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VIA HAND DELIVERY

The Honorable Edmund Aczon, Chair
and Commission Members
State of Hawai'i Land Use Commission
235 South Beretania Street, Room 406
Honolulu, Hawai'i 96813

2017 MAY - 8 A 11:37
LAND USE COMMISSION
STATE OF HAWAII

Re: Docket No. A89-649 - Lāna'i Resorts

Dear Chair Aczon and Commission Members:

We are very grateful for your recent decision finding that Petitioner, Lāna'i Resorts, LLC, has not violated Condition No. 10 of your Decision and Order dated April 16, 1991 (1991 Order).

In light of the discussion during the Commission's deliberations prior to decision making, certain questions or issues were posed which we felt important to shed some light on.

By way of background, there were no less than nine attorneys involved in the shaping of this case for the contested case hearings which finished in November of last year. All of the parties reviewed the 2004 Supreme Court decision, 2016 Intermediate Court of Appeals (ICA) decision, as well as other case law (e.g., Bridge Aina Lea, Waiāhole Ditch, Kaua'i Springs, Pila'a 400 etc.) relevant to the Commission's authority and powers. This was done collaboratively to conform to and stay within the respective Supreme Court and ICA remand orders. The parties felt that careful and prudent preparation prior to the actual hearings was critical to avoid a repeat of a judicial reversal upon appeal. With this in mind, the parties examined and discussed some of the same issues brought up during the Commission's deliberation. We offer our comments below not as advocacy of any particular position, but to explain how certain issues contained in Hearings Officer Minute Order No. 6 were addressed.

"Potable" and "Brackish" Definitions

During the Commission's deliberations, a concern was raised that the Hearings Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order (Recommended D&O) did not include a definition of "potable" water pursuant to the 2004 Supreme Court decision and remand. The irony of this concern is that since the 1993 Order to Show Cause

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hearings that very issue has been at the heart of this case. Because the administrative record contains no definition of “potable” it became the subject of intense debate amongst the parties over the last 24 years. Several rounds of hearings were spent on trying to define that term with no success. However, a recognized alternative approach to defining a term is to define what it is not, i.e., “potable water is water that is not non-potable”, which was the approach offered by the Petitioner, Office of Planning and County of Maui. Using this approach, the Hearings Officer found that “potable” in the context of Condition No. 10 excluded all non-potable water, e.g., brackish and reclaimed sewage effluent. Therefore, if one reads Finding of Fact No. 102 of the Recommended D&O, it defines potable water using this approach.

102. By including the category of “brackish” water as a specific example (in an e.g. clause) as an “alternate source” of water, Condition 10 clearly indicated that in the *specific* context of this Docket and Condition 10, “brackish” water was considered *not to be potable*, but rather a source of water “alternate” to the “potable” water supplies of the island: (“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.”) (1991 Order, Condition 10). Emphasis added.

Finding of Fact No. 102 specifically addresses the concern raised during the deliberation of the Commission. We should bear in mind that the overall objective of the Supreme Court’s remand order was not a directive to define a word, but to determine if Petitioner was violating Condition No. 10. To that end, Finding of Fact No. 102 is critical and germane to that determination.

We hope that this letter clarifies and places into context the handling of this particular issue as set forth in Minute Order No. 6. We again, thank you for your patience and decision in this case.

Very truly yours,

ASHFORD & WRISTON



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