NATIVE HAWAIIAN LEGAL CORPORATION
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813
Telephone: (808) 521-2302

DAVID KAUILA KOPPER 9374
LI'ULĀ NAKAMA 9250

Attorneys for Intervenor Lāna`ians For Sensible Growth

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

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

LĀNA`IANS FOR SENSIBLE GROWTH'S OBJECTIONS TO PETITIONER LĀNA'I RESORTS, LLC'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

I. INTRODUCTION

Intervenor Lāna'ians for Sensible Growth ("LSG") opposes and objects to the Lāna'i Resorts, LLC's (the "Resort") Exceptions to Hearing Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order.

The Resort's exceptions are unsound and contain multiple errors of fact and law. The Resort's exceptions improperly rely, almost exclusively, on irrelevant evidence, and are largely

unnecessary. The Resort's exceptions will not assist an appellate court in its review of the decision and should not be adopted.

II. LSG'S OBJECTIONS

The Resort's exceptions should not be adopted as they are largely irrelevant, unnecessary, and/or are contradicted by other evidence. Below, LSG addresses its objections to the **Finding of Facts** ("**FOF**") and **Conclusions of Law** ("**COL**") from the Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Decision and Order ("HO Decision & Order") from which the Resort took exceptions:

> **FOF 69. Water with chloride concentrations above 250 ppm may also be considered "potable." (Testimony of Roy Hardy, November 10, 2016 at 230) ("You cannot determine potability just based on chlorides.")**

The Resort objected to FOF 69 as being "incomplete," but it is a complete statement based on Hardy's testimony. As such, the Resort's proposed FOF 1 – 3 are unnecessary and irrelevant to whether Condition 10 was violated. The Resort's Proposed FOF 1 is irrelevant to potability, and instead only relates to brackishness. Proposed FOF 2 and 3 are directly contradicted by the Department of Health ("DOH") and the Department of Water Supply for Maui County. In addition, the Resort's statement that Wells 1 and 9 would not be accepted for use by the County is based on Nance's testimony, not the County.

The DOH would allow public water systems to provide water in excess of 250 mg/l chlorides for domestic use, 1. Trans. 138:18-22, and has stated that "there are water systems that have served drinking water in excess of 250 mg/l." Ex. I-12. It is "typical" for county water supplies to use water pumped at or above 250mg/l in their domestic water systems. 2. Trans. 250:13-251:9; 2. Trans 238:9-14. Currently, potable wells on O'ahu are producing water over 250 mg/l. *Id.* While Director of the Department of Water Supply for Maui County Dave Taylor testified that his department's water meets all relevant water quality standards, it "wouldn't surprise him" if Maui wells produced water with over 250mg/l chlorides. 4 Trans. 681:2-14.

In fact, County of Maui Water Supply has served water pumped at over 350 mg/l chlorides and blended with fresher water to improve the taste for drinking. R. V XXXIII, June 8, 2006 at 201:18-25. County of Maui has also served water at 300 mg/l chlorides for drinking and without blending to improve the taste. *Id.* at 202:12-203:4. Blending high chloride water to improve taste and palatability is an accepted public water system industry standard. 1 Trans.

138:4-6; 4 Trans. 682:13-683:4; R. V. XXXIII, June 8, 2006 at 219:11-25; 2 Trans. 200:2-201:8; 3 Trans. 423:9-20. The DOH, Safe Drinking Water Branch has never been asked to take action on water which exceeds 250 mg/L by consumers or recipients of such water. 1 Trans. 141:22-142:1.

Finally, Mr. Nance's testimony that Wells 1 and 9 would not be accepted by a county water supply for potable use, 3 Trans. 412:24-413:2, is not credible given his admission that he never consulted the Department of Water Supply for Maui County regarding Wells 1 and 9. 3 Trans. 444:2-7.

FOF 77. **The DOH also defines the term "potable water" to mean "water free from impurities in amounts sufficient to cause disease or harmful physiological effects" in its administrative rules concerning the protection of public water systems from contaminant and pollutants. (HAR § 11-21-2).**

The Resort objected to FOF 77 as a "mischaracterization of DOH testimony," but FOF 77 contains a direct and accurate quote from HAR § 11-21-2. FOF 77 is not a product of Joanna Seto's testimony. Thus, the Resort's Proposed FOF 1 and 2 are unnecessary and irrelevant.

FOF 90. **Mr. Jamile's testimony refers to primary contaminants regulated by HAR § 11-20-24.**

LSG agrees that the citation to HAR § 11-20-24 is incorrect, and it should instead be "HAR Chapter 11-20."

FOF 93. **Separate from the specific implied meanings of the words "potable" and "brackish" in Condition 10 and the references to Wells 1 and 9 in the original record it is reasonable** [to] **conclude that the water from Wells 1 and 9 may be considered to** [be] **"potable." However, as detailed further below, the evidence in the record and construction of Condition 10 indicates a meaning contrary to these more common sense meanings of the words potable and brackish, and how they apply to Wells 1 and 9.**

Beyond the addition of the words "to" and "be" in brackets above, the Resort's other objections and suggestions are grammatically unnecessary.

FOF 128. **Dr. Thomas testified that in his professional opinion and based on his studies, he found no sound evidence that supports the leakage theory, and no evidence that any leakage is occurring. (*Id.*, at 274-277, 289).**

The Resort objects to FOF 128 as being incomplete, then suggests 12 additional Proposed FOFs. These Proposed FOFs are inappropriate to include as the testimony of Dr. Thomas is not credible, and the testimony by Nance is not relevant to FOF 128 or Dr. Thomas's testimony.

Dr. Don Thomas' testimony regarding Lāna'i's hydrogeology is not credible at this time as he has not yet developed a numerical groundwater model for Lāna'i, 2 Trans. 309:2-18, he has not conducted an independent mapping of Lāna'i's groundwater dike complexes, 2 Trans 309:19-310:1,and he has not conducted any groundwater recharge studies on the Palawai Basin. 2 Trans. 310:2-13.

Dr. Thomas' testimony that there is no proof that the flow of water from higher level, fresher compartments into the Palawai basin is greater than zero, 2 Trans. 266:5-277:07, is not credible given the substantial evidence to the contrary, Ex. I-13 at 17; Ex. I-14 at 6-9; Ex. I-2 at 7; Ex. I-3 at 1, his admissions that it is impossible to conclusively prove such a theory, 2 Trans. 310:23-311:4, his admission that evidence of freshening of the Palawai Basin wells over time could indicate leakage from higher level compartments, 2 Trans. 311:13-22, his reliance upon the incorrect assumption that the chloride level of Well 1 has remained steady, 2 Trans. 278:4-279:12, and his reliance upon Exhibit 43B, 2 Trans 278:14-279:17; 2 Trans. 313:6-9, prepared by Tom Nance, which is inaccurate and unreliable due to the inclusion of invalid data. 3 Trans. 445:24-448:11. Also, Dr. Thomas' testimony that "chlorides is, to me, not the important constituent" to consider in determining potability, 2 Trans. 291:12-19, and that "the chloride issue is not tremendously relevant," 2 Trans. 292:10-11, conflicts with and undermines the Resort's position that chloride levels alone render Wells 1 and 9 not potable.

FOF 137. **The Petitioner, as compared to its predecessor entity Castle & Cooke, has employed approximately 20 additional workers in natural resources management, with a projected 2017 budget of close to $2,000,000, not including capital expenditures. (*Id.*, at 530).**

FOF 138. **Mr. Donoho offered no quantification of the amount of current conservation efforts compared to similar landowners, nor compared to the conservation needs identified in Water Use and Development Plan for the island.**

The Resort objected to these FOFs as being contradictory, with the suggestion that FOF 138 be deleted. Both FOF 137 and FOF 138 are irrelevant to whether potable water is being used in violation of Condition 10, but on their face they are not contradictory of one another.

FOF 141. **Mr. Hardy testified that the Periodic Water Reports produced since the 1990 CWRM Resubmittal show no changes that pose a threat to the water resources on the island. The only change is that pumpage is now lower than it was when pineapple agricultural uses were ongoing. (Transcript of November 10, 2016 at 224 – 225).**

A finding of harm is unnecessary and irrelevant to whether potable water is used in violation of Condition 10. Furthermore, the Resort's Proposed FOF 1 is contradicted by other testimony and should not be adopted. Mr. Nance's testimony regarding the availability of water resources on Lāna'i is not credible given his admission that he has never been involved in the calculation of a sustainable yield, and he has never conducted or commissioned any recharge studies for the Palawai Basin. 3 Trans. 441:18-24. A numerical groundwater model for Lanai, prepared by the CWRM, concludes that consistent pumping of .650 MGD would cause a 10 to 30 foot drop in water levels in the upper gradient potable wells in Lāna'i's aquifer. I-14 at 113; 2 Trans. 234:1-235:8. Wells 1 and 9 have continually declined in chloride levels, with both wells seeing a greater than 25mg/l reduction in chloride levels in the past six years. Ex. 24. Finally, Nance has testified repeatedly in this matter that, given the consistent decline in the chloride levels of Wells 1 and 9, these wells will eventually produce water under 250 mg/l. R. V. XXXIII June 7, 2016 at 112; *Id.* at 119; 3 Trans. 431:11-14.

FOF 142. **Under questioning by the Hearings Officer, LSG's witness Mr. Gima stated that he is unaware of and did not allege there was harm posed by the use of Wells 1 and 9 to irrigate the Mānele Golf Course. (Transcript of November 16, 2016, at 753).**

A finding of harm is unnecessary and irrelevant to whether potable water is used in violation of Condition 10. The Resort's Proposed FOFs improperly seek to shift the burden of proving harm to LSG, an intervening party to the Commission-initiated Order to Show Cause proceeding, and should not be adopted.

The Resort bears the burden to demonstrate that their past and present use of high level aquifer water to irrigate its golf course does not violate Condition 10. *Waiahole I*, 94 Haw. at 142-143 ("[T]he burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust). LSG's position and Mr. Gima's testimony are irrelevant to whether the Resort used potable water in violation of Condition 10. In addition, Mr. Gima testified that his role on the Lāna'i Water Advisory Committee ("LWAC") did not allow for his determination of the definitions used in the Lāna'i Water Use and Development Plan

("WUDP"), including the definition of "brackish" and how Wells 1 and 9 were identified. 4 Trans. 759:22-761:2.

FOF 143. No party has identified any potentially competing public trust uses of the water drawn from or possibly affected by the draw from Wells 1 or 9, other than the "domestic needs of the general public."

FOF 144. While the scientific information on the potential long-term effect of withdrawals from Wells 1 and 9 on drinking water wells on the island is ambiguous, no party has raised a reasonable allegation of harm against that or any other public trust use of water.

The Commission already determined the reasonable and beneficial use of Lāna'i's potable high-level water in the context of the Mānele project district by prohibiting the use of potable high-level water for golf course irrigation. Ex. 28. The terms of the 1991 Order, and specifically Condition 10, are not open to relitigation to now determine whether the use of water, regardless of potability, to irrigate the golf course complies with the public trust doctrine. See *Lanai Co. v. Land Use Comm'n*, 105 Hawai'i 296, 317 (2004) ("Accordingly, we remand the issue of whether [the Resort] has violated Condition 10 by utilizing potable water from the high level aquifer[.]"); Minute Order No. 6; *Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 352 n.8 (1997) (Describing the "law of the case doctrine" as mandating that a determination made in the course of an action "becomes the law of the case and may not be disputed by a reopening of the question at a later stage of the litigation."). The Commission determined that, pursuant to the public trust doctrine, potable water should not be used to irrigate the golf course.

The Resort's Proposed FOF 1 is contradicted by Mr. Asuncion's own admissions. Mr. Asuncion's testimony that brackish water and potable water are mutually exclusive, OP-2 at 8, is not credible given his admission that it is "correct" that "brackish water does not violate any Safe Drinking Water standards, and can be used for drinking water." *Id.* Mr. Asuncion's testimony that the use of brackish groundwater to irrigate the Mānele golf course is a reasonable and beneficial use of that resource is not credible given his admission that he is not familiar with public trust law. 1 Trans 149:2-150:2.

The Resort's Proposed FOF 2 is irrelevant to whether the Resort is utilizing potable water from the high level aquifer to irrigate the Mānele golf course in violation of Condition 10.

The Resort's Proposed FOF 3 is irrelevant to whether Condition 10 is being violated, and is extremely self-serving. For example, Mr. Matsumoto's personal opinion that the use of

brackish groundwater to irrigate the Mānele golf course is a reasonable and beneficial use of that resource is not credible given his admission that he is not aware that golf course irrigation is not a protected public trust resource and that there are no vested rights in water for commercial use. 4 Trans. 622:19-623:3 ("the use of brackish groundwater to irrigate the golf course is a reasonable and beneficial use of the resource"); 643:5-12 ("Wells -- brackish wells 1 and 9 are also contributing as a reasonable and beneficial use of water for the residents of the island."); 643:19-25 ("I believe that it is a reasonable and beneficial use meant for the residents of the island."); 644:1-6 ("It is a reasonable and beneficial use."); and 657:2-8.

COL 17. The use of water for irrigation of the golf course should be examined using a "reasonable and beneficial use standard" against other public and private uses of water. ***Id.***

COL 18. The Petitioner has, as identified in the Findings of Fact, identified its actual needs, made its uses more efficient (reasonable) over time, pursued the development of other alternate sources of water (desalination), and demonstrated that its use of water is beneficial.

The COLs 17 and 18 are irrelevant to whether Condition 10 was violated. Condition 10 prohibits the use of all high level potable water, regardless of whether it is done in an efficient way or whether such use is causing noticeable harm to the aquifer. There is no discretion for the Commission to excuse the violative use of potable water simply because it is a common industry practice, or because they are illegally using water in the most reasonable way.

The Resort's proposed addition to COL 18 is unsupported by the FOFs, and is unnecessary and irrelevant to whether Condition 10 was violated.

III. CONCLUSION

For the foregoing reasons, the Resort's Exceptions to the Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Decision and Order should not be adopted.

DATED: Honolulu, Hawai'i, April 25, 2017.

DAVID KAUILA KOPPER
LI`ULĀ NAKAMA
Attorneys for Intervenor
Lāna`ians for Sensible Growth

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served upon the following parties at their last known address by U.S. Mail, postage pre-paid on April 25, 2017.

BENJAMIN A. KUDO, ESQ.
CONNIE C. CHOW, ESQ.
Ashford & Wriston LLP
999 Bishop Street, Suite 1400
Honolulu, HI 96813
Attorneys for Lāna'i Resort Partners

BRYAN C. YEE, ESQ.
DAWN TAKEUCHI-APUNA, ESQ.
Deputy Attorneys General
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Attorneys for State Office of Planning

CALEB P. ROWE, ESQ.
MICHAEL J. HOPPER, ESQ.
Department of the Corporation Counsel
County of Maui
200 S. High Street
Wailuku, HI 96793
Attorneys for County of Maui, Department of Planning

DATED: Honolulu, Hawai'i, April 25, 2017.

DAVID KAUILA KOPPER
LI`ULĀ NAKAMA
Attorneys for Intervenor
Lāna`ians for Sensible Growth