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LAND USE COMMISSION
STATE OF HAWAII

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STATE OF HAWAII

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	DOCKET NO. A89-649
)	
LANA'I RESORT PARTNERS)	OFFICE OF PLANNING'S RESPONSE
)	TO PREHEARING MOTIONS;
To consider an Order to Show Cause as to)	CERTIFICATE OF SERVICE
whether certain land located at Manele,)	
Lana'i, 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)	
)	

OFFICE OF PLANNING'S RESPONSE TO PREHEARING MOTIONS

The Office of Planning ("OP") offers the following comments on Petitioner Lana'i Resort Partners, LLC's 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 and on Intervenor

Lanaians for Sensible Growth’s Motion for Clarification of Scope of Hearing, or in the Alternative, for an Order to Show Cause.

In brief, although OP believes Petitioner Lana‘i Resort Partners, LLC (“Petitioner”) has correctly stated the relevant issues for the hearing, OP has no objection if the Hearings Officer wants to receive additional evidence or consider additional issues. OP is willing to consider the additional evidence and issues, and then argue their weight and relevance at the end of the hearing. OP would, however, recommend that the issues listed in Minute Order No. 4 be restated to be more consistent with the 2016 decision from the Intermediate Court of Appeals. With respect to whether the scope of the hearing should cover the time period after 2004, OP defers to the Hearings Officer and the Land Use Commission (“LUC” or “Commission”). If relevant, however, the issuance of a new Order to Show Cause must come from the LUC, not the Hearings Officer.

I. THE PROPER STATEMENT OF ISSUES

A. The Scope of the Hearing

On October 13, 1993, the LUC issued its Order to Show Cause (“OSC”) which provided notice to the Petitioner of the basis for possible reversion and defined the scope of the OSC hearing. It stated in relevant part as follows:

The Land Use Commission has reason to believe that you have failed to perform according to Condition No. 10 of the Commission’s Decision and Order dated April 16, 1991 in that you have failed to develop and utilize alternative sources of non-potable water for golf course irrigation requirements. Condition No. 10 was imposed by the Commission after the Petitioner made representations that water from the high-level groundwater aquifer would not be used for golf course irrigation.

(emphasis added)

Consequently, it is clear that the scope of the OSC hearing was whether the Petitioner was utilizing “alternative sources of non-potable water for golf course irrigation” in violation of Condition No. 10.

On May 17, 1996, the LUC determined that Petitioner was violating Condition No. 10. According to the Hawaii Supreme Court, the basis for this decision was unclear. The Hawaii Supreme Court, therefore, remanded the case to determine whether Petitioner used potable water from the high level aquifer, in violation of Condition No. 10. The Hawaii Supreme Court stated in relevant part as follows:

In its 1996 Order, however, the LUC does not expressly state whether the use of potable water by LCI was the ground for the LUC’s conclusion that Condition No. 10 was violated, as opposed to its understanding that LCI was not to use any water from the high level aquifer. . . . Accordingly, we remand the issue of whether LCI has violated condition No. 10 by utilizing potable water from the high level aquifer, to the court, with instructions to remand the case to the LUC for clarification of its findings and conclusions, or for further hearings if necessary.

Lana‘i Company, Inc. v. Land Use Commission, 105 Hawai‘i 296, 315 and 319 (2004).

The scope of the remand was consistent with the scope of the OSC. Whether Petitioner failed to utilize alternative sources of non-potable water in violation of Condition No. 10 is simply another way of asking whether Petitioner was using potable water in violation of Condition No. 10. OP is willing to consider evidence within the scope of these questions, and then argue whether the theories proposed by the parties are supported by the evidence, and applicable or relevant to these questions after the close of evidence.

B. The Statement of Issues

On July 6, 2016, the Hearings Officer issued Minute Order No. 2 in which the Hearings Officer listed certain issues to be discussed. On September 2, 2016, the Hearings Officer issued

Minute Order No. 4 which re-stated or described the issues differently. It stated in relevant part as follows:

- II. The Hearings Officer would request that in addition to any other issues that the parties deem relevant, they be prepared to address the following issues at the hearings scheduled to commence on November 9, 2016:
- a) What did the Commission mean by the word “potable” in Condition 10 of the Decision and Order dated April 16, 1991?
 - b) Based on the entirety of the record, was the intention of Condition 10 to ensure that:
 - i. there would merely be no direct use of potable water by the golf course; or,
 - ii. in addition to prohibiting use of potable water for irrigation, there should be no implementation of irrigation that would negatively affect potable water in the high level aquifer?
 - c) Does the pumping of water for golf course irrigation negatively affect past, current or future uses of potable water from the high level aquifer.

(emphasis added)

In prehearing motions filed on September 16, 2016, both Petitioner and Intervenor Lanaians for Sensible Growth (“LSG”) disagree with the wording in which the Hearings Officer has phrased the issues. Both refer to the decision by the Intermediate Court of Appeals which stated that the LUC was not asked to clarify what was intended by Condition No. 10. The decision stated in relevant part as follows:

The purpose of the remand was not, as Lanai Resorts purports, “to force the LUC to clarify what was intended by Condition No. 10 and then, assuming the condition was sufficiently clear, to determine whether Lanai Resorts had violated it.” Instead, the LUC was given a clear task by the supreme court: clarify its findings and conclusions regarding whether Lanai Resorts violated the prohibition against the use of potable water in Condition No. 10, or to conduct further hearings if the LUC found additional hearings necessary.

Lanaians for Sensible Growth v. Lana'i Resorts, LLC, CAAP-13-314 and CAAP-12-1065, at 16 (Haw. App. Mar. 21, 2016) (memo).

As stated above, OP has no objection to the consideration of evidence and issues, even if OP believes the evidence and issues are ultimately unnecessary or irrelevant to the final decision. OP will make these arguments at the close of evidence. Accordingly, although OP does not necessarily believe the issues raised in Minute Order No. 4 are necessary or relevant to the final decision, OP only asks that the statement of issues in Minute Order No. 4 be amended to be more consistent with the Intermediate Court of Appeals' decision in this case. OP recommends the following changes:

- II. The Hearings Officer would request that in addition to any other issues that the parties deem relevant, they be prepared to address the following issues at the hearings scheduled to commence on November 9, 2016:
- a) What [~~did the Commission mean by~~] does the word "potable" mean in Condition 10 of the Decision and Order dated April 16, 1991?
 - b) ~~Based on the entirety of the record, was the intention of]~~ Does Condition 10 [~~to ensure that:~~
 - i. ~~there would merely be no direct use of potable water by the golf course; or,~~
 - ii. ~~in addition to prohibiting use of potable water for irrigation, there should be no implementation of]~~ prohibit any irrigation that would negatively affect potable water in the high level aquifer?
 - c) [~~Does]~~ How does the pumping of water for golf course irrigation [~~negatively]~~ affect past, current or future uses of potable water from the high level [~~aquifer.]~~ aquifer, if at all.

OP welcomes the Hearings Officer's attempt to frame the more specific issues as the Hearings Officer sees them. This helps the parties to focus their efforts to address the matters which the Hearings Officer deems important. OP also understands that the Hearings Officer did

not restrict the parties to those issues or even disallow the parties from disagreeing that those are the relevant issues.

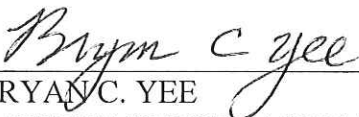
II. THE RELEVANT TIME PERIOD

Petitioner argues that the relevant time period for examination is prior to 1994 which was the year in which the LUC issued its Decision and Order finding a violation of Condition 10. Any remand of that 1994 Decision and Order should, therefore, cover the same time period. LSG disagrees. In addition, LSG argues in the alternative that if the relevant time period is prior to 1994, then a new Order to Show Cause should be issued for the time period from 1994 till the present.

OP will defer to the Hearings Officer on the relevant time period to be addressed at the hearing. If a new Order to Show Cause must be ordered, however, such an order must be issued by the LUC not the Hearings Officer. OP does not believe such authority was given to the Hearings Officer, and OP believes important decisions like this should be made by the entire LUC.

DATED: Honolulu, Hawaii, September 23, 2016.

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_____)	

CERTIFICATE OF SERVICE

I hereby certify that on the date below a true and correct copy of the foregoing OFFICE OF PLANNING’S RESPONSE TO PREHEARING MOTIONS was duly served on the following parties at their last known addresses via United States mail, postage prepaid:

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