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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 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; CERTIFICATE OF SERVICE**

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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 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**

PETITIONER LĀNA`I RESORTS, LLC'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

Petitioner LĀNA`I RESORTS, LLC (**Petitioner**) respectfully submits its response to Intervenor (**LSG**)'s *Exceptions to Hearing Officer's Recommended Findings of Fact, Conclusions of Law and Decision and Order* filed April 4, 2017 (**Recommended D&O**).

LSG's exceptions to the Recommended D&O contain flawed and contradictory arguments that seek to interpret Condition No. 10.

A. LSG's Exceptions to the Recommended D&O are Based on the Premise that Condition No. 10 is Defined by the Federal Safe Water Drinking Act and National/State Primary Drinking Water Regulations

LSG's exceptions are entirely based on the premise that the State Land Use Commission (**LUC or Commission**), in its 1991 Order, incorporated the federal Safe Drinking Water Act (**SDWA**) (42 U.S.C. § 300F) and national/state primary drinking water regulations (40 C.F.R.

§ 141/ HRS § 340E and HAR § 11-20) into Condition No. 10. Yet, nowhere in the administrative record of the original proceeding which spanned the period from 1989 to 1991 is there any mention of or evidence submitted that references the federal or state laws cited or its nexus to Condition No. 10.

LSG's argument is based on the Webster's dictionary definition of the term "potable" as being equivalent to "drinkable." LSG then attempts to draw the connection between drinking water and the federal and state laws cited above. There is no definition of "potable water" under the federal or state laws.

The 1991 Order never referenced the SDWA or the national/primary drinking water regulations, and did not offer a definition of the term "potable" used in Condition No. 10. In addition, there are no references to the SDWA or the national/state primary drinking water regulations in the administrative record of the Commission prior to its 1991 Order. During the 1991 Order proceedings, LSG filed proposed findings of fact and conclusions of law. Even LSG's proposed language never cited to these laws and regulations. None of the parties nor the Commissioners ever discussed or referenced these laws on drinking water.

Rather, the record indicates that the Commission and several parties focused on the term "non-potable" and used it interchangeably with the term "brackish" thereby creating a definition of that term. The term "potable" was essentially defined as any water which was <u>not</u> "potable" i.e., non-potable water.

LSG ignores the specific words of Condition No. 10 that defines "non-potable" water with the examples of "brackish" and "reclaimed sewage effluent" water. LSG disregards the plain language of Condition No. 10 in favor of tying a dictionary meaning of "potable" to

"drinkable" in order to draw in SDWA water quality standards into the meaning and intent behind Condition No. 10.

Although the terms of Condition No. 10 clearly and specifically define non-potable as including brackish water, and that Wells 1 and 9 are brackish water (to which LSG agrees) wells, LSG nevertheless concludes that the use of brackish water from Wells 1 and 9 is irrelevant. It is irrelevant because brackish water can be potable water. LSG's entire argument is based on this premise. Yet, LSG provides no evidence from the 1991 Order or the administrative record to support its interpretation of Condition No. 10 and the differentiation of brackish water, which is absent from the record.

LSG's interpretation of Condition No. 10 is inconsistent and incorrectly uses the legal rules of interpretation. There is no dispute that Condition No. 10 is "plain and unambiguous." *See, LSG's Exceptions pg 4-5* (stating, "Where a term is plain and unambiguous, it must be interpreted by its 'plain and obvious meaning' . . . unless there is an 'indication in the regulation that the term . . . be given a special interpretation other than its common and general meaning.'"). Non-potable water is defined as brackish water or reclaimed sewage effluent under Condition No. 10. There is no dispute about this.

LSG's argument relies on a rule of statutory construction, stated in Hawaii Revised Statutes (**HRS**) § 1-16. HRS § 1-16 states, "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." *LSG's Proposed COL 27 (citing HRS § 1-16).* There is nothing "doubtful" in Condition No. 10. Yet, LSG reaches that conclusion in order to incorporate the outside sources of the law (i.e., SDWA, etc.).

LSG's use of this rule of statutory construction is wrong. First, a condition drafted by the Land Use Commission (**Commission**) and water quality regulations promulgated by the Department of Health are not laws "upon the same subject matter."

Second, under Hawaii law, "it is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning." *Bhakta v. County of Maui*, 109 Hawai`i 198, 208, 124 P.3d 943, 953 (2005) (brackets omitted, emphases added). As stated above, there is nothing "doubtful" in Condition No. 10 to warrant bringing in external or outside laws. Because Condition No. 10 is undisputedly plain and unambiguous, the Commission is not at liberty to look beyond Condition No. 10 and to regulations promulgated by another agency. The Commission must use the definition of non-potable—as defined within the language of Condition No. 10, which clearly permits the use of brackish or reclaimed sewage effluent water.

LSG's exceptions to the Recommended D&O are based on an incorrect and unsupported interpretation and use of the rules of legal interpretation and should not be followed.

B. LSG Ignores the Definition of Non-Potable—Brackish and Reclaimed Sewage Effluent—Within the Plain Language of Condition No. 10

To determine whether Petitioner's use of Wells 1 and 9 is in compliance with Condition No. 10, the Commission need go no further than the language of Condition No. 10, which defines non-potable water by way of two examples— brackish water and reclaimed sewage effluent. There is no dispute that Wells 1 and 9 have always been considered brackish water wells. *See Recommended D&O, FOFs 103-114; 1991 Order FOFs 48, 89; 1996 OSC Order FOF 16.*

LSG now argues that brackish and potable water are not mutually exclusive—some brackish water is non-potable by SDWA standards, while other brackish water is potable. However, the language of Condition No. 10 makes no such distinction because it is not tied to SDWA standards. Further, the parties, including LSG's counsel at the time of the original petition hearing, used "brackish" and "non-potable" interchangeably. *See Recommended D&O, FOF 96; Tr., 7/12/1990, at 82:21 – 83:5, 144:21 – 145:7, 172:14 – 173:22, 178:21 – 179:8, 186:22 – 187:9.*

Petitioner submits that its interpretation of Condition No. 10, allowing the use of brackish and reclaimed sewage effluent as sources of irrigation water for the golf course, should be adopted by the Commission as it is a clear and definite reading of it.

C. LSG's Exceptions to the Recommended D&O Are Based on Misstated Witnesses' Testimony And Take Statements Out of Context

LSG's exceptions to the Recommended D&O presents an incomplete and twisted portrait of the evidence, omitting key testimony without explanation, and taking isolated statements out of context.

LSG claims that the Recommended D&O "ignores facts" proving that pumping brackish water in the Pālāwai Basin induces leakage of potable water from higher elevation wells. *LSG's Exceptions pg. 16.* Yet it is LSG who ignores the factual evidence introduced by Petitioner refuting the leakage theory. LSG incorrectly characterizes Dr. Thomas' testimony as "corroborat[ing] that pumping induced leakage into the Pālāwai Basin is occurring." *LSG's Exceptions pg. 17.* To the contrary, Dr. Thomas's testimony was exactly opposite of what LSG claims:

[By Petitioner]

Q. Do you also disagree with Mr. Meyer's opinion that the pumping of brackish wells is inducing leakage of potable water into the brackish wells?

A. I do. I see no evidence so far that that's occurring.

Tr., 11/10/2016, at 279:13-17.

LSG also wholly ignores Dr. Thomas's testimony and his empirical evidence that demonstrates that the chemistries of the higher elevation potable wells are dramatically different from that of the lower elevation brackish wells, and that the respective chemistries of each well compartment show no evidence of leakage between the wells. Dr. Thomas's testimony cannot be ignored or hidden away without any evidence to rebut his testimony.

LSG complains that the burden of proof unfairly shifted from Petitioner to LSG. However, Petitioner put forth substantial evidence of the brackish water it is currently using, that this water's chemistry is significantly different from the water chemistry found in higher elevation potable wells, and that there is no evidence of any significant leakage of potable water induced by pumping Wells 1 and 9.

Petitioner notes that LSG's leakage theory is in conflict with its "potable" definition argument—that the brackish water in Wells 1 and 9 is potable under SDWA standards. The leakage theory presumes that brackish water is an allowable use under Condition No. 10, but that the pumping of brackish water induces or causes potable water from higher elevation wells to "leak" into the brackish water wells. This theory concludes that the use of brackish water is not a violation, but the inducement of potable water into the brackish wells is violative of Condition No. 10. However, this theory cuts against LSG's "potable" definition argument discussed above in Section A, in which brackish water is "potable." If brackish water were potable under

Condition No. 10, the leakage of other potable wells into the brackish water wells should not matter. Clearly, LSG switches between these inconsistent arguments in order to argue different interpretations of Condition No. 10. LSG cannot credibly argue from two sides of the coin.

D. LSG's Exceptions to the Recommended D&O Ignore Its Own President and Secretary's Testimony

Extraordinarily, LSG makes no mention of its President and Secretary's testimony—the only evidence of LSG's position in this proceeding. Instead, LSG attempts to sweep Reynold "Butch" Gima's admissions under the rug.

LSG's President and Secretary Mr. Gima testified that their position is that no water from the high-level aquifer can be used to irrigate the golf course. Because Wells 1 and 9 are within the high-level aquifer, Wells 1 and 9 cannot be used to irrigate the golf course. *Tr. 11/16/2016, at 728:7-22.* LSG's interpretation was based on a memorandum of understanding between LSG, the Petitioner, and other parties (**MOU**). *Id.* However, Mr. Gima acknowledged that the MOU is "not part of these proceedings." He further acknowledged that the MOU's language differs from Condition No. 10. He agreed that the Commission, in its 1991 Order, adopted the language proposed by Petitioner, and did not adopt the MOU language that LSG proposed. *Tr., 11//16/2016, at 729:14 – 730:8; 750:16 – 751:11.*

Mr. Gima also admitted that LSG is not taking a position on whether Wells 1 and 9 are potable or non-potable:

> Q. Okay. Now, you've -- is it your position that the water from Wells 1 and 9 are potable wells?
>
> A. I believe it's not LSG's kuleana to determine that. It's my understanding that the resorts has to show that Wells 1 and 9 are either nonpotable wells or they have to show that Wells 1 and 9 are not potable wells.

Q. Okay. So LSG is not taking a position on whether Wells 1 and 9 are potable or nonpotable? You're saying that it's really up to us to show that it's nonpotable? You're not taking a position –

A. That's my understanding –

Tr., 11/16/2016, at 738:16 – 739:2.

Mr. Gima also admitted during his testimony that the definition of "brackish" water is water that has chlorides above 250 mg/l, and that Wells 1 and 9 were indeed "brackish" water wells:

Q. (By Mr. Kudo) Okay. Based on the definition in the Water Use Development Plan on page 29, Appendix A, for brackish water and the testimony that has been submitted to this body by other witnesses that the chlorides of Wells 1 and 9 exceed 250 parts per million, do you consider Wells 1 and 9 to be brackish?

A. Using the 250 threshold, it would seem that, yeah, that's consistent with how some people use the term "brackish."

Id., at 744:16-24.

Mr. Gima also admitted that Petitioner's current usage is <u>not</u> threatening the water resource:

[By Petitioner]

Q. . . . Are you saying that the current usage is threatening that water resource?

A. I don't believe I said that in my recent testimony.

Q. So you're not saying that?

A. Yeah, that's what I just told you.

* * * *

[By Hearings Officer Scheuer]

Q. I'm going to go little back to Condition 10. Just in your personal opinion, do you believe there is harm that occurs from the

use of Wells 1 and 9 for irrigation of the golf course at Manele, or a long-term threat?

A. No, I can't come up with any objective criteria or measurable means to say that something has specifically been harmed.

Tr., 11/16/2016, at 731:21 – 732:1; 753:6-13. See also, Recommended D&O, FOF 142-43.

Mr. Gima's statements, read together, indicate that LSG is not interested in the merits of its arguments. Instead, LSG seeks to keep up the appearance of protecting the community by staying relevant in a proceeding that has spanned over nearly three decades.

Mr. Gima's testimony also revealed LSG's disingenuousness about its position on desalination. He testified that LSG was "a proponent of the desal project" and "saw desal as a potential win-win for the community," yet at the final Lāna'i Planning Commission meeting on Petitioner's special use permit, he opposed granting a permit longer than five years, making the plant financially unviable. *Id., 748:2-19, 749:7-10.* He said his opposition was because "this was such a new concept" and "we didn't know enough about desal to know what questions to ask," yet he admitted he did no investigation about desalination plants before voicing his position at the Lāna'i Planning Commission hearing. *Id., at 749:1 – 750:5.*

LSG blatantly disregards its own witness's testimony and admissions on the record regarding the use of brackish water to irrigate the Mānele golf course and the absence of any threat to the high level aquifer by such use.

E. LSG Now Claims that the Public Trust Doctrine is Irrelevant to this Proceeding

Curiously, LSG argues that the Commission "already discharged its public trust duties in creating Condition 10" and "already determined the reasonable and beneficial use of Lāna'i's potable high-level water[.]" In its Position Statement filed August 12, 2016, page 1, LSG stated that "the Land Use Commission is bound by the public trust to protect drinking water as a vital

public trust purpose of the highest order. The Commission cannot be neutral: it actually must be partial and biased, as the public trust doctrine requires the Commission to favor the protection of domestic water use over competing commercial use of water for financial gain." *See also, LSG's Proposed COL 12, characterizing the 1991 Order as the Commission's "attempt to discharge its public trust duty[.]"*

In light of the foregoing admission of LSG President and Secretary Reynold "Butch" Gima, specifically that he was not alleging that the water resources on Lāna'i are being harmed by Petitioner's use of Wells 1 and 9, LSG has now abandoned their original argument. In addition, there is not one scintilla of evidence in the record that the water resources on Lāna'i are currently threatened. To the contrary, water use for the island is lower than during the pineapple era, water use at the golf course is at the lowest level it has been in two decades, and several expert witnesses testified that the aquifer is not threatened by Petitioner's use of the brackish water in Wells 1 and 9.

F. Conclusion

LSG's arguments have morphed and reversed itself over the past two decades from barring all high level water, to leaking potable water, to making brackish water potable. Petitioner submits that these untenable arguments fail on all counts and should not be accepted.

Based on the explanations stated herein, Petitioner respectfully requests that the Commission reject LSG's Exceptions to the Recommended D&O and adopt the Recommended D&O as amended by Petitioner's Exceptions.

Dated: Honolulu, Hawaii, April 25, 2017.

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CERTIFICATE OF SERVICE

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

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