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COUNTY OF MAUI
DEPT. OF PLANNING
ADMINISTRATION

July 8, 2014

VIA HAND DELIVERY

Department of Planning
c/o John Ornellas, Chair
Lana'i Planning Commission
2200 Main Street, Suite 315
Wailuku HI 96793

Re: State Land Use Special Use Permit SUP2 2013/0028: Reverse Osmosis
Desalination Facility and Distribution System: Proposed Condition # 23

Dear Sir/Madam:

This firm represents Pulama Lanai, applicant in the above referenced matter. At the Lanai Planning Commission ("LPC") meeting on June 18, 2014, the LPC voted to approve the subject Special Use Permit ("SUP") subject to several conditions of approval. The final decision and order of the LPC has not yet been issued.

Pulama Lanai appreciates the LPC's time and thoughtful deliberations in this matter. However, one of the proposed conditions of approval discussed at the public meeting raises significant legal and practical concerns. Therefore, Pulama Lanai wishes to bring these concerns to the LPC before the findings of fact, conclusions of law and decision and order granting the SUP is issued, so that the LPC has an opportunity to fully consider the matter, and incorporate all appropriate findings, conclusions and conditions into the final SUP decision and order. The LPC has the authority to make motions and amendments under LPC Rule §12-401-26. Therefore, Pulama Lanai respectfully requests that the LPC move to consider the issues raised in this letter and, to the extent applicable, continue, or re-open the proceedings in this matter so that the serious legal and substantive issues raised by the proposed condition of approval may be corrected.

Based on the discussions at the June 18 meeting, we understand that proposed Condition No. 23 states as follows:

Once the desalination plant is operational, no high level aquifer water will be pumped to or used in the Manele Project District except in the event of an emergency, as determined by the Lāna'i

Water Company and the Lānaʻi Water Advisory Committee (LWAC), and then only for human consumption.

Respectfully, we assert that there are several problems with proposed Condition 23. These serious defects mean that if proposed Condition 23 is incorporated into the final SUP decision and order, the SUP will be vulnerable to legal attack under HRS §91-14(g).¹

Special Use Permits granted under HRS §205-6 cannot supplant the LUC's Decision and Order in Docket A89-649, or the authority granted to CWRM under the State Water Code (*see* Chapter 174C, HRS), and there is nothing in the record to support the imposition of a condition that regulates the use of water in a SUP permit that is expressly authorizing the use of land.

We appreciate the opportunity to bring these concerns to the attention of the Lanai Planning Commission. In so doing, Pulama Lanai hopes to avoid legal and logistical problems that will arise, should the LPC incorporate proposed Condition 23 into the final SUP decision and order. Should the LPC request, Pulama Lanai is prepared to submit a detailed legal memorandum addressing each of these points.

Very truly yours,



Craig G. Nakamura

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Pulama Lanai

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¹ HRS §91-14(g) provides:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.