in what the LUC meant by potable[.]" Testimony of the Maui Planning Department filed August 11, 2016 at 3. However, this issue was already decided by the Supreme Court in its 2004 *Lānaʻi Company* decision. The plain meaning of the term "potable" therefore controls in this case, and this new proposed issue is not necessary.

The intent of the Commission in enacting Condition 10 is not pertinent to the meaning of Condition 10. Where a term is plain and unambiguous, it must be interpreted by its "plain and obvious meaning." *Chang v. Buffington*, 125 Haw.186, 193 (2011); *Lānaʻi Company* at 314-316. The unspoken intent of an agency should not be considered in interpreting the agency's decision. *Id.* In this docket, the Supreme Court expressly held that Condition 10"cannot be construed to mean what the LUC may have intended but did not express." *Lānaʻi Company* at 314; *Lanaians for Sensible Growth v. Lānaʻi Resorts, LLC*, 137 Haw. 298 (App. 2016) ("The purpose of the remand was not, as Lānaʻi Resorts purports, to force the LUC to clarify what was intended by Condition No. 10[.]")

To the extent that this proposed issue attempts to determine the original intent of the 1991 Commission, both the Supreme Court and the Intermediate Court of Appeals has restricted the scope on remand to only address the plain meaning of the language of Condition 10. *Lanaians for Sensible Growth*, 137 Haw. 298. Therefore, in interpreting the term "potable" as used in

Condition 10, the intent of the LUC in 1991 is irrelevant and immaterial to the present Commission's task. Instead, the term "potable" must be interpreted by its plain meaning. The Supreme Court of Hawai'i has already determined in this case that "[t]he term for 'potable water' is ordinarily defined as 'suitable for drinking.'" *Lāna'i Company* at 299, n. 9. Condition 10, and the 1991 Order, do not define "potable" differently than its plain meaning, which therefore must control in this case.

Proposed issue: Based on the entirety of the record, was the intention of Condition 10 to ensure that:

i. There would merely be no direct use of potable water by the golf course; or,

ii. In addition to prohibiting use of potable water for irrigation, there should be no implementation of irrigation that would negatively affect potable water in the high level aquifer?

This proposed issue addresses the intent of some of the parties to contravene the Supreme Court's remand instructions. *See* September 8, 2016 Resort's Statement of Threshold Issues Re: Minute Order No. 4 at 4. For example, the Resort is now claiming that the Commission is not to consider whether pumping-induced leakage into the Palawai Basin wells can be considered a use of potable water. Their 11th hour position has already been foreclosed by the Supreme Court's Order.

The Supreme Court in *Lāna'i Company* stated that the Commission's previous findings that "there is leakage from the high level potable water area to the low level brackish water area" "seem to imply that [the Resort] was using potable water[.]" *Lāna'i Company* at 316. However, because the 1996 Order did not contain an explicit finding, the Supreme Court remanded this matter to the Commission to clarify its findings and conclusions.

The Resort has taken the position that the Supreme Court's remand order is gospel. LSG agrees, and submits that adherence to the opinion in *Lāna'i Company* must be consistent on all issues. The Supreme Court expressly remanded this case to the Commission to clarify whether pumping induced leakage from the upper levels of the high level aquifer into the Palawai Basin wells is a prohibited use of potable water. If, as a matter of law, leekage could not constitute a "use" of water from the high level aquifer, the Supreme Court would not have ruled as they did. Thus, this hearing must address the Supreme Court's remand instructions. The Hearings Officer's prop Minute Order No. 2 sufficiently addresses the Supreme Court's remand.

Proposed issue: Does the pumping of water for golf course irrigation negatively affect past, current or future uses of potable water from the high level aquifer?

LSG agrees with the policy behind this proposed hearing issue. While there is no objection to this issue, because this issue is necessarily subsumed by the Commission's public trust duty, specifying this issue expressly is not necessary if the Hearings Officer believes it will cause confusion of the proceedings or induce unnecessary future appeals by other parties.

The Commission, and by extension the Hearings Officer, has a constitutional mandate to consider the negative affect of the Resort's pumping on Lāna'i's high level aquifer, the only natural source of drinking water for the entire island. Domestic use of water is a "vital" purpose of the state water resources trust. *In re Water Use Permit Applications*, 94 Haw. 97, 136 (2000).[2] Under the public trust, the state has both the 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[ ]." *Id.* at 141. 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." *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.,* 136 Haw. 376, 406 (2015) (quoting *Kelly v. 1250 Oceanside Partners,* 111 Haw. 231(2006)). In addition, where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource. *In re Water Use Permit Applications,* 94 Haw. at 154.

Whether there is an expressed issue regarding the negative effects on the public trust or not, the Commission and the Hearings Officer will nonetheless be required to consider the protection of domestic drinking water use as part of its decision.

B. <u>SCOPE OF HEARING INCLUDES ALL VIOLATIONS OF CONDITION 10 TO DATE</u>

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

The contested case hearing can address any ongoing violations of Condition 10 within this contested case hearing as the Resort has been, and will be given, ample notice of the scope of the contested case hearing.

1. The Commission has Broad Authority To Address Ongoing Violations of Condition 10

The proper inquiry regarding the scope of a contested case hearing is whether the parties are given sufficient notice of the subject of the contested case hearing such that they have a meaningful opportunity to present their case. The Resort has been given sufficient notice that the contested case hearing in this matter will include all alleged violations of Condition 10.

The notice requirements in contested case proceedings are exceptionally broad. HRS Chapter 91-9 requires that contested case hearing notices provide only "An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof[.]" The Commissions own rules, HAR 15-15-93, mirrors Chapter 91's requirements. The Supreme Court has held that notice of the subject of a contested case hearing can be communicated informally and outside of a formal Chapter 91-9 notice. In *Pilaa 400, LLC v. Bd. of Land & Nat. Res.*, 132 Hawai'i 247, 271 (2014), the Court held that "in determining the adequacy of notice of a contested case hearing, the record of communications between the agency and the interested person must be considered." *Id.* (citing *Chang v. Planning Commission of the County of Maui*, 64 Haw. 431, 643 P.2d 55 (1982)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 378 (1989). All that is required is that the parties are aware of the "actual problem" and are "fully apprised of all relevant issues" to be determined at the contested case hearing. What determines whether sufficient notice was provided, whether informal or formal, is whether the notice allows the parties to have "a meaningful opportunity to present arguments and evidence at the contested case hearing." *Pila'a 400, LLC,* 132 Hawai'i at 272.

The 1993 OSC satisfies Chapter 91 and due process by stating that

> The Land Use Commission has reason to believe that you have failed to perform according to Condition No. 10 of the Commission's Decision and Order dated April 16, 1991 in that you have failed to develop and utilize alternative sources of non-potable water for golf course irrigation requirements. . . .
>
> All parties in this docket shall present testimony and exhibits to the Commission as to whether Petitioner has failed to perform according to condition No. 10[.]

1993 OSC at 2-3. The 1993 OSC properly noticed the Resort that it is violating Condition 10 in its use of high level water to irrigate its golf course. Nowhere does the Commission limit the scope of the show cause proceedings to specific wells within a specific period. In addition, Minute Order No. 2 provides notice that the scope of the hearing encompasses all of the Resort's sources of irrigation water for the golf course and at all times.

The Resort is therefore "fully apprised" of the issues presented at the hearing; whether they have or are violating Condition 10. To the extent that the Resort claims ignorance, an order following this prehearing conference communicating that the scope of the hearing in this case will include all continuing violations of Condition 10 by the pumping of any well at any time will be sufficient. *Pilaa 400, LLC* at 272.

The Resort cannot claim that due process restricts the hearings officer from addressing continuing violations in this contested case proceeding. The Supreme Court has already foreclosed such an argument. In *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a*, LLC, 134 Haw. 187, 195 (2014), the Commission initiated show cause proceedings in 2008. In the same proceeding, the Commission found the petitioner in violation of conditions of a boundary amendment based on the status of the development in 2010.[3] The Supreme Court held that the Commission did not violate due process in considering condition violations which occurred after the relevant show cause proceedings commenced and that the "LUC had broad authority . . . to impose conditions, and the power to determine whether [the Petitioner] violated those conditions." *Id.* Because a show cause proceeding is not limited to violations which occurred prior to the issuance of the order to show cause, this hearing can and should address all alleged violations of Condition 10, from the inception of Condition 10 to the present.

To do as the Resort suggests and now limit the proceedings would reach an absurd result. If agencies could not exercise their broad authorities over their own conditions, *DW Aina Le'a Dev., LLC*, 134 Haw. 187, 195, then show cause orders would have to be issued continuously throughout the life of a case in order to address continuing violations. The Commission would

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[3] While the LUC was found to have violated the procedures of Chapter 205 in reverting the classification of the subject property, the Court found that the LUC did not violate due process by addressing continuing condition violations in one show cause proceeding. *DW Aina Le'a Dev., LLC*, 134 Haw. 187.

have to issue a new show cause order monthly to ensure that every alleged violation is within the scope of the Commission's show cause proceedings.

2. The Resort Will Not Be Prejudiced If The Contested Case Hearing Addresses All Possible Violations of Condition 10

The Resort will not be prejudiced if the Hearings Officer clarifies that the scope of the contested case hearing includes all potential violations of Condition 10. The LUC's rules require only 30 days notice of a show cause hearing. HAR 15-15-93. An order entered after the conclusion of the September 30, 2016 prehearing conference would be well over 30 days prior to the contested case hearing. The Resort would have no less notice than what is required by rule.

Further, the Resort already intends on calling witnesses with knowledge of the Resort's use of water **after** 1993. *See, e.g.* Written Direct Testimony of John Stubbart ("His testimony will include an overview of Lāna'i's wells . . . historical and current information about these wells . . . [and] the Periodic Water Reports required by and submitted to the State Commission on Water Resource Management."). The Resort intends on introducing the pumpage reports for all of the wells on Lāna'i at all times. Petitioner Lāna'i Resorts, LLC's List of Exhibits filed September 2, 2016. Any additional witnesses or exhibits could, with good faith and due diligence, be produced by the October 10, 2016 deadline for remaining witnesses and exhibits.

C. IN THE ALTERNATIVE, AN ADDITIONAL ORDER TO SHOW CAUSE SHOULD BE ISSUED

Case law is clear that this Hearings Officer can, and should, consider all past and present violations of Condition 10 in these proceedings. If the Hearings Officer so chooses, another show cause order can be issued, though it is not necessary given the broad authority of the Commission to address all possible violations of Condition 10 in these proceedings.

HAR Title 15 provides for the commencement of show cause proceedings before the Commission:

> §15-15-93 Enforcement of conditions, representations, or commitments. (a) Any party or interested person may file a motion with the commission requesting an issuance of an order to show cause upon a showing that there has been a failure to perform a condition, representation, or commitment on the part of the petitioner. The party or person shall also serve a copy of the motion for an order to show cause upon any person bound by the condition, representation, or commitment. The motion for order to show cause shall state:
>
> (1) The interest of the movant;

(2) The reasons for filing the motion;
(3) A description and a map of the property affected by the condition;
(4) The condition ordered by the commission which has not been performed or satisfied;
(5) Concisely and with particularity the facts, supported by an affidavit or declaration, giving rise to a belief that a condition ordered by the commission has not been performed or satisfied; and
(6) The specific relief requested.

Lanaians For Sensible Growth is a nonprofit corporation made up of Lāna'i residents and community members. As an organization, LSG seeks to assure adequate public shoreline access, protect unique coastal recreational and natural resources, and to preserve ancient Hawaiian archaeological and historical sites located in the Kō'ele and Mānele Bay resort project areas. Declaration of Counsel. LSG has participated in this docket since its inception. LSG moves for an order to show cause to be issued, and to be combined with the present proceedings, in order to ensure that this Commission can address all violations of Condition 10 in one proceeding. The Commission's 1993 OSC containing a description and map of the property affected by Condition 10 is attached as Exhibit "A."

The terms of Condition 10 is set forth above. There is a good faith belief that the Resort is violating Condition 10. The Commission already found a basis for issuing a show cause order for the violation of Condition 10 in 1993 for the Resorts use of water from Wells 1 and 9 to irrigate its golf course at Manele. Declaration of Counsel. Since that time, the Resort is continuing to use the same wells in addition to newer Wells 14 and 15, both located in Lāna'i's high level aquifer. Declaration of Counsel. The Resort does not deny that it is withdrawing water from Lāna'i's high level aquifer to irrigate its golf course. Petitioner Lāna'i Resort's Positional Statement at 8-10, 13. The same questions as to the potability of the water used to irrigate the golf course which existed in 1993 exist today.

LSG requests that an order to show cause seeking the same relief sought by the 1993 OSC be issued immediately and combined with this proceeding in the interest of finality. Declaration of Counsel.

IV. CONCLUSION

Based on the foregoing reasons, the Hearings Officer should issue an order:

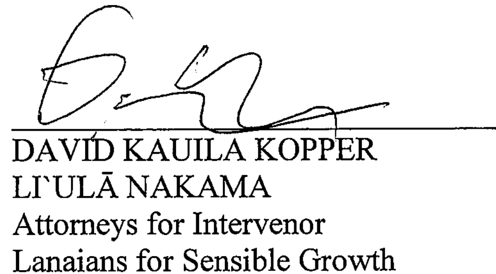
(I) Confirming that the contested case hearing scheduled to commence on November 9, 2016 will address the following issues:

1. Does Lāna'i Resorts use potable water from the high-level groundwater aquifer to irrigate the golf course?
2. Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water?
3. What is the definition of "potable"?
4. Any other issues relevant to the violation of Condition 10 and any reversion or other relief deemed appropriate by the Commission; and

(II) Confirming that all alleged violations of Condition 10 of the Commission's 1991 Findings of Fact, Conclusions of Law, and Decision and Order in this Docket from the 1993 Order to Show Cause's issuance till the present will be addressed by the hearing scheduled to commence on November 9, 2016.

In the alternative, and pursuant to HAR § 15-15-93, LSG requests that the presiding Hearings Officer, or the Commission, issue an additional Order to Show Cause to include all continuing violations of Condition 10 till the present.

DATED: Honolulu, Hawai'i, September 14, 2016.



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BEFORE THE LAND USE COMMISSION

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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 DECLARATION OF COUNSEL; EXHIBIT "A"

DECLARATION OF COUNSEL

I, DAVID KAUILA KOPPER, hereby declare under penalty of perjury that:

1. The statements I made below are based upon my personal knowledge.
2. I am an attorney of record for Lanaians For Sensible Growth (LSG).
3. LSG is a non profit corporation made up of Lāna'i residents and community members. As an organization, LSG seeks to assure adequate public shoreline access, protect unique coastal recreational and natural resources, and to preserve ancient Hawaiian archaeological and historical sites located in the Kō'ele and Mānele Bay resort project areas.
4. There is good cause to believe that Lāna'i Resorts is in violation of Condition 10 of the Land Use Commission's Decision and Order dated April 16, 1991, by using potable water from Lāna'i's high level aquifer to irrigate its golf course at Mānele.
5. The Commission already found a basis for issuing a show cause order for the violation of Condition 10 in 1993 for the Resorts use of water from Wells 1 and 9 to irrigate its golf course at Manele.

6. Attached as Exhibit A is a true and correct copy of the Land Use Commission's October 13, 1993's Order to Show Cause.

7. During the August 18, 2016 site visit for the hearing in this docket, representatives for Lāna'i Resorts explained that water from Wells 1, 9, 14, and 15, located in Lāna'i's high level aquifer, is used to irrigate the golf course at Mānele.

8. The Resort does not deny that it is withdrawing water from Lāna'i's high level aquifer to irrigate its golf course.

9. There has been no evidence to demonstrate that the water withdrawn from these wells are not potable.

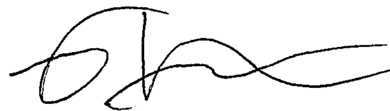
10. The same questions as to the potability of the water used to irrigate the golf course which existed in 1993 exist today.

11. LSG is requesting that the Commission issues an additional order to show cause addressing all past and continuing violations of Condition 10 and to combine the new order to show cause with the present proceedings.

12. Issuing a new order and combining it with the ongoing show cause proceedings will ensure that this Commission can address all violations of Condition 10 in one proceeding, avoiding multiple proceedings.

I hereby declare under penalty of perjury that the foregoing statements are true and correct, to the best of my knowledge, information, and belief.

DATED: Honolulu, Hawaii, September 14, 2016.



DAVID KAUILA KOPPER

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of LANAI RESORT PARTNERS To Amend the Rural Land Use District Boundary into the Urban Land Use District for Approximately 110.243 acres and the Agricultural Land Use District Boundary into the Urban Land Use District for Approximately 28.334 acres at Manele, Lanai, Hawaii, Tax Map Key No. 4-9-02: portion 49 (formerly Tax Map Key No.: 4-9-02: portion 1)	Docket No. A89-649 ORDER TO SHOW CAUSE

This is to certify that this is a true and correct copy of the document on file in the office of the State Land Use Commission, Honolulu, Hawaii.

OCT 13 1993 by [signature]
Date Executive Officer

LAND USE COMMISSION
STATE OF HAWAII
OCT 13 7 44 AM '93

ORDER TO SHOW CAUSE

EXHIBIT A

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of LANAI RESORT PARTNERS To Amend the Rural Land Use District Boundary into the Urban Land Use District for Approximately 110.243 acres and the Agricultural Land Use District Boundary into the Urban Land Use District for Approximately 28.334 acres at Manele, Lanai, Hawaii, Tax Map Key No. 4-9-02: portion 49 (formerly Tax Map Key No.: 4-9-02: portion 1)	Docket No. A89-649 ORDER TO SHOW CAUSE

ORDER TO SHOW CAUSE

TO: LANAI RESORT PARTNERS, MK DEVELOPMENT, INC., and LANAI COMPANY, INC.

YOU ARE HEREBY COMMANDED, under the authority of section 205-4, Haw. Rev. Stat., and section 15-15-93, Hawaii Administrative Rules, to appear before the Land Use Commission, State of Hawaii, at ILWU Union Hall, Lanai, Hawaii, on December 14, 1993, at 10:30 a.m., to show cause why that certain land at Manele, Lanai, Hawaii, Tax Map Key No. 4-9-02: portion of 49 (formerly Tax Map Key No. 4-9-02: portion of 1), covering approximately 110.243 acres of land, and land at Manele, Lanai, Hawaii, Tax Map Key No. 4-9-02: portion of 49 (formerly Tax Map Key No. 4-9-02: portion of 1), covering approximately 28.334 acres of land, collectively referred to as the Subject Area, and as approximately identified in Exhibit "A" attached hereto and

incorporated by reference herein, should not revert to its former land use classifications or be changed to a more appropriate classification.

The Land Use Commission has reason to believe that you have failed to perform according to Condition No. 10 of the Commission's Decision and Order dated April 16, 1991 in that you have failed to develop and utilize alternative sources of non-potable water for golf course irrigation requirements. Condition No. 10 was imposed by the Commission after the Petitioner made representations that water from the high-level groundwater aquifer would not be used for golf course irrigation.

Section 205-4, Haw. Rev. Stat., authorizes the Commission to impose conditions necessary to "assure substantial compliance with representations made by the petitioner in seeking a boundary change" and that "absent substantial commencement of use of the land in accordance with such representations, the Commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification."

Accordingly, the Commission will conduct a hearing on this matter in accordance with the requirements of chapter 91, Haw. Rev. Stat., and subchapters 7 and 9 of chapter 15-15, Hawaii Administrative Rules. All parties in this docket shall present testimony and exhibits to the Commission as to whether Petitioner has failed to perform according to Condition No. 10 and the

representations made by the Petitioner in seeking the land use reclassification.

Any party may retain counsel if the party so desires.

DATED: Honolulu, Hawaii October 13, 1993.

STATE OF HAWAII
LAND USE COMMISSION

By [signature]
JOANN N. MATTSON
Chairperson and Commissioner

SCALE: 1"=2,083 ft.±

LOCATION MAP

DOCKET NO.: A89-649/LANAI RESORT PARTNERS
TAX MAP KEY: 4-9-02: por. 49
(formerly TMK: 4-9-02: por. 1)
MANELE, LANAI, MAUI

SUBJECT AREA

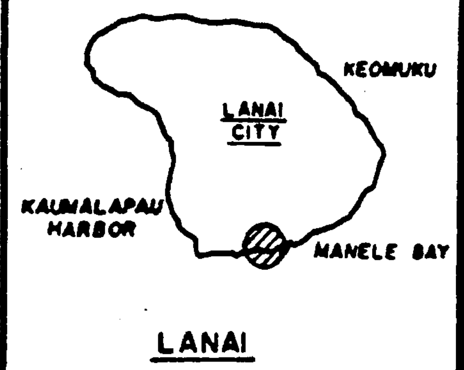


EXHIBIT "A"

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of LANAI RESORT PARTNERS To Amend the Rural Land Use District Boundary into the Urban Land Use District for Approximately 110.243 acres and the Agricultural Land Use District Boundary into the Urban Land Use District for Approximately 28.334 acres at Manele, Lanai, Hawaii, Tax Map Key No. 4-9-02: portion 49 (formerly Tax Map Key No.: 4-9-02: portion 1)	Docket No. A89-649 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order to Show Cause was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by certified mail:

HAROLD S. MASUMOTO, Director
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CERT.	ARNOLD L. LUM, ESQ., Attorney for Intervenor Sierra Club Legal Defense Fund 212 Merchant Street, #202 Honolulu, Hawaii 96813
CERT.	ISAAC D. HALL, ESQ., Attorney for Intervenor Lanaians for Sensible Growth 2087 Wells Street Wailuku, Hawaii 96793
CERT.	ALAN T. MURAKAMI, ESQ., Attorney for Intervenor Native Hawaiian Legal Corporation 1270 Queen Emma Street, Suite 1004 Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, this 13th day of October 1993.

ESTHER UEDA
Executive Officer

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 CERTIFICATE OF SERVICE

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 September 14, 2016.

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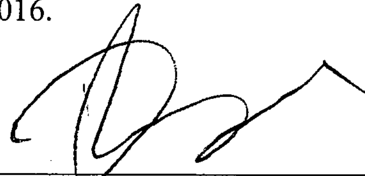
DATED: Honolulu, Hawai'i, September 14, 2016.



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