

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

ONE MAIN PLAZA, SUITE 400
2200 MAIN STREET, P.O. BOX 1086
WAILUKU, MAUI, HAWAII 96793-1086
TELEPHONE 808.242.4535 FAX 808.244.4974
WWW.CARLSMITH.COM

CNAKAMURA@CARLSMITH.COM

July 16, 2014

Re: Testimony On Agenda Item C.1. Proposed Condition #23 for SUP2 2013/0028:
Reverse Osmosis Desalination Facility & Distribution System

Dear Chair Ornellas and Members of the Lana'i Planning Commission:

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 findings of fact, conclusions of law and final decision and order of the LPC have not yet been issued. This testimony is to urge the LPC to eliminate proposed Condition 23 from the subject SUP before the SUP is finalized and issued as a written decision and order.¹ Condition 23 raises serious legal issues of a jurisdictional, substantive and procedural nature.

A. THE STATE LAND USE COMMISSION ALREADY EXERCISED JURISDICTION OVER PULAMA LANAI'S USE OF GROUNDWATER

By Findings of Fact, Conclusions of Law, and Decision and Order issued on April 16, 1991, in Docket A89-649 (*In re Lanai Resort Partners*), the State Land Use Commission ("LUC") imposed several conditions on the reclassification of land into the State Urban District. LUC Condition #10 instructed the Petitioner to refrain from using potable water from the high-level groundwater aquifer for golf course irrigation use. Instead, the LUC directed the Petitioner to develop and utilize alternative non-potable sources of water for golf course irrigation. The LUC also required the Petitioner to comply with the requirements imposed by the State Commission on Water Resource Management. The LUC Decision and Order in Docket A89-649 is binding on Pulama Lanai.

¹ 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 Lāna'i Water Advisory Committee (LWAC), and then only for human consumption.

1. WHERE THE LUC HAS ALREADY SPOKEN, THE LPC DOES NOT HAVE JURISDICTION TO IMPOSE AN ADDITIONAL OR CONTRARY CONDITION

The LUC has already spoken to issues of groundwater management and control within the Manele Project District. Therefore, the LPC does not have jurisdiction to impose conditions that relate to the same subject matter already addressed by the LUC. Similar to the legal principle that divests lower courts of jurisdiction once an appeal is filed, and transfers that jurisdiction to the appellate court, the LPC cannot claim jurisdiction over a matter already decided by another body. The legal principle requiring the transfer of jurisdiction is designed to avoid the confusion and inefficiency that would result from placing the same issue before two decision-making bodies at the same time. See *TSA Int'l Ltd. v Shimizu Corp.*, 92 Hawaii 243, 990 P.2d 713 (1999) (citing 9 J. Moore, Moore's Federal Practice (2d ed.1996)). Clearly, a situation where the LUC and the LPC both attempt to claim jurisdiction and impose separate conditions on Pulama Lanai will create confusion and inefficiency, and therefore runs contrary to fundamental purpose of subject matter jurisdiction.²

The LUC imposed Condition #10 to address the management and use of groundwater in the Manele Project District. In effect, the LUC has preempted the field with respect to Pulama Lanai's use of high level aquifer water. Now, in excess of its authority and jurisdiction, the LPC proposes to further condition Pulama Lanai's use of high level water in the Manele Project District by imposing Condition 23. However, the transfer of jurisdiction rule eliminates the LPC's jurisdiction in this subject area, and therefore precludes the LPC's legal authority to impose Condition 23.

2. ABSTENTION IS APPROPRIATE WHERE THE CONDITION IS THE SUBJECT OF CURRENT LITIGATION & MEDIATION

Proposed Condition 23 deals with an issue presently in litigation between Lanai Resorts, LLC, dba Pulama Lanai, the LUC, the members of the LUC in their official capacities, the County of Maui Planning Department, the State Office of Planning and Lanaians for Sensible Growth ("LSG"). The litigation relates in part to LUC Condition #10. Currently the parties are before the Intermediate Court of Appeals in the action entitled *Lanaians for Sensible Growth, v. Land Use Commission, et. al.*³ In connection with that litigation, Pulama Lanai and LSG are presently in mediation in an attempt to resolve the decade's long dispute. For this reason, even if the LPC had jurisdiction to address the use of high level water (which, as discussed above, Pulama Lanai asserts it does not), for reasons of comity, the LPC should abstain from imposing any conditions on the SUP that relate to the matter currently subject to litigation/mediation.⁴

² We also note that Condition 23, by delegating authority to the LWAC, runs afoul of the prohibition against unlawful delegation of duty, as set forth in *Hui Alaloa v. Planning Comm'n, Cty of Maui*, 68 Haw. 135, 705 P.2d 1042 (1985).

³ CAAP-13-0000314.

⁴ Comity is a self-imposed rule of judicial restraint. Judicial comity is the respect a court (or agency) of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and decisions. See Black's Law Dictionary.

In cases such as this, even if the fatal jurisdictional flaw was not present, the LPC should abstain from taking any action to regulate Pulama Lanai's use of groundwater. Abstention by the LPC from deciding an issue being litigated in state court proceedings avoids the very real possibility of duplicative litigation. Since the issue of whether a condition prohibiting high-level aquifer use is even appropriate is presently being litigated/mediated, abstention also prevents an unjust and unreasonable result. *See Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 40, 7 P.3d 1068, 1077 (2000) (holding that agency decisions must be just and reasonable).

B. CWRM, NOT THE LPC, HAS JURISDICTION OVER THE USE OF HIGH LEVEL AQUIFER WATER

Assuming, without conceding, that LUC Condition #10 did not work to remove jurisdiction from the LPC, the imposition of Condition 23 would still suffer from legal defects because, respectfully, it is in excess of the LPC's statutory authority and jurisdiction.

The State Commission on Water Resource Management ("CWRM") has the authority and jurisdiction over the water resources in the State of Hawaii. *See* Art. XI Sec. 7, Hawaii State Constitution; *and see* HRS §174C-7(a).⁵ CWRM further has the sole authority and jurisdiction to establish sustainable yields for aquifers in the State.⁶ HRS §174C-31(i)(2). CWRM has the sole authority to designate water management areas, issue water use permits and issue permits for well drilling and pump installation. CWRM plans, controls and manages the use of water resources in the State of Hawaii based on the Constitutional and statutory authority granted to it by the legislature. In contrast, the LPC's role, while very important, does not extend to the regulation of water resources. The LPC is a land use authority, and does not have the jurisdiction or authority to impose conditions that overreach into the realm controlled by CWRM.

C. NO NEXUS BETWEEN THE IMPACTS OF THE SPECIAL USE PERMIT AND THE PROPOSED PROHIBITION ON THE USE OF HIGH LEVEL WATER

Proposed Condition 23 suffers from a complete and total lack of nexus between the minimal impacts anticipated from the desalination facility and the unjustified restriction proposed under Condition 23. As a result, the SUP will fail under the unconstitutional conditions doctrine, which was recently affirmed by the U.S. Supreme Court. *See Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013) (holding in favor of the permit applicant, and against the agency that imposed a condition requiring the permit applicant to

⁵ HRS §174C-7(a) provides as follows: "There is established within the department a commission on water resource management consisting of seven members which shall have exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as otherwise specifically provided in this chapter."

⁶ HRS §174C-3 defines "Sustainable yield" as follows: "the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by [CWRM]."

donate off-site property in return for a land use permit; agency condition was an "extortionate demand" and an "unconstitutional condition").

Any condition imposed in the SUP must have an "essential nexus" to the social costs of Pulama Lanai's proposed land use. The proposed desalination facility generates virtually no social costs; the proposed facility generates a social benefit. "[T]he government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Dolan v. City of Tigard*, 512 U.S. 385 (1994), citing *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 837 (1987). In other words, all land use permit conditions must be crafted to offset impacts of the proposed development. Pulama Lanai should not be penalized in return for investing substantial sums and effort to develop a state-of-the-art water system that will ultimately benefit the Island and its water resources.

Hawaii courts are well familiar with the doctrine of unconstitutional conditions. In the context of a State Land Use Special Use Permit issued under HRS §205-6, the Hawaii Supreme Court upheld conditions imposed on Special Use Permit because those conditions "were undoubtedly intended to ameliorate deleterious effects of the special use on neighboring agriculture." *Perry v. Planning Comm'n*, 62 Haw. 666, 682, 619 P.2d 95, 106 (1980). Conversely, conditions that do not ameliorate the direct effects of the proposed land use, such as Condition 23, are not allowed under the constitution, or under the LPC's statutory authority. As such, Condition 23 will subject the SUP to legal challenge under HRS §91-14(g)(1), which allows the courts to reverse decisions of an administrative agency if the decision is in violation of constitutional or statutory provisions.

The LPC derives its jurisdiction and authority from HRS Chapter 205, which regulates land use district boundaries throughout the State of Hawaii. HRS §205-6 authorizes the LPC to issue Special Use Permits for "certain unusual and reasonable uses within agricultural and rural districts[.]" The LPC certainly has the authority to impose conditions on a SUP, but those conditions must "promote the effectiveness and objectives" of Chapter 205. In other words, the conditions imposed in a SUP must be tied to the impacts of the approved land use, and must promote agricultural or rural activities.

Prohibiting Pulama Lanai from making use of high level aquifer water in no way promotes the establishment of the State's land use district boundaries, and does nothing to ameliorate any potentially adverse impacts on agricultural activities. It is unrefuted that the proposed desalination facility "will not detract from the island's inventory of agricultural lands and will not present any adverse effects on agricultural production." See Planning Dept's Report to the LPC at 19. Therefore, proposed Condition 23 violates the language and policy underlying Chapter 205, HRS (the State land use law). As a result, Condition 23 will subject the SUP to legal challenge under HRS §91-14(g)(2), which allows the courts to reverse decisions of an administrative agency if the decision is in excess of the statutory authority or jurisdiction of the agency.

A further consideration is the fact that by eliminating Pulama Lanai's existing rights, which is the net effect of Condition 23, the LPC is essentially destroying legal rights long relied upon by Pulama Lanai, and its predecessors. Pulama Lanai has, in good faith, relied on the entitlements issued by the LUC and the County of Maui over the course of more than a decade. It is simply unfair for the LPC to now impose Condition 23, after Pulama Lanai made substantial investments in reliance on the existing, and unchallenged, entitlements.

D. **CONDITION 23 IS NOT SUPPORTED BY THE RECORD**

Pulama Lanai is concerned that there are procedural defects associated with proposed Condition 23, which provide yet another basis for a court to reverse the LPC's decision. *See* HRS §91-14(g)(3) (reversal based on unlawful procedure); *and see* HRS §91-14(g)(5) (reversal due to decision being clearly erroneous in view of the reliable, probative and substantial evidence on the whole record). Those concerns are based on the fact that Condition 23 is not supported by the evidence that is on the record, and therefore raises an inquiry as to whether the Commissioners impermissibly considered matters outside of the record, and not as part of the public process.

For the purposes of an agency decision, the "record" shall include all pleadings, all evidence received, including oral testimony and all staff memoranda. HRS §91-9. By law, "no matters outside the record shall be considered by the agency in making its decision[.]" *See* HRS §91-9(g). In this case, there is nothing in current record to support proposed Condition 23.

Condition 23 was not included in the Planning Department's Report to the LPC. It was not included in the Planning Department's Addendum Report to the LPC. Condition 23 is clearly adverse to Pulama Lanai, but Pulama Lanai was not served a proposed decision and order, nor provided an opportunity to file exceptions in response to that proposed decision and order, as required under HRS §91-11. Condition 23 was sprung on Pulama Lanai without fair warning, without precedence, and without any supporting evidence to substantiate it. In light of these procedural errors, Pulama Lanai was denied any meaningful opportunity to challenge Condition 23. That is the very essence of a decision that is arbitrary, capricious, or characterized by abuse of discretion. *See* HRS §91-14(g)(6).

Furthermore, if the LPC considered information outside of the record, and made its deliberations on that information in private, and not as part of the open meeting, the entire SUP proceedings are vulnerable to attack. Should this conduct have occurred, Pulama Lanai reserves its rights to challenge the final decision and order on this ground as well. Failure to comply with required procedures violates Pulama Lanai's constitutional rights to due process, as Pulama Lanai was not given a fair opportunity to respond to and refute proposed Condition 23. This not only creates a reversible error under HRS §91-14 (governing judicial review of the decisions of administrative agencies), it may also give rise to claims under 42 U.S.C. §1983.

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Thank you for this opportunity to present testimony on Agenda item C.I. Pulama Lanai respectfully requests that the Lanai Planning Commission grant the relief requested and issue the SUP without proposed Condition 23. However, in the event that the Commission cannot see its way to grant the requested relief, this will provide notice that Pulama Lanai provides this testimony without any waiver of claims, rights or causes of action, and hereby reserves any and all of its rights relating to the project approved under the SUP.

Sincerely,

A handwritten signature in black ink, appearing to read 'Craig G. Nakamura', written in a cursive style.

Craig G. Nakamura