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LAND USE COMMISSION
STATE OF HAWAII

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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,)	INTERVENOR LĀNA'IANS FOR
)	SENSIBLE GROWTH'S PROPOSED
To Consider an Order to Show Cause as to)	FINDINGS OF FACT, CONCLUSIONS OF
whether certain land located at Manele, Lanai,)	LAW, AND DECISION AND ORDER;
should revert to its former Agricultural and/or)	CERTIFICATE OF SERVICE
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))	
)	

I. FINDINGS OF FACT

The Land Use Commission of the State of Hawai'i ("Commission") makes the following findings of fact. To the extent that these findings of fact contain conclusions of law, they shall be considered as such.

Procedural History

1. On November 29, 1989, Lanai Resort Partners, the predecessor-in-interest to Lāna'i Resorts, LLC (both individually and including all successors and predecessors in interest, the "Resort" or "Petitioner"), filed a petition for a district boundary amendment to the Commission for a development project at Mānele Bay. *See* Land Use Commission Docket No.

A89-649. The project included the development of a golf course at Mānele Bay (the “golf course”).

2. Lanaians For Sensible Growth (“LSG”), Office of Hawaiian Affairs, and individual petitioners moved to intervene in the petition proceedings. Docket No. A89-649, Petition To Intervene filed February 9, 1990.

3. On March 9, 1990, the Commission allowed Office of Hawaiian Affairs (“OHA”), and LSG to intervene. The individual petitioners were denied participation as their interests were deemed to be represented by LSG and OHA. Docket No. A89-64, Order Granting In Part and Denying In Part Petition To Intervene filed March 9, 1990. The Commission determined that LSG represents the interests of individual Lāna‘i residents who are affected by the Mānele project. *Id.*

4. After intervening, LSG, OHA, and the Resort entered into a Memorandum Agreement wherein the Resort represented that they would not use **any** water from the high level aquifer on Lāna‘i to irrigate the golf course. Ex. I-20. Based on this promise and representation, LSG and OHA withdrew its opposition to the 1989 Petition.

5. On April 16, 1991, the Commission approved the Resort’s petition, imposing several conditions when it reclassified the Resort’s property to allow construction of the golf course. Docket No. A89-649, Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991 (“1991 Order”); Ex. 28. One of these conditions, Condition No. 10, requires that:

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.

Id. The 1991 Order does not define the term “potable,” nor does it use the term inconsistent with its plain meaning. *Id.*

6. Condition 10 was based on repeated representations by the Resort to the Commission that no water from the high level aquifer would be used to irrigate the golf course. *See Lanai Co. v. Land Use Comm'n*, 105 Hawai‘i 296, 302, 97 P.3d 372, 378 (2004) (noting the representations by the Resort that no water from the high level aquifer would be used to irrigate the golf course at Mānele).

7. The Commission issued an Order to Show Cause on October 13, 1993 ordering the Resort to demonstrate why the Mānele property reclassified by the 1991 Order should not revert to its former classification due to the failure to comply with Condition 10 of the 1991 Order. Docket No. A89-649, Order to Show Cause filed October 13, 1993.

8. On May 17, 1996, the Commission issued its findings of fact and conclusions of law. Docket No. A89-649, Findings of Fact, Conclusions of Law, and Decision and Order filed May 17, 1996 (“1996 Order”). Based on the evidence presented and the Resort’s admissions, the Commission found that the Resort was irrigating its golf course with water from Wells 1 and 9, which are located in the Palawai Basin, a portion of the high level aquifer. 1996 Order at 6.

9. The Commission also noted that the pumping of Wells 1 and 9 cause water from the upper levels of the aquifer to leak into the Palawai wells, and that the Resort never performed a comprehensive test on the potability of the water from Wells 1 and 9. *Id.* at 8.

10. The Commission held that the Resort violated Condition 10 by using water from Wells 1 and 9 to irrigate its golf course, and ordered a compliance plan to be prepared by the Resort within 60 days from the date of the 1996 Order. *Id.*

11. After various levels of appeals, the Hawai‘i Supreme Court reversed and vacated the Commission’s 1996 Order. *Lanai Co. v. Land Use Comm’n*, 105 Hawai‘i 296 (2004).

12. The Supreme Court ruled that Condition 10 does not prohibit the Resort from using any water from the high level aquifer, only potable water, but that the Commission did not issue any specific finding or conclusion on whether the Resort was using potable water for golf course irrigation. *Id.*

13. The Supreme Court recognized that there was evidence that potable water was leaking into the high level wells located in the Palawai basin, and that the Commission must clarify and determine whether the leakage of water into the basin wells is caused by the Resort’s pumping, and whether such leakage constitutes the “use” of potable water. *Lanai Co.*, 105 Hawai‘i at 319.

14. The Supreme Court “remanded to the [lower] court with instructions that the court remand this case to the LUC for clarification of its findings, or for further hearings if necessary, as to whether [the Resort] used potable water from the high level aquifer, in violation of Condition No. 10.” *Id.*

15. On remand, the Commission elected to hold a contested case hearing to determine whether the Resort was using potable water in violation of Condition 10. *Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai'i 298 (App. 2016). The contested case hearing was held on June 7 and 8, 2006, but after all other parties were able to present their case, LSG was denied the same opportunity. *Id.*

16. Instead of ruling on the contested case hearing, the Commission ended the proceedings and changed Condition 10 to prevent only water containing a chloride concentration of less than 250 mg/l from being used for golf course irrigation. Docket No. A89-649, 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 filed January 25, 2010 ("2010 Order").

17. After an intervening appeal regarding the Circuit Court's jurisdiction to rule on appeal from the 2010 Order, *see Lanaians for Sensible Growth v. Land Use Comm'n*, 128 Hawai'i 128 (App. 2012), the Circuit Court in Civ. No. 10-1-0415-02 vacated the Commission's 2010 Order and remanded the proceeding to the "LUC with instruction to conduct **de novo** further evidentiary hearings with a new hearings officer, pursuant to LUC's decision to do so[.]" Civ. No. 10-1-0415-02 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, filed November 8, 2010 ("2012 Circuit Court Remand Order").

18. After the Resort appealed the 2012 Circuit Court Remand Order, the Intermediate Court of Appeals affirmed the 2012 Circuit Court Remand Order in *Lanaians for Sensible Growth* on March 21, 2016. Judgment on appeal was entered April 18, 2016.

19. The Resort's current owner was aware of Condition 10 and this ongoing matter prior to the purchase of the Resort four years ago. 4 Trans. 651:17-19; 4 Trans. 667:13-16.

20. On June 24, 2016, the Commission issued its Order Appointing Hearings Officer, wherein Vice-Chairperson Jonathan Likeke Scheuer was appointed hearings officer in this docket.

21. On June 28, 2016, Lanaians for Sensible Growth moved to substitute Lāna‘ians For Sensible Growth (“LSG”) as Intervenor to reflect an administrative named change. No parties objected to the Motion For Substitution of Parties. The Hearings Officer deferred the decision on the Motion until the contested case hearing in this docket was held. Minute Order No. 2.

22. On July 6, 2016, the Commission issued Minute Order No. 2, setting the issues for the instant hearing and the relevant pre-hearing deadlines. *Id.*

23. On August 11, 2016, Maui Planning Department filed a positional statement. On August 12, 2016, Office of Planning (“OP”), the Resort, and LSG filed positional statements. By way of their positional statements, the parties disagreed as to the issues on remand and the scope of the remanded contested case hearing.

24. On August 18, 2016, the Commission held a site visit on Lāna‘i, attended by the Hearings Officer, Commission staff, and attorneys and representatives of the parties.

25. On September 14, 2016, LSG filed a Motion for Clarification of Scope of Hearing, or in the Alternative, for an Order to Show Cause, seeking to clarify that the scope of the present docket on remand includes all violations of Condition 10 regardless of the alleged well source or time of infraction.

26. On September 14, 2016, the Resort filed a 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, seeking to limit the present docket’s scope on remand to only the uses of Wells 1 and 9 from 1991 to 1993.

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

[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?

28. The hearing in this docket began on November 9, 2016 at the Lāna‘i Community Center. Public testimony was taken prior to the evidentiary portion of the hearing.

29. At the November 9, 2016 hearing, LSG’s Motion For Substitution of Parties was granted.

30. Each party presented opening statements on November 9, 2016.

31. The evidentiary portion of the hearing began on November 9, 2016, and continued at the Lāna‘i Community Center through November 10, 2016. The evidentiary portion of the hearing continued at the Maui Arts and Cultural Center on November 15 and 16, 2016.

32. At the November 9, 2016 hearing on this matter, Joanna Seto and Leo Asuncion testified on behalf of the State Office of Planning; and John Stubbart testified on behalf of the Resort.

33. At the November 10, 2016 hearing on this matter, John Stubbart (continued from November 9, 2016), Donald Thomas, and Seril Shimizu testified on behalf of the Resort; Roy Hardy testified on behalf of the State Office of Planning; and Sally Kaye testified on behalf of LSG.

34. At the November 15, 2016 hearing on this matter, Tom Nance, Allan Schildknecht, Mike Donoho, and Bruce Plasch testified on behalf of the Resort.

35. At the November 16, 2016 hearing on this matter, Kurt Matsumoto testified on behalf of the Resort; David Taylor and William Spence testified on behalf of the County of Maui; and Reynold “Butch” Gima testified on behalf of LSG.

36. At the November 9, 2016 hearing on this matter, Petitioner Resort Exhibits 1 through 49A and 49B; State Office of Planning Exhibits OP-1 through OP-12; County of Maui Exhibits 1 through 6, and R-1 and R-2; and LSG Exhibits I-1 through I-21, inclusive of I-15A were received into evidence.

37. At the November 10, 2016 hearing on this matter, Petitioner Resort Exhibits 49C and 49D were received into evidence.

38. At the November 15, 2016 hearing on this matter, Petitioner Resort Exhibits 41B and 45D; and LSG Exhibits I-22 and I-23 were received into evidence.

39. The evidentiary portion of the hearing concluded on November 16.

40. Closing arguments were taken at the Maui Arts and Cultural Center on December 8, 2016. All parties presented closing arguments.

Ground Water of Lāna‘i

41. This hearing concerns the use of groundwater wells on the island of Lāna‘i.

42. Lāna‘i has basal and high-level dike confined aquifers. Ex. I-14 at 5.

43. The high level aquifers are composed of permeable lavas intersected by impermeable dikes and other structures associated with the caldera of the original volcano and its rift zones. These aquifers are collectively referred to as the “high level aquifer.” Ex. I-3 at 1.

44. The high level aquifer is interconnected and compartmentalized, connected by fractures which permit hydraulic continuity within the aquifer such that the aquifer can be treated as a single unit in determining sustainable yield of the resource. Ex. I-3 at 1; Ex. I-2 at 5, 7.

45. The Palawai Basin, an area located within the leeward portion of the high level aquifer, contains both fresh and somewhat brackish water. Ex. I-2.

46. The Palawai Basin is over an ancient volcanic caldera, which still has a thermal source. This feature may cause some wells located in the Palawai Basin to have elevated chloride levels and temperature. Exhibits I-1 at 4; I-9 at 3-4; I-6; I-4 at 5; R. V. XXX III, June 7, 2006 at 171.¹

47. Lāna‘i has the only known high level aquifer in the State of Hawai‘i which contains brackish water. 3 Trans. 386:8:12.

48. Lāna‘i’s drinking water is supplied by the high level aquifer. Ex. I-13 at 2; 1 Trans. 158:1-159:6.²

¹ The administrative record is cited to as R.(record) V. _____ (volume), _____(document number and/or date) at (page number).

² The transcripts for the 2016 hearing dates are cited to as ____ (volume) Trans. ____ (page number): ____ (line numbers).

49. The sustainable yield of the high level aquifer on Lāna‘i is set by the Commission on Water Resource Management (“CWRM”) at 6 million gallons per day (“MGD”). Ex. 32; Ex. I-9 at 5; Ex. I-2 at 4; Ex. I-3 at 2.

50. The high level aquifer is divided into a leeward and windward system. Ex. I-9 at 5.

51. The yield for each system is 3 MGD each. *Id.*

52. The sustainable yield of the island is relatively small. Ex. I-9 at 1.

53. Lanai has no major surface water source. Ex. I-9 at 6.

54. Lanai is not located to benefit from favorable annual average rainfall over a large area and consequently, its water resources are limited. Ex. I-3 at 1.

55. Recharge of the island’s sole aquifer is highly dependent on fog drip collected by its forested watershed, which is mesic and rather low elevation for a cloud forest, making it vulnerable to climate change, fires, invasive species, and other factors. Ex. I-9 at 1, 5; Ex. I-14 at 102.

Groundwater Well Resources

56. All groundwater wells on Lāna‘i are owned and operated by the Resort through Lāna‘i Water Company, a PUC and Department of Health-regulated water utility. 1 Trans. 155:23-156:6; Ex. I-9 at 6-7.

57. Eight wells are currently in operation, Wells 1, 9, 14, 15, 3, 4, 6, and 8. 1 Trans. 163:14-16.

58. Lāna‘i’s groundwater wells are divided into several independent water distribution systems for domestic use, irrigation water, and recycled wastewater. Ex. I-9 at 8; 1 Trans. 158:4-159:6.

59. Wells 6 and 8 provide water to the Kō‘ele Project District, Lāna‘i City, and Kaumalapau for domestic and commercial use. Ex. I-9 at 9.

60. Wells 3 and 4 provide irrigation water to the Palawai Irrigation Grid, as well as water for domestic use to the Mānele Project District. Ex. I-9 at 9.

61. Wells 1, 9, 14 and 15 produce water which is currently being used for irrigation at the Mānele Project District and for irrigation of the Challenge at Mānele golf course. Ex. I-9 at 9; Ex. I-4; 2 Trans 197:15-20; 2 Trans. 442:1-9; 3 Trans 650:9-16.

62. Wells 1, 9, 14 and 15, 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.

63. Wells 1, 9, 14, and 15 are located in the Palawai Basin. 1 Trans. 159:1-6.

64. Well 1 has been used to irrigate the golf course since 1991. Well 9 has been used to irrigate the golf course since July 1993. 3 Trans. 405:24-406:7.

65. Though categorized as “brackish” wells by the Resort, Wells 1 and 9 have seen a continuous drop in chloride and water levels since the wells were drilled. 3 Trans. 394:2-4; 3 Trans. 431:11-14; 3 Trans. 444:8-445:15; Ex. 43B.

66. Well 1, which initially produced chlorides at above 800 mg/L when it was drilled in 1948, Ex. I-4 at 1; Ex. 43B, and in the range of 314-325 in 2006 (excluding readings the Resort’s witness Tom Nance admits are invalid), consistently produces water with chlorides under 300 mg/l. Ex. 24.

67. Well 9, which produced chlorides in the range of 452-485 in 2006 (excluding readings the Resort’s witness Tom Nance admits are invalid), now consistently produces water with chlorides under 430 mg/l. *Id.*

68. The Resort’s witness Tom Nance has repeatedly testified in this matter that, given the continuous 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.

69. The Resort is currently pumping on average 1.95 MGD of the total leeward sustainable yield. Ex. 43-J.

70. The Resort uses, on average, 475,000 gallons daily from the high level aquifer to irrigate the golf course. 2 Trans. 368:20-22.

71. The present sustainable yield given the current well locations and settings of the Resort’s well pumps is 2.4 MGD for the entire island. 1 Trans 188:11-18.

72. Due to the impermeableness of the aquifer medium, the effects of well pumping on other compartments within the aquifer are not immediately apparent. Stabilization of sources of withdrawal may take decades to stabilize, and transition periods may take several years or decades. Exhibit I-2 at 5; R. V. XX no. 582 at 139.

73. On March 2, 1989, CWRM received a written petition to designate the island of Lāna‘i as a Water Management Area. Exhibit I-1.

74. On January 31, 1990, CWRM staff recommended that Lāna‘i not be designated as a water management area at that time, but that the CWRM should re-institute water management area designation proceedings if the static water level of any well falls below one half its original elevation above mean sea level, or if the Resort does not develop alternative water sources as contained in the Resort’s water development plan and full land development continues. Ex. I-1; Ex. 32.

75. In addition to the CWRM redesignation levels, the Resort has set voluntary action levels based on the recommendation of Tom Nance. Ex. I-9 at 3-8.

76. On Lāna‘i, there has been a continuous decline in water levels across nearly all wells:

Well	Initial Static water level (Ex. I-14 at 50; Ex. I-9 Fig 3-8)	1/2006 Level (Ex. 25)	7/14/16 Static water level (Ex. 25; Ex. 43K)	CWRM Trigger Static Level (Ex. I-9 Fig 3-8)	Action Level (per Nance) (Ex. I-9 Fig 3-8)
1	818	700	636	414	550
9	808	660	686	404	550
14	551	531	461	275	400
15	-	Drilled 2012	459	-	-
2	1544	-	1446.87	772	1050
3	1124	1030	1001	562	750
4	1589	1498	1510	794.2	1100
5	1570	NIS	1496	735	1100
6	1005	936	883	502.5	750
7	650	NIS	-	325	-
8	1014	961	930	507	750

Definition of “Potable”

77. Condition 10 of the 1991 Order prohibits the use of “potable water” from the high-level groundwater aquifer to irrigate the Mānele golf course. Ex. 28.

78. The 1991 Order does not define “potable” in a way that differs from its plain and obvious meaning. *Id.*

79. Webster’s Dictionary defines “potable” as “water suitable for drinking.” *See Lanai Co.*, 105 Hawai‘i at 299 n. 8. The Oxford Dictionaries defines the term as “safe to drink; drinkable.” Office of Planning’s Position Statement at 7.

80. In the six times the term “potable” appears in the 1991 Order, it is not used in a way which indicates that it is to be given a special interpretation different from its common and general 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.

81. 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.

82. The Resort concedes that the plain meaning of potable means water that is suitable or safe for drinking. Petitioner Lāna'i Resort's LLC's Statement of Position at 3 ("In the absence of a definition, the supreme court looked to the plain and ordinary meaning, derived from Webster's dictionary, and defined potable as 'suitable for drinking.'" (emphasis added); 4 Trans. 653:13-14 (Matsumoto Testimony) ("But 'potable' to me means 'drinkable.'").

83. No evidence of a definition of "potable" that differs from its plain meaning of water suitable or safe to drink was introduced at the hearing.

84. 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.").

85. The DOH regulates "public water systems" which deliver potable water for domestic consumption. HAR § 11-20-2; 1 Trans. 137:2-13.

86. 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.

87. 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).

88. Both the DOH's regulations, as well as the EPA's National Primary Drinking Water Regulations, set maximum contaminant levels "at a level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." HRS § 340E-2; 40 CFR § 141.2 (defining "maximum contaminant level").

89. If water satisfies the regulations set forth in HAR Chapter 11-20, the DOH will allow that water to be used for domestic purposes, including drinking. 1 Trans. 137:14-22.

90. Testing for potability by way of DOH and/or EPA primary contaminants is not cost prohibitive and costs less than \$5,000 per test. 3 Trans. 460:12-15.

91. The DOH also defines the term “potable water” to mean “water free from impurities in amounts sufficient to cause disease or harmful physiological effects” in its administrative rules concerning the protection of public water systems from contaminants and pollutants. HAR § 11-21-2.

92. The County of Maui defines potable water in the context of golf course irrigation as follows:

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

MCC § 14.08.20 (emphasis added).

Chlorides, Brackish Water, and Potability

93. The 1991 Order does not define the term “brackish.” Ex. 28.

94. Webster’s Dictionary defines “brackish” as “somewhat salty, distasteful.” *Lanai Co.*, 105 Hawai‘i at 299 n.10.

95. John Stubbart and Roy Hardy testified that water with chloride levels exceeding 250 mg/l is brackish. 2 Trans. 220:1-7; 2. Trans 230:15-17.

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

97. 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.

98. 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).

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

100. 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.”).

101. Instead of an indicator of potability, chlorides are used as an operational parameter in locating and drilling wells. 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).

102. Chlorides are considered a secondary contaminant that affects only the “aesthetic qualities” of drinking water. Ex. I-12; 40 CFR § 143.1.

103. The federal regulations regarding chloride levels are not legally enforceable and are only suggestions for “reasonable goals for drinking water quality.” *Id.*

104. The DOH does not implement secondary regulations. Ex. I-12.

105. 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.

106. Taste concerns with chloride levels appear well before any health concerns would arise from high chloride levels. 4. Trans. 682:13-17.

107. 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.

108. The DOH has stated that “there are water systems that have served drinking water in excess of 250 mg/l.” Ex. I-12.

109. 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.

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

111. 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.

112. 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.

113. 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.

114. Blending high chloride water to improve taste and palatability is an accepted public water system industry standard. 1 Trans. 138:4-6; 4 Trans. 682:13-683:4; R. V. XXXIII, June 8, 2006 at 219:11-25; 2 Trans. 200:2-201:8; 3 Trans. 423:9-20.

115. The Resort currently blends the water in each of its potable public water systems. 2 Trans. 200:2-201:8

116. Blending water to make it more palatable is not cost prohibitive. 4 Trans. 683:5-13.

117. 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.

118. The results of these required tests are reduced to a report entitled “Lāna‘i Potable Water System Report to the Consumer for Calendar Year 2015.” *Id.*; Ex. I-15.

119. 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.

120. 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.

121. Based on the above, water with chloride levels above 250 mg/L can be safe to drink, and brackish water can be potable.

Potability of Water in Wells 1 and 9

122. 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.

123. Sally Kaye, former Lāna'i Planning Commission member and chairperson who was present at the October 18, 2006 meeting, testified that the draft "minutes" of the October 18, 2006 meeting, received into evidence as Ex. I-21, were prepared according to the Lāna'i Planning Commission's regular practice of transcribing verbatim planning commission meetings from a taped recording and allowing members of the planning commission to review them to ensure accuracy. 2 Trans. 324:11-25.

124. The October 18, 2006 meeting minutes, contained in Ex. I-21, were formally adopted by the Lāna'i Planning Commission at its February 2, 2007 meeting. 2 Trans. 335:2-7.

125. Ex. I-21 is identical to the form of the minutes adopted by the Lāna'i Planning Commission on February 2, 2007. 2 Trans. 350:19-351-3.

126. Mrs. Kaye testified that Ex. I-21, and Mr. Jamile's testimony at page 12 therein, accurately reflects what was said at the October 18, 2006 meeting. 2 Trans. 327:22-24.

127. The Commission finds Mrs. Kaye's testimony, and Ex. I-21, credible.

128. Mr. Jamile's testimony refers to EDB, DBCP, and TCP, primary contaminants regulated by HAR §11-20-24.

129. Mr. Jamile's testimony in Ex. I-21 indicates that Wells 1, 9 and 14 were tested for potability under state and/or federal standards, and that the water from those wells tested safe. Ex. I-21 at 12-13.

130. 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.").

131. No evidence that Wells 1, 9, 14, and 15 contain any of the primary contaminants regulated by HAR Chapter 11-20 and 40 CFR § 141 in levels exceeding the maximum levels set for such contaminants by the DOH or the EPA at any time was introduced at the hearing.

132. 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 (Schildknecht testimony); 3 Trans. 551:17-22 (Donoho Testimony); 4 Trans. 655:23-656:20 (Matsumoto Testimony).

133. The Resort did not produce a sample of the water from Wells 1, 9, 14, and/or 15 at the hearing on this matter.

134. The Resort did not produce any relevant evidence that the water in Wells 1, 9, 14, and 15 was ever or is now not potable.

Leakage of Potable Water (alternative basis)

135. According to a theory known as “Darcy’s Law,” the rate of flow across a hydraulic medium increases as the difference in water level or pressure increases. Ex. I-14; 2 Trans. 233:1-11.

136. Generally, pumping of a well increases the rate of flow of water within an aquifer in the direction of the pumping. 2 Trans. 233:23-25.

137. A numerical groundwater model for Lanai, prepared by the CWRM, concludes that consistent pumping of .650 MGD would cause a 10 to 30 foot drop in water levels in the upper gradient potable wells in Lāna‘i’s aquifer. I-14 at 113; 2 Trans. 234:1-235:8.

138. 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.

139. 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.

140. 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.

141. 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.

142. Dr. Thomas' testimony that a continuing trend of the freshening of the Palawai Basin wells over time could indicate leakage from higher level compartments corroborates the finding that pumping induced leakage into the Palawai Basin is occurring. 2 Trans. 311:13-22.

143. The Resort's witness Tom Nance admits that water taken out of Wells 1 and 9 reduces the water available for drinking under the 6 MGD sustainable yield by the same amount. Ex. I-6.

144. The lowering of chloride levels in Wells 1 and 9 is more likely than not due in part to pumping induced leakage of fresher water from the upper compartments.

The Resort's Case

145. Evidence of potential adverse economic effects resulting from the possible closure of the golf course does not inform the Commission as to whether the Resort has violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 3 Trans. 568:16-580:5; 4 Trans. 623:17-625:3.

146. Evidence of the Resort's water conservation efforts, watershed restoration projects, and water system improvement efforts does not inform the Commission as to whether the Resort has violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 4 Trans. 626:19-628:24; 3 Trans. 528:6-548:3; 3 Trans. 551:9-16.

147. Evidence of whether or not there are competing uses for the water in Wells 1 and 9, whether the Resort is following best management practices for golf course irrigation, whether the use of Wells 1 and 9 for golf course irrigation is a reasonable and beneficial use, and other testimony regarding the public trust doctrine does not inform whether the Resort violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 10 1 Trans 168:10-12; 3 Trans. 504:13-22; 3 Trans. 551:9-16.

148. Evidence of existing pumpage rates not being a threat to Lāna'i's groundwater aquifer does not inform the Commission whether the Resort violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 2. Trans. 271:16-272:6; 2 Trans. 229:15-22;

149. Evidence of whether or not there are alternatives to Wells 1 and 9 for irrigating the Mānele golf course does not inform whether the Resort violated Condition 10 by utilizing potable water from the high level aquifer, 1 Trans 171:11-172:4 (Stubbart Testimony), and is otherwise rebutted by the Resort's special use permit to construct and operate a reverse osmosis desalination plant. Ex. 20.

150. The Resort's reliance on Lāna'i Water Use Development Plan's ("LWUDP") characterization of Wells 1 and 9 as "non-potable brackish" wells is not credible for purposes of this hearing as no testing for potability was conducted on Wells 1 and 9 by the Lāna'i Water Advisory Committee or by the County of Maui in preparing the LWUDP. 4 Trans. 717:17-718:2; 4 Trans. 685:23-686:10; 4 Trans. 740:18-741:2; Ex. 12.

151. Further, the CWRM's representative admitted that the LWUDP is a guideline and planning document not promulgated as an administrative rule. 2 Trans. 243:24-244:13.

152. The testimony of John Stubbart, the Director of Utilities for the Resort, that testing Wells 1 and 9 for potability was not done due to the cost, 1 Trans 173:11-174:3, is not credible given the conflicting testimony of the Resort's witness Tom Nance that the costs for such a test is less than \$5,000 per test, 3 Trans. 460:12-15, and given the admission that the Resort has invested several hundreds of millions of dollars on Lāna'i in the last four years. 4 Trans. 645:7-10 (Matsumoto Testimony).

153. John Stubbart's testimony that Wells 1 and 9 are not potable is not credible given that Mr. Stubbart admitted to not testing the wells for potability. 1 Trans 206:14-19.

154. John Stubbart's testimony that chloride and hardness levels in Wells 1 and 9 render the wells non-potable is not credible given that chlorides and hardness are not considered primary contaminants which render water unsafe to drink by the DOH and the EPA. 1 Trans 206:20-207:1.

155. John Stubbart's testimony that Wells 1 and 9 do not meet the CWRM's standards for potable water wells, 1 Trans. 212:2-19, is not credible given that the CWRM's representative testified that the CWRM does not restrict whether a well is used for potable or non-potable purposes, and a well operator does not need to seek approval to change the use of a well from non-potable to potable. 2 Trans. 246:11-248:2.

156. The testimony of Dr. Don Thomas is not credible.

157. Dr. Don Thomas' testimony regarding Lāna'i's hydrogeology is not credible at this time as he has not yet developed a numerical groundwater model for Lāna'i, 2 Trans. 309:2-18, he has not conducted an independent mapping of Lāna'i's groundwater dike complexes, 2 Trans 309:19-310:1, and he has not conducted any groundwater recharge studies on the Palawai Basin. 2 Trans. 310:2-13.

158. Dr. Thomas' testimony that there is no proof that the flow of water from higher level, fresher compartments into the Palawai basin is greater than zero, 2 Trans. 266:5-277:07, is not credible given the substantial evidence to the contrary, Ex. I-13 at 17; Ex. I-14 at 6-9; Ex. I-2 at 7; Ex. I-3 at 1, his admissions that it is impossible to conclusively prove such a theory, 2 Trans. 310:23-311:4, his admission that evidence of freshening of the Palawai Basin wells over 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.

159. Dr. Thomas' testimony that "chlorides is, to me, not the important constituent" to consider in determining potability, 2 Trans. 291:12-19, and that "the chloride issue is not tremendously relevant," 2 Trans. 292:10-11, conflicts with and undermines the Resort's position that chloride levels alone render Wells 1 and 9 not potable.

160. Dr. Thomas' testimony that the water in the Palawai Basin wells are not potable, 2 Trans. 291:12-14, is not credible given his admission that he did not test the wells for potability. 2 Trans 307:7-12.

161. Dr. Thomas' testimony that the salinity in the Palawai Basin wells render the wells not safe to drink is not credible as it conflicts with his testimony that the sodium levels in Wells 1 and 9 are relatively low in relation to the chloride levels in the wells as compared to water from other sources. 2 Trans. 291:19-292-13.

162. Dr. Thomas' testimony that sodium and magnesium levels may present health effects is not credible as such testimony is outside of his area of training, education, professional experience, and expertise, *see* 2 Trans. 293:25-294:5, and given that Ex . 49D, relied upon by Dr. Thomas in reaching his conclusion, admits that the EPA's recommendation on sodium levels "is not federally enforceable," that "[d]rinking water does not play a significant role in sodium

exposure,” and that the World Health Organization established a drinking water guideline of 200 mg/sodium/L.” Ex. 49D.

163. Dr. Thomas’ testimony that sodium levels may present health effects is not credible given his admission that he is not aware of any health-based regulations regarding sodium by the DOH. 2 Trans. 308:18-20.

164. The testimony of Tom Nance is not credible.

165. Mr. Nance’s testimony is not credible or reliable given his submission of graphs of historic chloride levels in Wells 1 and 9 submitted in Ex. 42B-C which contain data that Mr. Nance previously testified to as being inaccurate. 3 Trans. 445:24-448:11; 3 Trans. 451:9-452:5.

166. Mr. Nance admitted that his graphs of historic chloride levels in Wells 1 and 9 submitted in Ex. 42B and 42C contain inaccurate data which alters the chloride level trend line for Wells 1 and 9. 3 Trans. 445:24-448:11; 3 Trans. 451:9-452:5.

167. Mr. Nance’s testimony is not credible given that he misrepresented his prior testimony on the geothermal contribution of chlorides in Wells 1 and 9. 3 Trans. 456:11-460:3.

168. Mr. Nance’s testimony regarding the availability of water resources on Lāna‘i is not credible given his admission that he has never been involved in the calculation of a sustainable yield, and he has never conducted or commissioned any recharge studies for the Palawai Basin. 3 Trans. 441:18-24.

169. Mr. Nance’s testimony regarding the water quality in Wells 1 and 9 is not credible given his admission that he did not test the wells for potability. 3 Trans. 442:10-443:4.

170. Mr. Nance’s admission that chlorides are not regulated by the DOH, and that chlorides and hardness are secondary contaminants, undermines the Resort’s position that the chlorides in wells 1 and 9 render the wells not potable. 3 Trans 443:5-19.

171. Mr. Nance’s testimony that pumpage of one aquifer compartment does not affect other compartments based on short term pumping tests, 3 Trans. 403:14-404:5, is not credible given his prior admissions that, given the permeability of the dikes, 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.

172. Mr. Nance’s testimony that Wells 1 and 9 would not be accepted by a county water supply for potable use, 3 Trans. 412:24-413:2, is not credible given his admission that he never consulted Maui Water Supply regarding Wells 1 and 9. 3 Trans. 444:2-7.

173. The testimony of Allan Schildknecht, of Irrigation Design Consultants, is not credible.

174. Mr. Schildknecht admitted that he is unaware if the golf courses he studied in forming his opinions are restricted from using potable water from a high level aquifer in the same manner as is in Condition 10. 3 Trans. 518:19-519:1; Exs. 45C and 45D.

175. Mr. Schildknecht's testimony that high-level brackish water and reclaimed sewage effluent are the only water sources on Lāna'i that could be used for golf course irrigation is not credible given his admission that he is not a water quality expert, 3 Trans. 500:19-501:2; 3 Trans. 516:20-21, and that a golf course can use water from a desalination plant for irrigation. 3 Trans. 516:7-9.

176. The testimony of Dr. Bruce Plasch, principal of Plasch Econ Pacific, LLC, is not credible. 3 Trans. 583:11-584:7.

177. Dr. Plasch's testimony regarding his findings on economic impacts of the closure of the golf course is not credible given his admission that his findings are based on full development and operation of the resort, and not the current level of operations. 3 Trans. 563:23-24.

178. Dr. Plasch's testimony as to the economic benefits provided by full capacity resort residential development is not credible given his admission that he does not know the projected per-unit consumption of water for those units and he "assumed that there'd be sufficient water to supply the residents" and he "didn't get into the source of the water." 3 Trans. 566:10 – 567:22; and 582:18-20.

179. Dr. Plasch's testimony is not credible given his admission that he did not do an economic assessment of the golf course using water from a desalination plant. 3 Trans. 582:21-583:1.

180. Mr. Matsumoto's testimony regarding whether Condition 10 is being violated is not credible as Mr. Matsumoto admitted that he is not a hydrologist. 4 Trans. 656:21-24.

181. Mr. Matsumoto's personal opinion that the use of brackish groundwater to irrigate the Mānele golf course is a reasonable and beneficial use of that resource is not credible given his admission that he is not aware that golf course irrigation is not a protected public trust resource and that there are no vested rights in water for commercial use. 4 Trans. 622:19-623:3 ("the use of brackish groundwater to irrigate the golf course is a reasonable and beneficial use of the

resource”); 643:5-12 (“Wells -- brackish wells 1 and 9 are also contributing as a reasonable and beneficial use of water for the residents of the island.”); 643:19-25 (“I believe that it is a reasonable and beneficial use meant for the residents of the island.”); 644:1-6 (“It is a reasonable and beneficial use.”); and 657:2-8.

182. Mr. Matsumoto’s testimony as to the doomsday scenario of the golf course closure is not credible given his admission that the loss of the golf course is not at issue at this hearing. 4 Trans. 623:17-625:3 and 651:20-24.

County of Maui’s Case

183. Director of the Department of Water Supply for Maui County Dave Taylor’s testimony that water which is not disinfected is not potable under Maui County code § 14.01.040, 4 Trans. 673:14-674:7, is not credible given his admission that section 14.01.040 only applies to the County of Maui’s distribution system. 4 Trans. 674:8-12.

184. Planning Director of the County of Maui William Spence’s testimony that the use of Wells 1 and 9 for golf course irrigation is consistent with the Water Use and Development Plan, does not inform whether the Resort utilizing potable water from the high level aquifer to irrigate the Mānele golf course in violation of Condition 10. 4 Trans. 693:13-19.

Office of Planning’s Case

185. The DOH, State of Hawai‘i, takes no position on the questions raised in Condition 10. 1 Trans. 134:6-8; Ex. OP-4.

186. DOH, Safe Drinking Water Branch Manager Joanna Seto’s testimony that Safe Drinking Water Branch, through its drinking water regulations at HAR 11-20, does not determine whether water “is or is not suitable for drinking” is not credible given her admission that “if water meets the standards in Chapter 11-20, it can be used in drinking water systems” and it can be “distributed for domestic use, like washing dishes . . . and drinking[.]” 1 Trans. 137:5-22.

187. The testimony of Leo Asuncion, Director of the State of Hawai‘i Office of Planning, is not credible for the purpose of this hearing.

188. Mr. Asuncion’s testimony that brackish water and potable water are mutually exclusive, OP-2 at 8, is not credible given his admission that it is “correct” that “brackish water does not violate any Safe Drinking Water standards, and can be used for drinking water.” *Id.*

189. Mr. Asuncion's testimony that the use of brackish groundwater to irrigate the Mānele golf course is a reasonable and beneficial use of that resource is not credible given his admission that he is not familiar with public trust law. 1 Trans 149:2-150:2.

190. Mr. Hardy's testimony that Wells 1, 9, and 14 are "probably not drinkable" is not credible given his admission that such determination should be made by the DOH, and his admission that the CWRM has not tested Wells 1 and 9 for potability. 2 Trans. 218:3-6; 2 Trans. 240:19-25.

LSG's Case

191. Sally Kaye's testimony that Cliff Jamile, former Director of Utilities of Lāna'i Water Company, testified before the Lāna'i Planning Commission that Wells 1, 9, and 14 were tested for potability, and that the wells were contaminant free is credible given that she was present at the meeting as a commissioner and that she has first-hand knowledge that the draft "minutes" of the October 18, 2006 meeting which contains Mr. Jamile's testimony are accurate and were prepared according to the Lāna'i Planning Commission's regular practice of transcribing verbatim planning commission meetings. 2 Trans. 324:11-25.

192. President and Secretary of LSG Reynold "Butch" Gima's testimony that Wells 1, 9, 14, or 15 were not tested for potability as part of the creation of the LWUDP was credible given that he is a member of the Lāna'i Water Advisory Committee ("LWAC") which and given that his testimony was not rebutted. 4 Trans. 717:17-24.

II. CONCLUSIONS OF LAW

Public Trust

1. "All public natural resources are held in trust by the State for the benefit of the people." Hawai'i State Constitution Art. XI, § 1.

2. "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." Hawai'i State Constitution Art. XI, § 1.

3. These sections "incorporate the notion of the public trust into our constitution." *In re Water Use Permit Applications*, 94 Haw. 97, 131 (2000) (*Waiahole I*).

4. "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." *Waiahole I*, 94 Haw. at 141.

5. As the Hawai'i Supreme Court has ruled:

In Hawaii, this court has recognized . . . a distinct public trust encompassing all the water resources of the State. The public trust doctrine applies to all water resources without exception or distinction. The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use. The public trust is, therefore, the duty and authority to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.

Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 133 Hawai'i 141, 171-72 (2014) (internal citations and quotations omitted).

6. “Based on the plain language of our constitution and a reasoned modern view of the sovereign reservation, we confirm that the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction.” *Waiahole I*, 94 Hawai'i at 135.

7. “[S]tates have uniformly recognized domestic uses, particularly drinking, as among the highest uses of water resources.” *Waiahole I*, 94 Haw. at 137; *Kaua'i Springs*, 133 Haw. at 172 (“[T]he public trust protects domestic water use, in particular, protecting an adequate supply of drinking water.”).

8. “[N]o person or entity has automatic vested rights to water.” *Kauai Springs*, 133 Hawai'i at 172.

9. “[T]he public trust has never been understood to safeguard rights of exclusive use for private commercial gain.” *Waiahole I*, 94 Hawai'i at 138. Therefore, a higher level of scrutiny is employed when considering or private commercial use. *Kauai Springs*, 133 Hawai'i at 172 (citing *Waiahole I* at 142).

10. Golf course irrigation as a use of public trust water carries a heavy burden to prove entitlement thereto. *Waiahole I*, 94 Haw. at 138.

11. Where uncertainty exists, a trustee's duty to protect a public trust resource mitigates in favor of choosing presumptions that also protect the resource. *Waiahole I*, 94 Haw. at 154.

12. Condition 10 of the 1991 Order is the Commission's attempt to discharge its public trust duty 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.

13. Condition 10 of the 1991 Order 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 from golf course irrigation. Ex. 28.

14. The terms of the 1991 Order, and specifically Condition 10, are not open to relitigation to now determine whether the use of brackish 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.”).

Petitioner’s Burden

15. At issue in this hearing is whether the Resort’s use of water from Wells 1 and 9 violate Condition 10. Minute Order No. 6; *Lanai Co.*, 105 Hawai‘i at 317.

16. The 1993 Show Cause Order directs the Resort to show cause why it is not violating Condition 10. Ex. 9; *see also* HAR 15-15-59(a).

17. The Resort bears the burden to demonstrate that their past and present use of high level aquifer water to irrigate its golf course does not violate Condition 10. *Waiahole I*, 94 Haw. at 142-143 (“[T]he burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust).

18. Allocating the burden of proof to the petitioner, while a departure from the common law rule, is necessary where the protection of public trust resources is implicated:

The rationale 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 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).

19. 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. *See* Minute Order No. 6; *Waiahole I*, 94 Haw. at 142-143.

Definition of Potable Water

20. 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).

21. 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.*, 105 Hawai‘i at 308 (relying on the “plain language of Condition 10”).

22. This Commission may “resort to legal or other well accepted dictionaries as 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).

23. 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).

24. The term “potable” as used in Condition 10 is plain and unambiguous as it is not used in a way that indicates it be given a special interpretation other than its common and general meaning. *Singleton*, 111 Hawai‘i at 244.

25. The plain and obvious meaning of “potable” as used in Condition 10 is water that is safe and suitable for drinking. *Lanai Co.*, 105 Hawai‘i at 299 n. 8. (citing Webster’s Dictionary).

26. The term “potable” as used in Condition 10 means water that is safe and suitable for drinking.

27. To determine what makes water safe or suitable for drinking, the Commission looks to other statutes and rules on the same subject matter. 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.”)

28. In Hawai‘i, the DOH determines and administers regulations regarding safe drinking water. 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.”); HRS § 340E-2.

29. HRS Chapter 340E places upon the DOH the duty to create and enforce State Primary Drinking Water Regulations, which mirror the National Primary Drinking Water Regulations established by the United States Environmental Protection Agency, to protect the health of Hawai'i's citizens to the extent feasible. HRS § 340E-2.

30. The State Primary Drinking Water Regulations at HAR Chapter 11-20, as well as the National Primary Drinking Water Regulations at 40 CFR § 141, establish criteria to determine whether water is safe to drink based on maximum contaminant levels "set at a level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." HRS § 340E-2; 40 CFR § 141.2 (defining "maximum contaminant level").

31. Using HAR Chapter 11-20 and 40 CFR § 141 to inform whether water is potable is consistent with the County of Maui's definition of "potable water" in the context of golf course irrigation to mean "water that meets the standards established by the department of health as suitable for cooking or drinking purposes." MCC § 14.08.20.

32. Using HAR Chapter 11-20 and 40 CFR § 141 to inform whether water is potable is consistent with the DOH rules defining the term "potable water" to mean "water free from impurities in amounts sufficient to cause disease or harmful physiological effects" in its administrative rules concerning the protection of public water systems from contaminants and pollutants. HAR § 11-21-2.

33. Given that HAR Chapter 11-20 and 40 CFR § 141 set forth regulations that determine whether water is safe and suitable for serving in a system which provides water for human consumption, HAR § 11-20-2 and 40 CFR § 141.2 inform whether water is potable.

34. Accordingly, the term "potable" as used in Condition 10 means water that is safe to drink.

35. Testing for potability by way of DOH and EPA primary drinking water regulations informs whether water is safe and suitable for drinking.

36. Condition 10's prohibition on the use of potable water, and its mandate of the use of non-potable alternate sources, must be treated as two separate, equally enforceable clauses. *In re Ainoa*, 60 Haw. 487, 490 (1979) (noting the cardinal rule of statutory construction which 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.”).

37. Therefore, the Commission cannot ignore Condition 10’s prohibition on the use of potable water to instead focus only on whether brackish water is being utilized. *Id.*; *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[.]”)

38. The terms “brackish” and potable are not mutually exclusive as used in Condition 10. *Lanai Co.*, 105 Hawai‘i 296, 312-316 (2004) (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[.]”).

39. If brackish water was *per se* not potable, the Supreme Court in *Lāna‘i Company* could not have remanded this hearing for further proceedings given the Commission’s previous findings. *Lanai Co.*, 105 Hawai‘i at 312-316.

40. Based on the record, brackish water and potable water as used in Condition 10 is not mutually exclusive.

41. Further, 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; if that was the intent of the Condition, it would have defined potable and non-potable to reflect that intent, or it would have used “i.e.” instead. *See People v. Alsup*, 241 Ill. 2d 266, 280 (2011).

42. Therefore, whether Wells 1 and 9 produce brackish water is irrelevant to whether the Resort has utilized potable water to irrigate the golf course.

43. The record demonstrates, by the preponderance of the evidence, that Wells 1 and 9 are and were at all relevant times potable.

44. Even assuming *arguendo* that the record was not sufficient to affirmatively establish that the water in Wells 1 and 9 are potable, the Resort has failed to meet its burden to demonstrate that the water used to irrigate the golf course is, or ever was, not “potable.”

45. The Resort has utilized potable water from the high level aquifer to irrigate the golf course.

46. The Resort has violated Condition 10 of the 1991 Order. Ex. 28.

Pumping Induced Leakage Is Use of Potable Water (Additional or Alternative Basis)

47. In the alternative, this Commission is tasked with clarifying whether pumping induced leakage into the Palawai Basin constitutes the “use of potable water.” *Lanai Co.*, 105 Hawai‘i at 316.

48. Webster’s Dictionary defines “use” as “the act or practice of employing something.”

49. Given that pumping of Wells 1 and 9 for golf course irrigation is causing fresh, potable water to flow into those wells, and that the withdrawal of water from Wells 1 and 9 ultimately limits the available potable water for domestic use by the same amount, Ex. I-4, potable water from the high level aquifer is being utilized to irrigate the golf course. *Lanai Co.*, 105 Hawai‘i at 316.

50. The pumping induced leakage of potable water into the Palawai Basin constitutes the utilization of potable water as prohibited by Condition 10.

Remedy

51. In show cause proceedings on violations of boundary amendment conditions, the Commission has two choices for enforcement of conditions where substantial commencement of the approved land use activity has already occurred: (1) declare that a violation has occurred, order that the violation of the condition cease and refer to the County of Maui for enforcement of that order, or (2) hold a reversion hearing which follows the procedures set forth in HRS § 205-4. *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 134 Hawai‘i 187 (2014); *Lanai Co.*, 105 Hawai‘i at 319.

52. As set forth in this Commission’s Minute Order No. 6 , this hearing “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); *Lanai Co.*, 105 Hawai‘i at 319.

53. The Resort has substantially commenced use of the property subject of Doc. No. A89-649.

54. Therefore, the only available enforcement action to the Commission in this hearing is to declare that the Resort is violating Condition 10 of the 1991 Order, order the Resort to cease violations of Condition 10, and refer this matter to the County of Maui for enforcement.

Scope of Hearing

55. While evidence of the balance of harms to the parties and the public interest as a result of the possible closure of the Mānele golf course 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 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.

56. Testimony as to whether or not there are competing uses for the water in Wells 1 and 9, whether the Resort is following best management practices for golf course irrigation, whether the use of Wells 1 and 9 for golf course irrigation is a reasonable and beneficial use, and other testimony regarding the public trust doctrine is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

57. Evidence of potential adverse economic effects resulting from the possible closure of the golf course is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

58. Evidence of the Resort's water conservation efforts, watershed restoration projects, and water system improvement efforts is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

59. Evidence of the Resort's community improvement efforts and projects is irrelevant to whether the Resort is utilizing potable water to whether Condition 10 was violated. Minute Order No. 6.

60. Evidence of existing pumpage rates not being a threat to Lāna'i's aquifer is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

61. Evidence of whether or not there are alternative sources of water to Wells 1 and 9 for irrigating the Mānele golf course is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

62. Evidence as to the water quality in Wells 1 and 9 as being "brackish," without including evidence of primary contaminant levels under DOH and EPA drinking water standards,

is irrelevant to whether Condition 10 was violated. Minute Order No. 6; *Lanai Co.*, 105 Hawai'i at 312-316.

ORDER

Based on the evidence and arguments presented and in light of the above Findings of Fact and Conclusions of Law, good cause having been shown,

IT IS HEREBY DECLARED AND ORDERED that:

1. The Resort has violated Condition 10 of the 1991 Order;
2. The Resort is continuing to violate Condition 10 of the 1991 Order;
3. The Resort shall comply with Condition No. 10 of the 1991 Order and cease its use of Wells 1 and 9 for golf course irrigation; and
4. This matter is referred to County of Maui for enforcement action pursuant to HRS § 205-12.

DATED: Honolulu, Hawai'i, December 29, 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 December 29, 2016.

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DATED: Honolulu, Hawai'i, December 29, 2016.

A handwritten signature in black ink, appearing to read 'David Kopper', written over a horizontal line.

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