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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 LANAI RESORT PARTNERS, To Consider an Order to Show Cause as to whether certain land located at Manele, Lanai, should revert to its former Agricultural and/or Rural land use classification or be changed to a more appropriate classification due to Petitioner's failure to comply with condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991. Tax Map Key No.: 4-9-02: Por. 49 (Formerly Tax Map Key No. 4-9-02: Por. 1)	Docket No. A89-649 LĀNA`IANS FOR SENSIBLE GROWTH'S OBJECTIONS TO PARTIAL STIPULATION AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; CERTIFICATE OF SERVICE

LĀNA`IANS FOR SENSIBLE GROWTH'S OBJECTIONS TO PARTIAL STIPULATION AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

I. INTRODUCTION

Intervenor Lāna'ians for Sensible Growth ("LSG") opposes the Proposed Findings of Fact, Conclusions of Law, and Decision and Order prepared by Lāna'i Resorts, LLC (the "Resort") and supported by the Office of Planning and the County of Maui Department of Planning (the "Resort's Order").

The Resort's Order is unsound and contains multiple errors of fact and law. The Resort's Order refuses to define potable by its plain and obvious meaning. It ignores relevant law on potability. It improperly relies on the administrative record to manufacture a definition of potable which is not in Condition 10 or the 1991 Order itself. It is inconsistent. It improperly relies, almost exclusively, on irrelevant evidence. Its conclusions of law are nearly void of any supporting legal authority.

Because the Resort, and the parties that support their position, are aware that they cannot prove that the water in Wells 1 and 9 are potable, they instead propose that this Commission ignore the established issue of this hearing (to determine whether potable water from the high level aquifer is utilized to irrigate the Challenge at Mānele) and instead focus only on whether brackish water is being used to irrigate the golf course. Most illustrative of the issue with this tenuous position is the way the Resort must define the term "potable" in order to make their case; to the Resort, the term "potable" means "not non-potable." This circuitous double-negative definition is so ambiguous that adoption of the definition will ensure continuing litigation. And it leads to an illogical conclusion: that water which is not brackish or reclaimed effluent is therefore "potable" regardless if it contains contaminants at levels which are dangerous or fatal. Condition 10 would become the first known drinking water regulation to use chlorides, a contaminant which effects the taste of water, instead of known dangerous contaminants, to determine whether water is potable or otherwise suitable for drinking.

The Resort failed to meet its burden to prove its case. The ultimate decision and order in this case should not be contorted to hide their failure. Their proposed order should not be adopted.

II. THE RESORT'S ORDER SHOULD NOT BE ADOPTED

A. THE RESORT'S ORDER ERRS IN DEFINING THE TERM POTABLE

1. THE RESORT'S ORDER DOES NOT USE THE PLAIN AND UNAMBIGUOUS DEFINITION OF POTABLE

The Resort's proposed decision and order fails to define the term "potable" by its plain and obvious meaning.

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"); *see E & J Lounge*

Operating Co. v. Liquor Comm'n of City & County of Honolulu, 118 Haw. 320, 349, 189 P. 3d 432, 461 (2008). 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). The failure of a regulation to specifically define a term does not render it ambiguous; dictionaries can be consulted to define terms by their ordinary meaning. *Davis v. Four Seasons Hotel Ltd.*, 122 Hawai'i 423, 448 (2010).

The term "potable" as used in Condition 10 is plain and unambiguous as the term itself 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. Further, the Resort's Order admits to facts indicating that "potable" as used in Condition 10 is plain and unambiguous by conceding that the plain language of the 1991 Order controls, Resort's Order ¶ 32, that the definition of "potable" "is not set forth in the 1991 Order or anywhere in the administrative record of the 1991 Order proceedings[,]" Resort's Order ¶ 33, and that the "the Hawai'i Supreme Court . . . defined the term by its plain and ordinary meaning as 'suitable for drinking[.]'" Resort's Order ¶ 48.

Because the term "potable" is plain and unambiguous, its ordinary meaning must be used. None of the parties, including the Resort, have disputed the dictionary definition of "potable" to mean suitable or safe for drinking, nor have they provided an alternate common meaning of the term. *See Lanai Co.,* 105 Hawai'i at 299 n. 8. (noting that Webster's Dictionary defines "potable" as "water suitable for drinking."); Office of Planning's Position Statement at 7 (admitting that the Oxford Dictionaries defines the term as "safe to drink; drinkable."); 1 Trans. 215:1-14 (testimony of CWRM admitting that the "common sense" definition of "potable" is water that is "safe to drink."); *Davis v. Four Seasons Hotel Ltd.*, 122 Hawai'i 423, 448 (2010) (finders of fact may "resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined."). The Resort's Order is not complete for failing to include this undisputed definition.

2. THE RESORT'S ORDER DOES NOT CONSIDER THAT EVERY LAW IN PARI MATERIA DEFINES POTABILITY BASED ON HEALTH-BASED STANDARDS

The Resort's Order fails to address how to determine whether water is "suitable or safe for drinking," and instead takes inconsistent positions on the applicability of outside laws and regulations in interpreting Condition 10.

This Commission must look at other statutes and rules on the same subject matter to determine whether water is "suitable or safe to drink." H.R.S. § 1-16 ("Laws in pari materia, or upon the same subject matter, **shall** be construed with reference to each other.").

There can be no dispute that federal and state safe drinking water regulations are relevant to the subject of whether water is potable and suitable or safe for drinking. The County of Maui looks to these regulations by defining "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 (emphasis added). The Department of Health similarly defines "potable water" in its administrative rules concerning the protection of public water systems from contaminants and pollutants as "water free from impurities in amounts sufficient to cause disease or harmful physiological effects." HAR § 11-21-2. The regulations themselves, HAR Chapter 11-20 and 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." H.R.S. § 340E-2; 40 CFR§ 141.2 (defining "maximum contaminant level"). Affordable tests to determine whether water is potable based on these standards are available, and are already done for the Resort's domestic water systems. 3 Trans. 460:12-15; Ex. I-15a; I-15; 2 Trans. 202:2-203:9. These regulations are clearly relevant to assist in determining whether water is safe or suitable for drinking. H.R.S. § 1-16.

The Resort's Order contains unpersuasive findings of fact in an attempt to distinguish these relevant laws regarding potable water. It is unpersuasive that safe drinking water regulations were not referenced in the 1991 Order or considered in the boundary amendment proceedings, Resort's Order ¶ 41, 50, as the Commission must look to relevant laws on the same subject matter. H.R.S. § 1-16. The Resort's reliance on the testimony of Joanna Seto of the DOH Safe Drinking Water Branch that the terms "potable" and "non-potable" are not used by state or federal drinking water regulations, Resort's Order ¶ 42-43, is also not persuasive given Ms. Seto's admission on cross examination that if water satisfies the regulations set forth in HAR Chapter 11-20, "it can be used in drinking water systems . . . distributed for domestic use

like washing dishes . . . and drinking." 1 Trans. 137:14-22. The Resort's argument that the EPA and DOH did not adopt groundwater regulations until 2006, Resort's Order ¶¶ 45-46, 50, is irrelevant as the primary drinking water regulations established by H.R.S. Chapter 340E (1976-77) and 40 CFR § 141 (1976) which regulate the safety of drinking water were in place at the time the 1991 Order was issued.

The 1991 Order did not need to expressly define the term "potable" to include all laws *in pari materia*. Resort's Order FOF ¶¶ 41, 50-52. The Resort received enough notice that the term potable is defined by its plain meaning of water that is suitable or safe to drink. *See* Resort's Order FOF ¶ 49. They were well aware that the term "potable" as it is used necessarily includes compliance with safe drinking water standards as the Resort tests their s own "potable" water systems for domestic use for DOH and EPA primary contaminants as a means of ensuring that their "water is safe for drinking and day-to-day use," and to "demonstrate the purity of [Lāna'i's] groundwater." Ex. I-15a; Ex. I-15; 2 Trans. 202:2-203:9. The Resort publishes a report on their testing of their potable water wells pursuant to DOH and EPA primary contaminant standards every year. *Id.* They cannot claim ignorance of potability regulations they actively comply with and test for.

The Resort has not provided any other legitimate way to determine potability. Resort's Order ¶¶ 51-52. Their failure to perform a test for potability based on DOH and EPA standards, especially in light of their knowledge of the existence of these standards and affordable comprehensive tests for potability based on these standards is evidence of their failure to prove that Wells 1 and 9 are not potable. Ex. I-15a; Ex. I-15; 2 Trans. 202:2-203:9; 3 Trans. 460:12-15.

Given the importance of laws on drinking water in determining whether water is potable, the Resort's omission of the unrebutted testimony of Mrs. Sally Kaye and Exhibit I-21 is improper. There is no dispute that Cliff Jamile, the Resort's prior director of utilities, tested Wells 1 and 9 for potability and determined that the wells were potable. Ex. I-21; 2 Trans. 324:11-327:24. This credible evidence is the only relevant direct evidence on the issue of whether Wells 1 and 9 are potable. *See Lanai Co.*, 105 Hawai'i at 312-316 (Court noted that even though the LUC considered Wells 1 and 9 "brackish" in 1991, the Court nonetheless considered that the fact that the Resort has never performed a comprehensive test to determine the potability of Wells No. 1 and 9 "imply that [the Resort] was using potable water[.]").

Ultimately, the Resort is hypocritically picking and choosing when laws *in pari materia* are to be consulted, as they rely on such laws in attempting to define "brackish." For example, the Resort criticizes LSG's reference to EPA national primary drinking water regulations because it does not use the term "potable," yet they rely on the EPA's secondary drinking water regulations regarding chlorides to define brackishness even though the regulations does not use the term "brackish" and the EPA's secondary regulations were never cited in the 1991 Order. 40 CFR 143.1; Resort's Order FOF ¶¶ 86, 96. The Resort wants the Commission to ignore that Maui County currently defines potable 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, but they argue that a previous county ordinance that is no longer in effect, which was enacted after Condition 10 was adopted, and which defined potable water as water extracted with chlorides at less than 250 milligrams per liter, be considered. Resort's Order FOF ¶ 89. They rely on an unenforceable CWRM Water Resource Plan definition of brackish to prove that Wells 1 and 9 are not potable based on chlorides, Resort's Order FOF ¶¶ 87-88, even though CWRM testified that it 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; H.R.S. § 174C-66 , and that "you cannot determine potability just based on chlorides." 2 Trans. 230:13-14. None of these outside sources were contemplated in the 1991 Order or the proceedings, but yet the Resort uses them as persuasive authority. The Resort cannot pick and choose when relevant laws apply.

3. DEFINING POTABLE AS WATER THAT IS "NOT NON-POTABLE" IS ABSURD AND ILLOGICAL

The deficiency of the Resort's legal position is evident by its definition of the term "potable water" as "water that is not non-potable." Resort's Order COL ¶ 4. Defining a term as the inverse of its inverse of itself is illogical and absurd. *E & J Lounge Operating Co. v. Liquor Comm'n of City & Cty. of Honolulu*, 118 Hawai'i 320, 349 (2008) ("an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result.").

Condition 10 does not define "non-potable" water as incorrectly stated by Resort's Order FOF ¶ 53. Condition 10 merely provides two examples of water that could be "alternative non-

potable sources of water" in a parenthetical. Condition 10 does not say all brackish water is non-potable.

Defining potable water as water which is not-non-potable is unduly confusing. *Smith v. Dean*, 232 S.W.3d 181, 191 (Tex. App. 2007) (holding that a jury questionnaire was "confusing due to the double negative" and likely resulted in inaccurate responses the result of confusion.); *Newport v. Hyde*, 244 Miss. 870, 877 (1962) (holding that a jury instruction was improper because it "contains a double negative, and is misleading and is probably confusing[.]"); *Morrow v. Gregory*, 994 Ohio App. LEXIS 1364, at *10 (1994) (finding an interrogative was properly excluded where it contained a "confusing double negative[.]"). Its circuitousness will lead to more confusion and likely further litigation.

Assuming that the Resort is attempting to impliedly define "potable" as all water which is not brackish or reclaimed effluent, the Resort is again ignoring a cardinal rule of statutory instruction 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." *In re Ainoa*, 60 Haw. 487, 490 (1979). By focusing on whether brackish water is being utilized and ignoring whether Wells 1 and 9 are potable, the Resort is refusing to follow the hearing's stated purpose to define "potable" and determine whether the Resort is utilizing potable water to irrigate the golf course, Minute Order No. 6. The Resort's Order is inviting this Commission to render the potable water prohibition of Condition 10 null. *Id.*

The Resort's definition of "potable" to exclude all brackish water necessarily fails as it ignores that, both as a matter of fact and law, the terms brackish and potable are not mutually exclusive as used in Condition 10. In *Lanai Co.*, the Court noted that even though the LUC considered Wells 1 and 9 "brackish" in 1991, the Court nonetheless considered the fact that the Resort has never performed a comprehensive test to determine the potability of Wells No. 1 and 9 to "imply that [the Resort] was using potable water[.]". *Lanai Co.*, 105 Hawai'i 296, 312-316 (2004). If brackish water was *per se* not potable, the Supreme Court in *Lanai Co.* could not have remanded this hearing for further proceedings given the Commission's previous findings. *Lanai Co.*, 105 Hawai'i at 312-316. Therefore, just because the 1991 Order considered that Well 1 and other Palawai Basin wells to be brackish does not mean that those wells are not potable.

Based on the record, brackish water and potable water as used in Condition 10 is not mutually exclusive. The Resort's Order ignores a litany of facts on the record which establishes that brackish water can be potable:

- 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.

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

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

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

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

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

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

- 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.

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

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

- 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.

- 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.

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

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

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 so, the Supreme Court would have never remanded this matter back to the Commission for further proceedings.

The Resort's Order includes a finding which misstates LSG's position. The Resort argues that brackish water cannot be considered potable due to the ability to blend, as all water, even sea water, could be blended to become potable. Resort's Order FOF ¶ 115. This finding demonstrates a clear misunderstanding of the brackish quality of water. Brackish water is potable, as chlorides do not affect the potable quality of water at reasonable levels. *See* 40 CFR § 143.1. Blending can be done to improve taste if needed, and already occurs for all of the domestic water systems on Lāna'i. However, it is clear from the record that water with chloride levels at or greater than what is being produced by Well 1 has been served by Maui County without blending for taste. R. V XXXIII, June 8, 2006 at 202:12-203:4.

Defining potable as water which is not brackish or reclaimed effluent, as the Resort proposes, ultimately leads to an illogical result. Water which could be drunk without treatment, but which has elevated chlorides, would be considered non-potable while water with low chlorides but with fatal levels of primary drinking water contaminants would be considered potable. It is more logical to define potable by its plain meaning.

4. THE ADMINISTRATIVE RECORD CANNOT BE USED TO DEFINE POTABLE DIFFERENT THAN WHAT WAS EXPRESSED IN CONDITION 10

The Resort's Order oddly relies extensively on prior representations by the Resort's witnesses and the parties in the administrative record preceding the 1991 Order to demonstrate that the term "potable" should be defined in a way different from its plain and obvious meaning

and different from its use in the 1991 Order. Resort's Order FOF ¶¶ 63-72. Such an argument fails and risks reversible error.

The Resort's reliance on the administrative record of the proceedings that resulted in the 1991 Order is inconsistent with the Resort's finding of fact which stipulates that "the plain language of the 1991 Order controls, and that the hearing officer does not need to, and should not, go further than Condition 10." Resort's Order FOF ¶ 32 (internal citations and quotations omitted). Such inconsistencies would render the Resort's Order defective. *Lanai Co.* 105 Hawai'i at 315 (noting the conflicting findings of the 1996 Order).

The Resort's Order's reliance on the record of the 1991 Order is not necessary as Condition 10 is not ambiguous. It is well settled that where a regulation is "clear and unambiguous," "any discussion regarding legislative history is unnecessary." *Carlisle v. One (1) Boat*, 119 Hawai'i 245, 258, 195 P.3d 1177, 1190 (2008); *State v. Yamada*, 99 Hawai'i 542, 553, 57 P.3d 467, 478 (2002) ("Inasmuch as the statute's language is plain, clear, and unambiguous, our inquiry regarding its interpretation should be at an end."); *Lanai Co.*, 105 Hawai'i at 310 (relying on "[t]he plain language of Condition 10); *see Wittig v. Allianz*, 112 Hawai'i 195, 202, 145 P.3d 738, 745 (App. 2006) ("the court may not resort to extrinsic evidence to determine the parties' intent where the contract's language is unambiguous").

The Supreme Court in *Lanai Co.* has already cautioned that, in this particular instance, "the 1991 Order cannot be construed to mean what the LUC may have intended but did not express." *Lanai Co.* 105 Hawai'i at 296. Therefore, the administrative record should not be used to create a definition of potable which does not appear from the plain language of Condition 10. *Id.* Given the *Lanai Co.* decision, LSG must caution against the adoption of a proposed decision and order which defines Condition 10 based on unexpressed intent. *Id.*

Further, the administrative record cited by Plaintiffs is not helpful in determining the Commission's intent. Unlike situations where legislative history is consulted to determine the legislature's intent in enacting an unambiguous, the record cited by the Resort is not indicative of the Commission's intent but instead the Resort's representations, witness testimony, and witness examinations by the parties. Resort's Order ¶ 64 (referring to the original petitioner's representations); *Id.* ¶ 65 (Tom Leppert's testimony); *Id.* ¶ 66 (Resort's expert witness discussing brackish water). Not one of the Resort's findings of facts includes actual discussion by the Commission as to the intent behind Condition 10. Resort's Order FOF ¶¶ 63-72.

Even if the Resort's prior representations to the Commission is considered helpful, it is undisputable that the Resort represented to the Commission that the term "brackish" referred to basal water, not high level aquifer water:

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

R. V. XX no. 569 118:14-23; *see* R. V. XX no 570 at 32:2-8 (James Kumagai confirming that the Resort intends to exploit basal brackish water.). This is in line with the repeated representations by the Resort that no water from the high level aquifer would be used. *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).

Clearly, going down the path of reliance upon the record of the 1991 Order to define potable in a way not expressly done in the 1991 Order itself is problematic given *Lanai Co.*'s previous admonishment of going beyond the plain language of Condition 10. *Id.* at 314 ("Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies.") There is no reason to commit the sins admonished in *Lanai Co.* over again.

B. THE RESORT'S ORDER RELIES EXTENSIVELY ON IRRELEVANT EVIDENCE

In this matter, the hearings officer allowed all parties to make their record and introduce evidence regardless of its relevance, a prudent decision in light of the opinion in *Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai'i 298 114 (Haw. App. 2016). The Resort's Order, however relies extensively on irrelevant evidence. Adopting the Resort's Order will render the Commission's ultimate decision void.

Under the Hawai'i Administrative Procedures Act, "every agency **shall** as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." H.R.S. § 91-10(1). While the "admission of irrelevant or incompetent matter before an

administrative agency does not constitute reversible error," an agency's decision is void for actually relying on irrelevant evidence. *Shorba v. Bd. of Educ.*, 59 Haw. 388, 397, 583 P.2d 313, 319 (1978).

Wholesale adoption of the Resort's Order will undoubtedly lead to reversible error given its almost extensive reliance on irrelevant evidence. The Resort's Order's reliance upon chloride levels to prove potability is irrelevant given the clear record which establishes that you cannot determine potability just based on chlorides, 2 Trans. 230:13-14, and that it is "really wrong to look at chlorides as a sole indicator of potability." R. V. XXXIII June 8, 2006 at 152:16-153:1.

But aside from the obvious improper reliance on chloride levels to determine potability, the Resort's Order is overwhelmed by evidence which is irrelevant to (1) whether the Resort utilized potable water from the high-level groundwater aquifer to irrigate the golf course; (2) what the phrase "potable" means in Condition 10; and (3) whether there is leakage of potable water to the wells in the Palawai Basin and, does such leakage constitute utilization of potable water as prohibited by Condition 10. Minute Order No. 6. For example:

- FOF ¶¶ 99-104, evidence that other golf courses in Hawai'i have used brackish water for golf course and other irrigation;
- FOF ¶¶ 106-110, evidence of historic use of Wells 1, 9, 14 and 15 for golf course irrigation;
- FOF ¶¶ 112, 168-169, evidence of the lack of alternative sources to irrigate the golf course;
- FOF ¶ ¶153-157, evidence of the alleged lack of competing users for water;
- FOF ¶¶ 160-163, evidence of personal opinions of unqualified witnesses that golf course irrigation is a reasonable and beneficial use of Lāna'i's high level water;
- FOF ¶¶ 165-166, evidence of golf course management practices;
- FOF ¶¶ 170-171, evidence of unrelated wildlife, watershed, and conservation management practices;
- FOF ¶¶ 172, evidence of tax revenue contribution and job creation;
- FOF ¶¶ 173-174, evidence of the Resort's prospective economic viability;
- FOF ¶¶ 175, evidence of the Resort's philanthropic activities;
- FOF ¶¶ 176-177, lay evidence of conformance to non-enforceable government planning documents;

- FOF ¶ 178, irrelevant conclusion that the use of Well 1 and 9 is a reasonable and beneficial use;
- FOF ¶¶ 179-188, evidence of whether harm to Lāna'i's aquifer could be reversed in the long-term.

C. PUBLIC TRUST

Throughout this hearing, the parties have presented various interpretations of the function of the public trust doctrine on the present subject matter.

Whether using brackish water irrigate the golf course is consistent with the public trust is not an issue of this hearing. Minute Order No. 6. The Resort admits that issues of the public trust "are outside the scope of the Supreme Court's remand and are contradictory to the Commission's undisputed findings of fact in the 1991 Order." Resort's Order FOF ¶ 148. The Resort has argued that public trust concerns have already been decided by the 1991 Order and should not be re-litigated. *See* Lāna'i Resort's Statement of Threshold Issues re Minute Order No. 3 at 5. LSG's position, which has been misrepresented by the Resort, is in agreement with these threshold concerns and instead views the public trust as a context in interpreting Condition 10 consistent with its facial intent, and not as a separate issue of this hearing. LSG's Positional Statement at 8-9.

Regardless of the prior position of the parties, the hearings officer has already considered arguments regarding the public trust, proposed possible additional issues to be considered at the hearing, but ultimately limited the issues of this hearing to whether potable water has been utilized to irrigate the golf course. Minute Order No. 3; Minute Order No. 6. The hearings officer's decision is law of the case and must be abided by the parties. *Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 352 n.8 (1997). 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.").

However, that is not to say that the public trust has no bearing on this case whatsoever, as the public trust doctrine counsels this Commission on the proper allocation of the burden of proof, and on the interpretation of Condition 10. For example, 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. The Commission adopted a regulation to protect a public trust resource. It would be absurd and illogical to interpret the drinking-water protection clause of Condition 10 to not protect all drinking water.

D. CONCLUSIONS OF LAW

The Resort's Order's Conclusions of Law are woefully insufficient and does not include key conclusions necessary for a complete and binding order.

The proposed conclusions of law are nearly void of any supporting legal authority, with few supporting legal citations to support the Commission's findings.

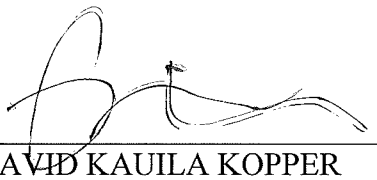
The proposed conclusions of law do not specify that the Resort bears the burden of proof in these hearings. Ex. 9; s*ee also* HAR 15-15-59(a); Ex. 9; s*ee also* HAR 15-15-59(a); *CEEED v. Cal. Coastal Zone Conservation Com.*, 43 Cal. App. 3d 306, 330 (1974); Minute Order No. 6. Such omission is in line with the Resort's attempt to paint LSG as the party with the burden of proof. *See* Resort's Order FOF ¶ 31. This omission constitutes reversible error.

The Order also does not specify any laws on statutory construction which would support the Commission's ultimate conclusion on the definition of potable. Neither does the Resort's Order recount the relevant authority setting forth the available remedy to the Commission. *See* H.R.S. § 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; *Life of Land v. Ariyoshi*, 59 Haw. 156, 158 (1978). The Commission's order should be well supported and complete. The Resort's proposal is not.

III. CONCLUSION

For the foregoing reasons, the Resort's Order should not be adopted.

DATED: Honolulu, Hawai'i, January 6, 2017.



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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of	)	Docket No. A89-649
	)	
LANAI RESORT PARTNERS,	)	CERTIFICATE OF SERVICE
	)	
To Consider an Order to Show Cause as to whether certain land located at Manele, Lanai, should revert to its former Agricultural and/or Rural land use classification or be changed to a more appropriate classification due to Petitioner's failure to comply with condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991.	)	
	)	
Tax Map Key No.: 4-9-02: Por. 49 (Formerly Tax Map Key No. 4-9-02: Por. 1)	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served upon the following parties at their last known address by U.S. Mail, postage pre-paid on January 6, 2017.

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DATED: Honolulu, Hawai'i, January 6, 2017.

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