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LAND USE COMMISSION  
STATE OF HAWAII

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STATE OF HAWAII

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

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

**OFFICE OF PLANNING'S RESPONSE TO PETITIONER LANA'I  
RESORTS, LLC'S EXCEPTIONS TO HEARING OFFICER'S RECOMMENDED  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER**

OFFICE OF PLANNING, STATE OF HAWAI'I (OP) supports and joins in Petitioner  
Lana'i Resorts, LLC's Exceptions to Hearing Officer's Recommended Findings of Fact,

Conclusions of Law, and Decision and Order filed on April 18, 2017 (Lana‘i Resorts’ Exceptions).

## I. INTRODUCTION

OP supports the Hearing Officer’s Decision, and joins in Lana‘i Resorts’ Exceptions as required to further clarify and support the decision. OP particularly notes the usefulness of incorporating: (1) proposed findings of fact 42, 45, and 46 from the Partial Stipulation and Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed by Lana‘i Resorts, LLC, on January 3, 2017 (Lana‘i Resorts, LLC’s Partial Stipulation); (2) proposed findings of fact 62 and 142A from Office of Planning’s Response to Lana‘i Resorts, LLC’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order (OP’s Response to Lana‘i Resorts, LLC); and (3) amendments to the proposed finding of fact 93 and the third paragraph of the Decision and Order portion of the Hearing Officer’s decision to delete the term “common sense.”

## II. ARGUMENT

### A. Findings of Fact 42, 45, and 46 from Lana‘i Resorts, LLC’s Partial Stipulation.

The proposed findings of fact 42, 45, and 46 from Lana‘i Resorts, LLC’s Partial Stipulation<sup>1</sup> state as follows:

42. Second, as stated in the written testimony of Joanna Seto, Engineering Program Manager for the DOH Safe Drinking Water Branch (SDWB) expert witness in state water quality, “The terms ‘potable’ and ‘non-potable’ do not exist in these State or federal primary drinking water regulations,” and “the terms ‘potable’ or ‘non-potable’ are not used by SDWB.” Exhibit OP No. 4.

45. Third, Ms. Seto testified that the federal regulations distinguish between surface water and groundwater. *Id.* at 135:25-136:10. The National

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<sup>1</sup> These findings are also covered under FoF 81 and 82 of Lana‘i Resorts’ Exceptions.

Primary Drinking Water Regulations: Ground Water Rules, which contains the federal regulations that regulate public water systems that use groundwater as a source of drinking water, and regulates the testing of groundwater for primary contaminants, was published on November 8, 2006. Petitioner's Exhibit 44B.

46. Ms. Seto testified that DOH did not adopt groundwater regulations until after the federal Ground Water Rule was published in 2006, and therefore the groundwater regulations were not in force during the Commission's proceedings on the 1991 Order and the 1996 OSC Order. Tr., 11/9/16, at 136:5-10.

The Hearing Officer's Decision goes into some detail regarding federal and state regulations, but does not note that the terms "potable" and "non-potable" are not used by the SDWB, and that these federal and state regulations did not exist at the time the 1991 Order and the 1996 OSC Order were issued. Consequently, these regulations could not have been considered by the Land Use Commission (LUC) at the time the original decisions were made. These facts further support the Hearing Officer's Decision that these federal and state regulations are not helpful in understanding the terms "potable" and "non-potable" as used in Condition 10 of the 1991 Order.

**B. Findings of Fact 62 and 142A from OP's Response to Lana'i Resorts, LLC.**

**1. FoF 62**

OP's proposed finding of fact 62 recommended amendments to Lana'i Resorts, LLC's proposed finding of fact 62 as follows:

**FoF 62.** Moreover, the above FOFs and entire exact language of Condition No. 10 originated from a "Stipulation for Proposed Findings of Fact, Conclusions of Law, and Decision and Order" by Petitioner and OP and filed by the Petitioner on February 20, 1991, meaning that Petitioner reviewed and agreed to the language of Condition No. 10. It would be absurd and illogical for Petitioner to propose or agree to a condition that would prohibit it from irrigating with the brackish water wells that it had already installed, tested, and in the case of Well 1, was already operating, or to propose or agree to a condition that would prohibit it from engaging in the exact conduct it had proposed to the Commission. 1991 Order, FoF 48, 89, and 91, at pp. 14-15, 27-28, and 28 respectively.

In different places, the Hearing Officer's Decision contains the relevant facts that Petitioner clearly and specifically intended to use Wells 1 and 9 to irrigate the Manele Golf Course and that Petitioner agreed to the language of Condition No. 10. OP's proposed finding of fact 62 brings these facts together to explain their relevance, namely that it would be absurd and illogical to conclude that Petitioner agreed to a condition that would "prohibit it from engaging in the exact conduct it was proposing to the Commission."

**2. FoF 142A**

OP's proposed finding of fact 142A states as follows:

**FoF 142A.** The leakage theory is inconsistent with the language of Condition 10 and the findings of fact and oral testimony from the district boundary amendment proceeding in which brackish water was described as non-potable, and in which brackish water from Wells 1 and 9 were proposed for irrigation of the Manele Golf Course.

The Hearing Officer's Decision sets forth the basis to conclude that there is no significant leakage from the freshwater wells into the brackish water wells. It does not, however, clearly decide that Condition 10 is not violated even if leakage occurs between the freshwater wells and the brackish water wells. As discussed above, Petitioner clearly intended to use Wells 1 and 9 to irrigate the Manele Golf Course, and stipulated to the language of Condition 10. The LUC should explicitly reject the suggestion that the LUC might have hidden a prohibition on the use of Wells 1 and 9 in Condition 10 based upon a theory of leakage.

**C. Amendments to FoF 93 and the Decision and Order.**

The specific language is not cited here. The Hearing Officer's Decision uses the term "common sense" in the proposed finding of fact 93 and the third paragraph of the Decision and Order to describe the criteria one may use to define the term "potable." Petitioner addresses this issue in its FoF 98 of Lana'i Resorts' Exceptions. The term "potable," however, is specifically


not used by either CWRM or SDWB because of the confusing nature of the term, because it means different things to different people, and because water which may be drinkable to one person is not drinkable to another. Common sense is simply not a useful way to understand the term. OP understands that there are different viewpoints on the definition of “potable,” and has no objection to the use of the term “plausible” when characterizing Intervenor Lāna‘ians for Sensible Growth’s (LSG) definition based on information outside the context of Condition 10. We believe this fulfills the Hearing Officer’s attempt to understand and describe LSG’s arguments, without jeopardizing the Hearing Officer’s conclusion. OP, therefore, supports Petitioner’s proposed amendment to FoF 93.

### III. CONCLUSION

For all the aforementioned reasons, OP respectfully recommends that the LUC adopt the Hearing Officer’s Decision, subject to such amendments as will strengthen and clarify the Order.

DATED: Honolulu, Hawaii, April 25, 2017.

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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 PETITIONER LANA'I RESORTS, LLC'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:


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