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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 LĀNA'IANS FOR SENSIBLE GROWTH'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER; CERTIFICATE OF SERVICE

INTERVENOR LĀNA'IANS FOR SENSIBLE GROWTH'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

I. INTRODUCTION

Intervenor Lāna'ians For Sensible Growth ("LSG") files its exceptions to the Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Decision and Order filed April 4, 2017 (the "Proposed Order).

In 1991, the Land Use Commission (the "Commission") approved a petition by Lāna'i Resorts, LLC for a district boundary amendment to allow for the development of a golf course at Mānele Bay. To protect Lāna'i's drinking water, the Commission conditioned the district

boundary amendment on the prohibition of using potable water from Lāna'i's high level aquifer, the only source of drinking water for Lāna'i, for golf course irrigation.

Now, over 25 years later and after multiple appeals, the Resort is continuing to use drinking water to irrigate its golf course. After five days of hearings, the Hearings Officer had no choice but to agree that the water pumped for golf course irrigation by the Resort is potable. The water meets Hawai'i Department of Health standards for water in public water systems which deliver potable water for domestic consumption. The water meets the National Primary Drinking Water Regulations set by the U.S. Environmental Protection Agency. It meets the County of Maui definition for potable water in the context of golf course irrigation. Its chloride levels, or "brackishness," is consistent with water served for drinking by counties across Hawai'i. A utilities director for Lāna'i confirmed that the water was subjected to a comprehensive test for potability, and the water tested as potable. The Resort offered no evidence that the water was or is undrinkable. The water is potable.

While the Proposed Order correctly finds that the Resort's irrigation water is potable under all common sense and legal definitions of the term, it nonetheless reaches an illogical result: that water which meets all standards of potability can be used for irrigation even though there is a regulation that clearly aims to prevent the use of potable water for irrigation. To reach this inconsistent result, the Proposed Order fails to make a proper or reasonable legal analysis in interpreting the language of the Commission's condition prohibiting the use of potable water to irrigate the golf course. It commits the same errors that the Hawai'i Supreme Court previously held was erroneous. It improperly shifts the burden of proof to LSG. It relies on claims not at issue in this contested case hearing. It is persuaded by irrelevant facts of the Resort's good deeds intended to distract from the illegal pumping of drinking water.

The faulty legal conclusions of the Proposed Order do not make logical sense in light of the facts of this case and the factual findings in the Proposed Order itself. The Commission imposed a condition to prevent the use of potable water to irrigate a golf course. The water at issue is potable in every sense of the term. Adopting the Proposed Order will only perpetuate the legal disputes which have plagued this docket for the past 25 years. The Proposed Order should be rejected.

II. PROCEDURAL HISTORY

On November 29, 1989, Lanai Resort Partners, the predecessor-in-interest to Lāna'i 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 Challenge at Mānele 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 due to the use of Wells 1 and 9, located in the high level aquifer, to irrigate the Mānele golf course. 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.

On June 24, 2016, the Commission issued its Order Appointing Hearings Officer, appointing Vice-Chairperson Jonathan Likeke Scheuer as the hearing officer in this docket.

Following a September 30, 2016 pre-hearing conference on the two September 14, 2016 motions, the Hearing Officer issued Minute Order No. 6, limiting the scope of, and resolving all disputes regarding, the issues on remand:

> [1.] The scope of the remand is limited to the use of wells 1 and 9 to irrigate the golf course and whether such use violates condition 10 of the LUC Decision and Order dated April 6, 1991. Evidence will be accepted with regard to wells 1 and 9 from the date of the 1991 Decision and Order until present. If the use of any other wells in the aquifer has relevance to the issue of whether the use of wells 1 and 9 to irrigate the golf course results in a violation of condition 10, evidence of such may be considered. However, allegations that the use of additional wells not

a part of the 1996 proceedings (i.e., the original order to show cause proceedings) are in and of themselves a violation of Condition 10 are not a part of the remand. [2.] Has Lana`i Resorts utilized potable water from the high-level groundwater aquifer to irrigate the golf course?

[3.] What does the phrase "potable" mean in condition 10?

[4.] Is there leakage of potable water to the wells in the Palawai Basin and if so does such leakage constitute utilization of potable water as prohibited by condition 10?

On November 9, 2016, the contested case hearing on the above issues began. The evidentiary portion of the hearing concluded on November 16, 2016. Closing arguments were taken at the Maui Arts and Cultural Center on December 8, 2016. All parties presented closing arguments.

After the parties submitted proposed orders on the contested case hearing, the Hearing Officer issued his Proposed Order on April 4, 2016.

III. THE HEARING OFFICER ERRED IN CONCLUDING THAT THE RESORT IS NOT USING POTABLE WATER TO IRRIGATE ITS GOLF COURSE

A. WELLS 1 AND 9 ARE POTABLE

There is no dispute that Wells 1 and 9 are located in the high level aquifer, Ex. I-4; 2 Trans 197:15-20; 2 Trans. 442:1-9; 3 Trans 650:9-16; Ex. I-11, and that they are used to irrigate the Challenge at Mānele. 3 Trans. 405:24-406:7. Therefore, if Wells 1 and 9 are "potable" then the Resort is violating Condition 10. There can be no dispute that Wells 1 and 9 are potable. Proposed Order FOF ¶¶ 92-93.

1. WATER IS POTABLE IF IT IS SAFE TO DRINK AS DETERMINED BY SAFE DRINKING WATER REGULATIONS

The general principles of construction which apply to statutes also apply to administrative agencies. *International Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Telephone Company*, 68 Haw 316, 323 (1986). Where a term is plain and unambiguous, it must be interpreted by its "plain and obvious meaning." *Chang v. Buffington*, 125 Hawai'i 186, 193, 256 P.3d 694, 701 (2011); *see Lanai Co v. Land Use Comm'n.*, 105 Hawai'i 296, 308 (2004)(relying on the "plain language of Condition 10"). A term is plain and unambiguous where "the definition could readily be established through common sense and everyday experience." *Todd v. State*, 161

Md. App. 332, 346, 868 A.2d 944, 953 (2005). Simply because a term is undefined does not make it unambiguous: "legal or other well accepted dictionaries [are] one way to determine the ordinary meaning of certain terms not statutorily defined." *Davis v. Four Seasons Hotel Ltd.*, 122 Hawai'i 423, 448 (2010). The Commission cannot "depart[] from the plain and unambiguous language" unless there is an "indication in the regulation that the term . . . be given a special interpretation other than its common and general meaning." *Singleton v. Liquor Comm'n*, 111 Hawai'i 234, 244 (2006).

In and of its self, the term "potable" is plain and unambiguous. At the contested case hearing on this matter, LSG offered substantial unrebutted testimony that "potable" means safe to drink. LSG's Proposed FOF ¶¶ 78-122. The safety of drinking water is determined by various safe drinking water regulations, all of which look to maximum contaminant levels, not brackishness. HRS § 1-16 ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other."); *Richardson v. City & Cty. of Honolulu*, 76 Haw. 46, 868 P.2d 1193 (1994) (holding that what is clear in one statute or rule may be "called in aid to explain what is doubtful in another."); Proposed Order FOF ¶¶ 66-93. Based on this irrefutable definition, the Hearing Officer concedes that potability, by its plain meaning, means safe to drink, irrespective of its brackishness. Proposed Order FOF ¶ 92 ("Based on the above facts, it is possible for water chloride concentrations of greater than 250 ppm to be used as potable water, including the water from Wells 1 and 9, either directly or blended with other potable sources, depending on the level of chlorides, and so long as other drinking water standards are met.")

2. WELLS 1 AND 9 MEET ALL SAFE DRINKING WATER STANDARDS

Uncontroverted evidence on the record establishes that Wells 1 and 9 are potable. Proposed Order FOF ¶¶ 85-91.

On or about October 18, 2006, at a regular meeting of the Lāna'i Planning Commission, Cliff Jamile, former Director of Utilities of Lāna'i Water Company, testified before the Commission that Wells 1, 9, and 14 were tested for potability, and that the wells were contaminant free:

> [T]he EPA sets certain guidelines, sets certain requirements that we have to comply with, and that is the first stage contaminant list in there. There must be about 25 to 30-contaminant that we have to test for including E.D.B., DBCP, TCP, you know, and all of these things. So we send those to the lab . . . and the lab runs those test exactly as they

> are suppose to do in accordance with EPA's requirements and test methods. And so far as I know, well I do know for sure that wells #1, 9, and 14 were tested and no contaminants were found present in the water.

Ex. I-21 at 12. This testimony was sufficiently authenticated by a former member and chair of the Lāna'i Planning commission. 2 Trans. 324:11-25; 2 Trans. 327:22-24. Mr. Jamile's testimony refers to primary contaminants regulated by State and Federal drinking water standards. *See* HAR §11-20-24, Proposed Order FOF ¶ 90. Mr. Jamile's testimony is corroborated by an August 23, 1994 letter from the Resort wherein the Resort admits that Well 1 produces potable water. Ex. I-8 at 1 ("Our goal is to develop a brackish, more salient water source further away from the high level potable groundwater in Well 1.").

The Resort did not produce any contrary evidence that Wells 1 and 9 contain any of the primary contaminants regulated by safe drinking water regulations in levels exceeding the maximum levels set for such contaminants at any time at the hearing. Other than the test referenced in Exhibit I-21, no evidence that the Resort, any other parties, or their witnesses or agents ordered and/or performed a test for potability as determined by DOH and EPA primary drinking water regulations on Wells 1 and 9 at any other time was introduced at the hearing. 1 Trans. 150:7-18 (Asuncion testimony); 1 Trans. 140:24-141:9 (Seto testimony); 2 Trans. 201:9-202:1 (Stubbart Testimony); 2 Trans. 240:19-25 (Hardy Testimony); 2 Trans. 307:7-12 (Thomas testimony); 3 Trans. 442:10-443:4 (Nance Testimony) 3 Trans. 517:13-21 (Schildknect testimony); 3 Trans. 551:17-22 (Donoho Testimony); 4 Trans. 655:23-656:20 (Matsumoto Testimony). The Resort did not produce a sample of the water from Wells 1 and 9. The Resort did not produce any relevant evidence that the water in Wells 1 and 9 was ever or is now not potable. The Proposed Order is void of any findings regarding this lack of contrary evidence.

Accordingly, using the plain and common sense meaning of the term "potable", the Resort is violating Condition 10 by the use of water from Wells 1 and 9 unless there is an indication in the regulation that the term "potable" must be given a special interpretation. *Singleton*, 111 Hawai'i at 244.

3. THE TERM POTABLE IS NOT USED IN SUCH A WAY THAT IMPLIES A DEFINITION OTHER THAN ITS PLAIN AND OBVIOUS MEANING

There is no basis to claim that the term "potable" as used in Condition 10 means something other than water safe to drink. Proposed Order FOF ¶¶ 93, 102, 113, COL ¶¶ 1-3. In the six times the term "potable" appears in the 1991 Order, it is used in accord with its plain meaning:

> [Findings of Fact]
>
> *46.* The proposed golf course at Mānele of which the Property is to be a part, will be irrigated with nonpotable water from sources other than potable water from the high level aquifer.
>
> . . .
>
> *90.* Maui planning Department recommends that any use of potable groundwater for golf course irrigation should be limited and terminated within five years.
>
> *91.* Petitioner intends to irrigate the golf course with nonpotable water, leaving only the clubhouse which will use potable water[.]
>
> . . .
>
> *117.* Petitioner has stated that the Mānele golf course will be irrigated with nonpotable water from sources other than the potable water from the high level aquifer.
>
> . . .
>
> [Order]
>
> *10.* 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.
>
> *11.* Petitioner shall fund the design and construction of all necessary water facility improvements . . . to provide adequate quantities of potable and non-potable water to service the subject property.

Not once does Condition 10, or the 1991 Order, define potable to exclude water based on elevated chloride levels. There is nothing in these six instances which suggests that potable means something other than water that is safe to drink. As such, the Commission would commit reversible error if it would look further than the plain meaning of the term "potable." Proposed Order FOF ¶¶ 94-101. Given that the Hearing Officer agreed with the overwhelming evidence

that Wells 1 and 9 are "potable" under the plain meaning of the term, there can be no dispute that the Resort is using potable water to irrigate the golf course. Proposed Order FOF ¶¶ 93-94.

4. THE REFERENCE TO BRACKISH WATER IN CONDITION 10 DOES NOT ALTER THE PLAIN AND OBVIOUS MEANING OF THE TERM POTABLE

The Proposed Order turns on a flawed argument: that by including brackish water as a possible example of a non-potable, alternate source of water, Condition 10 altered the definition of the term "potable" to exclude brackish water in all instances. *See* Proposed Order FOF ¶¶ 93-120. This position has no basis in law or fact. *See* Proposed Order COL ¶¶ 1-3.

The Hearing Officer's conclusion that Condition 10's reference to brackish water as a possible alternate source functions as a per se exception for the use of brackish water produces an inconsistent and illogical result. Proposed Order FOF ¶¶ 93, 102, COL ¶ 4. Substantial uncontroverted evidence and controlling legal precedent introduced at the contested case hearing establishes that brackish water and potable water are not mutually exclusive. Some potable water can be brackish: some brackish water can be non-potable:

- Office of Planning's witness Roy Hardy of the State Commission on Water Resource Management ("CWRM") testified that the "common sense" definition of "potable" is water that is "safe to drink." 1 Trans. 215:1-14.

- The CWRM defers to the State of Hawai'i Department of Health ("DOH") to determine whether water is safe to drink. 2 Trans. 240:23-25; 2 Trans. 231:15-19; HRS § 174C-66 ("The department of health shall exercise the powers and duties vested in it for the administration of the State's water quality control program as provided by law.").

- The DOH implements standards for water suitable for human consumption which considers whether maximum levels of certain contaminants have been reached. HAR §§ 11-20-3 to 11-20-7.5; 1 Trans. 136:24-137:22.

- HAR Chapter 11-20 mirrors the National Primary Drinking Water Regulations set by the U.S. Environmental Protection Agency ("EPA") which also determines whether water is suitable for drinking by way of setting maximum contaminant levels. 40 CFR § 141; 4 Trans. 680:24-681:10 (Taylor testimony).

- Chlorides are not considered a public water system contaminant by the DOH. 1 Trans. 138:10-12; Ex. I-12; Ex. OP-4.

- The DOH, Safe Drinking Water Branch has never been asked to take action on water which exceeds 250 mg/L by consumers or recipients of such water. 1 Trans. 141:22-142:1.

- Chlorides are not considered a primary contaminant and are not regulated by health-based standards by the EPA. Ex. I-12; 2 Trans 205:23-206:13 (Stubbart Testimony).

- Chlorides in drinking water are not regulated by the DOH. 1 Trans. 138:10-12; Ex. I-12; Ex. OP-4.

- According to the CWRM, "you cannot determine potability just based on chlorides." 2 Trans. 230:13-14; R. V. XXXIII June 8, 2006 at 152:16-153:1 ("[I]t's really wrong to look at chlorides as a sole indicator of potability.").

- Instead of an indicator of potability, chlorides are used as an operational parameter in locating and drilling wills. 2 Trans. 217:9-12 (Hardy Testimony) ("[Chlorides] comes into play when your design . . . of wells, how you build wells in accordance with these different – different demarcations of brackish, fresh and saltwater."); 3 Trans. 422:11-14 (Nance Testimony).

- The Resort's witness Dr. Thomas testified that "chlorides is, to me, not the important constituent" to consider in determining potability. 2 Trans 291:12-19.

- The DOH would allow public water systems to provide water in excess of 250 mg/l chlorides for domestic use. 1. Trans. 138:18-22.

- It is "typical" for county water supplies to use water pumped at or above 250mg/l in their domestic water systems. 2. Trans. 250:13-251:9; 2. Trans 238:9-14.

- Currently, potable wells on O'ahu are producing water over 250 mg/l. *Id.*

- While Director of the Department of Water Supply for Maui County Dave Taylor testified that his department's water meets all relevant water quality standards, it "wouldn't surprise him" if Maui wells produced water with over 250mg/l chlorides. 4 Trans. 681:2-14.

- County of Maui Water Supply has served water pumped at over 350 mg/l chlorides and blended with fresher water to improve the taste for drinking. R. V XXXIII, June 8, 2006 at 201:18-25.

- County of Maui has served water at 300 mg/l chlorides for drinking and without blending to improve the taste. *Id.* at 202:12-203:4.

- The Resort, through its subsidiary Lāna'i Water Company, does not classify chlorides as a drinking water contaminant in its water quality disclosures made to the public. For example, "to ensure water is safe for drinking and day-to-day use, Lāna'i Water Company conducts regular testing . . . [to] demonstrate the purity" of the water they serve to residents for drinking and day-to-day use in the two potable public water systems on Lāna'i. Ex. I-15a; I-15; 2 Trans. 202:2-203:9.

- Lāna'i Water Company's Potable Water System Report does not measure chloride levels in reporting the quality of its potable water. Ex. I-15; 2 Trans. 202:2-203:9.

- Maui County similarly does not report on chloride levels in its annual water quality report for its domestic customers. 4 Trans. 683:20-684:9.

LSG's FOF and COL p. 11-15; Proposed Order ¶¶ 66-84. The Hearing Officer agreed with LSG that brackish water is not always non-potable. Proposed Order ¶¶ 92-93. Brackishness is an operational parameter, not an indicator of potability. 2 Trans. 217:9-12 (Hardy Testimony); 3 Trans. 422:11-14 (Nance Testimony). If that is the case, then it is of no consequence that Condition 10 recognizes that "brackish" water could be used for irrigation if it is non-potable.[1] Some brackish water is potable, and some brackish water is non-potable. Therefore, the inclusion of non-potable brackish water as a possible source of irrigation does not change the fact that "potable" brackish water for irrigation use is strictly prohibited by the plain language of Condition 10.[2] *Lanai Co.*, 105 Hawai'i at 384, 97 P.3d at 308 ("In this light, the 1991 Order cannot be construed to mean what the LUC may have intended but did not express.").

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[1] The imprudence of focusing on whether water is "brackish" to determine compliance with Condition 10 is found in the lack of an agreed upon measurable standard for "brackish" water. While the Proposed Order relies upon Roy Hardy to establish that water with chloride concentrations above 250 mg/l is brackish, Proposed Order FOF ¶ 68, Mr. Hardy also admitted that he also believed that 300 mg/l is the threshold for brackish water. 2 Trans 230:18-231:14.Under that definition, Well 1 would be, and should be, considered fresh. Accordingly, LSG objections to finding 68.

[2] Further, the failure of the Proposed Order to follow the plain meaning of the term potable (and the countless regulations which define potability) is inequitable given that the order chooses to apply the plain meaning and EPA definition of the term "brackishness" to Condition 10. Proposed Order, FOF ¶ 68,94; 1 Trans. 104:22-23(Resort's reliance on "EPA Secondary Standards");3 Trans 421:21-23;2 Trans 206 1-24(Stubbart Testimony). If the Proposed Order looks to plain meanings to define brackish, it must also do so in defining "potable."

On a grammatical level, Condition 10's use of "e.g., brackish" in hypothetically positing that brackish water can be considered to be non-potable, does not create a per se exception for all brackish water use regardless of potability. Proposed Order FOF ¶ 102, COL ¶ 4; *See People v. Alsup*, 241 Ill. 2d 266, 280 (2011). If Condition 10 was intended to state that brackish water is always non-potable, it should (and must) have used "i.e." instead. However, by including non-potable brackish water only as an example of water which may be used for golf course irrigation, Condition 10 does not therefore allow all brackish water to be used for golf course irrigation regardless of its potability.

By focusing on the brackishness of Wells 1 and 9,[3] instead of its potability, the Proposed Order favors a construction of Condition 10 which fails to give effect to all parts of a regulation. In Hawai'i, all parts of a regulation must be given effect, and "no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." *Keliipuleole v. Wilson*, 85 Hawai'i 217, 221, 941 P.2d 300, 304 (1997); *In re Wai'ola O Moloka'i, Inc.*, 103 Hawai'i 401, 427, 83 P.3d 664, 690 (2004); *In re Ainoa*, 60 Haw. 487, 490 (1979).[4]

The first paragraph of Condition 10 contains two separate provisions:

> 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.

Ex. 28 (emphasis added). The first provision prohibits the use of **any** potable water from the high level groundwater aquifer for golf course irrigation. The second provision allows for the use of alternative non-potable sources for golf course irrigation. To read Condition 10 as the Proposed Order does, and look only as to whether brackish or reclaimed sewage is being used, ignores the first provision of Condition 10. There would be no reason to have a prohibition on potable water if the condition is satisfied simply by a showing that water is brackish. This interpretation renders the first clause of Condition 10 meaningless. *Keliipuleole*, 85 Hawai'i at 221, 941 P.2d at 304.

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[3] Given the lack of an agreed upon definition of "brackishness" among the witnesses at the contested case hearing, *see* note 1 *supra*, LSG objects to any finding that Wells 1 and 9 are per se brackish. However, even assuming that Wells 1 and 9 are brackish, those wells are nonetheless potable.

[4] The Proposed Order fails to include this important principle of statutory construction as a conclusion of law.

Instead, the Commission is required to choose an interpretation which preserves the entirety of Condition 10. *Id.* Condition 10 prohibits using high level potable water. It allows alternative sources of water. Therefore it follows that if brackish water is potable, it cannot be used to irrigate the golf course. If it is non-potable, it can be used to irrigate the golf course. The Commission is mandated by law to choose the more inclusive and reasonable interpretation of Condition 10 over the one proposed by the Resort and followed by the Hearing Officer. Proposed Order COL ¶ 4.

5. THE REFERENCE TO WELLS 1 AND 9 IN THE 1991 ORDER DOES NOT CHANGE THE DEFINITION OF THE TERM "POTABLE"

The Hearing Officer's Order concludes that the 1991 Order's findings of fact regarding the proposed use of Wells 1 and 9 for golf course irrigation serves as a basis for finding that the term "potable" excludes water which may be brackish. Proposed Order FOF ¶ 103-112, COL ¶ 4. This amounts to reversible error.

First, if Condition 10 was intended to allow Wells 1 and 9 for golf course irrigation irrespective of its water quality, it would have said so. By instead using potability as the bench mark of whether water is suitable for irrigation, Condition 10 recognized that Wells 1 and 9 are not *per se* suitable for irrigation. The Proposed Order itself recognizes that Wells 1 and 9 could become "potable" as the Order defines it. D&O at ¶ 113 ("No party presented any evidence that the chloride levels of either Well 1 or 9 has ever dropped below 250 mg/l."). Therefore, while the Commission in 1991 recognized that Wells 1 and 9 were intended to be used for golf course irrigation, it made no finding as to whether Wells 1 and 9 were potable or not, or that these wells could be used for golf course irrigation regardless of the water quality of the wells.

Second, the Supreme Court already foreclosed the Hearing Officer's position by recognizing that Wells 1 and 9 are not per se allowable for golf course use if they were potable. In *Lāna'i Co.*, the Supreme Court recognized that the Land Use Commission found that Wells 1 and 9 were "brackish" and that Wells 1 and 9 were intended to be used to irrigate the golf course. *Lāna'i Co.* 105 Haw. at 311-312, 316. Nevertheless, the Court recognized that the Resort has "not performed a comprehensive test to determine the potability of Wells No. 1 and 9." *Id.* at 316. To the Supreme Court, a comprehensive test on potability would be determinative of whether Wells 1 and 9 could be used for golf course irrigation. *Id.*

In this case, a comprehensive test on potability was done. Ex. I-21 at 12, Proposed Order FOF ¶¶ 85-93. The water in Wells 1 and 9 are potable. These wells should not be used to irrigate a golf course.

6. THE PROPOSED ORDER'S RELIANCE ON PRIOR TESTIMONY IN THE ADMINISTRATIVE RECORD IS IMPROPER

The Proposed Order relies extensively on portions of the administrative record to support its departure from the undisputed plain meaning of the term "potable." Proposed Order FOF ¶¶ 47-65, 94-101. For example, the Proposed Order cites to prior statements by the Resort wherein the Resort claimed that Wells 1 and 9 were non-potable. *See* Proposed Order FOF ¶¶ 52, 55, 59, 60, 94, 96. The Proposed Order also cites to statements by the Resort that Wells 1 and 9 and brackish water was intended to be used for golf course irrigation. *Id.* ¶¶ 48, 49, 50, 53, 54. This reliance constitutes reversible error.

First, the Supreme Court already ruled in this docket that Condition 10 "cannot be construed to mean what the LUC may have intended but did not express." *Lanai Co.* at 314; *Lanaians for Sensible Growth v. Lāna'i Resorts, LLC*, 137 Haw. 298 (App. 2016) ("The purpose of the remand was not, as Lāna'i Resorts purports, to force the LUC to clarify what was intended by Condition No. 10[.]"). So, just as Condition 10 cannot be read to hold the Resort to its repeated representations that it would use only high level aquifer water, neither can the record be used to force a definition of potable that allows for an unspoken *per se* exception for the use of Wells 1 and 9 or all brackish water regardless of potability. To the extent that the Proposed Order attempts to determine the original intent of the 1991 Commission by looking at representations of the Resort, 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. The Commission would commit reversible error if it once again relied on a definition of a term that was not expressly stated in Condition 10.

Second, the testimony relied upon by the Proposed Order are statements made by the Resort, not the Commission. Proposed Order FOF ¶¶ 47-60, 96-100. The Resort's opinions lend no insight into the actual decision making of the LUC. Whether the Resort intended to use Wells 1 and 9 to irrigate the golf course is inconsequential. The Commission chose to place a

restriction on the use of potable water regardless of whether that water may be brackish or come from Wells 1 and 9.

Third, and as a matter of statutory construction, the administrative history behind Condition 10 cannot be consulted where the regulation is "plain and unambiguous." *Chang v. Buffington*, 125 Haw.186, 193 (2011). "[A]bsent an absurd or unjust result, this court is bound to give effect to the plain meaning of **unambiguous** statutory language and may only resort to the use of **legislative history** when interpreting an ambiguous statute. *Thompson v. Kyo-Ya Co.*, 112 Hawai'i 472, 475, 146 P.3d 1049, 1052 (2006). The Proposed Order did not find Condition 10 to be ambiguous. The history and intent behind the 1991 Order is not relevant.

Fourth, the Proposed Order ignores representations by the Resort that the term "brackish" actually means basal groundwater. For example, the Resorts' expert, James Kumagai, actually testified that "alternate sources" refers to non-high level brackish water:

> Yes. There are alternate sources of water, and alternate sources, meaning water sources outside of the high level aquifer. That is, of course, the basal water, and we consider that to be brackish. Other source, which we call alternate, is something through water reclamation or reclamation of sewage effluent, that is another. But basically its everything outside of the high level aquifer or outside of the influence of or external factors that would influence the high level aquifer.

Transcripts, Volume XX-Number 569 118:14-23. If the record can be consulted to interpret the term "potable" in a way not expressly or even impliedly set forth in the 1991 Order, so to should the term "brackish" be interpreted by the Resort's representations. If brackish means "basal" water, then Wells 1 and 9 are not "brackish." Picking and choosing which part of the record controls the interpretation of Condition 10 is inequitable; either the Resort is bound by all of its prior representations, or it is bound by none of them. Either method of interpretation counsels for the finding of a violation of Condition 10.

Fifth, misrepresentations by the Resort as to the potability of Wells 1 and 9 are not the best evidence in determining whether the wells are indeed non-potable. At that time, the Resort never tested Wells 1 and 9 for potability. *Lanai Co.*, 105 Hawai'i at 312-316 (Court noted that even though the LUC considered Wells 1 and 9 "brackish" in 1991, 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[.]"). Those wells have now tested to be conclusively potable. Ex. I-21, Proposed Order FOF ¶ 85-91. It is

irrelevant that Resort intended to use certain wells because they believed they were non-potable without actually testing it. Wells 1 and 9 are potable.

The record from the proceedings leading up to the 1991 Order is so inconsistent that it is unreliable to assist in defining Condition 10. The Proposed Order itself recognizes the conflicting representations made by the Resort:

> Representations by various witnesses for the Petitioner during the initial hearings on this docket were at times inconsistent and/or contradictory on matters relevant to this remand. For instance as addressed elsewhere in the Findings of Fact, one witness did not challenge a question from the LUC chair that brackish water wells for the golf course would be solely developed in the basal aquifer rather than the high level aquifer (cross examination of Dr. Mink by LUC chair, Transcript of August 30, 1990 at 65). Later, another witness Mr. Kumagai stated that Wells 1 and 9 would likely be used, which were in the Palawai Basin in the high level aquifer (Transcript of January 10, 1991 at 38). Mr. Kumagai also did not affirmatively point out that these wells were in the high level aquifer. These contradictory representations could confuse the Commission and parties as to the specific representations being made by the Petitioner.

Proposed Order ¶ 97; *see also* Proposed Order at p. 32 (referring to "conflicting statements" in the record leading up to the 1991 Order). Given the admitted unreliability of the Resort's prior testimony, their representations should not be used to define Condition 10.[5]

B. THE PROPOSED ORDER ERRS IN SHIFTING THE BURDEN OF PROOF IN DETERMINING WHETHER PUMPING INDUCED LEAKAGE IS OCCURRING ON LĀNA'I

The Proposed Order improperly shifts the burden of proof to LSG in dismissing evidence of pumping induced leakage of fresh water into the Palawai Basin.

In cases involving the use of environmental and natural resources, the party seeking to justify the use of a natural resource use always bears the burden of proof:

> The rational for this allocation [of the burden of proof] represents a departure from the common law rule that the burden of proving harm rests upon one who objects to the utilization of resources, but in the days of the formulation of this common law rule there was neither the scarcity of resources nor the sharply competitive demands placed upon them that exists today. Allocation of the burden of proof often serves as an effective tool for shaping social policies, **and since it is**

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[5] The Proposed Order also appears to improperly shift the burden of proof to LSG by citing to the purported failure of LSG to clarify what was meant by the term "nonpotable," whether Wells 1 and 9 were located in the high level aquifer, or to prove harm to water resources. Proposed Order FOF ¶¶ 55, 57, 60, 62, 64, 94, 100, 142. As the Resort bears the burden of proof in this case, it is improper to shift the burden to clarify the Resort's representations to LSG.

> **imperative that the need for environmental protection and conservation be adequately reflected in the law, the consumer of natural resources should bear the responsibility for justifying his actions.**

CEEED v. Cal. Coastal Zone Conservation Com., 43 Cal. App. 3d 306, 330 (1974) (emphasis added). The Resort therefore bears the burden to demonstrate that it has not utilized potable water from the high-level groundwater aquifer to irrigate the golf course. However, the Proposed Order recognizes that Resort did not conclusively demonstrate that it does not cause pumping induced leakage of fresh potable drinking water into the Palawai Basin. Proposed Order FOF ¶ 121. If the record is "inconclusive" as the Hearing Officer concludes, then the Commission has no choice but to find that the Resort did not meet its burden to prove that it is not using potable water to irrigate its golf course.[6]

The Proposed Order also ignores facts establishing that pumping induced leakage is occurring in Lāna'i's high level aquifer:

- Wells 1 and 9 have continually declined in chloride levels, with both wells seeing a greater than 25mg/l reduction in chloride levels in the past six years. Ex. 24.

- The Resort's witness Tom Nance has testified repeatedly in this matter that, given the consistent decline in the chloride levels of Wells 1 and 9, these wells will eventually produce water under 250 mg/l. R. V. XXXIII June 7, 2016 at 112; *Id.* at 119; 3 Trans. 431:11-14.

- The water flowing into the Palawai basin from upper compartments are fresher than the water in the Palawai basin, 2 Trans. 236:5-9, and given Mr. Nance's testimony that Wells 1 and 9 will eventually reach 250 mg/l chlorides, the water flowing into the basin must be potable water with less than 250 mg/l chlorides.

- The pumping of the Palawai Basin wells, including Wells 1 and 9, necessarily induce more downgradient flow, or leakage, from higher level compartments into the Palawai Basin, and Wells 1 and 9, than would occur naturally. 2 Trans. 234:1-235:8.

The proposed order cites to testimony of Dr. Donald Thomas that he found no evidence that any leakage is occurring. Proposed Order FOF ¶ 128. This finding, and Thomas' testimony, is not credible given Thomas' admissions that it is impossible to conclusively prove his theory, 2 Trans. 310:23-311:4, his admission that evidence of freshening of the Palawai Basin wells over

[6] Further, the Proposed Order's finding that there is no indication that the pumping of Wells 1 and 9 cause harm to the high level aquifer is irrelevant to Condition 10's inquiry of whether potable water was used. *See* Proposed Order FOF ¶ 122.

time could indicate leakage from higher level compartments, 2 Trans. 311:13-22, his reliance upon the incorrect assumption that the chloride level of Well 1 has remained steady, 2 Trans. 278:4-279:12, and his reliance upon Exhibit 43B, 2 Trans 278:14-279:17; 2 Trans. 313:6-9, prepared by Tom Nance, which is inaccurate and unreliable due to the inclusion of invalid data. 3 Trans. 445:24-448:11. Further, Dr. Thomas' testimony that a continuing trend of the freshening of the Palawai Basin wells over time could indicate leakage from higher level compartments actually corroborates that pumping induced leakage into the Palawai Basin is occurring. 2 Trans. 311:13-22.

The Proposed order cites to testimony of Tom Nance that short term pump tests indicate that there is minimal leakage between high level dike compartments into the Palawai basin. Proposed Order FOF ¶ 130. This testimony is not credible given his prior admissions that, given the permeability of the aquifer medium on Lāna'i, it could take years to observe the effects of pumping, R. V. XX, no. 582 at 139, and that the pumping tests do not rule out hydraulic interconnections between the dike compartments in the high level aquifer. Ex. I-4 at 7.[7]

C. THE PROPOSED ORDER RELIES ON IRRELEVANT FINDINGS AND LEGAL CONCLUSIONS

The Proposed Order relies on purported evidence that the Resort, and Lāna'i's economy will suffer if it cannot use Wells 1 and 9 to irrigate its golf course. Proposed Order FOF ¶¶ 115-120, 137, 132-144. While evidence of the balance of harms to the parties and may be relevant if the County of Maui seeks judicial enforcement against the Resort to cease the use of Wells 1 and 9 for irrigation of the golf course, such evidence is irrelevant to the Commission's sole charge in this hearing to determine whether Condition 10 of the 1991 Order has been violated. *Life of Land v. Ariyoshi*, 59 Haw. 156, 158 (1978) (holding that the three-part test for injunctive relief is "(1) Is the plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage

[7] The proposed order also cites to testimony of Tom Nance of an extended pump test in which Wells 1 and 2 were pumped continuously while water level of nearby Well 2 and Shaft 3 were recorded, and that the tests showed no lowering of water levels in Shaft 3. Proposed Order FOF ¶ 130. However such testimony is inconclusive as Nance admitted on cross examination that he did not know the starting water level for Well 2. 3 Trans. 452-453. If Shaft 3 had a lower static water level than Well 2, then pumping of Well 2 would not affect Shaft 3 regardless of their distance apart according to Darcy's law regarding hydraulic gradient and pumping induced transmission across permeable aquifer mediums.

favor the issuance of a temporary injunction? (3) Does the public interest support granting the injunction?"); Minute Order No. 6; *Lanai Co.*, 105 Hawai'i at 319.

The Proposed Order also relies on totally irrelevant evidence of the Resort's claimed good deeds to allow the Resort to continue to violate the plain language of Condition 10. Proposed Order FOF ¶¶ 132-144. This Commission should not be persuaded as the Hearing's Officer was. The Proposed Order cites to irrelevant testimony on golf course efficiency and water management which has no bearing on whether Condition 10 is being violated. Proposed Order, FOF ¶¶ 132-144. The Proposed Order improperly relies on watershed maintenance programs that have no bearing on the potability of Wells 1 and 9. *Id.* FOF ¶¶ 136-138. The Proposed Order spends much of its findings and most of its conclusions of law addressing whether the Resort's use of Wells 1 and 9 comply with the public trust doctrine. Proposed Order, FOF ¶¶ 132-144; COL ¶¶ 5-23. Condition 10 prohibits the use of all high level potable water, regardless of whether it is done in an efficient way or whether such use is causing noticeable harm to the aquifer. There is no discretion for the Commission to excuse the violative use of potable water simply because it is a common industry practice, *Id.* FOF ¶ 133, or because they are illegally using water in the most reasonable way.[8] *Id.* ¶¶ 134-35.

While the public trust doctrine should inform the Commission in the discharge of its duties, whether the Resort is complying with the public trust doctrine has no bearing on whether it should be excused for violating Condition 10.[9]

Further, the Commission already discharged its public trust duties in creating Condition 10. Condition 10 is the Commission's attempt to protect the domestic use of water and ensure an adequate supply of drinking water by restricting high level potable water from use for golf course irrigation. Ex. 28. The Commission already determined the reasonable and beneficial use of Lāna'i's potable high-level water in the context of the Mānele project district by prohibiting the use of potable high-level water for golf course irrigation. Ex. 28. The terms of the 1991 Order, and specifically Condition 10, are not open to relitigation to now determine whether the use of

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[8] A request for further monitoring for potential impacts on Lāna'i's water is unnecessary given the plain meaning of Condition 10 in prohibiting the use of potable water for the golf course. Proposed Order COL ¶ 21.

[9] Whether the Resort's use of Wells 1 and 9 are in compliance with the public trust is not an issue in this hearing. Minute Order No. 6.

water, regardless of potability, to irrigate the golf course complies with the public trust doctrine. *See Lanai Co.*, 105 Hawai'i at 317 ("Accordingly, we remand the issue of whether [the Resort] has violated Condition 10 by utilizing potable water from the high level aquifer[.]"); Minute Order No. 6; *Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 352 n.8 (1997) (Describing the "law of the case doctrine" as mandating that a determination made in the course of an action "becomes the law of the case and may not be disputed by a reopening of the question at a later stage of the litigation."). The Commission determined that, pursuant to the public trust doctrine, potable water should not be used to irrigate the golf course. Wells 1 and 9 are potable. The Commission must uphold the 1991 Order and its attempt to protect the public trust in Lāna'i's drinking water by finding a violation of Condition 10 and referring this matter to the County of Maui for enforcement.

IV. CONCLUSION

For the forgoing reasons, the Proposed Order should be rejected, and LSG's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed December 28, 2016 should be adopted instead.

DATED: Honolulu, Hawai'i, April 18, 2017.

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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 April 18, 2017.

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