Of Counsel:
ASHFORD & WRISTON LLP
A Limited Liability Law Company
BENJAMIN A. KUDO 2262-0
CLARA PARK 9785-0
999 Bishop Street, Suite 1400
Honolulu, Hawaii 96813
Telephone: (808) 539-0400
Attorneys for
LĀNA`I RESORTS, LLC

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 MEMORANDUM IN OPPOSITION TO INTERVENOR LANAIANS FOR SENSIBLE GROWTH'S MOTION FOR CLARIFICATION OF SCOPE OF HEARING, OR IN THE ALTERNATIVE, FOR AN ORDER TO SHOW CAUSE; APPENDIX "A"; CERTIFICATE OF SERVICE**

PETITIONER LĀNA`I RESORTS, LLC'S MEMORANDUM IN OPPOSITION TO INTERVENOR LANAIANS FOR SENSIBLE GROWTH'S MOTION FOR CLARIFICATION OF SCOPE OF HEARING, OR IN THE ALTERNATIVE, FOR AN ORDER TO SHOW CAUSE

Petitioner LĀNA`I RESORTS, LLC **(Lanai Resorts)** respectfully submits this Memorandum in Opposition to Intervenor Lanaians for Sensible Growth (**LSG**)'s *Motion for Clarification of Scope of Hearing, or in the Alternative, for an Order to Show Cause*, filed on September 14, 2016 in the State Land Use Commission (**LUC**).

A. LSG's Request to Address Violations that Allegedly Arose After the LUC's Order to Show Cause filed October 13, 1993 Exceeds the Supreme Court's Remand and Leads to Reversible Error

The instant proceedings are on remand from the Hawaii Supreme Court. LSG agrees that "the Supreme Court's remand order is gospel."[1] The Hawaii Supreme Court has stated,

> [I]t is the duty of the trial court [or agency], on remand, to **comply strictly with the mandate** of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court, and (2) that when acting under an appellate court's mandate, an inferior court [or agency] **cannot vary it, or examine it for any other purpose than execution; or give any other or further relief**; or intermeddle with it, further than to settle so much as has been remanded.

Chun v. Bd. of Trustees of Employees' Ret. Sys. of State of Hawai'i, 106 Hawai`i 416, 439, 106 P.3d 339, 362 (2005) (emphases added, internal quotation marks and ellipsis omitted). "[R]emand for a specific act **does not reopen the entire case**; the lower tribunal only has the authority to carry out the appellate court's mandate." *Standard Mgmt., Inc. v. Kekona*, 99 Hawai`i 125, 137, 53 P.3d 264, 276 (Ct. App. 2001) (emphasis added). LSG's request to expand this case to address alleged violations arising up to today exceeds the supreme court's specific instructions and reopens the entire case.

[1] LSG Motion at 6.

The Hawaii Supreme Court remanded this case with specific instructions: to address the issue of "whether LCI **used** potable water from the high level aquifer in violation of Condition No. 10." *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai`i 296, 298, 97 P.3d 372, 374 (2004). The supreme court reiterated the issue throughout the opinion, always in the past tense. *See id.* at 306 ("we remand the question of whether LCI **was using** potable water"), 316 ("the LUC makes no specific finding or conclusion as to whether LCI **was using** potable water"), 319 ("the case is remanded . . . as to whether LCI **used** potable water from the high level aquifer"). The past tense was used because this is a remand to the 1993-1996 order to show cause proceeding, which examined the actions of Lanai Resorts' predecessor from 1991 to 1993. Nowhere in the opinion did the supreme court authorize the LUC to consider new allegations (i.e., post 1993) or issues during the remand proceedings.

LSG cites *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Hawai`i 187, 339 P.3d 685 (2014) as support for expanding the scope of this hearing.[2] However, *DW Aina Lea* is distinguishable because it was not pursuant to a remand order. That case involved a single, continuous proceeding on an order to show cause, not a rehearing of the case on remand from an appellate court. The central issue presented was whether the petitioner had failed to develop affordable housing units as required by an LUC condition. The LUC considered evidence of the petitioner's development efforts on a continuous basis for over several months, then rendered its decision reverting the petitioner's land use classification.[3] The LUC did not, however, consider any evidence or allegations after it issued the decision. The LUC decision concluded the show cause proceedings.

---

[2] LSG Motion at 9-10.

[3] Lanai Resorts agrees that evidence of the circumstances in 1993 up to the 1996 Show Cause Order may be relevant and are not precluded from this hearing. However, 1991 to 1993 is the time period during which the relevant alleged violations arose.

In the instant case, the LUC issued a decision twenty years ago that ended the show cause proceedings, i.e., the 1996 Show Cause Order. We are here to revisit that 1996 Show Cause Order only to the limited extent needed to address the supreme court's specific instructions on remand. We are not before the Commission to reopen the proceedings *de novo* or to create a new administrative record based on factual allegations that did not exist during those original show cause proceedings.

LSG also claims that Lanai Resorts "subjected Well 14, which wasn't in existence in 1993, to the reach of these proceedings" because Lanai Resorts mentioned Well 14 during the 2006 LUC proceedings held after the supreme court's remand.[4] We should bear in mind that the Intermediate Court of Appeals recently vacated those 2006-2010 proceedings for due process violations and for exceeding the supreme court's remand order. If LSG's request to expand the scope of our proceedings is granted, we fear that our proceedings will once again repeat the same procedural error that the 2006-2010 proceedings committed.

Moreover, Lanai Resorts' pleadings from the 2006-2010 proceedings indicated that Well 14 was raised only to show Lanai Resorts' consistent practice of using brackish water for irrigation, **not** to argue that Well 14 was part of those proceedings. *See* Appendix "A" (excerpts of Lanai Resorts' *Memorandum* filed September 25, 2007 (cited in LSG Motion at 3)).

LSG requests in the alternative that the LUC "issue[] an additional order to show cause addressing all past and continuing violations of Condition 10 and to combine the new order to show cause with the present proceedings."[5] The Commission is free to issue a new order to show cause if it so desires. However, combining a new order to show cause proceeding with the instant proceedings will clearly exceed the scope of the remand order by enlarging the scope of the 1993

[4] LSG Motion at 3-4.
[5] LSG Motion, Declaration of Counsel, at ¶ 11.

order to show cause hearings. This would constitute an *ultra vires* act and engender reversible error.

Based on the foregoing, Lanai Resorts respectfully asks that LSG's request to expand the scope of these proceedings be denied.

B. The Issues Presented in Minute Order No. 4 Should Not Be Pursued

LSG's Motion asks that Hearings Officer address the issues in Minute Order **No. 2** only, indicating that the issues in Minute Order No. 4 need not be pursued. In responding to the issues in Minute Order No. 4, LSG makes several arguments that Lanai Resorts does not agree with, and Lanai Resorts is prepared to present its opposition during the hearing if requested by the Hearings Officer. However, for the sake of simplicity, Lanai Resorts will not address those arguments here, and will rest on LSG's implicit agreement that the issues in Minute Order No. 4 should not be pursued.

C. The Issues Presented in Minute Order No. 2 Should Be Amended and Pursued

As stated in its *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*, filed herein on September 14, 2016, Lanai Resorts is requesting that these proceedings recast the amended issues set forth in the LUC's *Minute Order No. 2* filed on July 6, 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?"**

LSG also asks the Hearings Officer to adopt the issues in Minute Order No. 2. It appears the main source of disagreement between the parties (other than LSG's claim that these

proceedings should address allegations up to the present day) is whether LSG's "leakage" theory should be adopted as an issue.

Lanai Resorts does not dispute that the supreme court believed that the leakage theory could be relevant to the issue of "whether potable water is being used." However, the absence of any evidence in the 1991 hearings to establish the veracity of this theory resulted in no findings or conclusions by the LUC other than finding of fact no. 30.

Furthermore, Lanai Resorts' *Statement of Position* and subsequent filings (as well as the filings of all other parties besides LSG) have set forth several reasons why the leakage theory is a non-issue.

First, the word "leakage" is not mentioned in Condition No. 10 or anywhere in the April 16, 1991 Findings of Fact, Conclusions of Law, and Order (**1991 D&O**). LSG has not (and indeed, cannot) identified anything in the plain language of the 1991 D&O that supports its argument. All other parties besides LSG agree that the plain language of Condition No. 10 did not contemplate the leakage theory as a possible violation or use of potable water.

To support its leakage theory, LSG must look beyond Condition No. 10's plain language and into the potential unspoken intent of the Commissioners in 1991. However, LSG itself agrees that unspoken intent cannot be considered. As LSG stated, Condition No. 10 "must be interpreted by its 'plain and obvious meaning.' The unspoken intent of an agency should not be considered in interpreting the agency's decision. In this docket, the Supreme Court expressly held that Condition 10 'cannot be construed to mean what the LUC may have intended but did not express.'"[6]

[6] LSG Motion at 5 (internal citations omitted).

If anything, the administrative record indicates that "leakage" was **not** contemplated as a violation of Condition No. 10. Lanai Resorts has provided citations to the administrative record, showing that the Petitioner's experts openly presented testimony describing the leakage phenomenon as a naturally-occurring feature of the aquifer. Nothing in the 1991 D&O, or in the examination of these witnesses, indicated that any of the parties or the Commissioners equated leakage to the use of potable water, and therefore a violation of Condition 10.

Moreover, the leakage theory flies in the face of the supreme court's ruling. The supreme court found that the high-level aquifer contains both potable and non-potable water, and that Condition No. 10 allows Lanai Resorts to use the non-potable water for irrigation. *Lanai Co., Inc*, 105 Hawai`i at 313. The supreme court also pointed out that LSG had submitted a proposed order to the LUC to consider prior to the entry of the 1991 order. LSG proposed that Condition 10 prohibit all use of water in the high level aquifer for golf course maintenance or operation. The supreme court recognized that, "[s]uch a condition, which would have clearly prohibited the use of any water from the high level aquifer, was not adopted by the LUC in its 1991 order." *Lanai Co., Inc.,* 105 Hawai`i at 310. The logical conclusion of the leakage theory is to make **all** wells and water from the high-level aquifer potable. This conclusion was considered and rejected by the LUC and the supreme court.

D. <u>Conclusion</u>

Based on the foregoing, Lanai Resorts respectfully requests that LSG's Motion be denied, and 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 23, 2016.

BENJAMIN A. KUDO
CLARA PARK
Attorneys for
LĀNA`I RESORTS, LLC

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 PETITIONER CASTLE & COOKE RESORTS, LLC'S MEMORANDUM RE EFFECT OF GRANTING MOTION FOR MODIFICATION OF CONDITION NO. 10 AND DISSOLUTION OF 1996 CEASE AND DESIST ORDER UPON REMAND PROCEEDINGS

PETITIONER CASTLE & COOKE RESORTS, LLC'S MEMORANDUM RE EFFECT OF GRANTING MOTION FOR MODIFICATION OF CONDITION NO. 10 AND DISSOLUTION OF 1996 CEASE AND DESIST ORDER UPON REMAND PROCEEDINGS

I. INTRODUCTION

This supplemental memorandum addresses the particular issue raised by the Land Use Commission ("LUC") at the hearing in the above referenced matter on August 23, 2007, regarding the proposed modifications of Condition No. 10 and dissolution of the LUC's May 17, 1996 Findings of Fact, Conclusions of

The Supreme Court remanded this case to the LUC to determine whether or not Castle & Cooke violated Condition No. 10 by using "potable water" from the high level aquifer. The Supreme Court specifically instructed the Commission to clarify its findings and conclusions **or** to hold further hearings if necessary. *Id.* Granting either motion to modify would clarify the LUC's findings and conclusions as to whether Castle & Cooke used "potable water" from the high level aquifer. Both proposed modifications to Condition No. 10 adopt the definition of "potable" adopted by the County of Maui (*i.e.*, less than 250 mg/l chlorides). If the LUC adopts this definition as well, no further hearings are necessary because the existing evidence on the record is clear that Castle & Cooke was not utilizing water from the high level aquifer which contained less than 250 mg/l chlorides.

Specifically, further hearings are not necessary because the 1996 Cease and Desist Order itself stated that Well Nos. 1 and 9 are contaminated at least by chlorides not less than 250 mg/l. According to the extended well pump test cited by the 1996 Cease and Desist Order, for Well No. 1 chlorides ranged between 326 and 330 mg/l. For Well No. 9, the chloride range was between 395 and 404 mg/l. Finally, Well No. 14 was developed and first used in 2004; its chlorides levels are in excess of 500 mg/l. Because the evidence in the existing record clearly demonstrates that Castle & Cooke was not using "potable" water as

defined in the proposed modifications, the LUC will have clarified its findings and conclusions on this point and no further hearings are necessary or required.

The Supreme Court expressly directed the LUC to clarify its findings and conclusions. In fact, the Supreme Court stated that "[a]n administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed." *Lanai Company*, 105 Hawai'i at 314, 97 P.3d at (2004). Granting either of the motions to modify Condition No. 10 would satisfy this directive. Additionally, under the Land Use Commission Rules, the LUC is specifically authorized to clarify its conditions. *See* §15-15-94 "Modification or deletion of conditions or orders. . . (b) For good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order."

The appeal that eventually led to the Supreme Court remand was LCI's appeal of the 1996 Cease and Desist Order. If the Commission grants either pending motion to modify Condition 10, the evidence demonstrates that there is no violation under the modified terms, thus the 1996 Cease and Desist Order is dissolved. Any appeal or subsequent remand addressing that Cease and Desist Order necessarily becomes moot.

A controversy is moot if further proceedings can have no effect because outside events have resolved the issues. *See, e.g., Wong v. Board of*

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 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the **PETITIONER LĀNA`I RESORTS, LLC'S MEMORANDUM IN OPPOSITION TO INTERVENOR LANAIANS FOR SENSIBLE GROWTH'S MOTION FOR CLARIFICATION OF SCOPE OF HEARING, OR IN THE ALTERNATIVE, FOR AN ORDER TO SHOW CAUSE; APPENDIX "A"; CERTIFICATE OF SERVICE** was served upon the following as indicated below:

BRYAN C. YEE, ESQ. DAWN TAKEUCHI APUNA, ESQ. Department of the Attorney General Hale Auhau, Third Floor 425 Queen Street Honolulu, Hawaii 96813 Attorney for State Office of Planning	Via U.S. Postal Mail

LEO R. ASUNCION, Jr., AICP, Director RODNEY Y. FUNAKOSHI Office of State Planning 235 South Beretania Street, 6th Floor Honolulu, Hawaii 96813	Via U.S. Postal Mail
WILLIAM SPENCE, Director Planning Department, County of Maui 2200 Main Street One Main Plaza, Suite 315 Wailuku, HI 96793	Via U.S. Postal Mail
PATRICK K. WONG, ESQ. MICHAEL HOPPER, ESQ. CALEB ROWE, ESQ. Office of the Corporation Counsel 200 South High Street Wailuku, Hawaii 96793	Via U.S. Postal Mail
DAVID KOPPER, ESQ. LI`ULA NAKAMA, ESQ. Native Hawaiian Legal Corporation 1164 Bishop Street, Suite 1205 Honolulu, Hawaii 96813 Attorney for Intervenor LANAIANS FOR SENSIBLE GROWTH	Via U.S. Postal Mail

DATED: Honolulu, Hawaii, September 23, 2016.

BENJAMIN A. KUDO
CLARA PARK
Attorneys for
LĀNA`I RESORTS, LLC