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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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LĀNAʻIANS FOR SENSIBLE GROWTH, Intervenor-Appellant,

vs.

LAND USE COMMISSION, COUNTY OF MAUI DEPARTMENT OF PLANNING, STATE OFFICE OF PLANNING, Appellees,

and

LĀNAʻI RESORTS, LLC, Petitioner-Appellee.

SCOT-17-0000526

APPEAL FROM THE LAND USE COMMISSION
(Agency Docket No. A89-649)

MAY 15, 2020

OPINION CONCURRING IN THE JUDGMENT AND DISSENTING BY RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

I. INTRODUCTION

The Land Use Commission's (LUC) determination that the Resort complied with Condition 10 is supported by substantial

evidence, and accordingly, I concur in the judgment affirming the LUC's 2017 Order. However, I respectfully disagree with the majority's analysis in reaching this result.

This dispute began in 1991, when the LUC issued an Order (1991 Order) granting the Resort's petition for a district boundary amendment for purposes of building a golf course. The Order imposed Conditions on the Resort, including Condition 10, which provides in relevant part:

> [The Resort] shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.

In 1996, the LUC determined that the Resort violated Condition 10 by using water from the high-level aquifer to irrigate the golf course (1996 Order). In 2004, we vacated and remanded the LUC's 1996 Order and held that Condition 10 did not preclude use of all water from the high-level aquifer, only the "potable" water. Lanai Co. v. Land Use Commission, 105 Hawaiʻi 296, 314, 97 P.3d 372, 390 (2004). Because the LUC's 1996 Order did not contain reasonably clear findings as to whether the Resort used potable water in violation of Condition 10, we directed the LUC on remand to clarify its findings and conclusions and, if necessary, conduct further hearings. Id. On remand, the LUC concluded that the Resort complied with Condition 10 and that the Resort's use of Wells 1 and 9 to irrigate the

Mānele golf course did not pose a threat to public trust resources (2017 Order).

The LUC's conclusions are supported by the record and correctly apply the law. The Resort's use of brackish water from Wells 1 and 9 did not violate Condition 10, nor does such a reading of the Condition violate the public trust doctrine. Condition 10 clarified, by way of an "e.g." clause, that "brackish" water was an example of water that was nonpotable within the context of the Order and thus available for use by the Resort.

The majority, however, defines potable in reference to "county water quality standards." This reading ignores the terms of the Condition, for "county water quality standards" appears nowhere in it. Because the majority creates a standard contrary to the text of the Condition, deprives the Resort of fair warning of its ongoing obligations under the LUC's Order, and provides little useful guidance to the Resort for future water use, I respectfully dissent.

II. DISCUSSION

A. The Majority's Definition of "Potable" is Divorced from the Text of the 1991 Order

At the center of this decades-long dispute is, ultimately, the proper interpretation of Condition 10 and the meaning of the word "potable." The majority contends that the 1991 LUC intended "potable" to mean "suitable for drinking under

county water quality standards." Majority at 2. I respectfully disagree.

The majority cannot find its definition in the Order itself, because that language does not exist. We cannot "enforce a construction of Condition 10 that was not expressly adopted." Lanai Co., 105 Hawaiʻi at 314, 97 P.3d at 390. "Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires" in order to ensure the parties receive notice of their obligations. Id. As such, the LUC must "stat[e] with ascertainable certainty what is meant by the conditions it has imposed" in an administrative order. Id. While the majority rightly recognizes that "the meanings of the terms used in Condition 10" should be "fixed based on the LUC's intention at the time the condition was imposed," this intention must be stated "with ascertainable certainty" to be enforceable. Majority at 17 n.8; Lanai Co., 105 Hawaiʻi at 314, 97 P.3d at 390.

By creating and importing a new definition of potable into Condition 10, the majority's construction fails that test. It is difficult to imagine how the LUC could have given "fair notice" to the parties and stated its intention "with ascertainable certainty" through the absence of language that the majority now determines to bind the Resort. Tellingly, the majority can only point to one finding of fact in the 1991 Order that purports to support its "county water quality standards"

definition - and even that must be contorted to support their conclusion. Majority at 33-34. The most straightforward interpretation of the finding that the "[g]roundwater underlying the golf course at Manele is too brackish for drinking water" is that, consistent with Condition 10 itself and the Order as a whole, the LUC understood "brackish" water to be "nonpotable." Had the LUC intended to limit the Resort's ability to use brackish water based on additional standards, to monitor for EPA primary contaminants, to take into account "a host of secondary considerations," or to apply any other criteria beyond those provided under Condition 10, it could and should have expressly done so. Majority at 24 n.11; see Lanai Co., 105 Hawaiʻi at 314, 97 P.3d at 390; DW Aina Leʻa Development, LLC v. Bridge Aina Lea, LLC, 134 Hawaiʻi 187, 215-16, 339 P.3d 685, 713-14 (2014).

In DW Aina, we held that the LUC erred in enforcing a condition that was not expressly stated. 134 Hawaiʻi at 215-16, 339 P.3d at 713-14. In that case, the LUC issued an order that rescinded an Order to Show Cause, "provided that as a condition precedent, sixteen affordable units be completed by March 31, 2010." Id. at 215, 339 P.3d at 713 (emphasis added). Like the word "potable" in the instant case, the word "complete" in DW Aina was subject to multiple interpretations. As we noted, the LUC's order "did not make it clear what would qualify as a 'complete' unit" or "state what level of completion would satisfy" the condition. Id. At a hearing before the LUC, the

developer "made it clear to the LUC that vertical and horizontal construction would be occurring simultaneously, and that townhouses would be completed" prior to connecting them to utilities. Id. (emphasis added). However, the LUC later claimed that it intended the word "complete" to mean not only that the physical structures were built, but also that they were ready to be occupied. See id. In light of the LUC's failure to define "complete" with "ascertainable certainty," and in light of the developer's representations about its progress towards "completion," we held that the LUC erred by imposing on the developer a definition of "complete" not contemplated by the original condition. Id. at 215-16, 339 P.3d at 713-14.

Here, if the LUC indeed meant "potable" to mean "suitable for drinking under county water quality standard," it conveyed this intention with considerably less "ascertainable certainty" than in DW Aina. See id. at 215–16, 339 P.3d at 713–14; see also Lanai Co., 105 Hawaiʻi at 314, 97 P.3d at 390. As such, this is not an enforceable interpretation of Condition 10.[1] By contrast, Condition 10's plain text offered clear guidance: brackish water is an example of nonpotable water that

[1] If Condition 10 did not adequately protect the public trust, the administrative order must, of course, give way to the LUC's constitutional duties, regardless of whether the parties had "express notice of the existence of the rights protected under the doctrine," Majority at 30; the LUC undeniably had an affirmative duty to protect water resources. See In re Waiola O Molokai, Inc., 103 Hawaʻi 401, 430, 83 P.3d 664, 693 (2004). However, I disagree at the outset that the construction set forth in this opinion poses public trust concerns. See infra Part II.C.

the Resort may use for golf course irrigation.

B. Condition 10 Permits the Resort to Use Water Designated as Brackish - and Prevents the Resort from Using Water from the "Potable" System - to Irrigate the Golf Course

1. The 1991 Order was clear that "brackish" water is "nonpotable" and thus available for use

"[T]he 1991 Order cannot be construed to mean what the LUC may have intended but did not express." Lanai Co., 105 Hawaiʻi at 314, 97 P.3d at 390. While the definition of "potable" has long been a matter for debate, as Lanai Co. and the 2017 Order recognized, the 1991 Order does provide specific guidance about what constitutes nonpotable water. The Order expressly excluded "brackish" water from its definition of potable, and the Resort, therefore, was permitted to use brackish water from Wells 1 and 9 for irrigation.

In interpreting the meaning of an administrative order, we start with the plain language. See Lanai Co., 105 Hawaiʻi at 310, 97 P.3d at 386. The disputed portion of Condition 10 of the 1991 Order reads as follows:

> [The Resort] shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.

(Emphases added.)

As the LUC found in the 2017 Order, "[t]he language of Condition 10 has proved to be confusing and contentious," and "reasonable Commissioners or observers may have read the language

of Condition 10 to have different meanings." However, citing the testimony of one witness from the 1990-91 hearings, the LUC found that "[t]he common sense definition of the word 'potable' is drinkable." Likewise, this court has stated that "[t]he term for 'potable' water is ordinarily defined as 'suitable for drinking,'" but we recognized that reasonable minds could disagree as to what "potable" means and how to measure "potability." Lanai Co., 105 Hawaiʻi at 299 n.8, 97 P.3d at 375 n.8 (quoting Webster's Seventh New Collegiate Dictionary, 664 (1965)). "Potable water" could reasonably be defined as water that is "safe" for drinking, "suitable" for drinking, or "used" for drinking. All of these definitions could be described as "common meaning[s]" of the term potable, but the majority provides no compelling reason why "suitable for drinking under county water quality standards" prevails. Majority at 17.

By contrast, when there is a need to draw fine distinctions between these definitions, such as in this case, we must do so by reading the term "potable" in context. See Lanai Co., 105 Hawaiʻi at 310, 97 P.3d at 386. The LUC's ruling in the 2017 Order was properly based on a contextual reading of the term "potable," consistent with the language of Condition 10. In particular, the LUC considered the rest of the language in the first paragraph of Condition 10, construing the "e.g." clause as a plain-language tool intended to help narrow the meaning of

"potable" and more clearly define the Resort's obligations.[2] The LUC found:

> By including the category of "brackish" water as a specific example (in an e.g. clause) as an "alternate source" of water, Condition 10 clearly indicated that in the specific context of this Docket and Condition 10, "brackish" water was considered not to be potable, but rather a source of water "alternate" to the "potable" water supplies of the island[.]

(Emphases in original.)

LSG argues that the LUC's construction of Condition 10 departs from its plain and unambiguous language, asserting:

> Condition 10 restricts [the Resort] to using nonpotable water. Whether the water is "brackish" or not is literally not sufficient. Brackish water is either potable or nonpotable. Condition 10 bars its use if it is the former and allows it if it is the latter. The meaning of Condition 10 is plain and unambiguous. Nothing could be clearer.

While I disagree LSG's contention that what the Order meant by "potable" is "plain and unambiguous" - it is anything but - it does plainly indicate that the LUC contemplated two kinds of water sources to be "nonpotable": brackish water and reclaimed sewage effluent. The majority's contention that we and the LUC are reading the "e.g." clause as an "i.e." clause simply lacks merit. Majority at 15–16. I do not suggest that brackish is an "interchangeable term for non-potable" any more than I suggest that reclaimed sewage effluent is interchangeable for

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[2] The Resort and the Office of Planning agreed, arguing that it is clear from the language of Condition 10 that brackish water and reclaimed sewage effluent are examples of alternative non-potable sources of water, and "[t]he only reasonable reading of Condition 10, therefore, is that the term 'potable water' excludes brackish water and reclaimed sewage effluent."

non-potable. Majority at 15. I only conclude that brackish water is a specific example of a non-potable source as defined by Condition 10. Likewise, reclaimed sewage effluent may or may not be brackish, but it is non-potable within the meaning of Condition 10, as it is also an example within the "e.g." clause.

Indeed, the use of non-examples in an open-ended list can help clarify and narrow the meaning of broad terms applied in a given context, and the "e.g." clause could reasonably be construed as a means of doing so in the context of the 1991 Order. By way of analogy, if a catering business posted on its website, "Meat options are not available on Fridays," some people might reasonably assume that "meat" includes any form of animal protein, while others might not. Imagine that in the sentence after that, the company states, "However, non-meat protein options (e.g., fish, tofu) are available." In so doing, the company has clarified that it does not consider "fish" to be a "meat option" on the menu. While some might disagree with that meaning of "meat," the sentence nonetheless made it clear that "fish" will not be taken off the Friday menu.

As this multi-decade litigation throws into sharp relief, different people might construe the term "potable" differently. The "e.g." clause in Condition 10 clarified the meaning of "potable" water sources within the context of the Order by furnishing two non-examples: brackish water and reclaimed sewage effluent. These non-examples constitute two

sources that the Condition, by its terms, qualify as "non-potable," and in turn, the Resort could safely use those sources of water for golf course irrigation without running afoul of Condition 10.

Nothing about my construction of Condition 10 or the 1991 Order requires Wells 1 and 9 to remain in Lānaʻi's brackish water system in perpetuity, as the majority asserts. See, e.g., Majority at 20. Of course, if Wells 1 and 9 were made part of Lānaʻi's potable water system - in other words, if they no longer were "brackish" - their use for golf course irrigation would violate Condition 10. I agree with the majority that the Resort is not entitled to unmitigated and perpetual use of specific resources. But the Resort must be appraised of what kind of water they can use, such that if the island's resources change character, it may respond by changing its practices in accordance with the 1991 Order. In contrast to water sources changing relative to a fixed definition, the majority's definition of "potable" itself may change based on unstated factors.

2. Read as a whole, the 1991 Order provides the Resort fair notice of its obligations

While the majority's definition cannot be gleaned from the 1991 Order itself, by defining "brackish" water as an "alternative non-potable source," separate and distinct from "potable" water, Condition 10 provided the Resort fair notice that it could not irrigate the golf course with any water from

the high-level aquifer designated for use as part of the island's "potable" system - the Condition did not, however "prohibit [the Resort] from using all water from the high level aquifer." 105 Hawaiʻi at 310, 97 P.3d at 386.

Lānaʻi's high-level aquifer is unique in that it has certain wells that "draw the only known high-level ground water in the state that is brackish, as opposed to fresh." Because the high-level aquifer contains both fresh and brackish water, both the "potable" and "brackish" water systems on Lānaʻi draw from the high-level aquifer. Consistent with this understanding, Condition 10 precluded the Resort from using "the potable water from the high-level groundwater aquifer," or water in the "potable" system, to irrigate the golf course. But it did not preclude the Resort from using all water from the high-level aquifer, given the unique presence of brackish water sources, which, at the time, were already used in the "brackish" system for irrigation purposes.

In Lanai Co., this court distinguished the "potable" water in the high-level aquifer from the "brackish water supply" in the Pālāwai Basin area of the high-level aquifer. 105 Hawaiʻi at 313, 97 P.3d at 389. Because the map in the record showed Well 1 and the Pālāwai Basin to be within the high-level aquifer, we concluded that the LUC could not have believed "that the high level aquifer consisted of only potable water." Id. We noted:

> If the LUC believed that the high level aquifer only

> consisted of potable water, or that Wells No. 1 and 9 were not to be used, it could have expressly said so in the 1991 Order. Indeed, the mention of Wells No. 1 and 9 in finding 48 of the 1991 Order, suggests that the use of these wells, and their brackish water supply, was permissible.

Id. (footnote omitted).

Similarly, the LUC's findings in the 1991 Order indicate that the terms "potable" and "brackish" were used as mutually exclusive terms, while "non-potable" and "brackish" were used interchangeably. The 1991 Order referred to the Resort's plans to develop "brackish water sources" and the "brackish water supply" at the same time it referred to the Resort's plans to "irrigate the golf course with nonpotable water" from sources "other than potable water from the high level aquifer." Under a section of the 1991 Order titled "Water Resources," the LUC found that "[t]he proposed golf course . . . will be irrigated with nonpotable water from sources other than potable water from the high level aquifer," and that "[the Resort] proposes to provide alternate sources of water for golf course irrigation by developing the brackish water supply." Similarly, under a section of the 1991 Order titled "Water Service," the LUC found that the Resort "intends to irrigate the golf course with nonpotable water," and "is now in the process of developing the brackish water supply for irrigation of the proposed golf course."

Findings in the "Water Resources" and "Water Service" sections also specified what steps the Resort was taking "to

provide adequate quantities of . . . non-potable water to service the subject property." In light of projected "golf course irrigation requirements" of 624,000 gallons per day (gdp) to 800,000 gpd, the findings cited the Resort's plans to "develop[] the brackish water supply." The LUC referred to the possibility of using certain wells, including "Well No. 1 which is operational and which has a capacity of about 600,000 gdp," and "Well No[.] 9," which had "been subjected to full testing" and which had a "capacit[y] of about 300,000 gpd." The findings noted that the wells had an "aggregate brackish source capacity in excess of the projected requirements." The LUC also cited testimony establishing that "the brackish water sources necessary to supply enough water for golf course irrigation could be developed and be operational within a year," and that "it is only a matter of cost to develop" them. These findings aligned with Condition 10, which directed the Resort to "develop and utilize only alternative non-potable sources of water (e.g., brackish water . . .) for golf course irrigation requirements." They also aligned with Condition 11, which required the Resort to "fund the design and construction of all necessary water facility improvements, including source development and transmission, to provide adequate quantities of potable and non-potable water to service the subject property."

The language of the 1991 Order thus reflected the LUC's understanding that Wells 1 and 9, brackish wells from the high-

level aquifer, would be among the "alternate non-potable sources of water" used to satisfy the projected "golf course irrigation requirements." As we noted in Lanai Co., "[t]he 1991 Order does not make any express findings which prohibit the use of Wells No. 1 and 9" and instead "suggests that the use of these wells, and their brackish water supply, was permissible." 105 Hawaiʻi at 313, 97 P.3d at 389.

3. The administrative record supports this reading of Condition 10.

The transcripts of the district boundary amendment hearings, which indicate that people often used the terms "non-potable" and "brackish" interchangeably and that the Resort was clear in its representations that it intended to use brackish water to irrigate the golf course, also support the LUC's understanding and intent as reflected in the 1991 Order.[3] To cite only a few examples, Thomas Leppert, an employee of the Resort, equated "non-potable" and "brackish" multiple times throughout the 1991 hearings. When asked whether it was his intention to "utilize brackish water and sewage effluent on the

[3] The majority criticizes my reliance on the administrative record, but I cite to the hearings only to supplement and aid in analysis of the "entire order." Majority at 35; Lanai Co., 105 Hawaiʻi at 310, 97 P.3d at 386. I agree that interpreting the language itself must be the touchstone, but looking to the record to help understand how parties used key words, like looking to legislative history to understand a statute, is a well-established way to help interpret disputed language. Id. at 313, 97 P.3d at 389 (relying in part on map provided during the 1991 hearings); DW Aina, 134 Hawaiʻi at 215, 339 P.3d at 713 (looking to the administrative hearing transcript); cf. Kauai Springs, Inc. v. Planning Comm'n of the Cty. of Kauaʻi, 133 Hawaiʻi 141, 165-66, 324 P.3d 951, 975-76 (2014) (relying in part on legislative history to interpret specific statutory language).

Manele course," he responded, "Yes. We have no intention of using the potable water." Leppert referred to Well 9 as "brackish or non-potable" and also later referred to Wells 1 and 9 as non-potable. The Resort's witness, engineering consultant James Kumagai, testified: "Well 9 has proved to have higher chlorides than what we had anticipated . . . . It's brackish and we consider that right now nonpotable, but suitable for landscape irrigation."

Moreover, on the final day of the hearing, the LUC chairman asked Kumagai if he could "commit to us today that there is enough brackish water that's exploitable to meet your projections of usage[,]" and Kumagai agreed: "That is correct. . . . Without qualification, like I say, it's cost." (Emphasis added.) Picking up on this exchange, LSG's counsel requested to recross Kumagai about whether "it would be possible to obtain a nonpotable or brackish water source for the golf course in time to use that water for the golf course when it's built." (Emphasis added.) On recross, LSG asked, "[W]hen [the LUC chairman] asked you a question about whether nonpotable water was available, you said it was available without qualification?" (Emphasis added.) The LUC chairman likewise used "non-potable" and "brackish" interchangeably when discussing water sources, asking at one point: "With respect to the potential for using nonpotable sources, or brackish water, easier put, where else do they use brackish water, and to what success?" (Emphasis added.)

Thus, the evidence in the record supports what the text of the Order itself shows - that the 1991 LUC considered the brackish wells in the high-level aquifer to be "alternative non-potable sources" under Condition 10.

4. The LUC did not err by concluding the Resort did not violate Condition 10.

The LUC concluded that "[d]uring the time period at issue in the 1996 OSC Order, Wells 1 and 9 and reclaimed sewage effluent were the sole sources of irrigation water for the Mānele Golf Course." (Emphasis added.) Because Wells 1 and 9 were not part of Lānaʻi's drinking water system at any relevant point in time, but instead were designated as brackish wells, those wells did not constitute "potable" water sources at any time relevant to this appeal. Thus, the LUC did not err in holding that the possibility of freshwater "leakage" into Wells 1 and 9 did not give rise to a credible claim that the Resort violated Condition 10. By drawing only from brackish Wells 1 and 9 in the high-level aquifer, the Resort did not "utilize" any other sources per Condition 10.[4]

[4] This is not to say that any freshwater leakage into Wells 1 and 9 would not violate Condition 10. The LUC found inconclusive evidence of leakage resulting from the pumping of water from Wells 1 and 9, as the majority recognizes. Majority at 37. If there were conclusive evidence of leakage, and that leakage caused the designation of Wells 1 and 9 to change from "brackish" to "potable" - or if the Resort used water that could be credibly shown to have originated in the potable wells - the Resort would be in violation of Condition 10 because in either of these scenarios, the Resort would be utilizing water supplied from a potable well.

C. Condition 10, Properly Construed, is Consistent with the Public Trust

Contrary to the majority's assertion that "the 1991 Order would have violated its public trust duties" under the meaning of Condition 10 proposed by the 2017 Order and herein, Majority at 20, the LUC indeed met its public trust obligations when it adopted Condition 10, and its 2017 reading of the Condition does not pose any public trust concerns. The LUC, in reviewing a petition for reclassification of district boundaries, must specifically consider the impact of the proposed reclassification on preserving natural systems and natural resources. HRS § 205-17.[5] It did so here.

Under the LUC's construction, the first paragraph of

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[5] HRS § 205-17 provides, in relevant part:

> In its review of any petition for reclassification of district boundaries pursuant to this chapter, the [LUC] shall specifically consider the following:
>
> (1) The extent to which the proposed reclassification conforms to the applicable goals, objectives, and policies of the Hawaii state plan and relates to the applicable priority guidelines of the Hawaii state plan and the adopted functional plans;
>
> (2) The extent to which the proposed reclassification conforms to the applicable district standards;
>
> (3) The impact of the proposed reclassification on the following areas of state concern:
>
> > (A) Preservation or maintenance of important natural systems or habitats;
> >
> > (B) Maintenance of valued cultural, historical, or natural resources;
> >
> > (C) Maintenance of other natural resources relevant to Hawaii's economy, including agricultural resources[.]

Condition 10 is consistent with the purposes of the state water resource public trust. See, e.g., Kauai Springs, Inc. v. Planning Comm'n of the Cty. of Kauaʻi, 133 Hawaiʻi 141, 172, 324 P.3d 951, 982 (2014). One public trust purpose is "domestic water use," with particular attention toward "protecting an adequate supply of drinking water." Id.; see In re Water Use Permit Applications, 94 Hawaiʻi 97, 137, 9 P.3d 409, 449 (2000). By adopting terms of Condition 10 that align with the terms that define the two systems of water use and delivery on Lānaʻi, the LUC stated with "ascertainable certainty" that no source of drinking water on Lānaʻi can be used to irrigate the golf course. Lanai Co., 105 Hawaiʻi at 315, 97 P.3d at 391.

Moreover, understanding that the supply of drinking water on Lānaʻi may be impacted by overuse of brackish groundwater, the second paragraph of Condition 10 establishes important limitations designed to protect and prioritize the need for an adequate supply of drinking water. In exercising its obligations under the first paragraph of Condition 10 of the 1991 Order, the Resort must additionally

> comply with the requirements imposed upon the [Resort] by the State Commission on Water Resource Management as outlined in the State Commission on Water Resource Management's Resubmittal - Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990.

The LUC therefore included in Condition 10 requirements imposed by the Water Commission, which is tasked with protecting

the State's water resources.[6] Condition 10 requires that the Resort provide monthly water reports to the Water Commission, so it can closely monitor Lānaʻi's water resources and step in to reinstitute designation proceedings if certain indicators suggest that the island's groundwater resources are threatened. These requirements involve monitoring Lānaʻi's sustainable yield in order to determine whether and to what extent the golf course's operations strain Lānaʻi's drinking water supply. Given that the Resort's compliance with Condition 10 is monitored by the LUC, the Water Commission, and the public, through the reporting requirements the Resort must follow, I disagree with the majority and would hold that no public trust obligations have been improperly delegated to the Resort under the correct construction of this condition.

And in fact, the record reflects no threat to the public trust. The Resort included in the record its monthly periodic water reports from 1991 until 2016. During that time, the Water Commission has reviewed the periodic water reports and found no evidence of a threat to Lānaʻi's water resources. In 2009, the Chair of the Lānaʻi Water Advisory Committee requested that the Water Commission hold meetings concerning designation of the aquifer as a groundwater management area. The Water

[6] The State Water Code declares the "need for a program of comprehensive water resources planning to address the problems of supply and conservation of water." HRS § 174C-2(b). "The general administration of the state water code shall rest with" the Water Commission. HRS § 174C-5.

Commission responded that the Resort was complying with the requirements in its 1990 resubmittal and that the conditions for designation had not been met. The Commission has continued to review the monthly water reports, and has not found that Lānaʻi's water is threatened. As the LUC found in the 2017 Order:

> The Periodic Water Reports . . . show no changes that pose a threat to the water resources on the island. The only change is that pumpage is now lower than it was when pineapple agricultural uses were ongoing.

The Resort also worked with the Lānaʻi community to develop the Water Use Development Plan (WUDP). The Lānaʻi WUDP incorporates the requirements in the CWRM resubmittal, including, for example, that the Water Commission monitor Lānaʻi's sustainable yield, which is set at 6 million gallons per day, and will reinstitute designation proceedings if total pumpage exceeds 4.3 million gallons per day. A witness on behalf of the Water Commission confirmed that, based on his analysis of the periodic reports, the present use of water did not pose a threat to water resources on Lānaʻi. Finally, as the LUC found, the Resort has improved water conservation measures at the golf course and has taken measures to develop the watershed, thereby increasing aquifer recharge. Based on the record in this case, the Resort has complied with the Water Commission requirements in Condition 10 established to protect the public trust, and no threat of harm to the public trust has been shown.

III. CONCLUSION

I concur in the judgment affirming the LUC's June 1, 2017 findings of fact/conclusions of law, decision & order.[7] Because Condition 10, by its own terms, excludes water designated as "brackish" from its definition of "potable" water, and because this construction poses no public trust issues, I respectfully dissent in all other respects.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

[7] Two of my colleagues in the majority come to the same conclusion on other grounds. Since I respectfully disagree with their reasoning, I concur only in the judgment affirming the LUC's 2017 Order.