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LAND USE COMMISSION
STATE OF HAWAII

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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 MOTION TO SET ISSUES ON
REMAND OF THE LAND USE
COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER DATED MAY
17, 1996; MEMORANDUM IN
SUPPORT OF MOTION;
CERTIFICATE OF SERVICE**


**PETITIONER LĀNA'I RESORTS, LLC'S MOTION TO SET ISSUES ON REMAND OF
THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER DATED MAY 17, 1996**

Petitioner LĀNA'I RESORTS, LLC (**Lanai Resorts**) hereby respectfully requests that the Land Use Commission (**LUC**) set the issues on remand from the Hawaii Supreme Court of the LUC's *Findings of Fact, Conclusions of Law, and Decision and Order* dated May 17, 1996 (**1996 Show Cause Order**) by: (1) not pursuing the issues set forth in the LUC's *Minute Order No. 4* filed on September 2, 2016; and (2) adopting the amended issues set forth in the LUC's *Minute Order No. 2* filed on July 6, 2016 and in Lanai Resort's *Statement of Position* filed August 12, 2016, as follows:

- (a) **“What does ‘non-potable’ mean in the context of Condition No. 10?”; and**
- (b) **“Was Castle & Cooke, Inc. using non-potable or brackish water from the high-level groundwater aquifer to irrigate the golf course, from 1991 to 1993?”**

This motion is based upon the records and files herein, the decision of the Hawaii Supreme Court in *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 97 P.3d 372 (2004), the decision of the Intermediate Court of Appeals in *Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai'i 298, 369 P.3d 881 (App. 2016), the attached and any supplemental memoranda in support of this motion, any memoranda filed by Lanai Resorts in connection with any motion filed by any other party to this proceeding, and the argument to be made at the hearing on this motion.

Dated: Honolulu, Hawaii, September 14, 2016.



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**MEMORANDUM IN SUPPORT OF
MOTION**

MEMORANDUM IN SUPPORT OF MOTION

A. The Issues Presented in Minute Order No. 4 Will Engender Reversible Error, and Therefore Should Not Be Pursued

The LUC filed *Minute Order No. 4* on September 2, 2016. Lanai Resorts subsequently filed its *Statement of Threshold Issues Re: Minute Order No. 4*, addressing the issues presented in Minute Order No. 4.

As set forth in the *Statement of Threshold Issues*, Lanai Resorts believes the issues presented in Minute Order No. 4 will engender reversible error by exceeding the scope of the appellate courts' remand orders. Based on the other parties' statements at the pre-hearing conference held on September 9, 2016, it appears the other parties have similar concerns and concur. To avoid the risk of reversible error, Lanai Resorts respectfully requests that the issues presented in Minute Order No. 4 not be pursued.

B. The Issues Presented in Minute Order No. 2, as Amended in Lanai Resorts' Statement of Position, Accurately and Succinctly State the Issues on Remand

1. Relevant Issues in Minute Order No. 2

With some amendments, the issues presented in Minute Order No. 2 accurately and succinctly state the issues on remand, without going beyond the scope of the remand orders. As set forth herein and in Lanai Resorts' *Statement of Position*, the issues in Minute Order No. 2 can be further clarified and narrowed as follows:

- (a) "What does 'non-potable' mean in the context of Condition No. 10?"; and**
- (b) "Was Castle & Cooke, Inc. using non-potable or brackish water from the high-level groundwater aquifer to irrigate the golf course, from 1991 to 1993?"**

Although the *Statement of Position* explains the wording of the amended issues in detail, we will provide a brief summary below.

First, as the Hawaii Supreme Court's remand opinion pointed out, the LUC did not define the terms "potable" or "non-potable." *Lanai Co., Inc.*, 105 Hawai'i at 299 n.8. Attempting to adopt a more specific definition of "potable" is beyond the remand's scope. In 2016, the Intermediate Court of Appeals vacated the LUC's attempt to modify Condition No. 10 by adding a definition of potable water. *See Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai'i 298, 369 P.3d 881 (App. 2016) (stating, "The purpose of the remand was not . . . 'to force the LUC to clarify what was intended by Condition No. 10[.]").

However, Condition No. 10 itself does provide two examples of "non-potable water"—brackish water and reclaimed sewage effluent. Therefore, the Hearings Officer does not need to go further than Condition No. 10 to define "non-potable." The Office of Planning (OP) and Intervenor Lanaians for Sensible Growth (LSG) appear to agree that the definition should be derived from the language of Condition No. 10 itself. LSG's Positional Statement stated, "The

Hearings Officer does not need to, and should not, go further than Condition 10 The ‘plain language’ of the Commission’s decision controls.”¹ OP’s Position Statement stated, “OP’s position statement focuses on Condition 10’s reference to ‘alternative non-potable sources of water (e.g., brackish water . . .)[.]’”²

Second, our proceedings are to go back to the LUC’s 1996 Show Cause Order hearings commenced in 1993. The sole purpose of this hearing is to conduct further hearings on the 1996 Show Cause Order, which the supreme court concluded was “clearly erroneous.” *Lanai Co., Inc.*, 105 Hawai‘i at 314. This means that relevance is limited to the specific facts and circumstances presented during the proceedings leading up to the 1996 Show Cause Order (i.e., from 1991-1996).

At the September 9, 2016 pre-hearing conference, LSG’s counsel indicated their position that these proceedings could encompass whether any violations occurred **after** the 1996 Show Cause Order. In particular, LSG may request that the Hearings Officer rule on whether the 1996 Show Cause Order can be applied to Lanai Resorts’ use of brackish Wells 14 and 15.

Wells 14 and 15 were completed in 2004 and in 2012, respectively. It defies logic for the Hearings Officer to find that the **1996** Show Cause Order applies to wells that were not in existence until 8 to 16 years later. More importantly, expanding the scope and jurisdiction of the 1996 Show Cause Order in this manner constitutes reversible error. The remand orders gave the LUC a “clear task by the supreme court: **clarify its findings and conclusions,**”³ not to conjure up new findings and conclusions that were not even in existence during the original proceedings. Wells 14 and 15 were not part of the administrative record of the 1996 Show Cause Order

¹ *LSG Positional Statement* at 8.

² *OP’s Position Statement* at 7.

³ *Lanaians*, 137 Hawai‘i 298.

proceedings. Wells 14 and 15 should, therefore, be dealt with on a *de novo* basis and not be a part of the instant remand proceedings.

In addition, the supreme court's ruling emphasized the need for fair notice and due process when making decisions on alleged violations. The supreme court stated, "Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies. . . . An administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed." *Lanai Co., Inc.*, 105 Hawai'i at 314. Nothing in the 1989-1991 original proceedings provided fair notice and due process to the Petitioner that Wells 14 and 15 would be considered prospectively.

LSG may file a **separate** motion for an order to show cause targeting Wells 14 and 15 or any other alleged violation after 1996. Although this motion can be filed at any time, it would be logical that such a motion be filed after a decision is reached on the remanded proceedings. Conducting the proceedings separately would save time and resources, streamline the parties' cases, afford due process to the Petitioner, and minimize confusion of issues.

2. **Remaining Issues in Minute Order No. 2**

The remaining issues that were presented in Minute Order No. 2 are outside the scope of the remand orders.⁴ The Hawaii Supreme Court's remand opinion rendered Issues (b) and (c) of

⁴ The remaining issues in Minute Order No. 2 were:

- b) Is any source of the irrigation water from the golf course within the high-level groundwater aquifer?
- c) Is that water "potable" or not?
- d) Does leakage of potable water to the wells in the Palawai Basin constitute "use" of potable water?

Minute Order No. 2 moot,⁵ and none of the parties' position statements addressed these issues.

Issue (d) of Minute Order No. 2 refers to the "leakage" theory. With the sole exception of LSG, no other party considers this theory to be a valid issue. The County Planning Department stated, "The Department feels that leakage of potable water to the wells in the Palawai Basin does not constitute the 'use' of potable water. Even if this has occurred as a direct result of pumping non-potable water, Condition 10 only restricts [Lanai Resorts] from using potable water for irrigation of the golf course."⁶ OP stated that treating leakage as a violation "is inconsistent with the language of Condition 10 and the findings of fact and oral testimony from the district boundary amendment proceeding," and inconsistent with the Hawaii Supreme Court's remand order.⁷

As discussed in Lanai Resorts' *Statement of Position* and *Statement of Threshold Issues*, leakage is a naturally-occurring feature of the aquifer that the Petitioner's experts openly discussed during the 1989-1991 district boundary amendment proceedings. Nothing in those proceedings, or in the language of the LUC's April 16, 1991 Findings of Fact, Conclusions of Law, and Order, gave the Petitioner notice that "leakage" or indirect use of potable water was debated, argued, or contemplated as a violation of Condition 10. This lack of notice contravenes the supreme court's directive that "Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies." *Lanai Co., Inc.*, 105 Hawai'i at 314.

⁵ See *Lanai Resorts' Statement of Position* at 13.

⁶ *Testimony of the Maui Planning Department* at 4.

⁷ *Office of Planning's Testimony, Exhibit No. OP 2*, at 8.


C. Conclusion

We believe that the issues in Minute Order No. 2 as amended herein are consistent with, and more importantly, a direct reflection of the appellate courts' remand orders. Lanai Resorts seeks to minimize the risk of reversible error, by establishing a narrow and accurate scope for these proceedings in line with the appellate courts' orders.

Based on the foregoing, Lanai Resorts respectfully requests that the LUC set the issues on remand from the Hawaii Supreme Court of the LUC's 1996 Show Cause Order as follows:

- (a) "What does 'non-potable' mean in the context of Condition No. 10?"; and**
- (b) "Was Castle & Cooke, Inc. using non-potable or brackish water from the high-level groundwater aquifer to irrigate the golf course, from 1991 to 1993?"**

Dated: Honolulu, Hawaii, September 14, 2016.



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CERTIFICATE OF SERVICE


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I hereby certify that on this date a true and correct copy of the **PETITIONER LĀNA'I RESORTS, LLC'S MOTION TO SET ISSUES ON REMAND OF THE LAND USE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED MAY 17, 1996; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE OF SERVICE** was served upon the following as indicated below:

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DATED: Honolulu, Hawaii, September 14, 2016.


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