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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI

| | |
|---|---|
| In the Matter of the Petition of<br><br>LĀNA`I RESORTS, LLC<br><br>To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna`i, should revert to its former Agricultural and/or Rural land use 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. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.). | DOCKET NO. A89-649<br><br>**PETITIONER LĀNA`I RESORTS, LLC'S STATEMENT OF POSITION; EXHIBITS A – H; CERTIFICATE OF SERVICE** |

# PETITIONER LĀNA`I RESORTS, LLC'S STATEMENT OF POSITION

Pursuant to "*Minute Order No. 2*" (**Minute Order**) filed on July 6, 2016 in the State Land Use Commission (**LUC**), Petitioner LĀNA`I RESORTS, LLC (**Lanai Resorts**) respectfully submits this Statement of Position.

## I. FACTUAL BACKGROUND

This case arises out of a certain Condition 10, which was promulgated by the LUC over 25 years ago in the "*Findings of Fact, Conclusions of Law, and Decision and Order*" filed in this docket on April 16, 1991 (the **1991 Order**). Since the 1991 Order, Condition 10 has been the subject of several LUC proceedings and remand orders from Hawaii's appellate courts.

In 1996, the LUC issued an order (the **1996 Show Cause Order**) that found that Lanai Resorts' predecessor, Lanai Co. Inc. (**LCI**), had violated Condition 10. In 2004, the Hawaii Supreme Court reversed the 1996 Show Cause Order, and remanded this case to the LUC with specific instructions: "**for clarification of [the LUC's] findings, or for further hearings if necessary, as to whether LCI[1] used potable water from the high level aquifer, in violation of Condition No. 10**." *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai`i 296, 319, 97 P.3d 372 (2004) (attached as Exhibit A) (emphasis added).

After 2004, the LUC conducted further proceedings. However in 2016, the Intermediate Court of Appeals (**ICA**) vacated these proceedings and, once again, remanded this case back to the LUC, with instructions to comply with the supreme court's remand. The ICA stated, "[T]he 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*

[1] The supreme court referred to Lanai Resorts' predecessors collectively as "LCI" for sake of simplicity. "LCI" will be used in the same manner in this Statement of Position.

*Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai`i 298, 369 P.3d 881 (App. 2016) (attached as Exhibit B).

The remand orders of the supreme court and the ICA define and limit the scope of the instant hearing. The sole purpose of this hearing is to conduct further evidentiary proceedings pursuant to the LUC's 1996 Show Cause Order. The specific facts and circumstances that will be presented during this hearing pertain to the circumstances that existed from 1991 to 1993, the period in which the alleged violation of Condition 10 by LCI should have occurred.

The usage of Wells 1 and 9 was specifically the subject of the hearings that led to the 1996 Show Cause Order and did not include wells developed subsequent to 1996. We submit that Wells 14 and 15, developed years after the hearing (approximately 2004 and 2012, respectively), are beyond the scope of the show cause order, and therefore not relevant to whether LCI violated Condition 10 during the above period. These wells should therefore not be impacted by any decision stemming from this remand hearing.

The controversy surrounding this case deals with conflicting needs for groundwater resources on the island of Lāna`i. LCI's use of brackish groundwater from Wells 1, 9, and 12 during the relevant period (1991-1993) was an exercise of its correlative rights as a landowner of lands overlying the water source. This existing use is required to be protected and assured under Article XI, Section 7 of the Hawai`i State Constitution. Under the common law, the correlative rights doctrine grants reasonable use of the groundwater, and calls for the sharing of water resources amongst existing, competing users. It does not call for the exclusion of one user over the other. We believe that the use of brackish water from Wells 1 and 9 was a reasonable and beneficial use by LCI and continues to be so today. Any decision which results in the complete prohibition of a continued, reasonable use of groundwater would be incompatible with the spirit

of the correlative rights doctrine, and would fail to assure the existing correlative uses under the State Constitution.

Based on this procedural framework, Lanai Resorts sets forth below its position with respect to each of the issues stated in the Minute Order. The Minute Order presents the issues as follows:

a) Does Lanai Resorts use potable water from the high-level groundwater aquifer to irrigate the golf course?

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

c) Is that water "potable" or not?

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

e) What is the definition of "potable"?

## II. LANAI RESORTS' POSITIONS ON THE MINUTE ORDER ISSUES

### A. What is the definition of "potable"? (Minute Order Issue (e))

Although this issue is the final issue listed in the Minute Order, we address this issue first because it was the central issue focused on by the parties in the hearings on the 1996 Show Cause Order and the 2006 hearings following the supreme court's remand.

The Hawaii Supreme Court's remand opinion pointed out that "The 1991 Order did not define the term 'potable' or 'nonpotable.'" *Lanai Co., Inc.* at 299 n.8. 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." *Id.*

In the instant situation, we should not now adopt and apply a **new** definition of "potable." As the supreme court stated, "The LUC cannot now enforce a construction of Condition 10 that was not expressly adopted. . . . Parties subject to an administrative decision must have fair

warning of the conduct the government permits or requires. . . . An administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed." *Id.* at 314.

Attempting to bring meaning to a term adopted but not defined by the LUC some 25 years after the fact is problematic. This was clearly demonstrated by the 1996 Show Cause hearings and the 2006 remand hearings where the polysemic nature of the word "potable" became evident after extended debate and discussion over its definition.

We suggest that what is perhaps more fruitful and less problematic is determining what is "**non**-potable." We believe this to be a better course of action to take. After all, the LUC, in 1991, adopted a definition of "non-potable" within the very wording of Condition 10. Condition 10 so states as follows:

> 10. [LCI] shall not utilize the potable water from the high-level groundwater aquifer for the 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, [LCI] shall comply with the requirements imposed upon the [LCI] 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.

1991 Order (emphasis added).

From the above, the LUC prescribed and illustrated the term "non-potable" by providing two examples—i.e., brackish water and reclaimed sewage effluent. Therefore, the use of brackish water or sewage effluent are listed as specific permitted uses allowed for under Condition 10.

In the 1991 Order, the LUC made clear through the adoption of specific findings of fact, that Wells 1 and 9 were using "brackish" water. The applicable findings of fact set forth in the 1991 Order states as follows:

> 48. Petitioner proposes to provide alternate sources of water for golf course irrigation by developing the **brackish water supply**. According to Petitioner, **Well Nos. 9 and 12** which have capacities of about 300,000 gpd and 200,000 gpd, respectively, have been tested but are not operational. Currently available also is **brackish water from Well No. 1** which is operational and which has a capacity of about 600,000 gpd. . . .
>
> 89. Petitioner is now in the process of developing the **brackish water supply for irrigation** of the proposed golf course. According to Petitioner, **Well No. 1**, which is operational and available, and **Well Nos. 9, 10 and 12**, which have been subjected to full testing, have **aggregate brackish source capacity** in excess of the projected requirements of 624,000 gpd to 800,000 gpd for the Manele golf course.

1991 Order (emphases added).

These specific findings of fact were, in fact, pointed out by the Hawaii Supreme Court as evidence that the use of Wells 1 and 9 for irrigation purposes was indeed permissible.[2]

Likewise, in the subsequent 1996 Show Cause Order, the LUC once again reiterated its finding of fact that "**Wells No. 1 and 9** . . . are within the high level aquifer and provide **non-potable, brackish** water." 1996 Show Cause Order, Findings of Fact 16 (emphasis added).[3]

Although other parties to this proceeding may urge the LUC to amend or modify Condition 10 by adopting a more specific definition of "potable," we caution that this effort may be both unproductive and, more importantly, beyond the scope of the remand order. The ICA's

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[2] "Indeed, the mention of **Wells No. 1 and 9** in finding 48 of the 1991 Order suggests that the use of these wells, and their **brackish** water supply, was **permissible**." *Lanai Co., Inc.* at 313 (emphases added).

[3] Finding of Fact 16 was a finding made by the LUC itself; none of the parties proposed this finding. Transcript, May 16, 1996 LUC Hearing, at 70 (attached as Exhibit C).

remand order stated specifically that amending Condition 10 is **not** within the scope of the supreme court's order. Thus, the ICA vacated the LUC's attempt to modify Condition 10 during the remand hearings in 2006. The LUC's modification substituted the term "potable" with a definition of groundwater (i.e., having a chloride concentration of 250 milligrams per liter). The ICA found the LUC's attempt to define "potable" by substituting a literal definition to be unacceptable and beyond the scope of the supreme court remand order. Should Condition 10 need to be further clarified or modified, we suggest that this be done after the present LUC's remand proceedings have been concluded.

Condition 10 also required LCI to comply with the requirements of the Commission on Water Resource Management's (**CWRM**) Resubmittal—Petition for Designating the Island of Lanai as a Water Management Area dated March 29, 1990.[4] CWRM, however, refused to designate Lanai as a water management area. In so deciding, CWRM found, in part, that there was no reason to believe that the existing wells, including the then-newly developed Well No. 9, would endanger other wells or the stability of the entire high-level aquifer, and it was foreseen that "future needs will be met without harm to the high-level aquifer according to the planning efforts of [LCI]." Exhibit D at 6.

Pursuant to HRS Chapter 174C, CWRM's responsibility includes gathering information about water resources, including chloride levels from all potable wells. With this information, CWRM monitors situations throughout the State, assists each county in establishing a "water use and development plan" (**WUDP**) to be adopted by ordinance, and establishes a Hawaii Water Plan that divides the counties into hydrologic units. The state and county plans enable planning for water use, preservation, and development.

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[4] Attached as Exhibit D.

In 2012, CWRM adopted Lanai's WUDP dated February 25, 2011[5] (the **Lanai WUDP**), which was also adopted by the County of Maui in 2011 (by Ordinance No. 3885).[6] The Lanai WUDP[7] was developed by the Lanai Water Advisory Committee (**LWAC**), which was formed by the Maui Board of Water Supply to "provide public input and involvement during the development of the Lanai WUDP and to monitor the Lanai WUDP implementation." Lanai WUDP at 4. LWAC's membership included members of Intervenor Lanaians for Sensible Growth (**LSG**), and Lanai Resorts' Director of Utilities.

It is significant to note that the Lanai WUDP refers to and classifies Wells 1 and 9 (and the newer Well 14) as "non-potable - brackish" wells, and not as "potable" wells. We refer you to the relevant excerpts from the Lanai WUDP below:

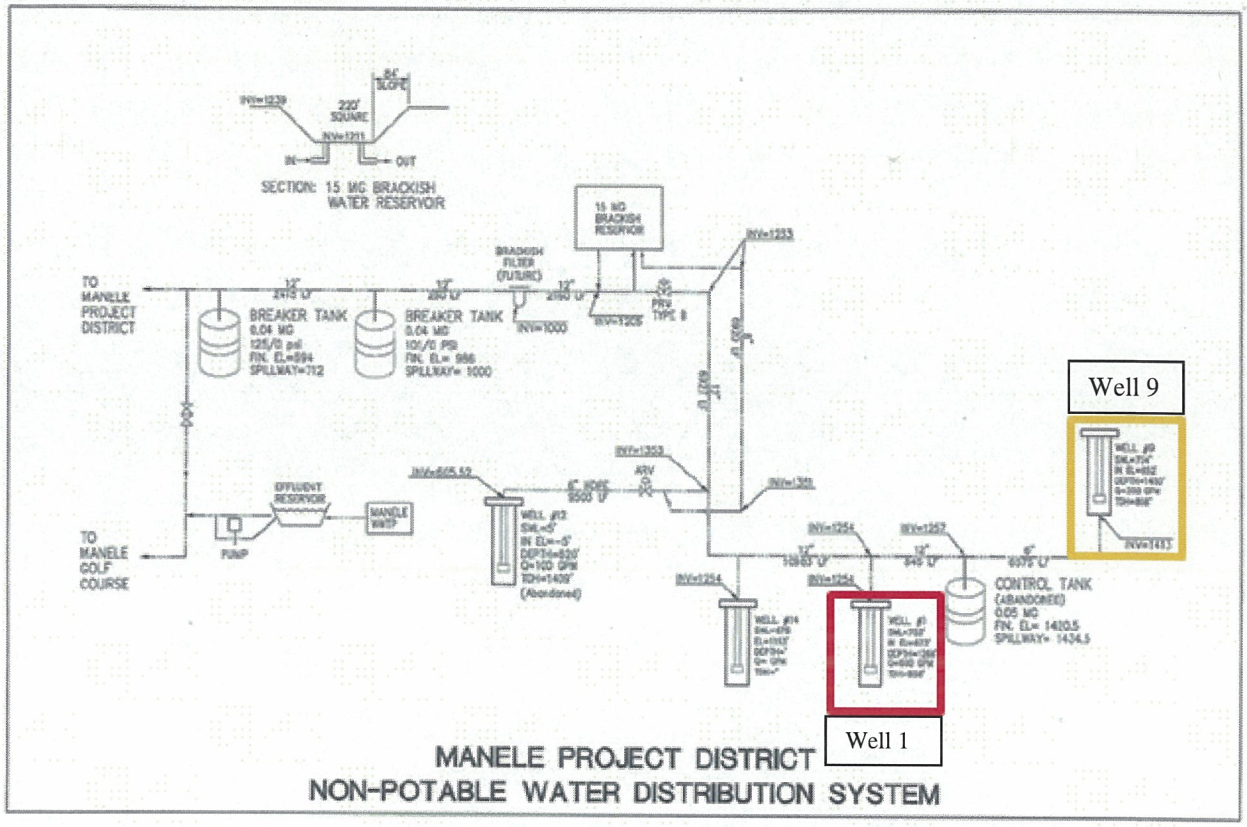
| Manele, Hulopo`e and Portions of Irrigation Grid | | | | | | |
|---|---|---|---|---|---|---|
| Hi`i Reservoir | 1.000 | 1823 | 1810.2 | | Concrete Lined | |
| Hi`i Tank | 0.500 | 1823.5 | 1791.5 | 1952 | Welded Steel | Potable - PWS 238 |
| Manele Breaker Tank 1 | 0.100 | 1141 | 1127 | 1987 | Bolted Steel w Glass Fused Coating | Potable - PWS 238 |
| Manele Breaker Tank 2 | 0.100 | 755.8 | 742 | 1987 | Bolted Steel w Glass Fused Coating | Potable - PWS 238 |
| Manele Breaker Tank 3 | 0.300 | 341 | 326 | 1987 | Bolted Steel w Glass Fused Coating | Potable - PWS 238 |
| | | | | | | |
| Wells 9 & 1 Control Tank | 0.050 | 1434.5 | 1420.5 | | Steel | Non-Potable - Brackish |
| Palawai Brackish Reservoir | 15.000 | 1211 | 1239 | | Lined | Non-Potable - Brackish |
| Effluent Reservoir | 2.800 | | 275 | | Lined | Non-Potable - Effluent |
| Manele GC Pond | 1.500 | | 250 | | | Non-Potable - Effluent |

[5] The CWRM Staff Submittal recommending adoption of the Lanai WUDP is available online at http://files.hawaii.gov/dlnr/cwrm/submittal/2012/sb201208E1.pdf. The minutes of the August 15, 2012 CWRM meeting adopting the Lanai WUDP are available online at http://files.hawaii.gov/dlnr/cwrm/minute/2012/mn20120815.pdf.

[6] A copy of Ordinance No. 3885 is available online at http://www.mauicounty.gov/DocumentCenter/View/16134.

[7] Available online at http://www.co.maui.hi.us/1772/2011-Lanai-Water-Use-Development-Plan.

FIGURE 3-33. Manele Non-Potable System Schematic




Lanai WUDP at 3-41, 3-47 (highlighting added).

It is evident from the above excerpts that both the County of Maui and CWRM, through their adoption of the Lanai WUDP, acknowledged that Wells 1 and 9 were "brackish" water wells that clearly fit within Condition 10's examples of **non**-potable water.

**B. <u>Does Lanai Resorts use potable water from the high-level groundwater aquifer to irrigate the golf course? (Minute Order, Issue (a))</u>**

In light of the limited scope of the supreme court's remand order, this issue should not be phrased in the present tense. Instead, the issue should be phrased as, "**Was LCI using** potable water from the high-level groundwater aquifer to irrigate the golf course, **from 1991 to 1993**?" *See Lanai Co., Inc.* at 306 ("[W]e remand the question of **whether LCI *was* using** potable water from the high level aquifer[.]").

The LUC in 1996 found that LCI's use of Wells 1 and 9 was a violation of Condition 10 because the LUC "believed the high level aquifer consisted of **only** potable water." Thus, the LUC "interpreted Condition No. 10 as precluding the use by LCI of 'any' or all water from the high level aquifer," including Wells 1 and 9 located in the high level aquifer. *Lanai Co., Inc.* at 296-97 (emphasis added). However, upon review the Hawaii Supreme Court later found that the LUC's interpretation was clearly erroneous and rejected its finding of a violation. The supreme court further clarified that LCI was not prohibited from using any or all water from the high level aquifer—only **potable** water. *Id.* at 314.

Thus, after the supreme court's remand, it became clear that LCI's use of brackish Wells 1 and 9 was not a violation, because the supreme court determined that the high level aquifer contained both potable and non-potable water, and the 1991 Order defined brackish water as being non-potable.[8]

Moreover, the record shows that LCI complied with standards promulgated by other regulatory agencies. Maui County Ordinance No. 2066, codified in Maui County Code §24.240.020, defines "potable water" for the purpose of golf course irrigation as groundwater "containing less than 250 milligrams per liter (mg/l) chlorides." Maui County Ordinance No. 2133, which established the Manele Bay Project District, required LCI to "use only non-potable water, as defined in Ordinance No. 2066 enacted by the County on December 17, 1991, for the

[8] Wells 1 and 9 are the only wells relevant to the 1996 Show Cause Order. *See* 1996 Show Cause Order, Finding of Fact 15. At the time, LCI was also using Well 12 and treated wastewater effluent for irrigation, but these uses are not at issue. Condition 10 expressly categorizes reclaimed sewage effluent as being non-potable water, and neither the sewage treatment plant nor brackish Well 12 was within the high level aquifer. Moreover, Well 12 is moot because it was closed in 1997 and is thus no longer in use.

irrigation of the Golf Course in the Manele Project District."[9] There is no dispute that Wells 1 and 9 were pumping non-potable water under the definition stated in the aforementioned ordinances. LCI conducted an extended well pump test cited by the 1996 Order showing that Well 1's chlorides level ranged between 326 and 330 mg/l, and Well 9 ranged between 395 and 404 mg/l, both in excess of 250 mg/l.[10]

The statutes and regulations governing CWRM do not contain a definition of "potable," but do define "brackish water." Similar to the Maui Ordinance, the definition is based on chloride level. This definition is set forth within the State Water Resource Protection Plan (**WRPP**),[11] a document prepared by CWRM under the State Water Code, HRS § 174C-31, and constitutes a part of the Hawaii Water Plan. The WRPP defines "brackish water" as water

> "that is presently unused for municipal supplies due to excessive chlorides (salt) content. Chlorides range from just above recommended drinking water limits to that nearly of seawater. . . . Water exhibiting chloride concentrations greater than 250 milligrams per liter (mg/L) is generally considered unacceptable for drinking purposes."

WRPP Section 3.3.2.5, at 3-11.[12]

The Hawaii Supreme Court's remand order identified specific factual issues that were not made clear from the 1996 Show Cause Order: (1) whether LCI was using any other water (other than Wells 1, 9, 12, and treated wastewater effluent) for irrigation; (2) whether the water quality

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[9] Portions of Maui County Ordinances 2133 and 2066 are attached as Exhibit E.

[10] The "Results of an Extended Pump Test of Wells 1 and 9" was attached to Petitioner's Motion to Amend Condition 10 as Exhibit 1, filed at the LUC on November 8, 1993. A portion of the report is attached as Exhibit F.

[11] The WRPP was adopted several years after the 1996 Show Cause proceedings, but it indicates that common practice and understanding of the term "brackish" has not changed since the 1980s.

[12] The WRPP is available online at http://files.hawaii.gov/dlnr/cwrm/planning/wrpp2008update/FINAL_WRPP_20080828.pdf.

of Wells 1 and 9 had been tested; and (3) whether LCI's use of non-potable water caused leakage of potable water, and whether that leakage constituted a use of potable water. *Id.* at 316.

At the hearing, Lanai Resorts will provide additional evidence to resolve and address these issues. Lanai Resorts can confirm that LCI did not use any water other than Wells 1, 9, 12, and treated wastewater effluent for irrigation. It can also provide testing results showing that Wells 1 and 9 were "brackish" at the time of the 1996 Show Cause Order, and have remained brackish until today, under the standards set forth by CWRM and the Maui County Code.

### C. Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water? (Minute Order, Issue (d))

The supreme court's remand opinion stated that although LCI's use of non-potable water was not a violation of Condition 10, the LUC had made some findings indicating a possibility that LCI's use of non-potable resulted in leakage of potable water. The supreme court remanded for further clarification or findings as to whether this leakage was in fact occurring, and whether the leakage constituted a use of potable water.

Lanai Resorts believes this to be a non-issue. The supreme court only requested further findings about this issue because the 1996 Show Cause Order included a finding stating, "[LCI's] water consultant also agrees that the small aquifers are interconnected, and there is leakage from the high level potable water area to the low level brackish water area." 1996 Show Cause Order, Finding of Fact 22.

The record shows that although LCI's water consultant, Tom Nance, agreed with the above statements, he testified that there was **no** evidence that pumping directly caused or induced such leakage:

[By Alan Murakami]

Q. Mr. Nance, are you saying that Mr. Mink is wrong about the interconnection between the high level aquifer where the potable wells are and the Palawai Basin aquifer where Wells 1 and 9 are?

A. I think they are interconnected. I think there's leakage from high to low, no question.

Q. So if you pump from the low, then there will be leakage of potable water into the Palawai Basin?

A. **The question is whether that pumpage induces such leakage. That is yet to be determined.**

Transcript, December 16, 1994 LUC hearing, at 150-152 (emphases added) (attached as Exhibit G).

Mr. Nance explained that it was impossible to attribute a causal link between the leakage and LCI's pumping because there is too little known about the aquifer and the movement of groundwater to be able to say what could be causing the leakage. *Id.*

Following the supreme court's remand in 2006, Mr. Nance provided further testimony regarding the "leakage" theory. Portions of his testimony are attached as Exhibit H. Without getting into the details here, Mr. Nance testified that even after conducting further tests and monitoring, the test results did not support the leakage theory. Moreover, there is still too little known about the aquifer. The aquifer is a large and complicated underground system containing an unknown number of compartments and other components, all of which may affect the aquifer in unknown ways.

Water is, by nature, a dynamic and ephemeral resource. Unlike land or real property, water can move, change from one form to another (i.e., liquid, gaseous, and solid ice), morph from potable to non-potable and vice versa, disappear, or take on different shapes. In this case, the aquifer's structure adds more layers of complexity and defies simplistic explanations and

exactness. "Leakage" itself defies definition. What quantum of water constitutes leakage? Is the leakage continuous or intermittent? Does leakage occur only when it is induced or accelerated beyond its natural flow? Does leakage contemplate water in a gaseous form moving through the atmosphere or in chambers?

Even with the benefit of additional studies and research, Lanai Resorts believes that these issues cannot be easily resolved or defined within the time frame of these proceedings. To this day, Lanai Resorts is not aware of any substantial evidence indicating that pumping actively causes induced leakage. Unsubstantiated theories or hypotheses may be interesting from a scientific and academic perspective, but its probative value and applicability as to certainty or exactness is questionable. We believe a debate or discourse on leakage (i.e., the interrelationship by and between hundreds of geologic compartments on the island of Lāna`i,), albeit interesting, will be inconclusive and of limited value to these proceedings.

### D. Is any source of the irrigation water from the golf course within the high-level groundwater aquifer? Is that water "potable" or not? (Minute Order, Issues (b) and (c))

Lanai Resorts believes that when the supreme court ruled that Condition 10 allowed LCI to use water from within the high-level aquifer, it rendered Issues (b) and (c) of the Minute Order moot. The location and source of irrigation water is immaterial in light of the remand opinion of the supreme court. The only issue stated in the remand opinion is "whether LCI used **potable** water from the high level aquifer, in violation of Condition No. 10." *Lanai Co., Inc.* at 319 (emphasis added), which is adequately addressed by the other issues of the LUC's Minute Order. Therefore, we believe that Issues (b) and (c) of the Minute Order are unnecessary.

## III. CONCLUSION

Despite the long and convoluted history of this case, the issues before the Hearing Officer have been further narrowed by the appellate courts' remand orders. We wish to minimize the risk

of substantive or procedural errors, and to maximize efficiency and eliminate unnecessary evidentiary hearing time. Lanai Resorts respectfully submits that the scope of this hearing should remain narrowly focused on the issues as we have restated above. In particular, we should focus our attention on what is permitted under Condition 10, rather than on what acts are not. Focusing on the permitted use of non-potable or brackish water accomplishes this objective.

Water disputes can be contentious and divisive to a community. We hope that a decision in this case will promote the reasonable and beneficial use and sharing of the groundwater resources amongst competing and conflicting uses in the spirit of the correlative rights doctrine and State Constitution. LCI, during the relevant period, did not violate Condition 10, but rather acted consistently within the parameters of the express authorization of that Condition by using non-potable, brackish water from Wells 1 and 9.

Dated: Honolulu, Hawaii, August 12, 2016.

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105 Hawai'i 296
Supreme Court of Hawai'i.

LANAI COMPANY, INC., Appellant–Appellee,
v.
LAND USE COMMISSION and Lanaians for Sensible Growth, Appellees–Appellants
and
Office of State Planning and County of Maui Planning Department, Appellees–Appellees.

No. 22564.
|
Sept. 17, 2004.

**Synopsis**

**Background:** Developer appealed order of Land Use Commission (LUC), finding that developer had violated condition of LUC order amending land use district boundary from rural and agricultural district to urban district to facilitate development of golf course, which condition LUC interpreted as precluding developer's use of any and all water from a high level groundwater aquifer. The Circuit Court reversed the LUC decision, finding that its interpretation of the condition was clearly erroneous. Citizens' group and LUC appealed.

**Holdings:** The Supreme Court, Acoba, J., held that:

[1] civil procedure rule requiring statement of facts in "actions tried upon the facts" did not apply to circuit court's review of LUC decision;

[2] condition of LUC order was properly interpreted as precluding only developer's use of potable water from high level groundwater aquifer; and

[3] LUC findings in support of order were inadequate for determination as to whether developer had violated condition by using proscribed potable water, and thus remand was required.

Affirmed in part, vacated in part, and remanded.

**Attorneys and Law Firms**

****373 *297** Russell A. Suzuki and James J.S. Chang, Deputy Attorneys General, on the briefs, for appellee-appellant Land Use Commission.

Alan T. Murakami and Carl C. Christensen (Native Hawaiian Legal Corporation), on the briefs, Honolulu, for appellee-appellant Lanaians for Sensible Growth.

Gary W. Zakian, Deputy Corporation Counsel, County of Maui, on the briefs, for appellee-appellee County of Maui.

Bruce L. Lamon and Ellen Cirangel (Goodsill Anderson Quinn & Stifel), on the briefs, Honolulu, for appellant-appellee Lanai Company, Inc.

MOON, C.J., LEVINSON, NAKAYAMA, ACOBA, and DUFFY, JJ.

**Opinion**

Opinion of the Court by ACOBA, J.

In this appeal, Appellees–Appellants Land Use Commission (the LUC) and Lanaians for ****374 *298** Sensible Growth (Sensible Growth) contest the April 26, 1997 order of the Circuit Court of the Second Circuit (the court)[1] reversing the LUC's May 17, 1996 order (1996 Order) which, *inter alia,* required Appellant–Appellee Lanai Company, Inc. (LCI)(1) to immediately cease and desist any use of water from the high level aquifer for irrigation of the Manele golf course on the island of Lanai pursuant to Condition 10 of its April 6, 1991 Order (1991 Order) and (2) to file a detailed plan with the LUC within sixty days, specifying how it will comply with the LUC's 1991 Order requiring water use from alternative non-potable water sources outside of the high level aquifer. For the reasons set forth herein, we (1) hold that Hawai'i Rules of Civil Procedure (HRCP) Rule 52(a) does not apply to a circuit court's review in an appeal from an agency decision; (2) affirm the court's conclusion that the LUC's 1996 Order was clearly erroneous to the extent it interpreted Condition No. 10 of its 1991 Order as precluding the use by LCI of "any" or all water from the high level aquifer; and (3) remand the case to the court, with instructions that the court remand this case to the LUC for clarification of its findings, or for further hearings if necessary, on the

issue of whether LCI used potable water from the high level aquifer in violation of Condition No. 10.

1 The Honorable Shackley Raffetto presided.

I.

On November 29, 1989, LCI's predecessor in interest, Lanai Resort Partners,[2] petitioned the LUC to amend the land use district boundary at Manele, on the island of Lanai, from rural and agricultural districts to an urban district.[3] LCI planned to develop an eighteen-hole golf course as an amenity of the Manele Bay Hotel. On October 10, 1990, Sensible Growth, the Office of Hawaiian Affairs (OHA), and LCI signed a memorandum of agreement (the Agreement).[4] It appears from the record that the Agreement was included as Appendix K of the *Manele Golf Course and Golf Residential Project Environmental Impact Statement* (Environmental Impact Statement or EIS), "accepted by the Maui Planning Commission as an accurate environmental disclosure document."[5] The Agreement provided in relevant part that LCI, in "consideration of the mutual promises and agreements" between the parties, agreed to "[e]nsure that no high level ground water aquifer [[[6] will be used for golf course maintenance or operation (other than as water for human consumption) and that all irrigation of the golf course shall be through alternative non-potable water sources."

2 As stated, Lanai Resort Partners was the predecessor in interest to LCI. LCI is a subsidiary of Castle and Cooke, Inc. For the sake of simplicity, the three companies will hereinafter collectively be referred to as "LCI."

3 On February 9, 1990, the Office of Hawaiian Affairs (OHA), Sensible Growth, Solomon Kaopuiki, John D. Gray, and Martha Evans petitioned to intervene. On March 9, 1990, the LUC permitted OHA and Sensible Growth to intervene, but denied the petition as to Solomon Kaopuiki, John D. Gray, and Martha Evans.

4 Initially, Sensible Growth intervened in opposition to the proposed golf course, but later withdrew its opposition after entering into the Agreement.

5 Both Sensible Growth and LCI acknowledge that the Agreement was attached as Appendix K to the EIS accepted by the Maui Planning Commission.

6 "Aquifer" is defined as "a water-bearing stratum of permeable rock, sand, or gravel." *Webster's Seventh New Collegiate Dictionary,* 44 (1965) [hereinafter *Webster's* ].

Sensible Growth and LCI submitted proposed findings of fact (findings), conclusions of law (conclusions), and orders, in February of 1991.[7] Sensible Growth's proposed order recommended that the LUC impose a condition that "no high level ground water aquifer will be used for golf course maintenance or operation (other than water for human consumption) and that all irrigation of the golf course shall be through alternative non-potable water sources."

7 Sensible Growth only submitted a proposed decision and order, and did not submit proposed findings or conclusions.

By the 1991 Order, the LUC granted LCI's petition. The LUC made the following relevant findings, conclusions, and Decision and Order (order), describing, *inter alia,* the ****375** ***299** sources of water for golf course irrigation and granting reclassification of the land:

*FINDINGS OF FACT*

*IMPACT UPON RESOURCES OF THE AREA*

....

*Water Resources*

45. Lanai draws its *domestic water and pineapple irrigation supply from the high level aquifer* which has a sustainable yield of [six million gallons per day (mgd) ].

46. The proposed golf course at Manele 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.* [8]

8 The term for "potable" water is ordinarily defined as "suitable for drinking." *Webster's* at 664. The 1991 Order did not define the term "potable" or "nonpotable." The parties attributed other meanings

to the term "potable" and disagree as to the means of measuring potability. LCI notes that the Maui County Code defines as potable, for the purposes of golf course irrigation, any water containing less than 250 milligrams per liter of chlorides. Maui County Code § 24.240.020. LCI notes that this definition of potability is also used by the United States Environmental Protection Agency (EPA) as a secondary standard and by the State of Hawai'i Department of Health as a recommended guideline.

Sensible Growth challenges LCI's interpretation of potability, and questions why Maui County should determine that the water from wells 1 and 9 referred to herein are "non-potable" solely because it is above 250 parts per million in chloride, when it has determined that water with similar or higher chloride readings in other parts of Maui County to be "potable." Sensible Growth further contends that Maui County Code § 24.240.020 defines " 'potable water' not on chloride levels alone, but on other contaminant levels established by the EPA." The LUC is not clear as to the definition to be given "potable water." *See* discussion *infra.*

47. [LCI's] golf course design consultant ... is projecting that 624,000 [gallons per day (gpd) ] will be required for irrigation of a "target" golf course, [9] but [LCI] is conservatively projecting 800,000 gpd for irrigation of the golf course.

9 A "target" golf course is described in an earlier finding by the LUC as a golf course in which the turf will be used "for the tees, the fairways and the greens with intervening areas between some of the tees, fairways and greens which intervening areas are left undeveloped in their natural states."

48. *[LCI] proposes to provide alternate sources of water for golf course irrigation by developing the brackish water supply.* [10] According to [LCI], Wells Nos. 9 and 12 which have capacities of about 300,000 gpd and 200,000 gpd, respectively, have been tested but are not yet operational. Well No. 10 which has a capacity of approximately 100,000 gpd with a possible potential of 150,000 gpd has also been tested and will be available. *Currently available also is brackish water from Well No. 1* which is operational and which has a capacity of about 600,000 gpd.

10 "Brackish" is defined as "somewhat salty, distasteful." *Webster's* at 101.

49. [LCI's] civil, sanitary and environmental engineering consultant, James Kumagai [ (Kumagai) ], *stated that it is only a matter of cost to develop wells for brackish water sources that are already there.* The consultant also state [d] that the brackish water sources necessary to supply enough water for golf course irrigation could be developed and be operational within a year.

....

*Water Service*

89. [LCI] is now in the process of developing the *brackish water supply* for irrigation of the proposed golf course. According to [LCI], *Well No. 1, which is operational and available, and Well Nos. 9, 10 and 12, which have been subjected to full testing, have aggregate brackish source capacity in excess of the projected requirements* of 624,000 gpd to 800,000 gpd for the Manele golf course.

....

91. *[LCI] intends to irrigate the golf course with nonpotable water, leaving only the clubhouse which will use potable water,* the requirement for which should be insignificant.

CONFORMANCE WITH THE HAWAII STATE PLAN

....

****376** ***300** 117. [LCI] has stated that the Manele golf course will be irrigated with *nonpotable* water from sources other than the *potable* water from the high level aquifer.

....

*CONFORMANCE TO STATE LAND USE URBAN DISTRICT STANDARDS*

122. The Property is proposed to be developed as a golf course to serve as an amenity of the Manele Bay Hotel.

*CONCLUSIONS OF LAW*

Pursuant to Chapter 205 of the [HRS] and the [LUC] Rules, the [LUC] finds upon a preponderance of the

evidence that the reclassification of the Property ... subject to the conditions in the Order, for a golf course ... is reasonable, nonviolative of Section 205–2, [HRS] ... and is consistent with the Hawaii State Plan ... and conforms to the Hawaii [LUC] Rules.

*ORDER*

IT IS HEREBY ORDERED that the Property ... for reclassification from the Rural Land Use District to the Urban Land Use District as to 110.243 acres thereof, shall be and is hereby approved, and the District Boundaries are amended accordingly, subject to the following conditions:

....

10. *[LCI] 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, [LCI] shall comply with the requirements imposed upon [LCI] by the State [of Hawai'i] Commission on Water Resource Management [ (the Water Commission) ] as outlined in the [Water Commission's] Resubmittal–Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990.[ 11 ]

11 The Water Commission's Resubmittal–Petition for Designating the Island of Lanai as a Water Management Area contains the following relevant provisions:

> Hawaii's Water Code, HRS § 174C–44 establishes eight criteria which the [Water] Commission must consider in deciding whether to designate a ground water area as a water management area under the Code....
>
> *None of the ground-water criteria cited in § 174C–44, HRS, has been met to support the designation of the island as a water management area ....*

(Emphasis added.) The Water Commission went on to make recommendations which required LCI to report water use to the Water Commission, and to formulate a plan in the event of a water shortage. The Water Commission also recommended that there be annual public informational meetings regarding the island's water conditions.

> At some undefined point, the Water Commission issued a permit to LCI to use Well No. 9, one of the wells at issue in this case. LCI argues that the Water Commission thus specifically approved the use of non-potable, brackish water from the high level aquifer for irrigation of the golf course. However, in a letter dated October 26, 1993, the Water Commission noted that "[w]ater usage generally is not a consideration for the issuance of well construction and pump installation permits."
>
> The Commission went on to state that, in regard to Well No. 9, "aquifer harm from the use of water was not evident; hence, the question of prudence in allowing non-potable water to be used for irrigation at Manele Bay, as raised at the LUC hearing, was not material to the [Water] Commission deliberations when it issued the Well 9 permit." Thus, the Water Commission neither approved, nor disapproved the use of high level aquifer water for purposes of golf course irrigation.

11. *[LCI] shall fund the design and construction* of all necessary water facility, improvements, *including source development* and transmission, to provide adequate quantities of *potable* and *non-potable* water to service the subject property.

....

18. *Non[-]potable* water sources shall be used towards all nonconsumptive uses during construction of the project.

....

20. [LCI] shall develop the property in *substantial compliance with representations made* to the [LUC] in obtaining reclassification of the property. *Failure to so develop may result in reclassification of* ****377** ***301** *the property to its former land use classification.*

....

(Emphases added.)

II.

Subsequent to the reclassification of the land and pursuant to the 1991 Order, the Maui County Council (the County Council), on February 17, 1993, submitted a letter to then-Mayor Linda Crockett Lingle (Mayor Lingle). The County Council noted that "[LCI] ha[d] gone to the

[LUC] and stated that water [would] be needed from the high level aquifer, an existing source, which violate[d] the commitment made during the approval process." The County Council explained that "[w]hen the approval was given, it was understood that [LCI] was committed to finding a new source or sources of water to adequately take care of the irrigation needs of the Manele Project." As such, the County Council requested that the Mayor's office direct the Land Use and Codes Division to stop work on the golf course until LCI developed a new source of water.

LCI responded to the County Council's letter in correspondence dated March 4, 1993, addressed to Mayor Lingle. LCI declared that "[b]rackish and treated effluent [would] be used for golf course and landscape irrigation.... These brackish wells for the golf course irrigation are in compliance to [sic] Ordinance No.2066 enacted by the County Council on December 17, 1991." [12] Mayor Lingle wrote on March 4, 1993, in response to the City Council, that "[she did] not find a specific prohibition on the use of high-level *brackish* water." (Emphasis in original.)

12 Maui County Ordinance Number 2066, codified as Maui County Code Chapter 20.24, entitled "Restrictions on use of potable water for golf courses," reads in pertinent part as follows:

> § 20.24.010(B)
>
> A golf course can use as much as one million gallons of water per day for irrigation and other nondomestic purposes and it is inappropriate to use potable water for such a purpose. *The purpose of this chapter is to prevent the use of potable water for irrigation and other nondomestic purposes at golf courses* by restricting the approval of any permit necessary for golf course construction, if that golf course cannot show that it will use a nonpotable source of water.
>
> (Emphasis added.)

On March 12, 1993, Appellee–Appellee County of Maui Planning Department [hereinafter Maui Planning Dept. or County] wrote to Mr. Thomas Leppert (Leppert), President of Castle and Cooke Properties, Inc. [13] In this letter, the Maui Planning Dept. acknowledged that "recent correspondence from [the County Council] have raised questions in regards [sic] to use of high-level water and the meaning of the water-related conditions attached to the various land use approvals for the golf course." The Maui Planning Dept. went on to indicate that it understood "that the golf course and resort residential irrigation would not draw from the island's limited high-level aquifer." The Maui Planning Dept. cited both Condition No. 10 from the 1991 Order and the Agreement to support its contention. *See supra* Part I.

13 *See supra* note 2.

After discussions with Leppert, the Maui Planning Dept. again reiterated to LCI, in a letter dated March 17, 1993, that the parties had "agreed to '*ensure that no high level ground water [would] be used for golf course maintenance or operation ... and that all irrigation of the golf course shall be through alternative non-potable water sources.*' " (Emphasis in original.) The Maui Planning Dept. further noted that it and "the [County Council] based their [sic] respective decisions to allow the Manele golf course to proceed" on such representations made by LCI. As such, the Maui Planning Dept. directed that "based on ... your previous representations, [LCI] ... *shall not use any water drawn from the high level aquifer for golf course construction, dust control, or irrigation purposes.*" (Emphasis in original.)

On March 25, 1993, LCI responded to the Maui Planning Dept., reporting that it was "in compliance with all conditions imposed ... in connection with this project...." LCI also argued that, in the Agreement, "the term 'high level ground water aquifer' was not used in a technical sense, but rather in ****378 *302** its colloquial sense on Lanai as being synonymous with potable or drinking water...."

## III.

On October 13, 1993, pursuant HRS § 205–4 (1993), [14] the LUC issued an order to show cause [hereinafter OSC or Order to Show Cause] as to why the land "should not revert to its former classification or be changed to a more appropriate classification." This OSC was based upon the LUC's belief that LCI had "failed to perform according to Condition No. 10" and LCI "[had] failed to develop and utilize alternative sources of non-potable water for golf course irrigation requirements."

14 HRS chapter 205 established the LUC. HRS § 205–4(g) provides in relevant part as follows:

> The commission may provide by condition that absent substantial commencement of use of the land *in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.*
>
> (Emphasis added.)

The OSC provided, in pertinent part, as follows:

> *ORDER TO SHOW CAUSE*
>
> TO: [LCI]
>
> YOU ARE HEREBY COMMANDED, under the authority of [HRS § 205-4], and Hawaii Administrative Rules [ (HAR) § ] 15-15-93, to appear before the [LUC], State of Hawaii, ... on December 14, 1993, ... to show cause why that certain land at Manele, Lanai, Hawaii, ... referred to as the Subject Area, ... *should not revert to its former land use classification.*
>
> The [LUC] has reason to believe that you have *failed to perform according to Condition No. 10 of the [1991 Order* ] 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 [LUC] *after [LCI] made representations that water from the high level groundwater aquifer would not be used for golf course irrigation.*
>
> [HRS § 205-4] authorizes the [LUC] to impose conditions necessary to *"assure substantial compliance with representations made by [LCI] in seeking a boundary change"* and that "absent substantial commencement of use of the land *in accordance with such representations,* the [LUC] shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification."
>
> Accordingly, the [LUC] will conduct a hearing on [this] matter in accordance with the requirements of chapter 91, [HRS] and subchapters 7 and 9 of [HAR chapter 15-15]. All parties in this docket *shall present testimony and exhibits to the [LUC] as to whether [LCI] has failed to perform according to Condition No. 10 and the representations made by [LCI] in seeking the land use reclassification.*
>
> (Emphases added.)

The LUC held a pre-hearing conference on November 8, 1993, and conducted a series of hearings, which included LCI, the Maui Planning Dept., Appellee-Appellee the Office of State Planning, and Sensible Growth.[15] On November 22, 1993, Sensible Growth submitted a position statement, maintaining that (1) LCI previously represented to the LUC that it would not be taking any water from the high level aquifer, and would instead be relying solely on alternative sources of water and (2) LCI was indirectly using potable water from the high level aquifer. LCI responded on November 29, 1993, asserting that (1) Condition No. 10 only prohibited the use of potable water from the high level aquifer and that the water being used by LCI was nonpotable and (2) LCI had made good faith efforts to develop alternate sources of water.

15 Hearings took place on October 6 and 7, 1994, December 14 and 15, 1994, March 8 and 9, 1995, and February 1 and 2, 1996. These hearings culminated in the LUC's findings, conclusions, and order dated May 17, 1996.

On November 23, 1993, the Maui Planning Dept. submitted testimony which included its determination that LCI had "complied with [C]ondition No. 10 as written and narrowly interpreted." However, the Maui Planning ****379** ***303** Dept. did point out that LCI had failed to perform according to its representations:

> [LCI's] inclusion of more specific language in the [Agreement] between [LCI] and [Sensible Growth], as well as in County Land Zoning Ordinance No. 2132, [[[16] would indicate the representation of [LCI] *not to use any of the high level source. Therefore, the County finds that [LCI] has failed to perform according to its representations made during the proceedings,* but that such failing was not intentional nor in bad faith.... The County recommends that the [Manele land] should not revert to its former classification.

16 Maui County Ordinance No. 2132, codified as Maui County Code Chapter 19.70, entitled "Lanai project district I (Manele)," read in pertinent part as follows:

> § 19.70.085(D)
> Irrigation. *No high level ground water aquifer will be used for golf course maintenance or operation* (other than as water for human consumption) and that *all irrigation of the golf course shall be through alternative nonpotable water sources.*

(Emphases added.) The language of Maui County Ordinance No. 2132, § 19.70.085(D), is identical to the language found in section six, part d, of the Agreement between LCI and Sensible Growth. *See supra* Part I. Maui County Ordinance No. 2408 revised § 19.70.085 in 1995. The relevant revised portion reads in pertinent part as follows:

> § 19.70.085(C)
> Irrigation. Effective January 1, 1995[,] *no potable water drawn from the high level aquifer may be used for irrigation of the golf course,* driving range and other associated landscaping. *The total amount of nonpotable water drawn from the high level aquifer that may be used for irrigation of the golf course,* driving range and other associated landscaping shall not exceed an average of six hundred fifty thousand gallons per day expressed as a moving annualized average using thirteen to twenty-eight day periods rather than twelve calendar months or such other reasonable withdrawal as may be determined by the Maui County Council upon advice from its standing committee on water use.

(Emphases added.)

(Emphasis added.)

On December 29, 1993, LCI moved for an order modifying Condition No. 10. LCI requested that condition 10 be modified to read as follows:

> 10. No potable groundwater from the high level aquifer will be used for golf course maintenance or operation (other than as water for human consumption and irrigation adjacent to the clubhouse and maintenance building). All irrigation of the golf course shall be through nonpotable water sources, *including brackish water from the lower portion of the high level aquifer.* ...

(Emphasis added.) [17]

17 LCI submitted an amendment to the motion for an order modifying Condition No. 10 on August 9, 1995. In this amended motion, LCI requested that Condition No. 10 be worded as follows:

> Effective January 1, 1995[,] no potable water drawn from the high level aquifer may be used for irrigation of the golf course, driving range and other associated landscaping. The total amount of nonpotable water drawn from the high level aquifer that may be used for irrigation of the golf course, driving range and other associated landscaping shall not exceed an average of 650,000 gallons per day expressed as a moving annualized average using [thirteen to twenty-eight] day periods rather than [twelve] calender months or such other reasonable withdrawal as may be determined by the Maui County Council upon advice from its standing committee on water use.

This language is verbatim the language of amended Maui County Ordinance No. 2408, § 19.70.085(C). *See supra* note 16.

On May 17, 1996, "the [LUC] having heard and examined all testimonies, evidence, and arguments presented by [LCI], [Maui Planning Dept.], the Office of State Planning, and [Sensible Growth]," and the entire record therein, issued the following relevant findings, conclusions, and order:

## *FINDINGS OF FACT*

### *Procedural Matters*

1. On October, 13, 1993, the [LUC] issued an [OSC] ... commanding [LCI] to appear before the Commission to show cause why the [p]roperty should not revert back to its former land classification or be changed to a more appropriate classification.... The OSC was issued due to the [LUC's] reason to believe that [LCI] has failed to perform according to Condition No. 10 of the ... [1991 Order,] ... and has failed to develop and utilize only alternative ****380 *304** non-potable water sources for golf course irrigation requirements.

....

*Property Description*

....

7. The subject Property is located at Manele, Lanai, and is identified as Tax Map Key No.: 4–9–02: portion of 49 (formerly Tax Map Key No.: 4–9–02: portion of 1).

8. The [p]roperty was reclassified from the Rural and Agricultural Districts to the Urban District pursuant to [Findings], [Conclusions], and Decision and order issued April 16, 1991....

....

10. The [p]roperty is currently being utilized for the golf course, and other related uses, including a clubhouse.

*Condition No. 10*

....

11. Condition No. 10 of the [1991 Order] reads as follows:

> *[LCI] 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, [LCI] shall comply with the requirements imposed upon [LCI] by [the Water Commission] as outlined in the [Water Commission's] Resubmittal–Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990.

12. The Water Resources Development Plan for the Island of Lanai defined alternative sources as water resources that are *outside of the high-level aquifer, particularly low-level fresh and brackish waters that underlie Palawai Basin and beyond, and reclaimed sewage effluent.*

13. *[LCI] represented that its intent was to utilize alternative sources and it did not expect to use potable water for irrigation. [LCI] also stated that it would not use water from the high-level aquifer for irrigation of the golf course, believing that use of such resource would be inappropriate.*

14. Throughout the original proceedings on the subject docket, [LCI] used the *term "high level aquifer" to be synonymous with potable water.* [LCI] *defined alternative sources of water as water sources outside of the high level aquifer.* [LCI's] definition also included water reclamation and effluent. [LCI] noted that alternate sources were "everything outside of the high level aquifer or outside of the influence of or external factors that would influence the high-level aquifer."

15. Irrigation for the [p]roperty is currently being supplied primarily from brackish Wells No. 1 and 9, located in the Palawai Basin, *which are within the high level aquifer. ...*

16. [LCI] has completed an extended pump test of Wells. No. 1 and 9, .... [which] found no anomalous behavior in the wells. [LCI] found no evidence of impact upon the quality or water level of the potable water wells located at a higher elevation within the high level aquifer.

17. [LCI] represents that the extended pump test of Wells 1 and 9, which lasted eighteen days, may not be sufficient....

18. Historical data indicates that between 1971 and 1987, there have been declines in water levels approximately 155 feet. Historical data also indicates that pumping during this period ranged from 100,000 gallons per day to 400,000 gallons per day.

....

21. [LCI's] water consultant agrees that the high level aquifer consists of smaller aquifers that are hydrologically connected, and must be treated as a single unit to establish a sustainable yield for the high level aquifer.

22. [LCI's] water consultant agrees that the small aquifers are interconnected, and there is leakage from the high level potable water area into the low level brackish area.

23. [LCI's] water consultant states that a drop in salinity from 800 milligrams per liter to 300

milligrams per liter corresponds **381 *305 to a mixture of fresh water and seawater.

24. Petitioner utilizes a definition for potable water found in Maui County Code, to determine potability of water being drawn from Wells No. 1 and 9. Section 20.24.020 of the Maui County code pertains to restrictions on use of potable water for golf courses. Said section of the Maui County code defines potable water as water containing less than 250 milligrams per liter of chlorides.

....

26. The potability of any water source does not depend on any particular level of chloride concentration.

27. The EPA has primary standards involving certain chemical constituents that may be found in water that may have been polluted. The EPA also has a guideline of 250 parts per million for chlorides, which is a secondary standard that can be exceeded without affecting potability.

28. Primary, not secondary, standards determine whether water is potable or not. The secondary standards, including chloride, would never be used to determine whether water is potable or not.

29. *[LCI] has not performed a comprehensive test to determine the potability of water from Wells No. 1 and 9.*

30. *As more water is pumped from Wells No. 1 and 9, it is likely that the salinity will drop as more potable water leaks into the dike compartments in the secondary recharge zone to replace the water being pumped.*

....

32. *[LCI] acknowledges that Condition No. 10 could be interpreted to restrict use of any water from the high level aquifer.*

....

*CONCLUSIONS OF LAW*

...

Pursuant to section 15–15–93,[18] HAR], the [LUC] finds upon a preponderance of the evidence that [LCI] has failed to perform according to Condition No. 10 of the [1991 Order].

18 HAR, Title 15, Department of Business, Economic Development & Tourism, Chapter 15, Land Use Commission Rules, § 15–15–93, states in relevant part as follows:

> *Whenever the commission shall have reason to believe that there has been a failure to perform according to the conditions imposed,* or the representations or commitments made by the petitioner, the *commission shall issue and serve upon the party* or person bound by the conditions, representations, or commitments, *an order to show cause* why the property should not revert to its former land use classification or be changed to a more appropriate classification.
>
> (Emphases added.)

(Emphases added.) The LUC accordingly ordered that "LCI shall" (1) "comply with Condition No. 10 of the [1991 Order]" and, as previously mentioned, (2) "immediately cease and desist any use of water from the high level aquifer for golf course irrigation requirements[,]" and (3) "file a detailed plan with the LUC within [sixty] days, specifying how it [would] comply with this Order requiring water use from alternative non-potable water sources outside of the high level aquifer for golf course irrigation requirements." On May 20, 1996, the LUC issued an order denying LCI's amendment to the motion for an order modifying Condition No. 10.

IV.

On June 7, 1996, LCI appealed the LUC's May 17, 1996 decision and order to the court. On November 19, 1996, LCI submitted its opening brief. On December 30, 1996, the Maui Planning Dept. filed its answering brief.[19] It requested that "the court ... seriously consider the impact on the citizens of Maui county living on Lanai, and the county generally, should the court affirm the LUC's decision." The County further asserted that, while it did not enforce the LUC's Condition No. 10, it did enforce its own zoning ordinance, Maui County Code § 19.70.085(C). *See supra* note 16.

19 Although the Maui Planning Dept. identifies itself as "Appellee," and titles its brief an answering brief, it argues essentially that LCI did not violate LUC Condition No. 10, and that the LUC cease and desist order should be reversed.

The LUC filed its answering brief on January 3, 1997. An answering brief was also **382 *306 submitted by Sensible Growth on the same day. On January 13, 1997, LCI filed a reply brief.

On March 10, 1997, the court issued an order reversing the 1996 Order to cease and desist. The court found that the "[c]ease and [d]esist [o]rder was in excess of the statutory authority or jurisdiction of the agency as provided in HRS § 91–14(g)(2)." The court specifically limited its ruling to the cease and desist order and did not disturb the LUC's finding that LCI violated Condition No. 10 of the LUC's 1991 Order or that LCI submit a plan for a source of irrigation water outside the high-level aquifer.

V.

On March 20, 1997, LCI filed a motion to alter or amend the judgment. LCI requested that the LUC's 1996 Order be reversed. LCI argued that the LUC's conclusion that LCI violated Condition No. 10 was wrong as a matter of law. On June 26, 1997, the court denied LCI's motion to alter or amend the judgment.

On July 16, 1997, LCI appealed the court's decision to this court. Sensible Growth cross-appealed on July 25, 1997, and the LUC cross-appealed on July 28, 1997.[20] On September 22, 1997, this court dismissed the appeal and cross-appeals because the court did not enter a judgment in favor of and against the parties on appeal, and thus, the appeal was premature.

20 The Maui Planning Dept. did not cross-appeal.

On April 26, 1999, the court entered an order reversing the LUC's 1996 Order. The judgment was in favor of LCI and the County and Office of State Planning.[21] The court reversed the LUC on, *inter alia,* the ground that "[t]he LUC's conclusion that [LCI] violated Condition No. 10 was arbitrary, capricious, and clearly erroneous." On May 20, 1999, Sensible Growth filed a notice of appeal. On May 21, 1999, the LUC filed its notice of appeal.

21 The Office of State Planning took no position in the current appeal and did not submit any briefs. The County of Maui's brief did not seek reversal of the court's March 10, 1997 order, but responded "specifically to the issue ... that the County failed to enforce [C]ondition [N]o. 10 of the LUC's order."

VI.

We affirm the court's order with respect to its ruling that LUC's determination that LCI had violated Condition 10 was clearly erroneous but on the grounds stated herein and only with respect to LUC's finding that LCI was prohibited from using any water from the high level aquifer.[22] As mentioned, we remand the question of whether LCI was using potable water from the high level aquifer to the court, with instructions to remand the issue to the LUC. *See TIG Ins. Co. v. Kauhane,* 101 Hawai'i 311, 329, 67 P.3d 810, 828 (2003) (remanding the case to the circuit court with instructions to remand the case to the Insurance Commissioner for further proceedings); *Iaea v. TIG Ins. Co.,* 104 Hawai'i 375, 383, 90 P.3d 267, 275 (App.2004). In light of our disposition, we vacate the other parts of the court's order. *See Taylor–Rice v. State,* 91 Hawai'i 60, 73, 979 P.2d 1086, 1099 (1999) ("[T]his court may affirm a judgment of the trial court on any ground in the record which supports affirmance.)

22 The court also reversed the LUC's 1996 Order on the grounds that (1) "the LUC was ... without jurisdiction to issue an order requiring [LCI] to cease and desist using water from Lanai's high level aquifer [ ]" because "[a]ll waters of the State are subject to regulation by the [Water Commission,]" (2) "[t]he LUC ... lacked jurisdiction to enforce Condition No. 10" because "jurisdiction to enforce such conditions lies with the counties[,]" (3) "the LUC ... acted in excess of its statutory authority[,]" "[b]y issuing a cease and desist order," and (4) "[t]he 1996 Order violates the Hawaii State Plan by tending to destroy a golf course previously found by the LUC to conform to and help satisfy the provisions of [HRS] chapter 226." Because our disposition results in the remand of Condition 10, it is unnecessary or premature to consider such other grounds to the extent they are raised by the parties on appeal.

VII.

[1] [2] [3] " 'Review of a decision made by a court upon its review of an administrative decision is a secondary appeal. The standard of review is one in which this court must determine whether the court under review **383 *307 was right or wrong in its decision.' " *Soderlund v. Admin. Dir. of the Courts,* 96 Hawai'i 114, 118, 26 P.3d 1214, 1218 (2001) (quoting *Farmer v. Admin. Dir. of Court,* 94 Hawai'i 232, 236, 11 P.3d 457, 461 (2000)) (brackets omitted). It is well settled "that in an appeal from a circuit court's review of an administrative decision the appellate court will utilize identical standards applied by the circuit court. The clearly erroneous standard governs and agency's findings of fact, whereas the courts may freely review and agency's conclusions of law." *Dole Hawaii Division–Castle & Cooke, Inc. v. Ramil,* 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990) (citing *Int'l. Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co.,* 68 Haw. 316, 322, 713 P.2d 943, 950 (1986)).

## VIII.

[4] Initially we address Sensible Growth's point on appeal that the court violated HRCP Rule 52(a)[23] by failing to give a reasoned explanation for its reversal of the 1996 Order to cease and desist.[24] "Review of a decision made by the circuit court upon review of an agency's decision is a secondary appeal. The standard of review is one in which the court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91–14(g) [ (1993) ] to the agency's decision." *Morgan v. Planning Dep't, County of Kauai,* 104 Hawai'i 173, 179, 86 P.3d 982, 988 (2004).[25]

23 HRCP Rule 52(a) states in relevant part as follows:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.... Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivisions (b) and (c) of this rule.

24 In light of our disposition, we do not believe it necessary to engage in an extended discussion of the other appeal points raised by Sensible Growth to the effect that (1) the court improperly substituted its own judgment for that of an agency in finding that the LUC's conclusion was arbitrary and capricious; (2) LCI cannot attack the validity of conditions set forth in the LUC's 1991 Order because LCI failed to appeal the 1991 Order; (3) the court improperly based its decision on evidence not in the administrative record; (4) the LUC's 1996 Order does not conflict with the state water code because the Water Commission does not have exclusive jurisdiction to regulate water use in Lanai, which has not been designated a water management area; (5) the LUC can issue a cease and desist order to enforce conditions of its approval of a boundary amendment; (6) LCI waived the issue, by not raising it before the LUC, of whether the 1996 Order would violate the Hawai'i State Plan by "tending to destroy" the golf course; and (7) the LUC's 1996 Order conformed to the Hawai'i State Plan, HRS chapter 226.

> We note that as to (1), the court was empowered to review LUC's decision pursuant to HRS chapter 91; as to (2), the LUC's OSC implicitly raised the validity of the 1991 Order's conditions; as to (3), the record supports the court's determination that the LUC's decision was clearly erroneous; as to (4), (6), and (7), because the LUC order is vacated in part and remanded in part on the grounds stated herein, a discussion of these issues would be premature; as to (5), because we remand the case, we do confirm the LUC's power to order a party to refrain from violating a condition of approval. *See* discussion *infra.*

25 In a related way, Sensible Growth argues that on remand to the court from this court in 1997, "the only task before the [court] was to render a final judgment" and thus the court "went outside the scope of its prior order" regarding LCI's violation of Condition No. 10 in its April 26, 1999 order reversing the LUC's May 17, 1996 order. As we discuss *infra,* no obligations were imposed on the court under HRCP Rule 52(a).

Sensible Growth argues that the court violated HRCP Rule 52(a), because it "failed to provide the required ... explanation of its reversal of the LUC's action...." LCI correctly notes that HRCP Rule 52(a) only requires a

statement of facts in "actions tried upon the facts." When a court reviews the decision of an administrative agency, HRS § 91–14(g)[26] governs.

26 HRS § 91–14 entitled "Judicial review of contested cases," provides in part:

> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or order are:
>
> (1) In violation of constitution or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

****384** ***308** According to HRS § 91-14(g), the court could either affirm, remand, reverse, or modify the administrative agency decision after reviewing the record. The administrative agency creates the record, and the circuit court reviews it. In this case, LUC was the initial trier of fact, and the court acted in an appellate capacity in reviewing the LUC's findings and conclusions. Hence, the matter was not an "action tried upon the facts" within the meaning of HRCP Rule 52(a) because the court reviewed the record rather than tried the facts.[27] HRCP Rule 52(a) therefore does not apply to the court's determinations.

27 Sensible Growth argues that, according to *Scott v. Contractors License Bd.*, 2 Haw.App. 92, 626 P.2d 199 (1981), a circuit court must articulate detailed findings, pursuant to HRCP Rule 52(a), when overturning an agency's order. However, LCI correctly notes that *Scott* is distinguishable from this case because, in *Scott,* the court's ruling was so vague that the Intermediate Court of Appeals could not determine whether the ruling was based on substantive or procedural grounds. In this case, the court clearly set forth its reasons for reversing the LUC. Thus, *Scott* does not control in this case.

## IX.

[5] We affirm the court's conclusion that the LUC's 1996 Order was clearly erroneous in deciding that LCI violated Condition No. 10 of the 1991 Order for using water from the high level aquifer in light of (1) the plain language of Condition No. 10, (2) the use of "potable" and "non-potable" as separate and distinct terms in other parts of the order, (3) LUC's rejection of Sensible Growth's proposed 1991 order, and (4) the map submitted to the LUC which clearly indicated that Well No. 1 was inside the high level aquifer.[28] The LUC erred inasmuch as it now seeks to enforce, through its 1996 Order, a version of the substance of Condition No. 10 of the 1991 Order which it had apparently previously rejected.

28 In arriving at our disposition we consider but do not concur with LUC's point on appeal that the court should be reversed because substantial credible evidence supports the LUC's finding that LCI violated Condition No. 10. In view of our holding, we need not decide LUC's points that (1) the court must be reversed because the LUC had jurisdiction to enforce the conditions it imposed upon granting a boundary amendment petition and (2) the water code does not confer upon the Water Commission exclusive jurisdiction over all state waters.

### A.

[6] The LUC based its findings and conclusions in the 1996 Order on evidence and arguments presented by LCI, the Maui Planning Dept., the Office of State Planning, and Sensible Growth. As noted, HRS § 91–14(g) "enumerates the standards of review applicable to an agency appeal." *In re Wai'ola O Moloka'i, Inc.*, 103 Hawai'i 401, 421, 83 P.3d 664, 684 (2004). Where an agency's conclusion of law, such as the LUC's conclusion that LCI violated Condition No. 10, "presents mixed questions of fact and law[, it] is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." *Id.*

[7] "[A] mixed determination of law and fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a

mistake has been made." *Id.; Child Support Enforcement Agency v. Roe,* 96 Hawai'i 1, 12, 25 P.3d 60, 71 (2001); *Leslie v. Estate of Tavares,* 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999); *see also* HRS § 91–14(g). " 'Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.' ****385 *309** " *Child Support Enforcement Agency,* 96 Hawai'i at 11, 25 P.3d at 71 (quoting *In re Water Use Permit Applications (Waiahole),* 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000)) (brackets and internal quotation marks omitted); *see Leslie,* 91 Hawai'i at 399, 984 P.2d at 1225.

B.

LCI argues the language of Condition No. 10 *only* prohibits the use of *potable* water, and, thus, the use of non-potable water from the high level aquifer was allowed for golf course irrigation. On the other hand, on appeal, LUC and Sensible Growth construe the language of the condition as prohibiting the use of *all* water from the high level aquifer, irrespective of whether the water was potable or brackish.

[8] The LUC maintains that throughout the proceedings, the term "high level aquifer" was used interchangeably with the term potable water, and that the 1991 Order mandated that LCI was to develop and utilize only alternative, non-potable sources of water, that is to say, sources outside of the high level aquifer. According to the LUC, "[d]uring the original hearings LCI represented that Well 1 and a proposed Well 9 would be alternate sources for non-potable water," located outside the high level aquifer, in the Palawai Basin. [29] The LUC notes that on March 9, 1990, Leppert [30] testified that LCI's "intent all along on this is to use *alternative sources* of water.... I think that's important, because we are *not using the high[ ]level aquifer* for the use of this golf course. We don't think that's appropriate." (Emphasis added.) [31] Also, the LUC observes that when LCI's Kumagai was asked whether there were "any alternate sources other than the high level aquifer," he replied, "Yes, there are alternate sources of water, ... *alternate sources meaning water sources outside the high level aquifer.* ... [B]asically it's everything outside of the high level aquifer or outside the influence of or external factors that would influence the high level aquifer." [32] (Emphasis added.) The LUC therefore asserts that it believed "that the high level aquifer consisted of only potable water" based on representations made by LCI.

29 The LUC claims its understanding is supported by a letter to LCI from Manabu Tagomori, Manager–Chief Engineer, Department of Land and Natural Resources. In responding to LCI's March 29, 1993 letter inquiring about the use of the term "high level aquifer" during the 1989 to 1991 meetings, Tagamori wrote that

> the term "high level aquifer" was used by some participants as synonymous with "potable water" since Lanai's drinking water comes from the highest compartments of the high level aquifer.... At that time groundwater in Palawai [B]asin *pumped by Well 1 was not included in the "high level aquifer" as the term was then being used.*

(Emphasis added.)

30 As noted, Leppert is the president of LCI.

31 The LUC notes that Leppert responded to a question as to which wells were located in the Palawai Basin by stating that, "you have [well] one, and [well] nine down in the crater here." However, the LUC provides no citation to the record for this quote by Leppert. Moreover, the LUC only refers to "p. 3039" as the record citation for the preceding testimony by Kumagai. However, the portion of the record under "3039" consists of two hundred pages. The aforementioned quotes by Kumagai and Leppert were not found, despite searching such portions of the record. This court is not obligated to sift through the voluminous record to verify an appellant's inadequately documented contentions. *See Miyamoto v. Lum,* 104 Hawai'i 1, 11 n. 14, 84 P.3d 509, 519 n. 14 (2004) (explaining that an appellate court is not required to sift through the voluminous record for documentation of a party's contentions); *Traders Travel Int., Inc. v. Howser,* 69 Haw. 609, 616, 753 P.2d 244, 248 (1988).

32 The testimony was from the July 12, 1990 LUC hearing. The LUC further describes Kumagai's additional testimony as being that "development of alternate sources" included drilling, especially in the Palawai Basin ... in an effort to seek out alternate sources of water."

Sensible Growth also asserts that LCI had previously represented on various occasions that it would not be taking any water from the high level aquifer.

C.

In opposition, LCI points out that "[Sensible Growth] specifically proposed, prior to the entry of the 1991 Order, that the LUC impose a condition that '*no high level ground water aquifer will be used for golf course* **386 *310 *maintenance or operation* (other than water for human consumption) *and that all irrigation of the golf course shall be through alternative non-potable water sources.*' " [33] (Emphases added.) Such a condition, which would have clearly prohibited the use of any water from the high level aquifer, was not adopted by the LUC in its 1991 Order. LCI maintains that the "LUC rejected this language in favor of prohibiting just the use of potable water form the high-level ground water aquifer as set forth in [Condition No. 10]." Thus, LCI argues that "[i]nasmuch as the LUC rejected [Sensible Growth's] proposed conditions, which would have articulated the precise condition [the] LUC now proposes to enforce[,]" Sensible Growth should not be allowed to present testimony "to show that [Condition No. 10] does not mean what it says."

33 Specifically, LCI cites to Sensible Growth's proposed order.

X.

The plain language of Condition No. 10 does not prohibit LCI from using *all* water from the high level aquifer. As mentioned previously, Condition No. 10 of the 1991 Order reads, in pertinent part, as follows:

> *[LCI] 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.

(Emphases added.) *See supra* 105 Hawai'i page 300, 97 P.3d page 376. We must read the language of an administrative order in the context of the entire order and construe it in a manner consistent with its purpose. *Cf. Gray v. Admin. Dir. of the Court, State of Hawai'i,* 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997) (explaining that "we read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose"). Condition 10 utilized the terms "potable" and "non-potable." It is evident from their use that the terms encompassed separate and distinct meanings. *Cf. id.* (determining the meaning of the ambiguous words in a statute by "examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning").

On its face, Condition No. 10 does not preclude the use of non-potable water, nor does it indicate that only potable water exists in the high-level aquifer. Rather, the use of the term "potable," as distinguished from "non-potable," implies the possibility of non-potable water in the high level aquifer. If the LUC interpreted "potable water" as synonymous with all water from the high level aquifer, it is unclear why a prohibition against the use of all water was not expressly adopted, to avoid confusion when both the terms potable and non-potable are employed in the same paragraph.

Although Condition No. 10 seemingly mandates that "only alternative non-potable sources of water" shall be used, it does not on its face exclude as a source "non-potable" water that may exist in the high level aquifer. Condition 10 only precluded LCI from "utiliz[ing] the potable water" from the high level aquifer; it did not also prohibit the use of "non-potable water." Accordingly, it is not apparent that Condition 10 was meant to exclude the use of "non-potable" water.

XI.

The 1991 Order utilized the terms "potable" and "non-potable" in separate and distinct ways. For example, finding 46 and finding 117 stated that the proposed golf course would "be irrigated with" "*nonpotable* water from sources other than *potable* water from the high level aquifer." Similarly, finding 91 used both terms in explaining that LCI intended to "irrigate the golf course with *nonpotable* water, leaving only the clubhouse which [would] use *potable* water." The 1991 Order's Condition No. 11 determined that LCI was required to "provide adequate quantities of *potable* and *non-potable* water to service the subject property." Condition No. 18 stated that "*nonpotable* water sources shall be used towards all nonconsumptive uses during construction." It is evident, then, that the terms encompassed separate **387 *311 and distinct meanings and were used in that sense throughout the 1991 Order.

XII.

LCI's interpretation of Condition No. 10 is further supported by the apparent rejection of Sensible Growth's proposed order prior to the entry of the 1991 Order, and LUC's substantial adoption of LCI's proposed findings relating to the aquifer in the 1991 Order. [34]

34 In addition, the Maui Planning Dept. filed exceptions to LCI's proposed order. The parties do not clarify whether the LUC ordered them to submit proposed decisions. However, the record reveals that the LUC approved the parties' stipulation for an extension of time to file proposed orders.

Sensible Growth's proposed order stated that no water from the high level aquifer would be employed for golf course purposes:

*Proposed Findings of Fact, Conclusions of Law, and Decision and Order*

....

In light of the [Agreement, [35]] ... as part of the decision and order of the commission, they propose the inclusion of the following terms, consistent with the memorandum of agreement [36]:

35 Sensible Growth's proposed order states that it "reflects the execution of a memorandum agreement among [Sensible Growth], OHA, [and LCI] on November 5, 1990." There are no references in Sensible Growth's opening brief to an agreement entered into on November 5, 1990. In the record is an Agreement executed on October 10, 1990 which, like Sensible Growth's proposed order, prohibited the use of any water from the high level aquifer for golf course maintenance. *See supra.*

36 Accordingly, it appears that the LUC considered the Agreement prior to the issuance of the 1991 Order.

*Decision and Order*

IT IS HEREBY ORDERED that the Petition for Reclassification of the district boundaries for the petition area, ... is hereby reclassified ... subject to the following conditions:

....

4. [LCI] shall ensure that *no high level ground water aquifer will be used for golf course maintenance or operation* (other than water for human consumption) and that all irrigation of the golf course shall be through alternative non-potable water source.

(Emphasis added.) Thus, Sensible Growth's proposed order contained express language which would have prohibited the use of *any* water from the high level aquifer for golf course maintenance.

LCI's proposed order, on the other hand, only prohibited the use of *potable* water from the high level aquifer, as follows:

*Water Resources*

45. Lanai draws its domestic pineapple irrigation supply from the high level aquifer which has a sustainable yield of 6 mgd.

46. The proposed golf course at Manele 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.*

47. [LCI's] golf course design consultant ... is projecting 624,000 gpd will be required for irrigation of a "target" golf course, but [LCI] is conservatively projecting 800,000 gpd for irrigation of the golf course.

48. [LCI] *proposes to provide alternate sources of water for golf course irrigation by developing the brackish water supply.* According to [LCI], *Well Nos. 9* and 12 which have capacities of 300,000 gpd and 200,000 gpd, respectively, have been tested but are not yet operational.... *Currently available also is brackish water from Well No. 1 which is operational* and which has a capacity of about 600,000 gpd.

49. [LCI's] civil, sanitary and environmental engineering consultant, James Kumagai, stated that it is only a matter of cost to develop wells for brackish water sources that are already there. The consultant also states that the brackish water sources necessary to supply enough water for golf course irrigation could be developed and be operational within a year.

....

**388 *312 *Water Service*

89. [LCI] is *now in the process of developing the brackish water supply for irrigation* of the proposed golf course. According to [LCI], *Well No. 1,* which is operational and available, and Well *Nos. 9, 10, and 12, which have been subjected to full testing, have aggregate brackish source capacity in excess of the projected requirements* of 624,000 gpd to 8000 gpd for the Manele golf course.

....

91. [LCI] *intends to irrigate the golf course with nonpotable water,* leaving only the clubhouse which will use potable water, the requirement for which should be insignificant.

*ORDER*

IT IS HEREBY ORDERED that the Petition ... for reclassification ... shall be and is hereby approved, ... subject to the following conditions:

....

10. *[LCI] 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, [LCI] shall comply with the requirements imposed upon [LCI] by [the Water Commission] as outlined in the [Water Commission's] Resubmittal–Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990.

11. *[LCI] shall fund the design and construction* of all necessary water facility, improvements, *including source development* and transmission, to provide adequate quantities of potable and non-potable water to service the subject property.

....

(Emphases added.) (Internal record citations omitted.)

As previously noted, in the 1991 Order, the LUC entered certain findings 45–49, 89, 91, and Conditions 10, 11, and 20, reproduced *supra.* It is manifest that the LUC's 1991 Order adopted language substantially similar or identical to that of LCI's proposed order. LCI's proposed findings 46, 47, 49, 89, and 91 are identical to LUC's findings 46, 47, 49, 89, and 91 of the 1991 Order. Proposed finding 45 is virtually identical to finding 45 of the 1991 Order, other than the inclusion of the word "water" in the 1991 Order.[37] Similarly, Conditions 10 and 11 of the proposed order are identical to Conditions 10 and 11 of the 1991 Order.[38]

37 Proposed finding 45 states that LCI "draws its domestic and pineapple irrigation supply from the high level aquifer[,]" while finding 45 of the 1991 Order states that LCI "draws its domestic *water* and pineapple irrigation supply from the high level aquifer[.]" (Emphasis added.)

38 LCI's proposed order did not include anything comparable to Condition 20 of the 1991 Order, which required LCI "to develop the property in substantial compliance with representations made to the [LUC] in obtaining reclassification of the property" and stated that failure to do so could "result in reclassification of the property to its former land use classification."

The LUC, in the 1991 Order, acknowledged that it had "heard and examined" the proposed findings and conclusions and thereby issued its findings, conclusions and decision and order accordingly. HRS § 91–12[39] requires that, in every agency decision in a contested case, "if any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each finding so presented." However, an agency need not enter a separate ruling on each finding, for "all that is required is that the agency incorporate its findings in its decision." *In re Terminal Transp., Inc.,* 54 Haw. 134, 137, 504 P.2d 1214, 1216 (1972).

39 HRS § 91-12 entitled "Decisions and orders," provides in pertinent part that

> [e]very decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. *If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision*

*a ruling upon each proposed finding so presented.*

...

(Emphasis added.)

****389** ***313** It is evident that the LUC considered and rejected Sensible Growth's proposed language which would have prohibited the use of *all* water from the high level aquifer. Instead, the LUC, in Condition No. 10, only instructed that "LCI shall not utilize the *potable* water from the high-level groundwater aquifer for golf course irrigation use." *See supra* 105 Hawai'i pages 300 and 312, 97 P.3d pages 376 and 388. In light of the opposing proposals concerning use of the high level aquifer, one precluding the use of " any" water, and the other prohibiting the use of "potable" water, it is difficult to credit the LUC's assertion that potable water was understood to preclude the use of "any" or all water from the high level aquifer.

XIII.

Further, the LUC's assertion that it believed "that the high level aquifer consisted of only potable water" is not supported by any of the findings in the 1991 Order. The 1991 Order does not make any express findings which prohibit the use of Wells No. 1 and 9. The map[40] provided during the 1991 hearings appears to indicate that Well No. 1 and the Palawai Basin[41] were both located within the high level aquifer. If the LUC believed that the high level aquifer only consisted of potable water, or that Wells No. 1 and 9 were not to be used, it could have expressly said so in the 1991 Order. Indeed, the mention of Wells No. 1 and 9 in finding 48 of the 1991 Order,[42] suggests that the use of these wells, and their brackish water supply, was permissible.

40 The LUC noted that this was "the only map ... offered into evidence during the 1991 hearings." Looking to the record, other maps are listed as exhibits, dated prior to the 1991 hearings. However, it appears that the LUC maintains that only one map was provided as to the location of the wells, the Palawai Basin, and the high level aquifer. If the LUC was unclear as to the location of the wells, or the potability of the water in the high level aquifer, it could have made further inquiries and findings in this regard. Yet, as noted, no such findings are present in the 1991 Order.

41 The parties apparently refer to the Palawai Basin as a geographical indicator to reference what was represented as being located outside or inside the high level aquifer. As discussed, the LUC asserts that LCI represented that Wells No. 1 and 9 were located *outside* the high level aquifer, and *inside* the Palawai Basin, such that they believed the wells to be "alternate sources" and not in the high level aquifer. *See supra.* However, finding 15 of the May 17, 1996 order relates that "[i]rrigation for the [p]roperty is currently being supplied primarily from brackish Wells No. 1 and 9, located in the Palawai Basin, *which are within the high level aquifer.* ..." (Emphasis added.)

42 As previously noted, finding 48 of the 1991 Order provided as follows:

> 48. *[LCI] proposes to provide alternate sources of water for golf course irrigation by developing the brackish water supply.* According to [LCI], *Wells Nos. 9* and 12 which have capacities of about 300,000 gpd and 200,000 gpd, respectively, *have been tested but are not yet operational.* Well No. 10 which has a capacity of approximately 100,000 gpd with a possible potential of 150,000 gpd has also been tested and will be available. *Currently available also is brackish water from Well No. 1 which is operational* and which has a capacity of about 600,000 gpd.

(Emphases added.)

XIV.

As related above, there was evidence that LCI represented that it would not use any water from the high level aquifer.[43] While such evidence existed, the ultimate order of the LUC did not incorporate the representation into a condition. In that light, we believe that a person exercising reasonable caution would not conclude that the evidence submitted with respect to the 1996 OSC was of sufficient quality so as to support the conclusion that Condition 10 of the 1991 Order was violated because Condition 10 precluded LCI from using any water at all from the high level aquifer. The plain text of Condition 10, the separate and distinct uses of the terms potable and non-potable throughout the 1991 Order, LUC's apparent rejection of Sensible Growth's proposed order, ****390** ***314** the similarity between LCI's proposed findings and the LUC's adopted findings in the 1991 Order, and the map submitted to the Commission indicating that Well No. 1 was inside the high level aquifer, weigh decisively against this basis for the LUC's 1996 Order. Hence, this

interpretation of the 1991 Order was not supported by substantial evidence in the record and must be deemed "clearly erroneous." HRS § 91–14(g).

43 In its memorandum in response to the OSC, LCI focused on the interpretation of the 1991 Order, asserting that (1) use of non-potable water from the high level aquifer was permitted under Condition No. 10, (2) it was LCI's understanding that "the obligation to develop alternate sources was only to the extent of any shortfall," (3) it had made good faith efforts to develop alternate sources of water, and (4) the potability standard intended for and applicable to Condition No. 10 must coincide with the EPA standard.

Assuming, *arguendo,* that LCI's representations that it would not use any water from the high level aquifer, constituted substantial evidence, we have, based on the grounds stated above, a "definite and firm conviction" that the LUC made a "mistake" in attempting to enforce such an interpretation of Condition No. 10. *See In re Wai'ola O Moloka'i, Inc.*, 103 Hawai'i at 421, 83 P.3d at 684.

XV.

Moreover, the LUC's decision was "affected by other error of law." HRS § 91-14(g)(4). The LUC cannot now enforce a construction of Condition 10 that was not expressly adopted. This court has mandated that, in issuing a decision, an "agency must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency." *In re Water Use Permit Applications (Waiahole)*, 94 Hawai'i at 158, 9 P.3d at 470 (quoting *In re Kauai Elec. Div. Of Citizens Utilities Co.*, 60 Haw. 166, 183, 590 P.2d 524, 537 (1978) [hereinafter *Kauai Elec.*]); *In re Terminal Transp., Inc.*, 54 Haw. at 139, 504 P.2d at 1217; *cf. In re Wai'ola O Moloka'i, Inc.*, 103 Hawai'i at 432, 83 P.3d at 695 (explaining that any presumption of validity, given to an agency's decision, "presupposes that the agency has grounded its decision in reasonably clear" findings of fact and conclusions of law).

[9] [10] 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. *See e.g., Gates & Fox v. Occupational Saftey & Health Review Comm'n,* 790 F.2d 154, 156 (D.C.Cir.1986) (reasoning that an "employer is entitled to fair notice in dealing with his government," and thus the agency's regulations "must give an employer fair warning of the conduct it prohibits or requires"). In this light, the 1991 Order cannot be construed to mean what the LUC may have intended but did not express. *Cf. id.* (explaining that "a regulation cannot be construed to mean what an agency intended but did not adequately express"). An administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed. *Cf. id.* (reasoning that the "enforcer of the act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated"). The plain language of Condition No. 10 did not give fair notice, or adequately express any intent on the LUC's part that LCI be precluded from using *all* water from the high level aquifer.

XVI.

[11] LCI thus was not prohibited from using all water from the high level aquifer by Condition 10. In that context, Sensible Growth argues that LCI did use potable water from the high level aquifer,[44] and, thus, the court erred in reversing the 1996 Order. The 1996 Order stated that "pursuant to [HAR § 15–15–93], the [LUC] finds upon a preponderance of the evidence that [LCI] has failed to perform according to Condition No. 10 of the [1991 Order]."[45]

44 As discussed, the parties disagreed on the applicable standard to be used to determine potability. LCI relied on the definition of potability provided in the Maui County Code § 24.240.020, which defines "potable water as water containing less than 250 milligrams per liter of chlorides."

Sensible Growth contends that even the Maui County Code § 24.240.020 defines " 'potable water' not on chloride levels alone, but on other contaminant levels established by the EPA." The LUC, in its May 17, 1996 order stated that "the potability of any water does not depend on any particular level of chloride concentration."

45 The LUC argues that it properly assigned to LCI, the burden of proving that it was in compliance with Condition No. 10 regarding the use of potable water. Thus, the LUC posits that in order to prove that it was fulfilling its obligations under Condition No. 10, LCI had to demonstrate that the water being used to irrigate the golf course was non-potable. LCI responds that Sensible Growth "makes the erroneous and unsupported comment that LCI bore the burden of proof" that it had complied with Condition No. 10. However, LCI acknowledges, and does not contest, the LUC's application of a preponderance of the evidence standard to the findings.

**391 *315 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. The LUC maintains that its 1996 Order was based upon the "repeated representations that (1) the high level aquifer was synonymous with 'potable water,' (2) alternate non-potable water sources were located outside the high level aquifer," and (3) LCI's intention was to "not [use] water from the high level aquifer to irrigate the Manele Golf Course." The LUC did not focus on the appropriate standard for determining potability but, rather, notes that in the hearings prior to the 1991 Order, "LCI did not elaborate about the existence of potable and non-potable water within the high level aquifer."

The 1996 Order included the following findings pertinent to the potability issue:

> 15. Irrigation for the [p]roperty is currently being supplied primarily from brackish Wells No. 1 and 9, located in the Palawai Basin, *which are within the high level aquifer. ...*
>
> ....
>
> 21. [LCI's] water consultant agrees that the high level aquifer consists of smaller aquifers that are hydrologically connected, and must be as a single unit to establish a sustainable yield for the high level aquifer.
>
> 22. [LCI's] water consultant agrees that the small aquifers are interconnected, and *there is leakage from the high level potable water area into the low level brackish* area.
>
> 23. [LCI's] water consultant states that a drop in salinity from 800 milligrams per liter to 300 milligrams per liter corresponds to a mixture of fresh water and seawater.
>
> 24. Petitioner utilizes *a definition for potable water found in Maui County Code,* to determine potability of water being drawn from Wells No. 1 and 8. Section 20.24.020 of the Maui County code pertains to restrictions on use of potable water for golf courses. Said section of the Maui County code *defines potable water as water containing less than 250 milligrams per liter of chlorides.*
>
> ....
>
> 29. *[LCI] has not performed a comprehensive test to determine the potability of water from Wells No. 1 and 9.*
>
> 30. *As more water is pumped from Wells No. 1 and 9, it is likely that the salinity will drop as more potable water leaks into the dike compartments in the secondary recharge zone to replace the water being pumped.*
>
> ....
>
> 32. *[LCI] acknowledges that Condition No. 10 could be interpreted to restrict use of any water from the high level aquifer.*
>
> ....

(Emphases added.)

Sensible Growth contends that the LUC "found that LCI failed to show that it was *not* using potable water." (Emphasis added.) In support of this assertion, the LUC points to finding 26 of the 1996 Order, which states that the "potability of any water source does not depend on any particular level or chloride concentration." Findings 24 through 27 indicated that LCI utilized a definition of potable water which is dependent on the particular *chloride* concentration level. In findings 29 and 30 of the 1996 Order, Sensible Growth notes that the LUC found that (1) LCI failed to perform a "comprehensive test to determine the potability of water from Wells No. 1 and 9" and (2) fresh potable water is replacing the water pumped from Wells No. 1 and 9.

In this regard, Sensible Growth points to testimony of Rae Loui (Loui), the chair of the state Water Commission, indicating that the **392 *316 drawing of brackish water from the aquifer affects the potable water resource.

A letter from the Water Commission to LCI regarding Loui's testimony, also explained that the "chlorides in Well 1 dropped from about 700 ppm to between 320 to 350 ppm" which implies that "at least half the water pumped from Well 1 is potable water."[46] Sensible Growth asserts that "since LCI is using potable water for its golf course, it is reasonable to conclude that it is in violation" of Condition No. 10.

46 Loui's testimony is from the LUC hearing on August 12, 1993, as summarized in the letter from the Water Commission to LCI dated October 26, 1993. However, the LUC made no finding in its 1996 Order to the effect that one-half of the water pumped from Well 1 was potable water.

On the other hand, LCI responds that finding 15 of the 1996 Order states that "[i]rrigation for the [golf course] is currently being supplied *primarily* from *brackish* Wells No. 1 and 9, ... which are within the high level aquifer [,]" (emphasis added), finding 16 states that the LCI "has completed an extended pump test of Wells No. 1 and 9, which ... provided non-potable, brackish water[,]" and finding 31 reflects that LCI "has spent approximately 2.5 million dollars to develop the brackish water system, and to ensure that only brackish water ... is being utilized."

Although such findings are relevant to the issue of whether potable water is being used, the LUC makes no specific finding or conclusion as to whether LCI was using potable water. Additionally, it is not clear from finding No. 30, whether the potable water leaking into Wells No. 1 and 9 is a direct result of LCI's actions, or if such leakage would occur irrespective of LCI's water usage. Similarly, assuming LCI's use is affecting potable water in the high level aquifer, the LUC did not indicate whether such an effect would qualify as "utiliz[ing] the potable water" under Condition No. 10.

Contrary to LCI's assertions, the findings of the 1996 Order also fail to establish that potable water is *not* being used. Although finding 15 states that irrigation is "primarily" being supplied from brackish wells, this would not preclude the possibility that some potable water is also being used. Finding 16 that "Wells No. 1 and 9 ... provide non-potable, brackish water [,]" is countered by finding 29, which states that LCI "has not performed a comprehensive test to determine the potability of Wells No. 1 and 9." Additionally, the findings explain that "there is leakage from the high level potable water area to the low level brackish water area."

While such findings seem to imply that LCI was using potable water, the LUC did not include any express findings in this regard in its 1996 Order. As such, the LUC has failed to "make its findings reasonably clear" as to whether LCI was using potable water in violation of Condition No. 10. *In re Water Use Permit Applications (Waiahole)*, 94 Hawai'i at 158, 9 P.3d at 470 (quoting *Kauai Elec.*, 60 Haw. at 183, 590 P.2d at 537); *In re Terminal Transp., Inc.*, 54 Haw. at 139, 504 P.2d at 1217. This court should "not be left to guess, with respect to any material question of fact ... the precise finding of the agency." *In re Water Use Permit Applications (Waiahole)*, 94 Hawai'i at 158, 9 P.3d at 470 (quoting *Kauai Elec.*, 60 Haw. at 183, 590 P.2d at 537).

In the present case, the LUC has not provided sufficient "findings or conclusions that would enable meaningful review of" whether LCI has violated the prohibition against use of potable water in Condition No. 10. *Id.* HRS § 91-14 provides that, upon review of an agency decision, an appellate court may "remand the case with instructions for further proceedings."

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. *See TIG Ins. Co.*, 101 Hawai'i at 329, 67 P.3d at 828 (remanding the case to the circuit court with instructions to remand the case to the Insurance Commissioner ****393 *317** for further proceedings); *see In re Water Use Permit Applications (Waiahole)*, 94 Hawai'i at 158, 9 P.3d at 470 (remanding a matter to the agency for "proper resolution" where the agency had "not provided any findings or conclusions that would enable meaningful review of its decision"); *Kauai Elec.*, 60 Haw. at 183, 590 P.2d at 537 (remanding for further proceedings and requiring the agency to make appropriate findings). " 'It is familiar appellate practice to remand causes for further proceedings without deciding the merits.... Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points....' " *Kauai Elec.*, 60 Haw. at 183, 590 P.2d at 537 (quoting *Ford Motor Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 364, 373, 59 S.Ct. 301, 83 L.Ed. 221 (1939)).

## XVII.

### A.

**[12]** We confirm several propositions germane to our remand of this case. Whether there has been a breach of Condition No. 10 is a determination to be made by the LUC. Such a determination falls within the authority of the LUC, for HRS § 205–4(g)[47] expressly authorizes the LUC to "impose conditions." Moreover, "absent substantial commencement of use of the land *in accordance with such representations made* ... in seeking [the] boundary change [,]"[48] the LUC is expressly authorized to order a reversion of land to the prior classification. HRS § 205–4(g) (emphasis added). The language of HRS § 205–4(g) is broad, and empowers the LUC to use conditions as needed to (1) "uphold the intent and spirit" of HRS chapter 205, (2) uphold "the policies and criteria established pursuant to section 205–17,"[49] and (3) to "assure substantial compliance with representations made by petitioner in seeking a boundary change." *Id.* This statute, however, lacks an express provision regarding cease and desist orders. *See id.*

47 HRS § 205–4(g) provides, in pertinent part, that the LUC, after receiving a petition for land reclassification, shall act to

> approve the petition, deny the petition, or to modify the petition *by imposing conditions necessary to uphold the intent and spirit of this chapter or policies and criteria established pursuant to section 205–17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change.* The commission may provide by condition that absent substantial commencement of the use of the land *in accordance with such representations,* the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification.

(Emphases added.)

48 The reclassification of land by the LUC is apparently also referred to as a "boundary change."

49 HRS § 205–17 (1993), entitled "Land use commission decision-making criteria," provides as follows:

> In its review of any petition for reclassification of district boundaries pursuant to this chapter, the commission shall specifically consider the following:
>
> (1) The extent to which the proposed reclassification conforms to the applicable goals, objectives, and policies of the Hawaii state plan and relates to the applicable priority guidelines of the Hawaii state plan and the adopted functional plans;
>
> (2) The extent to which the proposed reclassification conforms to the applicable district standards; and
>
> (3) The impact of the proposed reclassification on the following areas of state concern:
>
> (A) Preservation or maintenance of important natural systems or habitats;
>
> (B) Maintenance of valued cultural, historical, or natural resources;
>
> (C) Maintenance of other natural resources relevant to Hawaii's economy, including, but not limited to, agricultural resources;
>
> (D) Commitment of state funds and resources;
>
> (E) Provision for employment opportunities and economic development; and
>
> (F) Provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups; and
>
> (4) The representations and commitments made by the petitioner in securing a boundary change.

"It is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted." *Morgan,* 104 Hawai'i at 184, 86 P.3d at 993. "The reason for implied powers is that, as a ****394 *318** practical matter, the legislature cannot forsee all the problems incidental to ... carrying out ... the duties and responsibilities of the agency." *Id.* (brackets and internal quotation marks omitted).

HRS chapter 205 does not expressly authorize the LUC to issue cease and desist orders.[50] But the legislature granted the LUC the authority to impose conditions and to down-zone land for the violation of such conditions for the purpose of "uphold[ing] the intent and spirit" of HRS chapter 205, and for "assur[ing] substantial compliance with representations made" by petitioners. HRS § 205–4(g); *Cf. Morgan,* 104 Hawai'i at 185, 86 P.3d at 994 (holding that although HRS chapter 205A does not expressly authorize the Planning Commission to

modify permits, the Commission must have jurisdiction to do so to "ensure compliance" with the Coastal Zone Management Act and to "carry out [its] objectives, policies, and procedures"). Consequently, the LUC must necessarily be able to order that a condition it imposed be complied with, and that violation of a condition cease.

50 The LUC and Sensible Growth argue that the LUC has inherent authority to enforce the conditions it imposes. LCI asserts that the court correctly decided that the County has the authority to enforce Condition No. 10, and that the LUC does not have the power to issue a cease and desist order.

B.

The power to enforce the LUC's conditions and orders, however, lies with the various counties.[51] HRS § 205–12[52] (1993) delegates the power to enforce district classifications to the counties.[53] HRS § 205–12 mandates that the "appropriate officer or agency charged with the administration of county zoning laws *shall enforce* ... the use classification districts adopted by the [LUC] and the restriction on use and ... shall report to the commission all violations." (Emphasis added.) Pursuant to their enforcement duties under § 205–12, counties have the responsibility to take necessary action against violators. A.G. Opinion 70–72 (1970). Such enforcement covers all land use district classifications and land use district regulations. *Id.* Thus, looking to the express language of HRS § 205–12, it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration of county zoning laws, namely the counties, and not the LUC. *Cf. Morgan,* 104 Hawai'i at 190, 86 P.3d at 999 (explaining that the statute expressly granted injunctive power to the circuit court and not the Planning Commission).

51 While in its briefs LCI refers to the Water Commission as having jurisdiction over "water disputes," it concedes that it is not appealing "either here or below, whether the LUC exceeded its power in *imposing* Condition 10." (Emphasis added.) LCI maintains that it is only arguing that *enforcement* of the conditions in the 1991 Order belongs "to the County of Maui and the Water Commission[,]" as opposed to the LUC. Inasmuch as we agree that the County, and not the LUC, has the power to enforce the LUC's conditions, we do not address LCI's arguments in this regard. We note that LCI apparently did not argue the issue of the Water Commission's jurisdiction before the LUC in the hearings prior to the 1991 Order or the 1996 Order, and LCI provides no citations to the record to that effect.

52 HRS § 205–12 states:

> The appropriate *officer or agency charged with the administration of county zoning laws shall enforce* within each county *the use classification districts adopted by the land use commission* and *the restriction on use* and the condition relating to agricultural districts under section 205–4.5 and shall report to the commission all violations.
>
> (Emphases added.)

53 We observe that LCI cites an attorney general's opinion, (A.G.Opinion) 70–22 (Sept. 16, 1970), for the proposition that "[t]he enforcement powers of the counties include an affirmative duty to undertake the necessary legal or other corrective measures against violators of the land use law." Sensible Growth argues that LCI mischaracterizes A.G. Opinion 70–22, and cites A.G. Opinion 72–8, which was issued two years after A.G. Opinion 70–22, and opines that the LUC has enforcement power.

There is no provision in HRS § 205–12 that expressly delegates enforcement power to the LUC. If the legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power. *Cf. id.* (if the legislature intended to ****395 *319** grant the commission injunctive powers, it would have done so expressly). By omitting any such reference, it is apparent the legislature did not intend to grant such enforcement powers to the LUC. *Cf. id.* (by omitting reference to the Planning Commission, the legislature made clear that the power to enjoin is solely granted to the courts). Thus, the LUC does not have the power to enforce a cease and desist order. However, if the LUC finds a violation of a condition, the county has an affirmative duty to enforce the LUC's conditions, according to HRS § 205–12. *Cf. Save Sunset Beach Coalition v. City & County of Honolulu,* 102 Hawai'i 465, 483, 78 P.3d 1, 19 (2003) (observing that the City and County of Honolulu confirmed that it would enforce the appropriate zoning statutes and ordinances).

XVIII.

Therefore, (1) the court's April 26, 1999 order is affirmed to the extent that it concludes that the LUC erred in interpreting Condition No. 10 as precluding the use of "any" or all water from the high level aquifer, and is vacated in all other respects, and (2) the case is remanded to the 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 LCI used potable water from the high level aquifer, in violation of Condition No. 10.

**All Citations**

105 Hawai'i 296, 97 P.3d 372

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IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

CAAP-13-0000314

LANAIANS FOR SENSIBLE GROWTH, Appellant-Appellee,
v.
LANAI RESORTS, LLC, Appellee-Appellant,
and
LAND USE COMMISSION; RANSOM A.K. PILTZ, in this official capacity as Chairperson of the STATE OF HAWAII LAND USE COMMISSION; VLADIMIR P. DEVENS, REUBEN S.F. WONG, KYLE CHOCK, THOMAS CONTRADES, LISA M. JUDGE, DUANE KANUHA, NORMAND R. LEZY, and NICHOLAS W. TEVES, JR., in their official capacities as members of the LAND USE COMMISSION; COUNTY OF MAUI PLANNING DEPARTMENT; STATE OFFICE OF PLANNING, Appellees-Appellees

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CAAP-12-0001065

LANAIANS FOR SENSIBLE GROWTH, Appellant-Appellee,
v.
LANAI RESORTS, LLC, Appellee-Appellant,
and
LAND USE COMMISSION; RANSOM A.K. PILTZ, in this official capacity as Chairperson of the STATE OF HAWAII LAND USE COMMISSION; VLADIMIR P. DEVENS, REUBEN S.F. WONG, KYLE CHOCK, THOMAS CONTRADES, LISA M. JUDGE, DUANE KANUHA, NORMAND R. LEZY, and NICHOLAS W. TEVES, JR., in their official capacities as members of the LAND USE COMMISSION; CASTLE AND COOKE RESORTS, INC.; COUNTY OF MAUI PLANNING DEPARTMENT; STATE OFFICE OF PLANNING, Appellees-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 10-1-0415)

MEMORANDUM OPINION
(By: Foley, Presiding J., Fujise and Leonard, JJ.)

Appellee-Appellant Lanai Resorts, LLC[1] (**Lanai Resorts**) appeals from the Final Judgment entered on March 19, 2013 in the Circuit Court of the First Circuit[2] (**circuit court**).

On appeal, Lanai Resorts contends the circuit court erred in: (1) upholding the decision of the Land Use Commission (**LUC**) finding there was insufficient evidence to support its 1996 Cease and Desist Order; (2) invalidating the LUC's grant of Lanai Resorts' Motion for Modification of Condition No. 10; and (3) denying Lanai Resort's Motion to Dismiss the Appeal.

## I. BACKGROUND

In 1989, Lanai Resorts filed a petition with the LUC for an amendment to the existing land use district boundary for a reclassification of a parcel of land in order to develop a golf course.

The LUC granted Lanai Resorts' petition on April 16, 1991 (**1991 Order**), subject to twenty-three conditions. Condition number ten (**Condition No. 10**) stated, "[Lanai Resorts] 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 1993, the LUC ordered Lanai Resorts to show cause why the land at issue should not revert to its former land use classification or be changed to a more appropriate classification on the basis that the LUC had reason to believe Lanai Resorts

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[1] The Petitioner-Appellee-Appellant's name has changed throughout the proceedings, from Castle & Cooke Resorts, LLC; Lanai Company, Inc.; Lāna'i Resort Partners; to the current Lanai Resorts, LLC. For clarity, we refer to it by the current successor in interest, Lanai Resorts.

[2] The Honorable Karl K. Sakamoto presided.

failed to perform according to Condition No. 10 of the 1991 Order.

On May 17, 1996, the LUC issued its "Findings of Fact, Conclusions of Law, and Decision and Order" (**1996 Order**), which ordered Lanai Resorts to comply with Condition No. 10, finding that Lanai Resorts had failed to perform according to the condition. The 1996 Order was appealed to the Hawai'i Supreme Court. Lanai Co. v. Land Use Comm'n, 105 Hawai'i 296, 305-06, 97 P.3d 372, 381-82 (2004).

In 2004, the supreme court remanded this case to the circuit court with instructions to remand to the LUC "for clarification of its findings and conclusions, or for further hearings if necessary" on "the issue of whether [Lanai Resorts] has violated Condition No. 10 by utilizing potable water from the high level aquifer." Lanai Co., 105 Hawai'i at 316, 97 P.3d at 392.

On May 26, 2006, the LUC issued its "Second Prehearing Order on Remand From the Hawaii Supreme Court of the [LUC's] Findings of Fact, Conclusions of Law, and Decision and Order Dated May 17, 1996" (**Second Prehearing Order**), which ordered the parties to prepare to address a number of issues in hearings to be held on June 7-9, 2006. The issues the LUC directed the parties to address at the hearing were:

> 1. Does Condition No. 10 of the LUC's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991 restrict [Lanai Resorts'] utilization of water for golf course irrigation use to alternative non-potable sources of water that [Lanai Resorts] develops?
>
> (a) If so, what does "alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent)" mean as used in Condition No. 10?
>
> (i) What sources of water are encompassed by that term?
>
> (ii) Does this mean that the water must be from a source outside of the high-level groundwater aquifer?

(b) If so, did [Lanai Resorts] develop and utilize alternative non-potable sources of water for golf course irrigation use?

2. Did Condition No. 10 give fair warning to [Lanai Resorts] as to the sources of water that could and could not be used for golf course irrigation use?

3. Did [Lanai Resorts] utilize potable water from the high-level groundwater aquifer?

The hearings were held on June 7 and 8, 2006. The LUC canceled the final day of the hearing for lack of quorum.

Each of the parties were invited to submit written testimony to the LUC at the June 2006 hearing, as well as a list of witnesses to be called. At the hearing, however, only Lanai Resorts, the County of Maui (**County**), and the State of Hawai'i Office of Planning (**OP**) were able to present live witness testimony to the LUC.

Lanai Resorts' witness list, which was submitted to the LUC before the hearing included Tom Nance of Tom Nance Water Resource Engineering; and Cliff Jamile, Ralph Masuda, and Harry Saunders of Castle & Cooke Resorts, LLC, the predecessor of Lanai Resorts. Tom Nance testified at the hearing, and was designated as an expert in hydrology and water resource engineering. Lanai Resorts also submitted exhibits as written testimony.

The County's witness list included Michael W. Foley, Director of Planning Department for the County (or his designee); George Y. Tengan, Director of Water Supply for the County (or his designee); and G. Riki Hokama, Council Chair of the Lana'i Residency Area. At the hearing, Ellen Kraftsow, the Water Resources and Planning Division Program Manager for the Department of Water Supply testified for the County. The County also submitted written testimony through exhibits to the LUC.

The OP's list of witnesses it expected to testify at the hearing included Laura H. Thielen, Director of OP and/or Abe E. Mitsuda, Division Head of the Land Use Division for the OP; Stuart Yamada, Clean Drinking Water Branch, Department of Health;

W. Roy Hardy, Regulation Branch Chief, Commission on Water Resource Management, Department of Land and Natural Resources; and an unidentified representative of the County's Department of Water Supply. W. Roy Hardy and Stuart Yamada testified at the hearing. The OP also submitted exhibits at the hearing.

The witness list for Intervenor-Appellant-Appellee Lanaians for Sensible Growth (**LSG**) included Rob McOmber, President of LSG; Reynold "Butch" Gima, Chairperson of Lanai Water Working Group; William Meyer, Private Consultant in Hydrology; and Michael Foley, Planning Director of the County. LSG submitted written exhibits at the hearing. Ron McOmber testified at the hearing, but testified as a citizen of Lāna'i and participant in the Lanai Water Advisory Committee, and not as the President of LSG or as LSG's witness.

On May 18, 2007, the LUC voted to allow a hearing officer to continue holding hearings and make a recommendation to the LUC. Commissioner Michael D. Formby (**Commissioner Formby**) suggested that the assignment of this case to a hearing officer "would allow for a more streamlined and efficient timeframe within which testimony and evidence could be collected . . . ." At this hearing, counsel for LSG reminded the LUC that it had heard all parties' testimony at the June 2006 hearing, except for testimony from LSG.

On July 16, 2007, Lanai Resorts filed a "Motion for Modification of Condition No. 10 and Dissolution of [the 1996 Order]" (**Motion for Modification**). On January 25, 2010, the LUC entered its "Order Vacating [1996 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 [Lanai Resorts'] Motion for Modification of Condition No. 10, with Modifications" (**2010 Order**).

LSG appealed the 2010 Order to the circuit court and on November 8, 2012, the circuit court entered the "Order Vacating [LUC's] Order Vacating [1996 Order]; Denying [OP's] Revised Motion to Amend Findings of Fact, Conclusions of Law, and

Decision and Order Filed April 16, 1991; and Granting [Lanai Resorts'] Motion for Modification of Condition No. 10, with Modifications Entered January 25, 2010 and Remanding Matter to the [LUC]" (**November 2012 Order**) vacating the 2010 Order. The circuit court entered its Final Judgment on March 19, 2013. Lanai Resorts filed their notice of appeal on March 28, 2013.

## II. STANDARD OF REVIEW

### A. Ripeness/Subject Matter Jurisdiction

Ripeness is an issue of subject matter jurisdiction. Kapuwai v. City and Cty. of Honolulu, Dep't of Parks and Recreation, 121 Hawai'i 33, 39, 211 P.3d 750, 756 (2009). "Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo." Id. (internal quotation marks and emphasis omitted) (quoting Kaho'ohanohano v. Dep't. of Human Servs., 117 Hawai'i 262, 281, 178 P.3d 538, 557 (2008)).

### B. Standing

Standing is a question of law reviewable de novo. McDermott v. Iqe, 135 Hawai'i 275, 282, 349 P.3d 382, 389 (2015) (citing Hawaii Med. Ass'n v. Hawaii Med Serv. Ass'n, 113 Hawai'i 77, 90, 148 P.3d 1179, 1192 (2006).

### C. Secondary Appeals

"Review of a decision made by a court upon its review of an administrative decision is a secondary appeal. The standard of review is one in which [an appellate] court must determine whether the court was right or wrong in its decision." Brescia v. North Shore Ohana, 115 Hawai'i 477, 491, 168 P.3d 929, 943 (2007) (internal quotation marks omitted) (quoting Leslie v. Bd. of Appeals of Cty. of Hawaii, 109 Hawai'i 384, 391, 126 P.3d 1071, 1078 (2006)).

The standard of review that applies to the circuit court's review of an administrative proceeding is outlined in Hawaii Revised Statutes (**HRS**) § 91-14(g) (2012 Repl.), which states:

> (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the

> substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 388, 363 P.3d 224, 236 (2015). "Further, under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." Hou, 136 Hawai'i at 388, 363 P.3d at 236 (brackets and internal quotation marks omitted) (quoting Bragg v. State Farm Mut. Auto. Ins. Co., 81 Hawai'i 302, 205, 916 P.2d 1203, 1206 (1996)).

> "'An agency's findings are not clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence unless the reviewing court is left with a firm and definite conviction that a mistake has been made.'" Poe v. Hawai'i Labor Relations Bd., 105 Hawai'i 97, 100, 94 P.3d 652, 655 (2004) (quoting Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 229-30, 751 P.2d 1031, 1034 (1988)). "'The courts may freely review an agency's [COL].'" Lanai Co., 105 Hawai'i at 307, 97 P.3d at 383 (quoting Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990) (other citation omitted)). "Abuse is apparent when the discretion exercised clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Kimura v. Kamalo, 106 Hawai'i 501, 507, 107 P.3d 430, 436 (2005) (internal quotation marks and citation omitted).

Brescia, 115 Hawai'i at 491-92, 168 P.3d at 943-44 (brackets in original omitted).

## III. DISCUSSION

### A. Ripeness/Subject Matter Jurisdiction

As a preliminary matter, we address LSG's contention that this court lacks jurisdiction because the "remand order is clearly interlocutory." This court is required to determine if we have jurisdiction on each appeal. See Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994).

LSG contends the circuit court's decision was a remand order, and thus not a "final order" under HRS § 91-14(a) (2012 Repl.).[3] In Gealon v. Keala, 60 Haw. 513, 591 P.2d 621 (1979), the Hawai'i Supreme Court held that a "'[f]inal order' means an order ending the proceedings, leaving nothing further to be accomplished. Consequently, an order is not final if the rights of a party involved remain undetermined or if the matter is retained for further action." Id. at 520, 591 P.2d at 626 (citing Downing v. Bd. of Zoning Appeals of Whitley Cty., 274 N.E.2d 542, 544 (Ind. App. 1971)).

LSG cites to the line of workers compensation cases in which appellate courts have held that they lack jurisdiction to review a decision the Labor and Industrial Relations Appeals Board (**LIRAB**) remanding the case to the director of the Department of Labor and Industrial Relations (**DLIR**) to determine the amount of compensation for a compensable injury. The supreme court in Bocalbos v. Kapiolani Med. Ctr. for Women & Children, 89

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[3] HRS § 91-14(a) provides:

> **§91-14 Judicial review of contested cases.** (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

Hawai'i 436, 974 P.2d 1026 (1999) summarized the rule established by this line of cases: "a decision of the LIRAB in a workers' compensation case is not appealable under § 91-14(a) if a right of the claimant remains undetermined or if the case is retained for further action by the director of labor." Id. at 443, 974 P.2d at 1033.

The rule cited by LSG has been applied only in workers' compensation cases. The workers' compensation system is unique in that the LIRAB reviews decisions of the director of the DLIR, and can remand cases to the director for further determinations. See HRS § 386-87(c) (2015 Repl.) ("The appellate board shall have power to . . . remand the case to the director for further proceedings and action."). A decision by the LIRAB to remand the case to the director for a determination of compensation is not a "final order" under the definition provided in Gealon because a remand order from the LIRAB leaves further administrative action to be taken on the issue of the claimant's compensation benefits. See Mitchell v. State, Dep't of Educ., 77 Hawai'i 305, 307-08, 884 P.2d 368, 370-71 (1994).

LSG tries in its answering brief to equate the remand from the circuit court in this case to remand orders from the LIRAB in workers' compensation cases. Although both are remand orders, they are procedurally distinct. Judicial review by the circuit court is appropriate under HRS § 91-14(a) when an administrative agency has made a "final decision and order." A circuit court's remand directive is therefore irrelevant to the issue of whether there has been a "final order" under HRS § 91-14(a).

The 2010 Order by the LUC held that "there was insufficient evidence to support the Commission's 1996 Order finding a violation of Condition No. 10 and therefore the 1996 Order is hereby VACATED" and granted Lanai Resorts' Motion for Modification. Given the scope of the hearings as defined by the LUC, there were no more issues to be resolved or rights of a party to be determined following the 2010 Order. See Gealon, 60

Haw. at 520, 591 P.2d at 626. Therefore, this court has jurisdiction to hear this appeal and the appeal is ripe for our consideration.

**B. Standing**

Lanai Resorts argues the circuit court erred in denying its motion to dismiss the appeal because LSG lacked the statutory authority to pursue the agency appeal under HRS § 414D-249(c)[4] (Supp. 2015) because LSG had been administratively dissolved in 2004 and was permitted under the statute to only carry on activities relating to "winding up."

In its opposition to Lanai Resorts' motion to dismiss, LSG maintained that it is the same entity that had administratively dissolved in 2004, although its name changed from "Lanaians for Sensible Growth" to "Lānaʻians for Sensible Growth."[5] In its answering brief, LSG argues that "[s]uch name changes produce no legal hurdle for continuing litigation, so long as the entities are merely carrying on the activities of its predecessor and carry the same rights and obligations from one entity to its successor-in- interest." However, the record shows that LSG did not merely go through a name change, but filed new articles of incorporation on November 14, 2008. Under HRS § 414D-249(f) (Supp. 2015),[6] LSG was permitted to amend its

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[4] HRS § 414D-249(c) provides:

> **§414D-249 Procedure for and effect of administrative dissolution and effect of expiration.**
>
> . . . .
>
> (c) A corporation administratively dissolved continues its corporate existence but may not carry on any activities except those necessary to wind up and liquidate its affairs under section 414D-245 and notify its claimants under sections 414D-246 and 414D-247.

[5] The November 14, 2008 Articles of Incorporation listed LSG's name as "Lanaiians for Sensible Growth," but LSG filed Articles of Amendment to Change Corporate Name on March 22, 2010 to "Lānaʻians for Sensible Growth."

[6] LSG conceded in its opposition to Lanai Resorts' motion to dismiss that it "did not obtain reinstatement by December 14, 2006, the last day it could have done so" under HRS § 414D-249(f).

(continued...)

articles incorporation to "resume carrying on its activities as if the expiration had never occurred[,]" but must have done so within two years of dissolution. Lāna'ians for Sensible Growth did not attempt to resume corporate activities until four years had passed, and therefore had no statutory basis for carrying on its activities as the same entity prior to dissolution. At no point did Lāna'ians for Sensible Growth submit a motion pursuant to Hawai'i Rules of Civil Procedure (**HRCP**) Rule 25(c)[7] or Hawaii Administrative Rules (**HAR**) § 15-15-71 (effective 2013)[8] to substitute in as the successor-in-interest to LSG. Lāna'ians for Sensible Growth, as a new corporation, is required to substitute in before it may replace LSG as a party.

LSG argues alternatively that it was entitled to continue litigating this case under HRS § 414D-245(b)(5) (2004

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[6](...continued)

> The corporation, at any time within two years of the expiration of its period of duration, may amend its articles of incorporation to extend its period of duration and, upon the amendment, the corporation may resume carrying on its activities as if the expiration had never occurred; provided that if the name of the corporation, or a name substantially identical is registered or reserved by another entity, or if that name or a name substantially identical is registered as a trade name, trademark, or service mark, the extension of its period of duration shall be allowed only upon the registration of a new name by the corporation pursuant to the amendment provisions of this chapter.

HRS § 414D-249(f).

[7] HRCP Rule 25(c) provides:

> **Rule 25. SUBSTITUTION OF PARTIES**
>
> . . . .
>
> **(c) Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

[8] HAR § 15-15-71 states:

> § 15-15-71 Substitution of parties. Upon motion and for good cause shown, the commission may order substitution of parties, except that in the case of death of a party, substitution may be ordered without the filing of a motion.

Repl.),[9] which states that the dissolution of a nonprofit corporation does not "[a]bate or suspend a proceeding by or against the corporation on the effective date of dissolution." Lanai Resorts argues in response that the effect of administrative dissolution, as opposed to voluntary dissolution, is governed by HRS § 414D-249, which limits post-dissolution activities to "those necessary to wind up and liquidate its affairs under section 414D-245 . . . ." HRS § 414-249(c). However, HRS § 414D-245(b) does not, as Lanai Resorts asserts, set forth activities in which voluntarily dissolved corporations may participate in addition to those necessary to wind up and liquidate, which would mean that HRS § 414D-249 acts as a limitation on the types of activities in which an administratively dissolved corporation may participate. Instead, HRS § 414D-245(b) enumerates certain rights and procedures that are not affected by or precluded by dissolution. Thus, HRS § 414D-245(b)(5) is applicable to administratively dissolved corporations through HRS § 414D-249(c). LSG, as an administratively dissolved corporation, was permitted to continue its involvement in this litigation under HRS § 414-245(b)(5).

Practically speaking, Lānaʻians for Sensible Growth, the corporation in existence since 2008, is substantially similar to LSG, the corporation in existence prior to 2004. The President of Lānaʻians for Sensible Growth, Donovan Kealoha, testified in a declaration, "Lānaʻians for Sensible Growth, except for the new nomenclature in its label, has continued to

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[9] HRS § 414D-245(b)(5) provides:

> **§414D-245 Effect of dissolution.**
>
> . . . .
>
> (b) Dissolution of a corporation does not:
>
> . . . .
>
> (5) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution[.]

operate in exactly the same role as 'Lanaians for Sensible Growth,' with essentially the same board membership except for the addition of four new members as part of its evolution as a community advocacy group." While Lāna'ians for Sensible Growth must officially substitute itself as a party in this litigation to become the real party in interest, HRS § 414D-245(b)(5) allows the members of LSG, who have continued to be involved with this litigation or who have been replaced by new members, to continue their role in the proceedings despite LSG's administrative dissolution.

Lanai Resorts' contention that HRS § 414D-249 prevents LSG from continuing litigation because it is not an activity necessary to wind up and liquidate its affairs is without merit. The circuit court did not err in denying Lanai Resorts' motion to dismiss.

**C. 1996 Order**

Lanai Resorts argues the circuit court erred when it vacated the LUC's 1996 Order because its findings "could [not] provide the [circuit] court with the definite and firm conviction that a mistake had been made necessary to allow the LUC's decision to be overturned." Lanai Resorts takes issue with three specific findings by the circuit court supporting its decision to vacate the 1996 Order: (1) the LUC did not abide by the mandate provided by the supreme court; (2) the LUC did not follow its own procedures; and (3) LSG had not been given a full and fair opportunity to have its evidence heard and considered.

In its 2004 decision in this case, the Hawai'i Supreme Court held:

> In the present case, the LUC has not provided sufficient "findings or conclusions that would enable meaningful review of" whether [Lanai Resorts] has violated the prohibition against [the] use of potable water in Condition No. 10. HRS § 91-14 provides that, upon review of an agency decision, an appellate court may "remand the case with instructions for further proceedings.
>
> Accordingly, we remand the issue of whether [Lanai Resorts] 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.

Lanai Co., 105 Hawai'i at 316, 97 P.3d at 392 (citation omitted).

The question on appeal is whether the circuit court erred in vacating the LUC's 2010 Order because the LUC's decision was made upon unlawful procedure following the supreme court's remand instructions. HRS § 91-9 (2012 Repl.), requires that "in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." HRS § 91-9(a). "Opportunities shall be afforded [sic] all parties to present evidence and argument on all issues involved." HRS § 91-9(c); see Application of Kauai Elec. Div. of Citizens Utils. Co., 60 Haw. 166, 182, 590 P.2d 524, 536 (1978) (holding that a hearing satisfied HRS § 91-9 where "all parties had been given ample opportunity to obtain and present all their evidence, to present testimony, both written and oral, to cross examine witnesses, and to argue the issues on the merits before the Commission.").

The supreme court in Hou recently discussed the importance of due process protections for parties in adjudicatory proceedings before administrative agencies in Hou. Regarding contested case hearings, the supreme court stated:

> A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process.

Hou, 136 Hawai'i at 380, 393 P.3d at 228. "[T]he manner in which the justice system operates must be fair and must also appear to be fair." Hou, 136 Hawai'i at 389, 363 P.3d at 237 (citing Sifagaloa v. Bd. of Trs. of Emps.' Ret. Sys. of State of Hawaii, 74 Haw. 181, 190, 840 P.2d 367, 371 (1992)). "Fundamentally, in the justice system, 'justice can perform its high function in the best way only if it satisfies the appearance of justice.'" Hou, 136 Hawai'i at 389, 363 P.3d at 237 (quoting Sifagaloa, 74 Haw. at 189, 840 P.2d at 371).

Following the supreme court's remand in this case, the

LUC issued a Second Prehearing Order on May 26, 2006 scheduling hearings at which the parties could address specific issues relating to the supreme court's remand instructions. The LUC scheduled the hearings for June 7, 8, and 9, 2006. At the hearing, the LUC heard witness testimony from Lanai Resorts, OP, and the County. LSG had scheduled their expert witness, William Meyer (**Meyer**), a private hydrology consultant, to appear by video on June 9, but the LUC canceled the final day of the hearing for lack of quorum.

At a May 18, 2007 hearing, Commissioner Formby explained the need to appoint a hearings officer: "Given the protracted history and extensive litigation in this matter and the importance of this matter on remand from the [Hawai'i] Supreme Court, I believe it would be more efficient to assign the conclusion of this matter to a hearing officer." Commissioner Formby added, "I also believe that the assignment of this matter to a hearing officer would allow for a more streamlined and efficient timeframe within which testimony and evidence could be collected on this matter."

Before the commissioners voted to approve the use of a hearing officer, counsel for LSG reminded the LUC that it had heard all parties' testimony except for LSG's testimony. Counsel for LSG stated, "I think we would be prejudiced if, in fact, the record stands as it is with everybody else's testimony but not ours on these critical issues. We would at least, at the very least want to have [Meyer] to testify if you're going to close that record." The deputy attorney general responded on behalf of the LUC,

> [W]e're not closing the record. I think you would have an opportunity to rebut the motion or oppose the motion based on those arguments. We would only, the [LUC] would only consider the motion if there are no material issues of fact that would preclude them from making the decision.

Effectively, however, the LUC did not accept any more testimony on the contested cases.

Meyer was included on LSG's list of witnesses to be submitted to the LUC for the purpose of testifying about the

"standards of potability," "affects [sic] of pumping water from high level aquifer in Lanai," and "water use in Lanai."[10] This testimony was directly relevant to the issue on remand from the Hawai'i Supreme Court, "whether [Lanai Resorts] has violated Condition No. 10 by utilizing potable water from the high level aquifer," Lanai Co., 105 Hawai'i at 316, 97 P.2d at 392, and to the LUC's subsequent finding that "there's no basis to conclude that there was a violation of Condition No. 10." Additionally, Meyer's testimony was relevant to rebutting the testimony of Lanai Resorts' expert Tom Nance. At the hearing, counsel for LSG objected to the testimony of Lanai Resorts' expert Tom Nance, stating, "This new testimony is being delivered orally today and all the technical data is a denial of my client's right to be able to effectively cross-examine with the assistance of our expert."

Lanai Resorts argues that because the LUC in 2010 could not determine what "Condition No. 10" meant when it was drafted in 1991, there was no need for the additional contested case hearings and thus, the LUC did not deviate from the post-remand process. Lanai Resorts, however, misconstrues the remand from the supreme court. 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. Lanai Co., 105 Hawai'i at 316, 97 P.2d at 392.

Because the LUC decided, in its discretion, to hold hearings to address the issues remanded by the supreme court, the hearings became subject to the requirements of HRS § 91-9. See

[10] A transcript of Meyer's former testimony before the LUC was submitted to the LUC as Exhibit LSG-017-R.

Bush v. Hawaiian Homes Comm'n., 76 Hawai'i 128, 135, 870 P.2d 1272, 1279 (1994).

The LUC entered its 2010 Order based on "having reviewed [the OP's] Motion and Revised Motion, [Lanai Resorts'] Motion, the various pleadings filed by the parties and the record in this proceeding, and having heard public testimony and arguments of counsel for [the OP], [Lanai Resorts], Maui County, and counsel for LSG," noticeably leaving out public testimony for LSG. Therefore, we come to the same conclusion as the circuit court: "the 'further hearings' LUC conducted pursuant to [the Second Prehearing Order] dated May 26, 2006 did not result in LSG being afforded a full and fair opportunity to have its evidence heard and considered post-remand." "Such a process does not satisfy the appearance of justice[.]" Hou, 136 Hawai'i at 391, 363 P.3d at 239.

We affirm the circuit court's decision to vacate the LUC's 2010 Order on the grounds that the LUC's decision was made upon unlawful procedure. See HRS § 91-14(g)(3).

## IV. CONCLUSION

The Final Judgment entered on March 19, 2013 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, March 21, 2016.

LindaLee K. (Cissy) Farm
(Brett R. Tobin with her
on the briefs)
(Goodsill Anderson Quinn & Stifel)
for Appellee-Appellant.

David Kopper
(Alan T. Murakami on the briefs)
(Native Hawaiian Legal Corporation)
for Appellant-Appellee.

Presiding Judge

Associate Judge

Associate Judge

Finding No. 14 is an LUC finding. "Throughout the original proceedings on the subject docket, Petitioner used the term 'high-level aquifer' to be synonymous with potable water. Petitioner defined alternative sources of water as water sources outside of the high-level aquifer. Petitioner's definition also included water reclamation and effluent. Petitioner noted that alternative sources were 'everything outside of the high-level aquifer or outside of the influence of or external factors that would influence the high-level aquifer.'"

Finding No. 15 is Petitioner's 26 modified. "Irrigation for the property is currently being supplied primarily from brackish Wells No. 1 and 9 located in the Palawai Basin which are within the high-level aquifer. Treated wastewater effluent in brackish Well No. 12 provide minor amounts of the irrigation supply."

Finding No. 16 is an LUC finding. "Petitioner has completed an extended pump test of Wells No. 1 and 9 which are within the high-level aquifer and provide non-potable brackish water. The extended pump test found no anomalous behavior in the wells and no deterioration of the quality of the wells. Petitioner found no evidence of impact upon the quality or water level of the potable water wells located at a higher elevation within the high-level aquifer."

17 is another LUC finding. "Petitioner represents

State of Hawaii
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources
Honolulu, Hawaii

March 29, 1990

Chairperson and Members
Commission on Water Resource Management
State of Hawaii
Honolulu, Hawaii

Gentlemen:

RESUBMITTAL
Petition for Designating the
Island of Lanai as a Water Management Area

Introduction

On March 2, 1989, the Commission on Water Resource Management received a written petition to designate the Island of Lanai as a Water Management Area for the purpose of regulating the use of ground-water resources. The petition was submitted by Mr. John D. Gray on behalf of the 168 residents of Lanai. This petition stated that resort development on Lanai in the future would cause water demand to exceed the available water supply.

On May 17, 1989 the Commission approved the continuance of the designation process for Lanai and subsequently held a public hearing on August 29, 1989 to receive oral and written testimony. Mr. Gray requested a contested case hearing, but the Office of the Attorney General has subsequently advised the Commission that the law does not provide for a contested case hearing in the designation process. A contested case could arise later in the permitting stage when individual rights, privileges, or duties are determined.

Pursuant to HRS §174C-46 Commission staff conducted an investigation of Lanai's hydrology, reviewed the public testimony and existing literature,, and evaluated comments of other governmental agencies. Findings of Fact have been prepared which summarize that investigation. To allow sufficient time for public review of the Lanai Water Resources Findings of Fact, the Commission deferred action on the petition for designating Lanai as a water management area at its January 31, 1990 meeting.

Hawaii's Water Code, HRS §174C-44 establishes eight criteria which the Commission must consider in deciding whether to designate a ground water area as a water management area under the Code:

[§174C-44] Ground water criteria for designation. In designating an area for water use regulation, the Commission shall consider the following:

(1) Whether an increase in water use or authorized use may cause the maximum rate of withdrawal from the ground water source to reach ninety percent of the sustainable yield of the proposed water management area;

(2) There is an actual or threatened water quality degradation as determined by the department of health;

(3) Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels;

(4) Whether rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upconing or encroachment of salt water;

(5) Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses;

(6) Whether excessive preventable waste is occurring;

(7) Serious disputes respecting the use of ground water resources are occurring; or

(8) Whether water development projects that have received any federal, state, or county approval may result, in the opinion of the Commission, in one of the above conditions.

Notwithstanding an imminent designation of a water management area conditioned on a rise in the rate of ground water withdrawal to a level of ninety per cent of the area's sustainable yield, the Commission, when such level reaches the eight per cent level of the sustainable yield, may invite the participation of water users in the affected area to an informational hearing for the purposes of assessing the ground water situation and devising mitigative measures.[L 1987, c45, pt of § 2]

Analysis

Staff has prepared a Findings of Fact to provide an objective assessment of the current and future water resource situation on Lanai. Staff analyzed recent hydrologic studies to determine the reasonableness of and consistency between hydrologic estimations presented, being cognizant of previous public testimony and Maui County comments. The report examines relevant references and adopts a conservative stance in its analysis of the water situation. The report makes no recommendations for Commission action.

The staff's updated proposed Findings of Fact reach the following ultimate factual determinations:

1) Hydrologic Assessment of High-Level Aquifer

| | |
|---|---|
| Sustainable Yield of Aquifer | 6 mgd |
| Total Future Potable Water Demand | 4.5 mgd |
| % of Sustainable Yield | 75 % |

2) Non-potable water demands of planned land developments would be satisfied through basal aquifer sources and treated wastewater effluent which should provide a total of 1.4 mgd;

3) Efforts are underway to upgrade the existing potable water distribution system. Wells 8 through 10 have been drilled in an effort to upgrade the existing water distribution system capacity to utilize the high-level water supply while existing pumps could also be lowered and/or existing wells could also be deepened to help prevent water shortages which have occurred in the past. Alternative sources consisting of non-potable treated wastewater are available, however, a basal ground-water source has yet to be discovered;

4) If planned alternative sources of supply do not materialize and full land development continues then future withdrawals could exceed 90% of the ultimate sustainable yield of the island's high-level aquifer.

5) None of the ground-water criteria cited in §174C-44, HRS, has been met to support the designation of the island as a water management area according to the following analysis:

Criterion 1.

Whether an increase in water use or authorized use may cause the maximum rate of withdrawal from the ground water source to reach ninety percent of the sustainable yield of the proposed water management area.

Discussion

From the analysis of existing data and methodology used by hydrologists in determining a sustainable yield for the island of Lanai, the estimate of 6 mgd for potable water from high-level dike aquifer is considered reasonable. A sustainable yield for the basal aquifer is unknown although it is anticipated that it can supply useful non-potable water.

Maximum future projected potable water demand on the high-level aquifer from all projects could reach 4.5 mgd. This demand is based on conservative estimates and consideration of maximum demands stated from all development related reports. In light of updated information regarding projected potable demand, the Findings of Fact total future demand on the high-level aquifer is sufficiently conservative.

Given a sustainable yield of 6 mgd and a total projected future demand of 4.5 mgd, the maximum annual average withdrawal from Lanai's high-level ground water source would be 75%. This condition would not warrant designation although the Commission, pursuant to §174C, HRS, may coordinate an informational meeting for all water users to devise mitigative measures.

Development of new and/or modification of existing well sources is necessary to increase the present potable water supply infrastructure's ability. Such efforts are presently underway while additional alternative non-potable sources are also being pursued. Once potable hardware is in place, it should not be ignored that if planned alternative non-potable water sources fail to materialize then withdrawals from the high-level aquifer could reach the 90% of its the sustainable yield.

Conclusion: NO DESIGNATION

Criterion 2.

There is an actual or threatened water quality degradation as determined by the Department of Health.

Discussion

There is no evidence of water quality degradation. Neither the Department of Health nor any individual has found or shown actual or threatened water quality degradation on Lanai.

Conclusion: NO DESIGNATION

Criterion 3.

Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels.

Discussion

Declining groundwater levels have been observed in wells with a significant drop in recent years. These water level reductions have been mainly due to the increase of pineapple irrigation from the introduction of full time drip irrigation combined with the recent drought conditions experienced throughout the state.

Future reductions in head levels will affect well configurations rather than the high-level ground water supply. If wells are modified then reduction in water table levels can be tolerated without harming the ground water supply for future needs.

Conclusion: NO DESIGNATION

Criterion 4.

Whether rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upcoming or encroachment of salt water.

Discussion

None of the existing wells have exhibited any evidence that upconing or salt water encroachment will be a problem. Recently drilled exploratory well Nos. 9 and 10 have yielded warm and brackish water from the Palawai basin but there is no reason to believe that, if developed, these wells would endanger other wells or the stability of the entire high-level ground water aquifer.

Conclusion: NO DESIGNATION

Criterion 5.

Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses.

Discussion

There has not been any observable chloride concentration increases in existing wells over the past 50 years. Recently drilled wells 9 & 10 show high chloride contents which are due to geothermal activity isolated within the Palawai calders.

Conclusion: NO DESIGNATION

Criterion 6.

Whether excessive preventable waste is occurring.

Discussion

No comment has been made through petitions or testimony regarding preventable waste and there is no evidence of excessive preventable water waste occurring on Lanai. However, the 180 gpd per capita on Lanai is slightly high compared to normal domestic use elsewhere in the state.

Conclusion: NO DESIGNATION

Criterion 7.

Serious disputes respecting the use of ground water resources are occurring.

Discussion

Since there is a single private purveyor and developer of water on Lanai, actual serious disputes are not now and have not occurred on the island in the sense that there are separate competing water wells drawing from a common aquifer. However, some dispute has arisen based on speculation that future water from the sole purveyor may be allocated to the disadvantage of the residents of Lanai should drought conditions or unforeseen events limit water withdrawals.

Conclusion: NO DESIGNATION

Criterion 8.

Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels.

Discussion

Ground water levels have declined since water development began on Lanai but at a relatively safe rates given the elevations of the water tables and their corresponding responses to region wide pumping. Recent increases in pumpages due to drip irrigation and development construction will lower water levels which should later stabilize at an equilibrium head. It is foreseen that future needs will be met without harm to the high-level aquifer according to the planning efforts of Lanai Company.

Conclusion: NO DESIGNATION

CONCLUSION:

None of the groundwater criteria cited in HRS §174C-44 has been met to support the designation of Lanai as a water management area.

RECOMMENDATIONS:

Given the findings of its investigation and the conclusions reached, the staff recommends that the Island of Lanai not be designated as a water management area at this time. In light of present information staff further recommends that the Commission take the following actions to protect Lanai's water resources:

1. Require Lanai Company to immediately commence monthly reporting of water use to the Commission, under the authority of Chapter §174C-83, HRS, which would include pumpage, water level, temperature, and chloride measurements from all wells and shafts;

2. In addition to monthly water use reporting and pursuant to Sects. 174C-43 & 44, HRS, require Lanai Company to monitor the hydrologic situation so that if and when ground-water withdrawals reach the 80-percent-of-sustainable-yield rate, the Company can expeditiously institute public informational meetings in collaboration with the Commission to discuss mitigative measures;

3. Require Lanai Co. to formulate a water shortage plan that would outline actions to be taken by the Company in the event a water shortage situation occurs. This plan shall be approved by the Commission and shall be used in regulating water use on Lanai if the Commission should exercise its declaratory powers of a water emergency pursuant to Section 174C-62(g) of the State Water Code. A draft of this plan should be available for public and Commission review no later than the beginning of October 1990 and shall be approved by the Commission no later than January 1991;

4. That the Commission hold annual public informational meetings on Lanai during the month of October to furnish and receive information regarding the island's water conditions. The public shall be duly notified of such meetings;

5. Authorize the Chairperson to re-institute water-management-area designation proceedings and, hence, re-evaluations of ground-water conditions on the island if and when:

   a. The static water-level of any production well falls below one-half its original elevation above mean sea level, or

   b. Any non-potable alternative source of supply contained in the Company's water development plan fails to materialize and full land development continues as scheduled.

   c. Items 1, 2, and 3 are not fulfilled by Lanai Company.

   d. If normal water use exceeds 4.3 mgd.

Respectfully submitted,

MANABU TAGOMORI
Deputy Director

Attach.

APPROVED FOR SUBMITTAL

WILLIAM W. PATY, Chairperson

ORDINANCE NO. 2133

BILL NO. 16 (1992)

A BILL FOR AN ORDINANCE TO ESTABLISH ZONING IN PD-L/1 (MANELE) PROJECT DISTRICT (CONDITIONAL ZONING) FOR PROPERTY SITUATE AT MANELE, LANAI, HAWAII

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Pursuant to Chapter 19.510 of the Maui County Code, PD-L/1 (Manele) Project District Zoning (conditional zoning) is hereby established, subject to Section 2 of this ordinance, for that certain parcel of land located at Manele, Lanai, Hawaii, identified for real property tax purposes by Tax Map Key Number 4-9-02:01 (portion), comprised of approximately 138.577 acres, more particularly described in Exhibit "1", which is attached hereto and made a part hereof, and in Land Zoning Map No. 2607, which is on file in the Office of the County Clerk of the County of Maui and which is by reference made a part hereof.

SECTION 2. Pursuant to Section 19.510.050 of the Maui County Code, the zoning established by this ordinance is subject to the conditions set forth in Exhibit "2", which is attached hereto and made a part hereof, and the Unilateral Agreement and Declaration for Conditional Zoning, which is attached hereto and made a part hereof as Exhibit "3".

SECTION 3. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

GARY W. HAKIAN

Deputy Corporation Counsel
County of Maui

EXHIBIT "2" (MANELE)

**Conditions**

Pursuant to Section 19.510.050 of the Maui County Code, the zoning established for the parcels of land shall be subject to the following conditions:

*1. The Declarant will establish a loan fund of $1,000,000.00 to be administered and managed by the Bank of Hawaii, in consultation with Lanai Resort Partners for the purpose of assisting current Lanai City merchants with improvements of their commercial facilities. Loans will be made available to the merchants from the date of the Unilateral Agreement and for a minimum of 10 years thereafter, at an annual rate of 2% per annum below the Bank of Hawaii's prevailing commercial loan rate for similar type loans. Also, the loan qualifications and pay back methods shall not exceed those required by the Bank of Hawaii for their commercial loans. Written notice that the loan fund of $1,000,000.00 is available for disbursement to qualified Lanai City merchants shall be given by Bank of Hawaii to said merchants, the Mayor of the County of Maui and the Chairperson of the County Council and the Chairperson of the Planning and Economic Development Committee. Written notice of the expiration of the loan fund shall be given to the above-named persons one (1) year prior to such expiration.

*2. The Declarant shall on a fee simple basis, donate at no cost and free and clear of all mortgage and lien encumbrances, 115 acres of land adjacent to the Lower Waialua Single Family site to the County as shown in Exhibit "A" (shaded area) attached hereto and by reference made a part hereof, for an affordable housing project. The project shall be similar in design quality and density to the recent affordable housing developments on Lanai.

*3. The Declarant shall on a fee simple basis, donate at no cost and free and clear of all mortgage and lien encumbrances, a minimum of one acre of land on Lanai to the County for use as a veteran's cemetery.

*4. The Declarant shall consummate a land exchange with the County for a new police station upon terms and conditions acceptable to Declarant and the County.

5. The Declarant will use only non-potable water, as defined in Ordinance No. 2066 enacted by the County on December 17, 1991, for the irrigation of the Golf Course in the Manele Project District.

WE HEREBY CERTIFY that the foregoing BILL NO. 16 (1992 )

1. Passed FINAL READING at the meeting of the Council of the County of Maui, State of Hawaii, held on the 17th day of July , 19 92 , by the following votes:

| Howard S. KIHUNE Chair | Patrick S. KAWANO Vice-Chair | Vince G. BAGOYO, Jr. | Goro HOKAMA | Alice L. LEE | Ricardo MEDINA | Wayne K. NISHIKI | Joe S. TANAKA | Leinaala TERUYA DRUMMOND |
|---|---|---|---|---|---|---|---|---|
| Aye | Aye | Aye | Excused | Aye | Aye | Aye | Aye | Excused |

2. Was transmitted to the Mayor of the County of Maui, State of Hawaii, on the 17th day of July , 19 92 .

DATED AT WAILUKU, MAUI, HAWAII, this 17th day of July , 1992 .

HOWARD S. KIHUNE, CHAIR
Council of the County of Maui

DARYL T. YAMAMOTO, COUNTY CLERK
County of Maui

THE FOREGOING BILL IS HEREBY APPROVED THIS 27 DAY OF July , 19 92.

LINDA CROCKETT LINGLE, MAYOR
County of Maui

I HEREBY CERTIFY that upon approval of the foregoing BILL by the Mayor of the County of Maui, the said BILL was designated as ORDINANCE NO. 2133 of the County of Maui, State of Hawaii.

DARYL T. YAMAMOTO, COUNTY CLERK
County of Maui

Passed First Reading on February 21, 1992.
Effective date of Ordinance July 27, 1992.

I HEREBY CERTIFY that the foregoing is a true and correct copy of Ordinance No. 2133 , the original of which is on file in the Office of the County Clerk, County of Maui, State of Hawaii.

Dated at Wailuku, Hawaii, on

County Clerk, County of Maui

ORDINANCE NO. 2066

BILL NO. 93 (1991)
Draft 1

A BILL FOR AN ORDINANCE PERTAINING TO
THE USE OF POTABLE WATER FOR GOLF COURSES

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Title 20 of the Maui County Code is amended by adding thereto a new chapter to be designated and to read as follows:

"Chapter 20.24

RESTRICTIONS ON USE OF POTABLE WATER FOR GOLF COURSES

Sections:



20.24.010 Purpose. The council finds that potable water must be limited to personal use in homes and businesses. The county must be assured that an adequate supply of such water will be available for current and future needs.

A golf course can use as much as one million gallons of water per day for irrigation and other non-domestic purposes and it is inappropriate to use potable water for such a purpose. The purpose of this ordinance is to prevent the use of potable water for irrigation and other non-domestic purposes at golf courses by restricting the approval of any permit necessary for golf course construction, if that golf course cannot show that it will use a non-potable source of water.

20.24.020 Definitions. For purposes of this chapter, unless it is plainly evident from the context that a different meaning is intended, certain terms and words are defined as follows:

"Building" shall have the same meaning as defined in the uniform building code as adopted, amended or replaced by the county.

"Grading" shall have the same meaning as defined in chapter 20.08 of the Maui county code.

"Grubbing" shall have the same meaning as defined in chapter 20.08 of the Maui county code.

"New golf course" means all golf courses which are not in operation prior to the effective date of this ordinance and whose development requires approval of a community plan amendment and rezoning of the golf course properties by the county council after the effective date of this ordinance.

"Non-domestic use" means water used for purposes other than drinking, bathing, heating, cooking and sanitation.

"Permit" means the official document or certificate issued by the county authorizing the grading or grubbing of a parcel or the construction of any building or structure.

"Potable water" means surface water which has been treated and satisfies standards set forth in chapter 20 of the state department of health rules entitled "potable water systems" and maximum contaminant level goals and national secondary drinking water contaminants set forth in 40 C.F.R. section 141 and 143 (1990), and ground-water extracted at an acceptable rate and and containing less than 250 milligrams per liter (mg/l) chlorides and which can be disinfected to satisfy standards set forth in the department of health rules chapter 20 entitled "potable water systems" and maximum contaminant level goals and national secondary drinking water contaminants set forth in 40 C.F.R. section 141 and 143 (1990).

"Reclaimed water" means effluent resulting from the treatment of sewage which has been disinfected and determined by the Department of Health to be appropriate for irrigation and non-domestic usage.

"Structure" shall have the same meaning as defined in title 18 of the Maui county code, the subdivision ordinance.

20.24.030 Restrictions on the approval of permits. A. Prior to approval of any permit for any new golf course, the permit application shall be transmitted to the department of water supply for its review and recommendations. The department shall consider whether potable water will be used for irrigation and other non-domestic purposes.

B. No permits shall be approved for any new golf course if potable water is to be used for irrigation

and other non-domestic purposes.

C. If the state commission on water resource management designates a water management area pursuant to chapter 174C, Hawaii revised statutes, withdrawals or diversions shall be pursuant to that chapter.

D. This ordinance shall not be construed to prevent the use of reclaimed water for irrigation and other non-domestic purposes.

20.24.040 Severability. If any provision of this ordinance or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this ordinance that can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable."

SECTION 2. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:

HOWARD M. FUKUSHIMA
Deputy Corporation Counsel
COUNTY OF MAUI
b:\ords\golf\epg

WE HEREBY CERTIFY that the foregoing BILL NO. 93 (1991), Draft 1

1. Passed FINAL READING at the meeting of the Council of the County of Maui, State of Hawaii, held on the 6th day of December, 1991, by the following votes:

| Howard S. KIHUNE Chair | Patrick S. KAWANO Vice-Chair | Vince G. BAGOYO, Jr. | Goro HOKAMA | Alice L. LEE | Ricardo MEDINA | Wayne K. NISHIKI | Joe S. TANAKA | Leinaala TERUYA DRUMMOND |
|---|---|---|---|---|---|---|---|---|
| Aye | Aye | Aye | Aye | Aye | Aye | Aye | Excused | Aye |

2. Was transmitted to the Mayor of the County of Maui, State of Hawaii, on the 6th day of December, 1991.

DATED AT WAILUKU, MAUI, HAWAII, this 6th day of December, 1991.

RECEIVED
1991 DEC -6 PM 3:02
OFFICE OF THE MAYOR

HOWARD S. KIHUNE, CHAIR
Council of the County of Maui

DARYL T. YAMAMOTO, COUNTY CLERK
County of Maui

THE FOREGOING BILL IS HEREBY APPROVED THIS 17 DAY OF DECEMBER, 1991.

LINDA CROCKETT LINGLE, MAYOR
County of Maui

I HEREBY CERTIFY that upon approval of the foregoing BILL by the Mayor of the County of Maui, the said BILL was designated as ORDINANCE NO. 2066 of the County of Maui, State of Hawaii.

DARYL T. YAMAMOTO, COUNTY CLERK
County of Maui

Passed First Reading on November 1, 1991.
Effective date of Ordinance December 17, 1991.

RECEIVED
1991 DEC 17 PM 3:56
OFFICE OF THE MAYOR

I HEREBY CERTIFY that the foregoing is a true and correct copy of Ordinance No. 2066, the original of which is on file in the Office of the County Clerk, County of Maui, State of Hawaii.

Dated at Wailuku, Hawaii, on

County Clerk, County of Maui

# Results of an Extended Pump Test of Wells 1 and 9

*Prepared for*

Lanai Water Company, Inc.
1223 Fraser Avenue
Lanai City, Hawaii 96763

*Prepared by*

Tom Nance Water Resource Engineering
680 Ala Moana Boulevard - Suite 406
Honolulu, Hawaii 96813

August 1993



2825

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## Introduction

This report presents the results of an extended pump test of Wells 1 and 9 which are located in Lanai's Palawai Basin. Both of these wells draw water from high level, brackish groundwater compartments. It is the intention of the Lanai Water Company to deliver water from these wells for golf course and other landscape irrigation at Manele Resort. Because the intended use rate is greater than levels of historic use, the response of the wells to extended pumping is of significant interest.

In June 1993, Lanai Company completed construction of a 15-million gallon (MG) open reservoir on the outer edge of Palawai Basin. The storage it provides is in integral part of the Manele Resort's irrigation system. The necessity to fill the reservoir while also supplying the golf course's ongoing irrigation and dust control requirements provided an opportunity to conduct an extended pump test of both wells. This report provides a compilation of the data and results of this test.

## Background Information

Well 1 was developed in 1948 for pineapple irrigation. The well is 1266 feet deep, terminating three feet below sea level. Its original water level was reportedly 818 feet above sea level. The original chloride concentration may have been in the range of 750 milligrams per liter (MGL), but this value cannot be confirmed and it is not known if it was a pumped or grab sample. The plantation's use of the well in the years since 1948 was modest and sporadic. Peak use occurred in the 1975 through 1989 period when the 15-year average was 0.27 MGD. During the peak year, 1984, the average was 0.43 MGD. Figure 1 depicts the well's pumpage since 1948 and available water level data since 1950. Chloride data is not available for most of this period. However, since 1991, chlorides have consistently been in the range of 320 to 350 MGL.

The pilot hole of Well 9 was drilled in 1990 to a depth 1450 feet, ending nine feet below sea level. The water level stood approximately 840 feet above sea level. A temperature profile in the pilot hole by DOWALD personnel showed a steady increase from 80° F. at the top of the water to 101° F. near the bottom. The well was reamed and cased to a depth of 775 feet (about 665 feet above sea level), with cuttings from the reaming process filling the pilot hole below 775 feet. Pump tests at 340 GPM showed a drawdown of 105 feet and a chloride level of approximately 550 MGL. Just prior to installation of a permanent pump in May 1993, the well was deepened by 200 feet. The well's performance with its new depth of 975 feet is substantially better. Drawdown is just 25 feet at 360 GPM. The water produced is also less saline; the chloride concentration is about 400 MGL.

The proximity of Wells 1 and 9 to several potable wells which are located further upslope and tap into higher groundwater compartments is shown on Figure 2. Figure 3 is a geologic cross section which illustrates relative water levels, chloride concentrations, and temperatures in all of these wells. Based on water levels and responses to pumping, each of these wells tap into physically distinct compartments. Chlorides and temperature increase and water levels decrease in these compartments with distance away from the mountain's crest. Wells 9 and 10 in Palawai Basin have substantially greater chlorides and higher temperatures than any of the potable wells. Well 10, which is located at the outer edge of Palawai Basin, has an even greater salinity and temperature than Wells 1 and 9. The

is how it's going to do, I'm not comfortable doing that. What we have got is a real time model, the groundwater model. Every 28 days we get comprehensive data. Groundwater responses are relatively slow. We have got plenty of time to react, respond, moderate, change the way we extract water.

So I take the ground truth over the model, but yes, it's true, the model can, you put something in, you get something out, no question.

Q Mr. Nance, were you involved in any of the decisions on how much water to use on irrigating the golf course to establish ground cover for areas that have been exposed or disturbed by grading in other construction activity?

A No.

Q So you didn't indicate to them how much water was available for their use for that purpose?

A No.

Q That was a decision made by the company?

A I would assume.

Q Mr. Nance, in terms of the interconnectedness of these various compartments or dikes, isn't it true that -- would you agree with Mr. Mink that you must treat the high level aquifer as a single unit?

A I'm not sure John would buy off on that statement. Obviously, it's physically interconnected mass of lava, so you can treat it as one in that respect, sure.

Q So are you familiar with -- do you recall Mr. Mink testifying -- I mean providing information that in fact a high level aquifer should be treated as a single unit?

A I'm not aware of that.

Q May I approach the witness to hand him a copy of I-7?

CHAIRMAN HOE: Yes.

Q (By Mr. Murakami): Doesn't Mr. Mink say on page one, individual aquifers are small but they are hydrologically connected to the extent that the area of high level water can be treated as a single unit in determining sustainable yield at the resource?

A That's what it says.

Q Do you agree with that statement?

A In terms of the sustainable yield of the entire thing, sure. I mean they are interconnected, there is no question.

Q So the high level aquifer must be treated as a single unit for purposes of establishing sustainable yield?

A I don't even know what that means, actually. If you want a single number, you'll have to do that.

Q I'm sorry, I thought you agreed with the statement. Do you know what it says?

A I agree with the fact that it is all interconnected, and if you want to find out how it performs, you got to relate

one compartment to the next.

Q Simple question. Do you agree with the statement or don't you?

A Well, I tell you what I have a problem with, because I don't think we're at a point in our state of knowledge where we have enough information about the aquifer itself, either through pumping or through the numerical model to define the sustainable yield that way.

Essentially what John did is he calculated the recharge rate and he used an equation to determine how much of the recharge rate could be developed a sustainable yield for a given drawdown.

The recharge is really the key, the state of knowledge of where we are, the recharge number is the key.

Q Mr. Mink, are you -- I'm sorry. Mr. Nance, are you saying that Mr. Mink is wrong about the interconnection between the high level aquifer where the potable wells are and the Palawai Basin aquifer where Wells 1 and 9 are?

A I think they are interconnected. I think there's leakage from high to low, no question.

Q So if you pump from the low, then there will be leakage of potable water into the Palawai Basin. ?

A The question is whether that pumpage induces such leakage. That is yet to be demonstrated.

Q So you can't tell this Commission today that there

water does leak naturally from upgradient compartments to lower ones. Some of that downgradient leakage ultimately goes into high-level dike-confined compartments in Palawai Basin.

In general, the leakage from one compartment to the other if it's not by a flowing over the top of a dike but rather through it, would be expected to be in proportion to the water level difference on the other side of the dike. That's the motivating force of the leakage through the dike.

This suggests, then, that if you draw the water level down in Palawai Basin it could increase the leakage in the groundwater compartment directly upgradient to it. And this in turn could ultimately impact the next compartment in a similar way and work its way on back upstream.

As we've seen in the records of at least as Wells 1 and 9 the pumpage over the last 14 years has caused a water level decline. That does mean that it's likely that or it's possible, anyway, that the water level difference between the compartment tapped by 1 or the compartment tapped by 9 is greater now than it was to the upgradient compartment than it was before.

However, as I also indicated before, we don't have any idea how many different compartments there are between the Well 1 compartment and the nearest potable well upgradient or Well 9 compartment and the nearest upgradient.

So the best you can do is to continually monitor the upgradient wells to see if you can see any impact of what is

happening in Palawai Basin. So that's what the series of exhibits of 111 to 118 are designed to try to, or attempt to try to illustrate.

If you look at Well 2 Shaft 3 record that's on 111, there's, 111 is the water level which doesn't seem to show much of anything except you've got a decrease of water level that's popped right back up. And basically they stopped recording toward the end of 2002.

Its chlorides don't show any trend in particular other than a fairly noisy record of a lack of precision in the chloride analysis itself.

Q. Mr. Nance, why do you look at Well 2 Shaft 3, Well 3 and Well 4 first?

A. These are the nearest wells upgradient.

Q. I see.

A. Directly upgradient. Well 2 Shaft 3 is the nearest to Well 1.

Q. So if there were an impact you would expect to see it there first?

A. Yeah. Lanai Well 4, which is Exhibits 113 and 114, is further away and you wouldn't expect to see somethin' there if you didn't see it in Well 2 Shaft 3. Basically you don't see anything happening in that well either as water level change or as chloride change over the last 14 years.

Well 3 is, again, a little farther away than Well 2

Shaft 3. Exhibits 115 and 116 look at their water levels and their chlorides. And again you don't see any impact happening in the upgrade potable wells during the 14 year period of the, call it the peak use of the Palawai Basin wells.

One seventeen and 118 are an attempt by me to show potentially how tight these dike compartments are and how the connectivity between them is rather indirect or not very fast.

Q. (By Mr. Lamon) Mr. Nance, I'm sorry. When you say "tight" do you mean impermeable?

A. Less impermeable yeah, or impermeable, poorly permeable. Well 2 was developed in the late '40s. It's a drilled well. And Shaft 3 was developed in, I think, 1954, and it's a skimming tunnel that when it hits its basement intercepts Well 2, and goes horizontally beyond Well 2 as a horizontal development tunnel.

That excavation pierced a dike which is about 25 feet away from Well 2. So the bulk of the Shaft 3 was finished by bulkheading right along the line of that dike. It's a reinforced concrete thing with a pipe through it and a valve and a pump.

And it shut off the water from coming in and flooding the pump floor and has allowed the water level behind that dike and bulkhead to build up.

That dike is about 25 feet away from Well 2. So it's the closest example you can get of one compartment adjacent to the other. And I have the ability to measure water levels and

pumpages from two adjacent compartments. They're not down at Palawai. They're up in high-quality potable water. But they're next to each other. As far as we know only one dike separates them.

So I looked for a period in the record of Well 2 and Shaft 3 where the shaft wasn't pumped and Well 2 was. The water level behind the shaft is 60, 70, 80 feet higher than the water in Well 2.

The water in Well 2 is actually below the pump floor. And the water behind the bulkhead in Shaft 3 is actually built up pressure above the floor.

And there is a period October '67 and March '68, a six month period, where Shaft 3 was used essentially not at all. And Well 2 was pumped at an average of a little over a quarter million gallons a day.

We have a sample here where we can say, "I pumped from this compartment. Did I see a water level response in the compartment right next to it?"

And if you look at 118 and you look at the water levels on 118 which is the water levels in Shaft 3, you can see that the water level in Shaft 3 increased continuously despite the fact that the compartment right next to it was being pumped. Not only that but the rate of increase is consistent with any other rate of increase throughout the entire period of record I've got shown here.

So you've got just one dike compartment away taking a quarter million gallons here and the compartment next door with the water level 70 or 80 feet higher as a static level. And when you turn well pump, the pump on in Well 2 its drawdown is about 30 feet, now you got a more than a hundred foot difference in water level one dike compartment away and you cannot see, you can't track an effect.

So clearly the leakage between that dike, between those two compartments is relatively small. Not saying it doesn't exist but it's clearly not identifiable in the record.

When you've got between this nearest potable well and Well 1 down at Palawai Basin, a number of these dike compartments in between, you can see that creating an effect by drawing the water level in Well 9 and expecting to have an effect in Well 2 it's gonna be a remote possibility or it's going to be relatively small, maybe not something you can see.

CHAIRPERSON SAKUMOTO: Let me ask you this before we go on because I know you've got a lot more charts to go through. And I appreciate the effort that went into putting these together.

So that we have the benefit of understanding the relevance of all the data that you're going through for us, I think you were alluding to it at the end of your statement just there.

But on the issue of whether the Petitioner utilized

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

| | |
|---|---|
| In the Matter of the Petition of<br><br>LĀNA`I RESORTS, LLC<br><br>To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna`i, should revert to its former Agricultural and/or Rural land use 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. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.). | DOCKET NO. A89-649<br><br>**CERTIFICATE OF SERVICE** |

## CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the **PETITIONER LĀNA`I RESORTS, LLC's STATEMENT OF POSITION; EXHIBITS A – H; CERTIFICATE OF SERVICE** was served upon the following as indicated below:

| | |
|---|---|
| BRYAN C. YEE, ESQ.<br>DAWN TAKEUCHI APUNA, ESQ.<br>Department of the Attorney General<br>Hale Auhau, Third Floor<br>425 Queen Street<br>Honolulu, Hawaii 96813<br>Attorney for State Office of Planning | Via U.S. Postal Mail |
| LEO R. ASUNCION, Jr., AICP, Director<br>Office of State Planning<br>235 South Beretania Street, 6th Floor<br>Honolulu, Hawaii 96813 | Via U.S. Postal Mail |

| | |
|---|---|
| WILLIAM SPENCE, Director<br>Planning Department, County of Maui<br>2200 Main Street<br>One Main Plaza, Suite 315<br>Wailuku, HI 96793 | Via U.S. Postal Mail |
| PATRICK K. WONG, ESQ.<br>MICHAEL HOPPER, ESQ.<br>Office of the Corporation Counsel<br>200 South High Street<br>Wailuku, Hawaii 96793 | Via U.S. Postal Mail |
| DAVID KOPPER, ESQ.<br>LI`ULA NAKAMA, ESQ.<br>Native Hawaiian Legal Corporation<br>1164 Bishop Street, Suite 1205<br>Honolulu, Hawaii 96813<br>Attorney for Intervenor<br>LANAIANS FOR SENSIBLE GROWTH | Via U.S. Postal Mail |

DATED: Honolulu, Hawaii, August 12, 2016.

BENJAMIN A. KUDO
CLARA PARK
Attorneys for
LĀNA`I RESORTS, LLC