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LAND USE COMMISSION  
STATE OF HAWAII

2016 SEP -8 P 3:01

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of

LĀNA`I RESORTS, LLC

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

**PETITIONER LĀNA`I RESORTS,  
LLC'S STATEMENT OF THRESHOLD  
ISSUES RE: MINUTE ORDER NO. 4;  
APPENDIX "A"; CERTIFICATE OF  
SERVICE**

**PETITIONER LĀNA'I RESORTS, LLC'S STATEMENT OF THRESHOLD ISSUES**  
**RE: MINUTE ORDER NO. 4**

On September 2, 2016, the State Land Use Commission (LUC or **Commission**) filed “**Minute Order No. 4**”. Minute Order No. 4 presents three issues identified as Issues a), b), and c), as follows:

- a) What did the Commission mean by the word "potable" in Condition 10 of the Decision and Order dated April 16, 1991?
- b) Based on the entirety of the record, was the intention of Condition 10 to ensure that:
  - i. there would merely be no direct use of potable water by the golf course; or
  - ii. in addition to prohibiting use of potable water for irrigation, there should be no implementation of irrigation that would negatively affect potable water in the high level aquifer?
- c) Does the pumping of water for golf course irrigation negatively affect past, current or future uses of potable water, from the high level aquifer?

Petitioner LĀNA'I RESORTS, LLC (**Lanai Resorts**) believes these issues raise additional, related issues. These additional issues may affect the issues presented in Minute Order No. 4, and are submitted herein to provide the parties and the Hearings Officer with ample notice and opportunity to prepare and discuss these additional issues.

- A. **Additional Issue: Whether the pursuit of any issue which seeks to determine the intent of the Commission in 1991 as to the specific meaning of words or phrases of Condition 10 is beyond the scope of the remand orders, and therefore reversible error**

In 2016, the Intermediate Court of Appeals (ICA) remanded this case back to the LUC with the following explanation:

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.

*Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai`i 298, 369 P.3d 881 (App. 2016) (emphasis added).

The exact words of the Hawaii Supreme Court’s remand order in 2004 were as follows:

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. . . . Accordingly, we remand the issue of whether LCI has violated Condition No. 10 by utilizing potable water from the high level[.]

*Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai`i 296, 316, 97 P.3d 372, 392 (2004)

In short, as the ICA stated, the purpose of the remand was not to “clarify what was *intended* by Condition No. 10.” *Lanaians*, 137 Hawai`i 298. However, as currently drafted, the issues presented in Minute Order No. 4 appear to call for an examination into the *intent* of LUC when it drafted Condition 10. This pursuit is very similar to what the 2006 hearings addressed, which the ICA subsequently considered to be inconsistent with the Hawaii Supreme Court’s remand order.

Lanai Resorts believes that the remand orders restrict the LUC from making any findings or conclusions that attempt to clarify the LUC’s intent underlying Condition 10 or the rest of the April 16, 1991 Findings of Fact, Conclusions of Law, and Order (1991 D&O). Under the remand orders, the LUC can only “clarify its findings and conclusions regarding whether Lanai Resorts violated the prohibition against the use of potable water in Condition No. 10[.]” *Id.* That is, we

are allowed to clarify the findings of fact and conclusions of law contained within the 1996 Show Cause Order.

This proceeding is a remand of the LUC's 1996 Show Cause Order. While the LUC can clarify or make additional findings and conclusions regarding the 1996 Show Cause Order, it cannot clarify, amend, or make any additional findings or conclusions regarding the 1991 D&O. The 1991 D&O was never appealed, and it was never addressed or remanded by the appellate courts. Therefore, the 1991 D&O must remain as it is.

Lanai Resorts understands that determining whether Lanai Resorts violated Condition 10 requires understanding what Condition 10 means. However, that meaning must be derived from the plain language of Condition 10 and the 1991 D&O. The meaning should not be derived from an attempt to read outside of the 1991 D&O, and to reach into the hearts and minds of the Commissioners in 1991. The 1991 D&O is the sole and controlling expression of the LUC's intent. Any attempt to clarify or amend the 1991 D&O, *even if supported by the record*, is beyond the scope of the remand orders of the courts.

Based on the other parties' submissions, it appears the other parties have taken a similar position. The Office of Planning's (OP) Testimony cited and agreed with Intervenor Lanaians for Sensible Growth's (LSG) Positional Statement, which argued that the "Hearings Officer does not need to, and should go no further than Condition 10 to determine the intent of the 1991 Commission in using the term 'potable water.'" *OP Testimony, Exhibit OP No. 2 at 2-3, LSG Positional Statement at 8.*

Issue (a) of Minute Order No. 4 appears to call for a determination of the LUC's intent that goes beyond the plain language of the 1991 D&O. Issue (a) requires the LUC to clarify

Condition 10 and make additional findings or conclusions that will affect the 1991 D&O, which is not the purpose of the remand.

Issue (b) of Minute Order No. 4 again seeks a determination of the LUC's intent. Again, Lanai Resorts believes that any attempt to clarify or expand the meaning of "using" potable water equates to amending the 1991 D&O and is therefore beyond the remand orders' scope. As stated by the County of Maui, "Condition 10 only restricts LR from using potable water for irrigation of the golf course. Condition 10 could have been worded to prohibit the use of potable water that seeps into the irrigation wells or to prohibit the indirect use of potable water; but the condition was not so worded." *Testimony of the Maui Planning Department*, filed August 11, 2016, at 4.

If one examines the record of the 1991 D&O proceedings, there is no indication that the "leakage" or indirect use of potable water was debated, argued, or even contemplated as a violation of Condition 10. The record shows that the Petitioner's experts openly presented exhibits and hearing testimony that described the leakage phenomenon as a naturally-occurring feature of the aquifer. Appendix "A" attached hereto provides portions of the 1991 D&O proceeding records in which the leakage theory was discussed. Nothing in the 1991 D&O, or in the examination of these witnesses, indicated that leakage equated to a use of potable water, or vice versa.

**B. Additional Issue: Whether Issue c) of Minute Order No. 4 is a re-litigation of issues resolved by the LUC in the 1991 D&O, and is therefore beyond the scope of the remand orders**

Issue (c) of Minute Order No. 4 states, "Does the pumping of water for golf course irrigation negatively affect past, current or future uses of potable water, from the high level aquifer?"

Preliminarily, Lanai Resorts believes that this issue is stated too broadly. If left to stand, it is vague and general and could engender multiple interpretations of its meaning. For instance, what constitutes a “negative effect”? How is it measured? What constitutes a “use” of potable water? For example, if a party proposes a future use but presents no plans for implementation, does that proposal constitute a “future” use? Is the LUC’s determination on this issue to supplant the findings of the County through the Lanai Water Use and Development Plan, and the State Commission on Water Resource Management’s March 29, 1990 decision on a petition that sought to designate Lanai as a water management area?

More importantly, Lanai Resorts believes this issue has been addressed and resolved by the LUC via its 1991 D&O. Before issuing the 1991 D&O, the LUC held nearly two weeks of hearings on the Petitioner’s petition. During those hearings, Petitioner presented evidence about the effects of its proposed development, and all of the parties (including LSG) and the Commissioners had the opportunity to question Petitioner.

During the 1991 D&O proceedings, Petitioner presented two expert witnesses who presented reports and testimony that addressed the proposed development’s effects on water resources. James Kumagai was qualified by the LUC as an expert witness in civil, sanitary, and environmental engineering. Dr. Kumagai and his firm, M & E Pacific, were retained to prepare a Water Resources Development Plan, and Dr. Kumagai testified about this study:

[By James Funaki, Esq., for the Petitioner]

Q. Mr. Kumagai, let me refer you to Petitioner’s Exhibit number 14, which is entitled Water Resources Development Plan for the Island of Lanai, Lanai, Hawaii . . . . Will you describe the purpose and objective of this study?

**A. The purpose and objective of that study was to first of all determine how much water there is, then determine how much water Lanai needs for the future, and to suggest the best strategy for development of that water resource.**

Q. And were **the proposed development of the Manele golf course and development of the uses pursuant to the Manele project district**, considered in the uses projected under your study?

A. Yes.

\* \* \* \*

Q. When you're considering a water resource development plan, Mr. Kumagai, what are the criteria that you use to determine your plan?

A. Well, there are actually three sets of criteria that we look at and consider when we develop the water plan. **First of which is the resource question, how much water there is, how much we need, et cetera, the balancing to make sure we have enough water and we don't over commit. . . .**

Q. So under your study, can all these criteria be met?

A. That is correct.

\* \* \* \*

Q. **Has there been any regulation, if at all, by the State Water Commission in so far as the Lanai water source and the draft?**

A. **Yes, the Water Commission evaluated the issue of whether to designate the area as a critical water area. Now, the conclusion from the – or the decision of the Water Commission is that when the annual average yield reaches 4.3 MGD, it will automatically reinstitute the intervention proceedings. This is the way I understand it.**

Now, if we look at the structure from a policy standpoint—attorneys look at it from a legal—from a policy standpoint, there are some check points embodied in the State Water Code, and this is something that we, M & E Pacific, had also suggested in the water development plan.

Basically it's not prudent, in the feelings of many people, if we have our resources, to commit it all right now, and hold the future generation or the future years accountable for the commitment made earlier. So it's always something short of that.

Now, the State Water code refers to a sustainable yield, and there is to be a designation process at 90 percent of the sustainable yield,

and there is also a check point at 80 percent of the sustainable yield, and the language in the Water Code says something to the effect that the Water Commission at that point may invite the affected parties to a public hearing for the purpose of assessing the situation and finding remedies, et cetera.

In other words, there is institutionalized these check points, 6.0 is the sustainable yield, 90 percent of that is 5.4 MGD, 80 percent of that is 4.8 MGD.

**The Water Commission, through their decision in the latest proceedings, came up with a seven[ty] percent, which is a 4.2 MGD. . . . So that is my understanding of the meaning of the situation, in coming from the idea that there was always a need, as a water management strategy, to have these checkpoints built into the whole development plan.**

\* \* \* \*

**Q. Based on your Water Resources Development Plan, is it your opinion that the additional Manele golf course will not result in significant adverse impact on the overall resources of the Island of Lanai?**

**A. No, the golf course water source has already been said by the company that it's going to use alternate sources.**

Transcript, July 12, 1990 LUC hearing, at 111-12, 115-16, 118-20, 121-22 (emphases added).

Thomas Leppert of Lanai Resort Partners testified that alternative sources of water to be used for golf course irrigation meant brackish water or reclaimed sewage effluent.

[By Rick Eichor, Esq., for the State of Hawaii, Office of State Planning]

**Q. And will you agree to fund and design and construct all the necessary water facility improvements, including source development and transmission to provide adequate quantities of potable and nonpotable water to service the subject property, in addition, utilizing only alternative sources of water, in other words, brackish or effluent for golf course irrigation purposes?**

**A. Yes, we included that in our application, and a significant amount of resources to insure the implementation of that come together.**

*Id.* at 82-83 (emphases added).



John Mink prepared Petitioner's Exhibit 37, the Lanai Water Supply study. Dr. Mink testified the purpose of this study "was to do a review of the previous work and to reanalyze the data and to **come-up with an estimate of the amount of water that is available for development.**" When OP asked Dr. Mink, "[D]o you think there's enough of a safety factor with the information we have to date?" Dr. Mink responded, "I think there is." Transcript, August 30, 1990 LUC hearing, at 9, 36 (emphasis added).

Finally, when the LUC issued its Findings of Fact, Conclusions of Law, and Order on April 16, 1991, the LUC made several findings of fact that addressed the proposed Manele golf course's impact on water resources:

#### IMPACT UPON RESOURCES OF THE AREA

##### Water Resources

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 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.

\* \* \* \*

#### ADEQUACY OF PUBLIC SERVICES AND FACILITIES

##### Water Service

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.

90. Maui Planning Department recommends that any use of potable groundwater for golf course irrigation should be limited and terminated within five years.

91. Petitioner 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**

112. The reclassification of the Property to allow the development of the proposed Manele golf course conforms to the Hawaii State Plan, Chapter 226, HRS, as amended, including the following objectives, policies and guidelines: . . .

**§ 226-12(b)(1) Promote the preservation and restoration of significant natural and historic resources.**

**§ 226-13(b)(2) Promote the proper management of Hawaii's land and water resources.**

**§ 226-13(b)(3) Promote effective measures to achieve desired quality in Hawaii's surface, ground and coastal waters.**

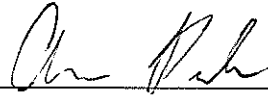
April 14, 1991 Findings of Fact, Conclusions of Law, and Order, at 13-15, 26-28, 33-34 (emphases added).

Again, Lanai Resorts believes that Issue c) of Minute Order No. 4 may lead to a clarification or amendment of the 1991 D&O, and is therefore beyond the scope of the remand orders.

We believe that the issues presented herein are threshold issues, which should be considered before proceeding to undertake the additional issues presented in Minute Order No. 4.

It is important for all involved that we not fall into the same pattern of reversible error that the previous Commission attempts engendered.

Dated: Honolulu, Hawaii, September 8, 2016.



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**APPENDIX "A"**

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The following are excerpts from the hearing transcripts and Petitioner's exhibits during the proceedings that led to the LUC's April 16, 1991 Findings of Fact, Conclusions of Law, and Order:

**A. Exhibits and Testimony of James Kumagai**

James Kumagai was qualified by the LUC as an expert in civil, sanitary, and environmental engineering.<sup>1</sup> Petitioner's Exhibit 14 was a "Water Resources Development Plan" written by Dr. Mink and his firm.

The Water Resources Development Plan described Lanai's aquifer as follows:

Interconnected aquifer. The high level aquifer is envisioned to be an interconnected, compartmentalized media connected by fractures which permit hydraulic continuity within the dike complex. Over decades of time all sources of withdrawal will stabilize, provided the rate of withdrawal is not significantly changed before equilibrium levels occur between compartments.

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<sup>1</sup> Transcript, July 12, 1990 LUC hearing, at 107.

Due to varying irrigation demands and equipment operation, this is, practically speaking, difficult to achieve. Differences in the water levels will be noted in the transition periods which may take several years or decades.

Petitioner's Exhibit 14, at 5-6. Dr. Kumagai proposed setting a threshold limit at 80 percent of the estimated sustainable yield, to **"leave a margin of error for such uncertainties as natural leakage from the aquifer, the vagaries of drought occurrences, and the imperfect nature of the hydraulic connectivity of the individual dike compartments which constitute the high level aquifer zone."** *Id.*

The Water Resources Development Plan also described the alternate sources that may be used for irrigation, as follows:

The principal alternate source is **low level fresh or brackish water**. This water, **because it has leaked from the high level aquifer on its path to the sea**, is unaccounted in the above estimates of sustainable yield. An exploratory well has been recommended as part of this program to evaluate the water table location and water quality condition of this alternate source.

Petitioner's Exhibit 14, at I (emphasis added). At the hearing, when questioned about the Petitioner's use of alternate sources, Dr. Kumagai discussed Wells 9 and 10.<sup>2</sup>

**B. Exhibits and Testimony of John F. Mink**

John F. Mink was qualified by the LUC as an expert hydrologist.<sup>3</sup> Petitioner's Exhibit 37 was a "Lanai Water Supply Study" prepared by Dr. Mink and dated October 1, 1983.

The Lanai Water Supply Study provided a calculation of sustainable yield, which remains in use today. In his study, Dr. Mink provided an overview of several calculations of sustainable yield that had been conducted before, but criticized these analyses because they "lacked a variable for natural leakage from the high level groundwater system." Petitioner's Exhibit 37, at

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<sup>2</sup> Transcript, July 12, 1990 LUC hearing, at 157-58.

<sup>3</sup> Transcript, August 30, 1990 LUC hearing, at 8.

4-5. Dr. Mink's model of the sustainable yield, on the other hand, attempted to capture the effects of leakage, stating, "The yield of the fresh groundwater resources of Lanai depends on the volume of water in the high level aquifers, the rate of which these aquifers are replenished, and **the rate of leakage from them.**" *Id.* at 12, 34.

During the DBA proceedings, Dr. Mink provided an analogy to illustrate how his calculation of sustainable yield captured the leakage phenomenon:

[By James Funaki, Esq., for the Petitioner]

Q. Could you define, as best as you can in layman's term, what is sustainable yield?

A. Sustainable yield is defined as the amount of water that you can withdraw from the ground. This is ground water without impairing either the quality or the amount of water that is taken out. **This is the amount of water you can take out forever.**

But, I think an analogy may be best to describe it so that you can get a mind picture of it.

**Assume that you have a bucket of water. And let's just fill it up with sand so it represents the ground. You allow an amount of water to come into the bucket, say, out of a hose and there are holes in the bottom where it leaks out, saturates the sand. So there's water that comes in at the top and under the natural conditions, without any perturbations, it leaks out on the bottom.**

At some point, the amount of water that comes in exactly balances the amount that goes out. So you fill up the bucket, don't put any more water in, keep running at a continuous rate, the amount coming in equals the amount going out through the leaks, that would be the original condition.

If you then look at that in reference to Lanai, it's the high-level water. The water comes in, the initial elevation of the water is about 1,500 feet above sea level. The way that the natural system under these initial conditions operates is an equal amount of water leaks out and goes down eventually to the sea.

**Well, if you come along and you put a straw or well into a bucket and you start drawing water out of it so that now you**

are taking water out artificially, so to speak, you still have leakage coming out the bottom. You have the same amount of water coming in the top, a new balance has to be struck. And the balance that is struck is that the level of water in the bucket falls so when that falls that means that the amount of leakage that is going out decreases because the leakage is a function of the elevation of the water pushing the water through the holes in the bottom.

So that, ultimately, a new equilibrium establishes itself, the water level in the bucket pushing the water out. The leakage has decreased now because there's less pressure and the amount of water that you were taking out of the well. **This is what "sustainable yield" is.**

**It's the equilibrium that you establish when you are taking water out artificially, the amount of water leaking out plus that which you are taking out is equal to the amount of the water that is coming in. . . .**

[S]ustainable yield has a time element in it. And the time element in the case of sustainable yield is really infinite time. **You can do this forever if you strike that balance.**

Transcript, August 30, 1990 LUC hearing, at 9-12 (emphases added).

During cross-examination by the County of Maui, Dr. Mink further explained how he believes leakage occurs:

[By Guy Archer, Esq. for the County of Maui]

Q. And the leakage at the bottom, where would that water leak to?

A. That water will leak out – in the case of Lanai, it's not really all at the bottom. **It's out the sides also, but leaks out from what are called the "dikes" that hold the water up.** And it eventually discharges into the sea.

**It leaks out into the second type of water resource which on Lanai is brackish which is called the basal water.** And that's the water that floats on sea water.

\* \* \* \*

Q. So there's a lot of **fresh water, potable water**?

A. **Yes. But you have to recall also, that is leaking out.**

*Id.* at 15, 19 (emphases added).

Dr. Mink testified that in preparing his Lanai Water Supply Study and calculating sustainable yield, the three factors that he assessed were water volume, rate of replenishment, and rate of leakage. *Id.* at 18.



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**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 THRESHOLD ISSUES RE: MINUTE ORDER NO. 4; APPENDIX "A"; CERTIFICATE OF SERVICE** was served upon the following as indicated below:

<p>BRYAN C. YEE, ESQ. DAWN TAKEUCHI APUNA, ESQ. Department of the Attorney General Hale Auhau, Third Floor 425 Queen Street Honolulu, Hawaii 96813 Attorney for State Office of Planning</p>	<p style="text-align: right;">Via U.S. Postal Mail and email</p>
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DATED: Honolulu, Hawaii, September 8, 2016.




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