

DOUGLAS S. CHIN 6465
Attorney General of Hawaii

LAND USE COMMISSION
STATE OF HAWAII

BRYAN C. YEE 4050
DAWN TAKEUCHI APUNA 7855
Deputy Attorneys General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 586-1180
Facsimile: (808) 586-1205

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Attorneys for OFFICE OF PLANNING,
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

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

**OFFICE OF PLANNING'S RESPONSE TO INTERVENOR
LĀNA'IAN'S FOR SENSIBLE GROWTH'S EXCEPTIONS
TO HEARING OFFICER'S RECOMMENDED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER**

The Office of Planning ("OP") respectfully disagrees with Intervenor Lāna'ians for
Sensible Growth's ("LSG") Exceptions to Hearing Officer's Recommended Findings of Fact,

Conclusions of Law, and Decision and Order (Intervenor’s Exceptions) for all the reasons set forth in its pleadings, testimony, and argument. OP will only highlight a few points of disagreement with Intervenor’s Exceptions.

I. ARGUMENT

A. Condition 10

Condition 10 of the 1991 Decision reads as follows:

10. Petitioner 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, Petitioner shall comply with the requirements imposed upon the Petitioner 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 Lana‘i as a Water Management Area, dated March 29, 1990.

It is clear from the wording of Condition 10 that the Commission prohibited the use of potable water and required the use of alternative non-potable sources of water for golf course irrigation. It is equally clear that both brackish water and reclaimed sewage effluent are examples of alternative non-potable sources of water. The only reasonable reading of Condition 10, therefore, is that the term “potable water” excludes brackish water and reclaimed sewage effluent.

B. Safe to Drink v. Drinkable v Suitable

LSG argues that the terms “potable” and “non-potable” have a plain meaning. Consequently, one does not need to go beyond the 1991 Decision to understand the term. OP notes that the parties have reached different conclusions as to the plain meaning, and LSG has used information from outside of Condition 10 of the 1991 Decision and Order to understand the

terms. Unsurprisingly, the Hearing Officer's reliance on matters outside Condition 10 appears to indicate that the definition is not as plain and unambiguous as first argued.

But if one tries to find a "plain meaning", Miriam Webster defines "potable" as "suitable for drinking." The Oxford Dictionaries define the term as "Safe to drink; drinkable." See OP's Written Testimony. But water "suitable for drinking" may differ from what is "safe to drink" which may differ from what is "drinkable." Some people may concede that water with unregulated contaminants like pharmaceuticals may be "safe for drinking" because it meets EPA standards for primary contaminants, but is nevertheless "unsuitable" for drinking. Perhaps more relevantly, some people may believe that brackish water is "safe to drink" because chlorides are not among the EPA's primary contaminants, but is nevertheless "unsuitable" for drinking because chlorides are among the secondary contaminants listed by EPA. Furthermore, these terms also do not assist in defining the term "potable" because what is "drinkable" to one person is not necessarily "drinkable" to another. In any case, even outside the context of Condition 10, "potable" does not necessarily mean "safe to drink" as asserted by LSG.

C. Relevance of brackishness

LSG argues inconsistently first that chloride levels are irrelevant to determine whether water is "potable" because chlorides are not among the primary contaminants listed by the EPA. LSG then argues that brackishness is an "operational parameter" of potability. See p. 10 of Intervenor's Exceptions.

LSG also argues that some brackish water is potable, and some is not. First, if you look at the wording of Condition 10, this argument would also imply that some reclaimed sewage effluent is potable and some is not. Second, if LSG means that brackish water with primary contaminants meeting EPA standards is potable and brackish water with primary contaminants

not meeting EPA standards is non-potable, then the brackish nature of the water is irrelevant. If LSG means that at some level of brackishness the water is no longer potable, then the Hearing Officer's decision to use the standard of 250 mg/l is clearly justified, especially given Petitioner's originally stated plans to use Wells 1 and 9 to irrigate the Manele Golf Course.

D. The 1991 Decision

1. LSG cites to four findings and two conditions.

LSG argues that there is nothing in the 1991 Decision to "suggest that potable means something other than water that is safe to drink." citing four findings of fact (FoF 46, 90, 91, and 117), and two conditions (Conditions 10 and 11) to the 1991 Decision. See p. 7 of Intervenor's Exceptions.

But one finding of fact (FoF 90) describes the Maui Planning Department's recommendation that potable groundwater for golf course irrigation should be limited, and the Maui Planning Department disagrees with LSG's definition of "potable."

Three findings of fact (FoF 46, 91, and 117) describe the intention of the Petitioner to use non-potable water for golf course irrigation. LSG omits to mention, however, that finding of fact 48 and 89 of the 1991 Decision also describe Petitioner's intention to use brackish water from Wells 1 and 9 for golf course irrigation. So, the 1991 Decision when read in total describes Petitioner's intention to use brackish water from Wells 1 and 9 as a type of non-potable water to irrigate the golf course.

Condition 10 specifically describes brackish water as an example of alternative non-potable source of water.

Condition 11 sets forth the requirement to have both potable and non-potable water to service the Petition Area, and the Hearing Officer's FoF 114 specifically recognizes that

Petitioner operates two separate water systems: one for potable water for drinking, and the other for brackish water for irrigation. The actions by Petitioner since 1991 over the past 26 years, therefore, are consistent with the Hearing Officer's conclusions.

2. LSG objects to the review of the 1991 administrative record.

LSG also suggests that the Hearing Officer is improperly trying to discern what was intended but not expressed in Condition 10 by looking at the 1991 administrative record.

But the Hearing Officer reviewed the 1991 administrative record to see how the terms "potable" and "non-potable" were used by the various parties. The Hearing Officer's review of the administrative record, therefore, was appropriate. The Hearing Officer was not reviewing the administrative record to discern an intent that was not expressed. Rather, the Hearing Officer was attempting to discern what was expressed by reviewing the administrative record. A review of the record shows that with one exception the terms "non-potable" and brackish were used interchangeably. The one exception cited by LSG is an answer by James Kumagai, and appears to be a factual outlier. In all other cases, the terms "non-potable" and brackish were used interchangeably.

3. LSG argues that the Hearing Officer's decision leads to surplusage.

LSG also argues that the Hearing Officer's Decision does not give effect to all parts of Condition 10, and renders part of the sentence in Condition 10 to be surplusage. Condition 10 states in relevant part as follows: "Petitioner 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." LSG then argues that by defining all brackish water as a

type of non-potable water, the Hearing Officer does not give effect to the first provision which prohibits utilizing potable water for golf course irrigation.


But the two provisions were placed within a single sentence, and must be read and understood together. The examples of brackish water and reclaimed sewage effluent are not surplusage, but rather safe harbors providing two examples of the type of water that can be used for golf course irrigation. Unambiguously, Condition 10 gives Petitioner two clear examples of what it can do to irrigate the Manele Golf Course.

II. CONCLUSION

For all the aforementioned reasons, OP recommends that the LUC reject the exceptions submitted by LSG, and to adopt the Hearing Officer's Decision, subject to such amendments as will strengthen and clarify the Order.

DATED: Honolulu, Hawaii, April 25, 2017.

DOUGLAS S. CHIN
Attorney General of Hawaii



BRYAN C. YEE
DAWN TAKEUCHI APUNA
Deputy Attorneys General

Attorneys for OFFICE OF PLANNING,
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CERTIFICATE OF SERVICE

I hereby certify that on the date below a true and correct copy of the foregoing OFFICE OF PLANNING'S RESPONSE TO INTERVENOR LĀNA' IANS FOR SENSIBLE GROWTH'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER was duly served on the following parties at their last known addresses via United States mail, postage prepaid:

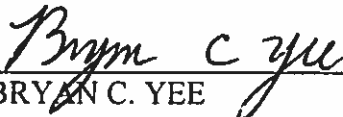
DAVID KAUILA KOPPER, ESQ.
LI'ULA NAKAMA, ESQ.
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawaii 96813
Attorneys for Intervenor
LĀNA' IANS FOR SENSIBLE GROWTH

BENJAMIN A. KUDO, ESQ.
CLARA PARK, ESQ.
SARAH M. SIMMONS, ESQ.
Ashford & Wriston LLP
999 Bishop Street, Suite 1400
Honolulu, Hawaii 96813
Attorneys for LANA'I RESORTS, LLC

WILLIAM SPENCE
Director, Department of Planning
County of Maui
One Main Plaza Building, Suite 315
2200 Main Street
Wailuku, Maui, Hawaii 96793

PATRICK K. WONG, ESQ.
MICHAEL HOPPER, ESQ.
CALEB P. ROWE, ESQ.
Department of the Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Maui, Hawaii 96793
Attorneys for COUNTY OF MAUI
DEPARTMENT OF PLANNING

DATED: Honolulu, Hawaii, April 25, 2017.



BRYAN C. YEE
DAWN TAKEUCHI APUNA
Deputy Attorneys General

Attorneys for OFFICE OF PLANNING,
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