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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 OPPOSITION TO PETITIONER LĀNA'I RESORTS, LLC'S MOTION TO SET ISSUES ON REMAND OF THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED MAY 17, 1996; CERTIFICATE OF SERVICE

INTERVENOR LANAIANS FOR SENSIBLE GROWTH'S OPPOSITION TO PETITIONER LĀNA'I RESORTS, LLC'S MOTION TO SET ISSUES ON REMAND OF THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED MAY 17, 1996

I. INTRODUCTION

The Resort's Motion To Set Issues On Remand Of The Land Use Commission's Findings Of Fact, Conclusions Of Law, And Decision And Order Dated May 17, 1996 (1) unilaterally modifies the Supreme Court's remand order such that it no longer directly addresses the Resort's violations of Condition 10; (2) ignores the Supreme Court's remand instructions; and (3) excludes twenty three years of relevant violations from the Commission's reach. Given the

importance of Lāna'i's water resources, the issues at the pending contested case hearing should not be so narrow as to limit the Hearing Officer's and the Commission's ability to fulfill their duty to protect Hawai'i's public trust.

II. THE RESORT'S PROPOSED ISSUES ON REMAND SHOULD BE DENIED[1]

A. THE PROPOSED ISSUES DO NOT ADDRESS THE RESORT'S VIOLATION OF CONDITION 10'S POTABLE WATER RESTRICTION

1. The Proposed Issues Violates The Supreme Court's Remand Order

The Resort's proposed issues runs contrary against the direction and intent of the Supreme Court of Hawai'i in *Lāna'i Company v. Land Use Comm'n, 105 Haw. 296 (2004).*

The Supreme Court commanded that "the issue of whether [the Resort] has violated Condition No. 10 by utilizing potable water from the high level aquifer" must be decided by the Commission. *Lāna'i Company* at 316. They did not direct the Commission to determine whether non-potable water is also being used. The Supreme Court's remand instructions must be followed. *Diamond v. Dobbin*, 132 Haw. 9, 35 (2014).

The Resort's proposed framing of the issues on remand fails to address what *Lāna'i Company* requires the Commission to determine: whether the Resort is using "potable water" from Lāna'i's high level aquifer. For sake of example only, it is a conceivable possibility that the Commission may determine that some wells in the basin produce potable water, and some produce non-potable water, or that the Resort uses potable water from the Basin in addition to recycled or reclaimed effluent from other sources. Even though it would be obvious that the Resort would be in violation of Condition 10 in these situations, under the Resort's proposed framing of the issues, they would avoid rebuke because they would be technically using non-potable or brackish water in addition to their violative use of potable water. By reframing Condition 10 and the Supreme Court's remand in this way, the Resort is reading the potable water restriction, and any teeth the restriction may have, right out of Condition 10.

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[1] The Resort is proposing to limit the review of the Hearings Officer to the following:

(a) What does "non-potable" mean in the context of Condition No. 10? and
(b) Was Castle & Cooke, Inc. using non-potable or brackish water from the high-level groundwater aquifer to irrigate the golf course, from 1991 to 1993?

It simply is without merit for the Resort to argue that, because the Commission is not tasked with determining the 1991 Commission's intent behind the term "potable water" and because Condition 10 does not define "potable," that the restriction on the use of "potable water" should be ignored in its entirety. Motion at 2. The Supreme Court made clear that the potable water restriction of Condition 10 was enforceable based on the plain meaning of the term. *Lāna'i Company* at 313-314. The Court required that the Commission address "the issue of whether [the Resort] has violated Condition No. 10 by utilizing potable water from the high level aquifer[.]" *Lāna'i Company* at 316. Ambiguity cannot be manufactured where none exists.

The proposed issues would turn this show cause hearing on its head. The purpose of a show cause hearing is to give the offending party an opportunity, along with the burden, to prove that it is NOT in violation of a condition of a boundary amendment as established by the Commission. HAR 15-15-93. This burden is triggered by the good faith belief of the Commission that a violation occurred or is occurring. *Id.* Turning this hearing into an opportunity for the Resort to show **how it may be complying with Condition 10 in some respects** frustrates this hearing's purpose: to address the Commission's belief that **the Resort is not complying with Condition 10 in other respects**.

2. Condition 10's Restriction On Potable Water Use and Its Mandate For Alternative Sources are Not Mutually Exclusive

The Resort's position necessarily requires an incorrect interpretation of Condition 10; that the terms "potable" and "brackish" are mutually exclusive.[2] They are not.

Potability and brackishness apply to two different characteristics of water. The term potable, by its plain meaning, refers to water's suitability for drinking. *Lāna'i Company* at 299, n. 9 ("The term for 'potable water' is ordinarily defined as 'suitable for drinking.'"). The term "brackish" generally refers to the aesthetic quality of water, not whether water can actually be drunk. *Id.* ("'Brackish' is defined as 'somewhat salty, distasteful.'"). Federal and State drinking water standards do not look at whether water is salty to determine whether it is suitable for consumption. 40 CFR § 141; HAR §§ 11-20-3 to 11-20-7.5. The County of Maui in fact

[2] Condition 10 reads: 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.

defines "potable water" as water which meets State and Federal standards for contaminants. MCC § 14.08.20. Conversely, whether water is salty or distasteful are governed by secondary standards which do not concern the drinkability of water. 40 CFR § 143.1. The Department of Health likewise does not consider whether water is salty in determining whether it is drinkable. Potable water can be brackish or not brackish; brackish water can be potable or not potable.

The Supreme Court agrees. Even though the Court noted that the LUC considered Wells 1 and 9 "brackish" in 1991, *Lāna'i Company*, 105 Haw. 296, 312 (2004), the Court nonetheless considered that the fact that the Resort has never performed a comprehensive test to determine the potability of Wells No. 1 and 9 "imply that [the Resort] was using potable water[.]" *Id.* at 316. There is no way the Supreme Court could have ruled as it did and remanded this matter if brackish water is always not-potable.

Condition 10 does not alter the plain meaning of these terms such that all brackish water can never be considered potable. Motion at 2-3. The Condition's use of e.g., or *exempli gratia,* in hypothetically positing that some brackish water can be considered to be non-potable, is not legally effective to mean that the example given is *per se* non-potable regardless of context; if that was the intent of the Condition, it would have defined "non-potable" or used "i.e." instead. If water that could be considered "brackish" is always "non-potable", then there would have been no reason to include the prohibition on potable water in the first portion of Condition 10. Reading Condition 10 in the Resort's way is illogical and makes the first portion of Condition 10 meaningless surplus. A cardinal rule of statutory construction requires tribunals "to give effect to all parts of a statute, and no sentence, clause or word shall be construed as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute." *In re Ainoa*, 60 Haw. 487, 490 (1979). Here, the construction of Condition 10 that gives full force to all the words of the condition, is to read "brackish water" as capable of being either potable or non-potable, with the Resort being prohibited from using brackish water that is potable from the high-level groundwater aquifer. To follow the Resort's interpretation would be to make the prohibition on potable water use meaningless.

Whether the Commission chooses to follow the Supreme Court, Maui County, the State, or Federal regulations, the only conclusion that can be reached is that water can be both

"brackish" and "potable."[3] Therefore, the Resort cannot now change the remand mandate from the Supreme Court by substituting an inquiry about the Resort's brackish water use for the required inquiry into their violative use of potable water.

B. THE LEAKAGE THEORY IS VALID AND MUST BE CONSIDERED

LSG is not the only party who considers the "leakage" theory to be valid. Motion at 5. The LUC itself found the theory valid in 1996. The Supreme Court found the theory valid in 2004. It cannot be brushed aside.

The Resort claims that to investigate the "leakage" theory would violate the due process mandates of the Supreme Court's decision in *Lāna'i Company*. But it was the decision in *Lāna'i Company* which validated the theory. The Supreme Court 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. If such a theory could not be presented or was otherwise invalid as a matter of law, as the Resort argues, then the Court would have so ruled. The Resort cannot blow hot and cold and argue, as they do, that the Supreme Court's decision must be followed but not to the extent that it recognizes that pumping induced leakage into Palawai Basin can be a basis of a finding that the Resort is violating Condition 10.

C. THE SCOPE OF THE HEARING MUST REACH ALL OF THE RESORT'S VIOLATIONS

Lāna'i Company cannot be twisted to stand for the proposition that due process restricts this Commission from addressing their continuing and ongoing violation of Condition 10. Motion at 4. *Lāna'i Company* does not address this issue. There are other cases which do.

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.* "[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

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[3] Maui County's prior admission serving water that could be considered both "brackish" and "potable" demonstrates that these terms are not mutually exclusive.

"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 Resort continues to assert that, because the 1993 OSC does not give fair notice of violations which did not exist at the time, the violations cannot be considered, and the Commission is bound to an order issued twenty three years ago. But the Commission is not bound by the 1993 order; they can apprise the Resort with full and fair notice of the exact scope of the contested case hearing by way of a communication or order by the hearings officer. *See Pilaa 400* at 271. The LUC's ability to address continuing violations was already upheld in *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 134 Haw. 187 (2014).

The Resort argues that any alleged violations which occurred after 1993 should "be dealt with on a *de novo* basis." Motion at 4. But the Circuit Court's remand, which was upheld by the ICA in *Lanaians for Sensible Growth v. Lāna'i Resorts, LLC*, 137 Haw. 298 (App. 2016), ordered that these proceedings be treated *de novo*. *See* November 8, 2012 Order Vacating Appellee Land Use Commission's Order Vacating 1996 Cease and Desist Order; Denying Office of Planning's Revised Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order Filed April 16, 1991; and Granting Petitioner's Motion for Modification of Condition No. 10; With Modifications Entered January 25, 2010 and Remanding Matter To The Land Use Commission ("[T]he Court . . . remands the matter to LUC with instructions to conduct de novo further evidentiary hearings with a new hearings officer, pursuant to LUC's decision to do so on May 18, 2007."). Now is the time to address all violations, *de novo*.

It is illogical to confine the Hearings Officer and the Commission to a brief period of time in the early 90s. If the Resort's position was taken to its logical conclusion, then the Commission would have to issue new show cause orders continuously to ensure that all violations can be addressed. It serves no party, except the Resort with their unlimited litigation resources, to have multiple proceedings on one continuing violation of one condition.

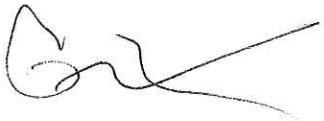
The Commission has a trust duty to affirmatively take action to protect Lāna'i's natural resources. *In re Water Use Permit Applications*, 94 Hawai'i 97, 136, 9 P.3d 409, 448 (2000); *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.,* 136 Haw. 376, 406, 363 P.3d 224, 254 (2015) (quoting *Kelly v. 1250 Oceanside Partners,* 111 Hawai'i 231, 140 P.3d 985 (2006)). The

Commission would not be meeting its duty by narrowing the scope of this hearing in the drastic way proposed by the Resort's Motion. It makes sense that the hearing be as broad as necessary to provide the Commission with all relevant facts, arguments, and theories in order to make a sound decision which takes into account the protection of Lāna'i's resources.

III. CONCLUSION

Based on these and the foregoing reasons, the Motion should be DENIED.

DATED: Honolulu, Hawai'i, September 23, 2016.



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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of	)	Docket No. A89-649
	)	
LANAI RESORT PARTNERS,	)	CERTIFICATE OF SERVICE
	)	
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)	)	

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 23, 2016.

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