

BEFORE THE LAND USE COMMISSION

STATE OF HAWAII

In the Matter of the Petition of:

LANA'I RESORT PARTNERS

To consider an Order to Show Cause as to whether certain land located at Manele, Island of Lana'i, should revert to its former Agricultural and/or Rural land use classification due to the 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 on April 16, 1991, identified by Tax Map Keys: (2) 4-9-002: 049 (por.), formerly (2) 4-9-002: 001 (por.), Manele, Island of Lana'i, State of Hawai'i

Docket No. A89-649

LANA'I RESORT PARTNERS

2016 AUG 11 P 1:58

LAND USE COMMISSION  
STATE OF HAWAII

**TESTIMONY OF THE MAUI PLANNING DEPARTMENT**

The County of Maui Department of Planning (hereinafter referred to as "Department") recognizes the importance of both protecting the public's water supply and a healthy economy for the citizens of Lana'i. The Department is also committed to a fair enforcement of regulations pertaining to land use permits. Based on the information available at this time, the Department does not believe that there is sufficient evidence to support returning the subject land back to its former Agricultural and/or Rural land use designation.

I. BACKGROUND

The island of Lana'i is located within the County of Maui. The island is comprised of just over 141 square miles and is the sixth largest of the eight major Hawaiian islands. The island has a population of 3,102 per the 2010 Census residing in 1,158 households. The population was 2,119 during the 1980 Census, 2,426 during the 1990 Census, and 3,193 during the 2000 Census.

Since the late 1800's, the economy of the island has been based almost entirely on a single-sector that has changed over the years, originally consisting of sheep, then cattle, then pineapple and now tourism. Approximately 98 percent of the island is privately owned (by Larry Ellison). Likewise, the island's water system is also privately owned and not under the jurisdiction of the County. The Lanai Water Advisory Committee is the organization that has been charged with the formulation of water policies for the island. The Committee drafted the Lana'i Water Use and Development Plan (LWUDP) which was accepted by the Maui Board of Water Supply in 2011.

According to the LWUDP, Lana'i has five water supply systems, including two public drinking water systems, two reclaimed water systems, and a brackish water system. All are privately operated and owned Pulama Lana'i. The sustainable yield of Lana'i is estimated at 6 million gallons per day (MGD).

Lana'i's water system includes roughly 79 miles of active pipeline, 35 million gallons (MG) of storage (of which approximately 4.8 MG is potable water storage in 8 tanks), and approximately 6.394 MGD in well capacity (of which 5.04 MGD is potable). About 23 well holes exist, but only 7 are in use. The system serves about 1,573 customers. The system is privately owned and not operated or regulated by the County of Maui Department of Water Supply.

The site has adjacent State land use designations of Agriculture and Conservation. The Community Plan designation for the land is PD-1 Project District, which "builds around one of Lanai's most beautiful and easily accessible beaches, Hulopoe Bay, and provides a major employment opportunity to the island through a planned luxury resort". The land is zoned Lanai Project District 1 (Manele), which provides for "golf courses" as a permitted use.

The land subject to this hearing contains the Challenge at Manele Bay golf course and related improvements and is located adjacent to the Manele Bay Hotel, on the south shore of Lanai.

## II. PROCEDURE

In 1991, the State Land Use Commission (LUC) issued an Order approving an application from the Petitioners for a District Boundary Amendment for the site from Agriculture/Rural to Urban. The Petitioners or owners of the subject land have changed over time, but will be referred to as Lanai Resort Partners (LRP), who are the current owners, in the remainder of this document.

The 1991 LUC Order contained a number of conditions of approval, including Condition 10 which reads:

"Petitioner shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g. brackish water, reclaimed sewage effluent) for golf course irrigation requirements.

In addition, Petitioner shall comply with the requirements imposed upon the Petitioner by the State Commission on Water Resource Management as outlined in the State Commission on Water Resource Management's Resubmittal - Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990."

Condition 10 has been the subject of litigation over the years, the more significant cases being:

- In 1993, the LUC issued an Order to Show Cause why the land should not be returned to its original land use designation due to LRP's non-compliance with Condition 10;
- In 1996, the LUC issued an Order which found LRP was in violation of Condition 10 and ordered LRP to cease and desist;

- In 1997, the Second Circuit Court reversed the 1996 LUC Order on the ground that the LUC's conclusion was clearly erroneous; and finally
- In 2004, the Hawaii Supreme Court remanded the case back to the LUC for clarification of its findings, or for further hearings if necessary, as to whether LRP used potable water from the high-level aquifer, in violation of Condition 10.
- In 2010, the LUC issued an Order which vacated the 1996 cease and desist order, and granted the petitioner's motion for modification of Condition 10 to clarify the definition of "potable water".

### III. DISCUSSION

The Department provides the following responses to the issues that will be covered during the hearing. Our response to "a" and "e" are combined as we feel these issues go hand in hand:

- a. Does Lana'i Resorts use potable water from the high-level groundwater aquifer to irrigate the golf course?
- e. What is the definition of "potable"?

After reviewing the documents and minutes associated with the original approval, there are multiple references to "brackish" water and the Petitioner's intent to use brackish water for golf course irrigation. There is also testimony that developing alternative sources of water for golf course irrigation would only take 1 year, and the Petitioner did not see the need to blend potable water with brackish water to lower salinity levels.

Based on the discussion, testimony, and information provided during the original approval process it appears that the LUC may have intended "potable" water to be non-brackish water. Condition No. 10 itself supports this premise as the LUC provided examples of "non-potable" water including "brackish water, reclaimed sewage effluent". However, there is no clear definition, such as a specific amount of chlorides, provided or mentioned, or other criteria that would indicate precisely what the Commission meant by "potable".

Given the lack of clarity in what the LUC meant by "potable", the Department feels there is no ground at this time to conclude that Lana'i Resorts LLC (LR) is in non-compliance with Condition 10. The Department is not able to enforce a condition that is not clearly defined. Therefore, we cannot support finding a violation or reverting the subject land to its former Agricultural/Rural land use designation.

- b. Is any source of irrigation water for the golf course within the high-level groundwater aquifer?

The Department feels that this issue is more appropriately addressed by LR.

- c. Is that water "potable" or not?

This issue depends on the how "potable" is defined.

- d. Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water?

The Department feels that leakage of potable water to the wells in the Palawai Basin does not constitute the “use” of potable water. Even if this has occurred as a direct result of pumping of non-potable water, Condition 10 only restricts LR from using potable water for irrigation of the golf course. Condition 10 could have been worded to prohibit the use of any potable water that seeps into the irrigation wells or to prohibit the indirect use of potable water; but the condition was not so worded. We feel it is a stretch to say that the mere movement of potable water is the same as “utilizing” potable water from a pump.

Along with the 2004 remand to the LUC, the Hawaii Supreme Court also ruled that Condition 10 restricted the use of potable water from the high-level groundwater aquifer, but did not prohibit the use of non-potable water.

The issue has been raised as to the interpretation of the rather vaguely worded phrase “only alternative non-potable sources of water” found in Condition 10. The Department does not believe that it is reasonable to interpret this phrase as “alternative to the high-level aquifer”. The Hawaii Supreme Court did not simply remand the case to the LUC for clarification of its findings. The Court took the extra effort to rule that Condition 10 allowed the use of non-potable water from the aquifer. The interpretation as “alternative to the high-level aquifer” is contradictory to the Court’s ruling that allows the use of water from the aquifer so long as it is non-potable. In light of the Court’s ruling, the Department believes the only available interpretation of this clause is “alternative to potable water”. Admittedly, this interpretation makes Condition 10 redundant, but consistent with the Court’s ruling.

Based on this standard, the Department cannot find a violation of Condition 10. While the irrigation water could be diluted to reduce chloride levels to an acceptable level, this could be true for any water. Under such a scenario, the inclusion of “potable” in Condition 10 would be meaningless.

The Department believes that when the Supreme Court ruled that the taking of non-potable water from the high-level aquifer was allowed under Condition 10, it rendered moot several issues that have been raised, namely: where the high-level aquifer is located, whether wells 1 and 9 are within the aquifer and whether the LUC intended to prohibit the use of any water from the aquifer. Locations and intentions become immaterial in light of the Court’s ruling that non-potable water could be taken from the high-level aquifer. The Court did not qualify their ruling in regard to location or intention.

Thus, the issue of compliance with Condition 10 has now been distilled down to whether the water used for the golf course irrigation is “potable”, and what exactly is considered “potable”?

Having said this, the Department feels there are several issues that need to be addressed in this docket.

#### IV. RECOMMENDATIONS

The County of Maui has an adopted standard regarding what is “potable water”. According to the Maui County Code §14.01.010, “Potable water” means water that has been certified by the department of health as suitable for cooking or drinking purposes. This standard is in line with Federal Safe Drinking Water requirements. The Department recommends that the LUC rely on this County standard in determining compliance with Condition 10. Using a clear

standard would provide for clear interpretation of Condition 10, which as written is rather opaque. The lack of clarity in Condition 10 has led to, and will continue to lead to various interpretations and contests. A clear standard in regard to Condition 10 would allow regulating authorities to have a distinct means to determine if the condition is being complied with, and allow appropriate enforcement action if necessary.

Non-compliance with Condition 10 could result in the land being reverted back to its Agricultural/Rural designation. The impacts of closing the golf course to a community where tourism is the major economic force would be tremendous and should not be ordered without substantial evidence that the LR is in violation of Condition 10.

The Department believes that the issue of compliance with Condition 10 is actually one portion of the larger issue of the overall water use and availability on Lanàì. Accordingly, the issue of irrigation water and impacts to the high-level aquifer should be considered within a comprehensive analysis of projected water supply and projected water demand for the island. Input from the citizens of Lanàì is necessary in determining something as values-based as “projected water demand”. A community’s vision is critical in projecting any future growth for that community. A comprehensive planning process that affords sufficient time for agency analysis and public input is the most appropriate methodology to arrive upon a solution regarding the water allocation on Lanàì.

Such a plan has been drafted by the Lanàì Water Advisory Committee. As mentioned previously, the Committee drafted the Lana’i Water Use and Development Plan (LWUDP) which was accepted by the Maui Board of Water Supply in 2011. The LWUDP predicts that the development proposed for Lana’i is, “ambitious, with total build-out of Project Districts plus other known projects likely to meet or exceed sustainable yields.” The LWUDP proposes watershed protection measures, water resource protection measures, water conservation measures, new supply resource development, and ensuring sufficient water resources and infrastructure are available prior to approving land use entitlements.

With respect to developing new water supply resources, Pulama Lana’i obtained approval for a reverse osmosis desalination plant on July 16, 2014. The proposed plant is capable of providing up to 2.5 MGD. The LWUDP estimates the sustainable yield of Lana’i at 6 MGD, therefore the amount of water the desalination plant would provide is a substantial increase in the overall water supply of Lana’i. However, it is worth noting that Lana’i Planning Commission limited the approval to a 15 year time limit while the applicant sought 30 years. In addition, a condition restricting the use of the high level aquifer for the Manele Project District once the desalinization plant is operational with the exception of emergencies was also placed on the project. These conditions may affect the feasibility of the desalination plant.

The LUDWP also points out the amount of unaccounted water on Lana’i due to leaks and deteriorated pipelines. Unaccounted water is the difference between what is pumped and metered consumption. It is estimated that 28% of the water pumped is unaccounted for. The percentage is highest for the Manele-Hulopo’e, Palawai Irrigation Grid, where the amount of water unaccounted for is approximately 44.61%.

If the desalination plant is constructed and water conservation measures in the form of repairing deteriorating or leaking supply pipes is implemented, these two actions alone could potentially make a substantial difference in the water issues on Lana’i.

Water issues are also addressed in the Lana'i Community Plan (LCP) which was recently amended and approved on July 26, 2016. The LCP proposes the continuation of planning, exploration, testing, and development of alternative water resources, such as a desalination plant. The LCP also proposes to prohibit the use of high-level aquifer water for golf course irrigation purposes. The LCP states that, "Producing potable water through desalination would greatly decrease the potential of overpumping the aquifer. Increased production of potable water for human consumption means there could be adequate water supply for the re-introduction of agricultural operations. Potable water can be saved by using brackish and treated water for the irrigation of the golf courses and resort landscaping."

The LCP goes on further to say that the Lana'i Community Plan Advisory Committee (CPAC) predicated its decisions on the availability of significant additional water sources for future development proposals. The Lana'i CPAC also prioritized the expansion of water sources in its desired sequence of future development.

Thus, while the water situation on Lanai clearly merits attention, there is no evidence to suggest that the situation is dire, or that irreparable harm to the water system is imminent. It has been argued that due to the composition of the aquifer, there may be little if any warning preceding irreparable harm to the aquifer. While this may be true to some extent, it shouldn't be the basis to determine non-compliance with Condition 10, but instead should be taken into account when the water policies for the island are formulated.

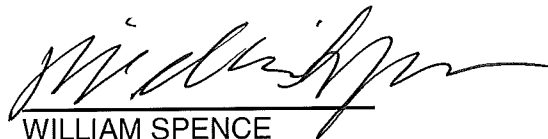
In addition, Pulama Lana'i has planned for, sought, and obtained approval for a desalination plant that can provide 2.5 MGD to an island with a sustainable yield estimated at 6 MGD. This is over a 40% increase in the amount of water currently available on island. Whether the desalination plant is constructed is yet to be seen, however thus far, it is clear that efforts are being made to increase the supply of water on Lana'i.

## CONCLUSION

The Maui County Planning Department recommends the State Land Use Commission issue findings based on County standards regarding the definition of "potable water", in determining compliance with Condition 10.

DATED: Wailuku, Hawaii, AUGUST 11, 2016.

Approved:



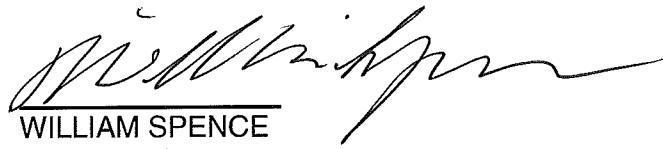
WILLIAM SPENCE  
Director of Planning  
Maui Planning Department

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Planning Department's Testimony was served on the following as indicated below:

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DATED: Wailuku, Hawaii, AUGUST 11, 2016.

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

WILLIAM SPENCE  
Planning Director  
Maui Planning Department