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

DISSENTING OPINION AS TO PARTS III(E) AND IV BY WILSON, J.

The Decision of the State Land Use Commission ("LUC") in 2017 authorized—for the first time—the irrigation of golf courses on Lānaʻi with water that is eligible for drinking as defined by county water quality standards. To do so, it defined all brackish water as non-potable—a definition that is without support in science, principles of public health, or precedent.

The novel "brackish-means-non-potable" proposition removed the protection[1] afforded to high-level potable groundwater by the LUC in its 1991 Findings of Fact, Conclusions of Law, and Decision and Order ("1991 Order") prohibiting the use of high-level aquifer ("HLA") drinking water for golf course irrigation. Despite overwhelming evidence to the contrary, the "brackish-means-non-potable" definition applied by the 2017 LUC established that all brackish water of the HLA with a chloride concentration heretofore legally potable is non-potable and available for golf course use.

The 2017 LUC erred in its failure to define the terms "potable" and "non-potable" in Condition 10 in accordance with their common sense meanings. The test to determine potability must take into consideration federal, state, and county laws that set standards for safe drinking water. Accordingly, I join Parts I-III(A-D) of the Majority opinion.

However, I disagree with the conclusion in Part III(E) of the Majority opinion that application of the wrong potability standard by the 2017 LUC was not an abuse of discretion. In my

[1] "In this jurisdiction, our decisions in McBryde and its progeny and the plain meaning and history of the term 'protection' in article XI, section 1 and article XI, section 7 [of the Hawai'i Constitution] establish that the state has a comparable duty to ensure the continued availability and existence of its water resources for present and future generations." In re Water Use Permit Applications (Waiāhole I), 94 Hawai'i 97, 139, 9 P.3d 409, 451 (2000) (footnote omitted).

view, if the correct standard had been properly applied by the LUC in 2017, its finding in 1991 that the water from wells 1 and 9 was not potable would not have been clearly erroneous.[2]

Discretion is abused when it is exercised pursuant to an improper legal standard. Lāna'ians for Sensible Growth's ("LSG") right to due process guarantees it the opportunity to establish under the correct potability standard that Wells 1 and 9, contain potable water that cannot be used for golf course irrigation. LSG has never been provided the process it is due to present its case to the LUC pursuant to correct county water quality standards defining potability. Once granted its due process right to have the LUC apply the correct legal definition of potability, LSG would have the opportunity to prove that the 1996 LUC correctly concluded that potable water from Wells 1 and 9 was being used for golf course irrigation in violation of the LUC's 1991 Findings of Fact, Conclusions of Law, and Decision and Order ("1991 Order") prohibiting the use of HLA drinking water for golf course irrigation. Thus, I dissent from Parts III-E and IV of the Majority opinion and with the Chief Justice's concurring/dissenting opinion.

[2] However, Lāna'ians for Sensible Growth is not precluded from seeking a determination from the LUC as to whether, under county water quality standards, wells 1 and 9 presently contain potable water.

I. Background

In 1989, the Lāna'i Resorts, LLC ("Resort") petitioned the LUC for a land use district boundary amendment at Mānele on the island of Lāna'i to change the land-use designation for land it sought to develop for an eighteen-hole golf course from rural and agricultural to urban. After granting a petition to intervene filed by LSG, and holding hearings, the LUC (hereinafter "1991 LUC") issued its 1991 Order granting the Resort's request. However, it did so based on conditions. Condition 10 of the 1991 Order prohibits the Resort from using potable water from the HLA to irrigate the golf course:

> 10. [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 other words, Condition 10 was specifically imposed by the 1991 LUC to prevent the use of potable drinking water for irrigation, requiring instead the use of "alternative non-potable sources of water[.]" In return for the benefit of receiving authorization to convert rural and agricultural land to urban land for a golf course, the Resort was required to assume the obligation of not using the water in the HLA that was potable.

The Resort constructed the proposed golf course and irrigated it with brackish water pumped from Wells 1 and 9 of

the HLA. The Resort did not determine whether the brackish water was, in fact, an "alternative non-potable source[] of water"—rather than potable brackish water—before using the water to irrigate the golf course. On notice that the Resort was using water from Wells 1 and 9 for golf course irrigation possibly in violation of Condition 10, the LUC ("1996 LUC") issued an Order to Show Cause requesting that the Resort explain "why the property should not revert back to its former land use classification." In its 1996 Findings of Fact, Conclusions of Law, and Decision and Order ("1996 LUC Order of Violation"), the 1996 LUC sought to follow the intent of the 1991 LUC to protect the use of potable water in the HLA for public use as drinking water, rather than for private use on a golf course. The 1996 LUC found that the Resort violated Condition 10 and ordered the Resort to "immediately cease and desist any use of water from the high level aquifer for golf course irrigation requirements." The 1996 LUC reached this determination because it interpreted Condition 10 to preclude the use of all water from the HLA, which it assumed to be potable. It also recognized that the Resort had not performed a comprehensive test to determine whether the water from Wells 1 and 9 was potable or non-potable.

The Resort appealed the 1996 LUC Order of Violation to the Circuit Court of the Second Circuit ("circuit court"). The circuit court reversed the 1996 LUC Order of Violation, finding,

inter alia, that the LUC's decision that the Resort "violated Condition 10 was arbitrary, capricious, and clearly erroneous." The record contains no explanation from the circuit court as to the basis of its finding. The result of the circuit court's finding was to free all water in Wells 1 and 9 to be used for golf course irrigation.

LSG and the 1996 LUC appealed to the Hawai'i Supreme Court the circuit court's finding that all water from Wells 1 and 9 in the HLA could be used to irrigate the Resort's golf course. Lanai Co. v. Land Use Comm'n (Lāna'i I), 105 Hawai'i 296, 306, 97 P.3d 372, 382 (2004). The 1996 LUC contended that the Resort made inaccurate representations that Wells 1 and 9 were non-potable water sources. Id. The LUC maintained that, throughout the boundary amendment proceedings before the 1991 LUC, "the term 'high level aquifer' was used interchangeably with the term potable water," thus, according to the 1996 LUC, the 1991 LUC regarded the HLA as containing potable water. Id. Accordingly, the 1996 LUC interpreted the phrase "alternative, non-potable sources of water" in Condition 10 of the 1991 Order to mean water outside the HLA—thereby prohibiting the use of water in Wells 1 and 9 for golf course irrigation. Id. This court determined that the 1996 LUC failed to make "sufficient 'findings or conclusions that would enable meaningful review'" of whether the Resort used potable water for golf course

irrigation in violation of Condition 10. Id. at 316, 97 P.3d at 392. The case was remanded to the circuit court on March 17, 2005,[3] with directions to remand the case to the LUC to clarify its findings of facts and conduct further hearings, if necessary, to determine if the Resort violated Condition 10 by utilizing potable water from the HLA.[4] Id. at 319, 97 P.3d at 395.

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[3] The date of the opinion in Lāna'i I was September 17, 2004, but the remand was not effective until the judgment on appeal was filed on March 17, 2005.

[4] Accordingly, this court's remand instructions specifically stated that, because the LUC did not at any time determine whether potable water from Wells 1 and 9 was being used, further LUC proceedings were required to determine whether potable water was ever being used in violation of Condition 10:

> Finding 16 that "Wells No. 1 and 9 . . . provide non-potable, brackish water[,]" is countered by finding 29, which states that [the Resort] "has not performed a comprehensive test to determine the potability of Wells No. 1 and 9." Additionally, the findings explain that "there is leakage from the high level potable water area to the low level brackish water area."
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> While such findings seem to imply that [the Resort] was using potable water, the LUC did not include any express findings in this regard in its 1996 Order. As such, the LUC has failed to "make its findings reasonably clear" as to whether [the Resort] was using potable water in violation of Condition No. 10.
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> . . . .
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> Accordingly, we remand the issue of whether [the Resort] has violated Condition No. 10 by utilizing potable water from the high level aquifer, to the court, with instructions to remand the case to the LUC for clarification of its findings and conclusions, or for further hearings if necessary.

Lāna'i I, 105 Hawai'i at 316, 97 P.3d at 392 (internal citations omitted).

On remand, rather than determine whether the Resort used potable water in violation of Condition 10, the LUC ("2010 LUC") authorized—for the first time—all water with a chloride concentration exceeding 250 PPM, otherwise known as brackish water, to be used for golf course irrigation. The LUC held hearings on June 7 and 8, 2006 at which the Resort, the County of Maui, and the State of Hawai'i Office of Planning presented testimony. Lanaians for Sensible Growth v. Lanai Resorts, LLC (Lāna'i II), Nos. CAAP-13-0000314, CAAP-12-0001065, 2016 WL 1123383 at *2 (App. March 21, 2016) (mem.). On June 9, 2006, the day LSG was supposed to present testimony, the hearing was cancelled for lack of quorum. Id. at *8. Approximately one year later, the Resort filed a motion seeking to vacate the 1996 LUC Order of Violation and modify Condition 10 to allow the use of water with a chloride concentration exceeding 250 PPM for golf course irrigation. Id. at *3. The 2010 LUC granted the Resort's motion to modify Condition 10 and, in so doing, supplied a new definition of potable that declared all water with a chloride concentration exceeding 250 PPM to be non-potable.[5] Id. Because the chloride concentration in the water

[5] Condition 10 was amended to read in relevant part:

a. [The Resort] shall not use ground water to irrigate the Mānele Golf Course, driving range and other associated

(continued . . .)

in Wells 1 and 9 surpassed 250 PPM, the water was deemed non-potable and available for golf course irrigation. See id.

LSG appealed the decision of the LUC to the circuit court, arguing that the LUC used unlawful procedures by depriving LSG of the opportunity to testify at the LUC hearings. Id. at *3, *7. The circuit court agreed with LSG and vacated the 2010 LUC's order. Id. at *3. It found that the LUC failed to abide by this court's mandate to determine the meaning of Condition 10, did not follow its procedures for contested cases, and failed to afford LSG a full and fair opportunity to present evidence and testimony at the hearings. Id. at *7. The Resort appealed to the Intermediate Court of Appeals ("ICA") which affirmed the circuit court's finding that the LUC used unlawful procedures by depriving LSG of an opportunity to participate in the hearings. Id. at *3, *7. The case was, once again, remanded to the LUC to determine whether the Resort violated

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> landscaping if the chloride concentration measured at the well head is 250 milligrams per liter(250 mg/l) or less.
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> b. In the event the chloride concentration measurement of ground water to irrigate the Mānele Golf Course, driving range and associated landscaping falls below 250 mg/l, [the Resort] shall cease use of the affected well(s) producing such ground water for irrigation purposes until such time as the chloride concentration measurement of the water drawn from such wells rises above 250 mg/l.

Condition 10 by using potable water for irrigation. See id. at *9.

On remand from the ICA, and after holding hearings, the LUC ("2017 LUC") adopted the new definition of potable water that makes all brackish water in the HLA, including Wells 1 and 9, available for irrigation of the Mānele Golf Course on Lāna'i. The definition supplied by the 2017 LUC in its June 1, 2017 Findings of Fact, Conclusions of Law, and Decision and Order ("2017 Order Releasing High Level Aquifer for Golf Course Irrigation") deems all brackish water non-potable and thus available for golf course use. The 2017 LUC recognized that by declaring all brackish water to be non-potable, it contradicted the "common sense meaning" of the word potable.[6] Nonetheless, the 2017 LUC rejected the common sense meaning of potable and instead found that the 1991 LUC intended the phrase "alternative non-potable sources of water (e.g., brackish water[)]" to mean that all brackish water is non-potable. On appeal to this court, LSG objects to the definition of potable adopted by the 2017 LUC that interprets Condition 10 to authorize the Resort to use all brackish water in the HLA, including Wells 1 and 9, for golf

[6] The 2017 LUC recognized that "there is substantial evidence on the record that a 'common sense' meaning of the word 'potable' could include the waters drawn from Wells 1 and 9," but concluded that "the specific language of Condition 10 excluded that common sense meaning and specifically excluded from 'potability' brackish water of a kind that is used elsewhere in these islands for drinking."

course irrigation. Before this court, LSG seeks the application of the "common sense" definition of potable water relied upon by the 1991 LUC—the definition applied by the 1991 LUC to prohibit the use of potable brackish water from Wells 1 and 9 for golf course use.[7]

II. Discussion

The phrase "shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water[)]" contained in Condition 10 of the 1991 Order was intended to protect an important public trust resource—potable water for drinking—and prevent its use for golf course irrigation. During the district boundary amendment proceedings

[7] Prior to 2016, the decision of the LUC would have been appealed to the environmental court and to the ICA thereafter. S.B. 632, 27th Leg., Reg. Sess. (2014). But in 2016, jurisdiction was removed from the environmental court. H.B. 1581, 28th Leg., Reg. & Sec. Spec. Sess. (2016). The 2016 amendment to Hawaii Revised Statutes ("HRS") Chapter 91 established direct appeal from LUC orders to the Hawai'i Supreme Court:

> (a) Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case under this chapter shall be appealed from a final decision and order or a preliminary ruling that is of the nature defined by section 91-14(a) upon the record directly to the supreme court for final decision. Only a person aggrieved in a contested case proceeding provided for in this chapter may appeal from the final decision and order or preliminary ruling. For the purposes of this section, the term "person aggrieved" includes an agency that is a party to a contested case proceeding before that agency or another agency.

HRS § 205-19 (Supp. 2016).

spanning 1989 to 1991, the LUC exercised its public trust duty to "conserve and protect" the potable water in the HLA and hold the water in trust for the benefit of the people of Hawai'i.[8] The 1991 LUC sought to fulfill this duty by imposing Condition 10, which indisputably prohibited the use of potable water to irrigate the Resort's private commercial golf course.

The purpose of Condition 10, as stated by the 1991 LUC in its 1991 Order, is to ensure that the Resort "not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and . . . instead develop and utilize only alternative non-potable sources of water[.]" Consistent with this purpose, the 1991 LUC provided an example of a non-potable alternative source when it listed in Condition 10 "brackish water" along with "sewage effluent." Notably, the 1991 LUC did not state in its 1991 Order that all brackish water could be used for golf course irrigation. Nonetheless, the 2017 LUC concluded that the phrase "e.g., brackish water" is meant to

[8] Hawai'i Constitution article XI, section 1 provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

include all brackish water in the HLA, including water that would be considered "potable" under the "common sense" definition of potable drinking water. This supposition would not only render meaningless the purpose of Condition 10, which is to conserve potable water for drinking by the public, but would also ignore the fact that brackish water may be potable or non-potable. And, under this interpretation, Condition 10 would violate the LUC's public trust duty to protect potable brackish water on Lāna'i for use as drinking water and would violate the LUC's duty to "make reasonable precautionary presumptions or allowances in the public interest" in the face of scientific uncertainty. Waiāhole I, 94 Hawai'i at 159, 9 P.3d at 471.

A. Wells 1 and 9 of the HLA may contain potable brackish water under state, federal, and county law.

The plain meaning of potable water, as defined by the State of Hawai'i Department of Health ("DOH"), does not exclude brackish water like that found in Wells 1 and 9. See Hawai'i Administrative Rules ("HAR") § 11-21-2. DOH defines potable water as "water free from impurities in amounts sufficient to cause disease or harmful physiological effects."[9] Id.

[9] The DOH's definition of potable water was the only legal definition of the term under the laws of the State of Hawai'i and the County of Maui at the time the 1991 LUC adopted Condition 10.

Therefore, Wells 1 and 9 contain water that, under DOH regulations, may be potable although it is brackish.

Under DOH's Rules Relating to Public Water Systems, HAR §§ 11-20-4 to 11-20-7, and the National Primary Drinking Water Regulations ("primary standards") promulgated by the U.S. Environmental Protection Agency ("EPA"), 40 C.F.R. §§ 141.61-.66 (2020), water is determined to be potable when it contains primary standard contaminants[10] that are below maximum allowable limits. Maximum contaminant levels are based on the level "at which no known or anticipated adverse effect on the health of persons occur, and which allows an adequate margin of safety." 40 C.F.R. § 141.2 (2020); HAR § 11-20-2.

The former Director of Utilities of Lāna'i Water Company, Cliff Jamile, testified that Wells 1 and 9 of the HLA were tested for contaminants under the EPA's primary standards and the standards set forth in HAR Ch. 11-20.[11] Wells 1 and 9 of the HLA were found to be contaminant-free:

> [T]he EPA sets certain guidelines, sets certain requirements that we have to comply with, and that is the

[10] Examples of the types of contaminants regulated by HAR Ch. 11-20 and 40 C.F.R. § 141 include arsenic, asbestos, nitrate, nitrite, cyanide, and fluoride.

[11] The EPA's primary standards and HAR Ch. 11-20 do not specifically refer to "potable" water. However, the regulations are used to determine whether water is suitable for human consumption. 40 C.F.R. § 141.4 (2020) (regulating public water systems to provide water for "human consumption"); HAR § 11-20-2 (defining the public water system regulated by the DOH as "a system which provides water for human consumption").

> first stage contaminant list in there. There must be about 25 to 30 contaminant[s] that we have to test for . . . . So we send those to the lab . . . and the lab runs those test[s] exactly as they are supposed to do in accordance with the EPA's requirements and test methods. And so far as I know, well I do know for sure that wells #1, 9, and 14 were tested and no contaminants were found present in the water.

Having found the water in Wells 1 and 9 free of contaminants, Jamile established a significant condition of potability. William Meyer, retired hydrologist for the U.S. Geological Survey, echoed Cliff Jamile's testimony:

> Q: Do you have any doubt that potable water is the primary constituent of the water being pumped from wells 1, 9, and 14?
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> A: Frankly, because there is no evidence that there is a contaminate in the water being pumped from those wells that exceeds U.S. EPA and the State of Hawai'i standards for drinking water, all of the water being pumped is potable. The level of chlorides being recorded in those wells are irrelevant to that inquiry.

(Emphasis added.)

Thus, according to those experts' testimony, the water in Wells 1 and 9 contained levels of primary standard contaminants that were not adverse to human health by federal and state regulatory standards. As noted, DOH defines potable water as "water free from impurities in amounts sufficient to cause disease or harmful physiological effects." HAR § 11-21-2. Therefore, Wells 1 and 9 may contain water that, under DOH regulations, is potable. Faced with a lack of evidence that Wells 1 and 9 contain primary standard contaminants that exceed the legally-enforceable limits to render the water non-potable,

the Resort relies upon chloride content to argue that the water being used to irrigate the golf course is non-potable. In 1990, the Resort's environmental consultant, James Kumagai, testified that the chloride content in Wells 1 and 9 was 407 PPM and 500 to 600 PPM, respectively.[12] Water with high chloride levels is considered "brackish;" it may have a salty taste, but the water is still "safe to drink" and is not "health threatening." United States Environmental Protection Agency, Secondary Drinking Water Standards: Guidance for Nuisance Chemicals, https://www.epa.gov/dwstandardsregulations/secondary-drinking-water-standards-guidance-nuisance-chemicals (last visited Jan. 7, 2020). The EPA's National Secondary Drinking Water Regulations ("secondary standards"), 40 C.F.R. § 143.3 (2020), identify water with a chloride level that exceeds 250 PPM as brackish.[13] Id. No law imposes a hard limit on chloride concentrations in potable water.[14] Because water with high

[12] The groundwater hydrologic program manager for the State of Hawai'i Commission on Water Resource Management, William Roy Hardy, testified that water with a chloride concentration between 250 and 17,000 PPM is considered "brackish." Notably, the chloride concentration of the water in Wells 1 and 9 is on the low end of brackishness as defined by Hardy.

[13] Secondary standards are "reasonable goals" that assist state and federal governments in managing the aesthetic quality of water that is provided for human consumption in public water systems. 40 C.F.R. § 143.3; see also U.S. EPA, supra.

[14] Nine months after the LUC imposed Condition 10 in the 1991 Order, Maui County enacted Maui County Code ("MCC") § 20.24.020 (1991), which defined "potable water" as having a maximum chloride concentration of 250 PPM—in direct contravention to state and federal law. The Resort relied on

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chloride levels does not adversely affect human health, there are no limits for chloride concentration in drinking water under federal law, or Hawai'i's state and county laws.

Consistent with the fact that there are no legally-enforceable limits to regulate chloride concentration in potable water, testimony presented at the 2016 LUC hearings on remand establishes that the water in Wells 1 and 9 may be potable as defined by the general practices of the State of Hawai'i and its counties. Representatives from DOH testified that it "would allow public water systems to provide water in excess of 250 [PPM] chlorides for domestic use" and "there are water systems that have served drinking water in excess of 250 [PPM]." Although some county officials testified that "county water departments generally limit chloride levels of water within their municipal system to less than 160 [PPM], or at most, under the EPA's secondary standard of 250 [PPM]," other county

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this erroneous definition to justify its use of water from the HLA. Maui County amended the ordinance in 2009 to reflect the fact that chloride concentration does not determine potability. See MCC § 14.08.020 (2009) ("'Potable water' means water that meets the standards established by the department of health as suitable for cooking or drinking purposes. A supply of water that at one time met the standards established by the department of health as potable water may not be used for golf course irrigation or other nondomestic uses, regardless of whether it is rendered nonpotable through such activities including, but not limited to, mixing or blending with any source of nonpotable water, storage in ponds or reservoirs, transmission through ditch systems, or exceeding the established pump capacity for a groundwater well.")

officials stated that counties typically "use water pumped at or above 250 [PPM] in their domestic water systems, blended into other water." Evidence was introduced that "potable wells on O'ahu are producing water over 250 [PPM] chlorides." Dave Taylor, Director of the Department of Water Supply for Maui County, testified that Maui wells have likely produced water with over 250 PPM chlorides. Because the chloride levels in Wells 1 and 9 exceed 250 PPM, it is brackish; but this does not render the water non-potable under the EPA's secondary standards or state and county law, nor does it conflict with the general practice of the counties to provide potable water in excess of 250 PPM chlorides.

The conclusion that the water in Wells 1 and 9 may be potable is supported by additional findings of the LUC and the record. In its 2017 Order Releasing High Level Aquifer for Golf Course Irrigation, the LUC expressly recognized that "it is reasonable to conclude that the water from Wells 1 and 9 may be considered to be 'potable.'" Furthermore, in the thirty years that have elapsed since the original boundary amendment proceedings in 1989-1990, the Resort has made multiple attempts to modify Condition 10 to reflect the reality that it may be using potable brackish water to irrigate its golf course in

violation of Condition 10. The Resort filed motions to modify Condition 10 in 1993[15] and 2007.[16] The Resort's multiple attempts

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[15] The 1993 request read in relevant part:

> 10. No potable groundwater from the high level aquifer will be used for golf course maintenance or operation (other than as water for human consumption and irrigation adjacent to the clubhouse and maintenance building). All irrigation of the golf course shall be through nonpotable water sources, including brackish water from the lower portion of the high level aquifer. Effective January 1, 1994 and January 1, 1995 the total amount of nonpotable water from said brackish water portion of the high level aquifer that may be used for irrigation of the golf course in the Manele project district shall not exceed an average of 800,000 gallons per day and 750,000 gallons per day, respectively, on an annualized basis.

(Emphasis added.) On August 9, 1995, the Resort filed an amendment to its 1993 motion for a modification requesting the following modification in relevant part:

> 10. Effective January 1, 1995 no potable water drawn from the high level aquifer may be used for irrigation of the golf course, driving range and other associated landscaping. The total amount of nonpotable water drawn from the high level aquifer that may be used for irrigation of the golf course, driving range and other associated landscaping shall not exceed an average of 650,000 gallons per day expressed as a moving annualized average using 13 - 28 day periods rather than 12 calendar months or such other reasonable withdrawal as may be determined by the Maui county council upon advice from its standing committee on water use.

[16] The 2007 request sought to amend Condition 10 to state:

> No potable water drawn from the high level aquifer may be used for irrigation of the golf course, driving range and other associated landscaping. The total amount of nonpotable water drawn from the high level aquifer that may be used for irrigation of the golf course, driving range and other associated landscaping shall not exceed an average of six hundred fifty thousand gallons per day expressed as a moving annualized average using thirteen to twenty-eight day periods rather than twelve calendar months or such other reasonable withdrawal as may be determined by the Maui County council upon advice from its standing committee on water use. "Potable water" means surface water or groundwater containing less than two hundred fifty milligrams per liter (mg/1) chlorides [(brackish)] and

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to modify Condition 10 to allow the use of potable brackish water for irrigation raises the question: if the Resort already possessed the right to use all potable as well as non-potable brackish water for irrigation pursuant to Condition 10, why would a modification be necessary? The logical answer is that the LUC did not grant the Resort the right to use potable brackish water for golf course irrigation under Condition 10 and, therefore, the Resort sought to modify Condition 10 to create this benefit. Thus, the Resort's action in seeking to amend Condition 10 contradicts the conclusions reached by the 2017 LUC and the Chief Justice's concurring/dissenting opinion that Condition 10 excludes the "common sense meaning" of potable and "specifically exclude[s] from 'potability' brackish water of a kind that is used elsewhere in these islands for drinking." Instead, the Resort's attempts to modify Condition 10 to include the use of brackish water for golf course irrigation signal an understanding that Condition 10, as drafted by the 1991 LUC, applied the common sense definition of potable water to protect

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> which can be disinfected to satisfy standards set forth in the State of Hawaii Department of Health rules chapter 20 entitled "potable water systems" and maximum contaminant level goals and national secondary drinking water contaminants set forth in 40 C.F.R. sections 141 and 143 (1990)[.]

(Emphasis added.)

brackish potable water in Wells 1 and 9 from use for golf course irrigation.

B. The LUC has yet to comply with the remand instructions contained in our opinion in Lāna'i I.

The LUC has not yet complied with our 2004 remand instructions in Lāna'i I. It is undisputed that on remand in Lāna'i I, the LUC was to determine whether potable water from Wells 1 and 9 was being used for irrigation of the golf course. The 2017 LUC thereafter failed to do so because it applied an incorrect definition of potability that rendered all water in Wells 1 and 9 available for golf course irrigation. Our remand was based in part on testimony supporting the conclusion that potable water was being used from Wells 1 and 9 for irrigation of the golf course. Finding of fact 22 of the LUC's 1996 Order stated that "there is leakage from the high level potable water area to the low level brackish water area" which, as found by this court, implied "that LCI was using potable water[.]" Lāna'i I, 105 Hawai'i at 316, 97 P.3d at 391. The chair of the State Water Commission also offered testimony at the 1993 LUC hearing that the "chlorides in Well 1 dropped from about 700 ppm to between 320 to 350 ppm" which implies that "at least half the

water pumped from Well 1 is potable water."[17] Id. And our remand was based in part on the concern that "assuming LCI's use is affecting potable water in the high level aquifer, the LUC did not indicate whether such an effect would qualify as 'utiliz[ing] the potable water' under Condition No. 10." Id.

As we concluded in Lānaʻi I, notwithstanding the ample evidence in the record implying that potable water from Wells 1 and 9 was being used in violation of Condition 10, the LUC failed to render findings of fact and conclusions of law as to whether such potable water was being used for golf course irrigation. Our remand instructions, therefore, have yet to be complied with; LSG has not received from the LUC its duly ordered hearing to determine whether–pursuant to county water quality standards—Wells 1 and 9 contain potable water that is being used for golf course irrigation in violation of Condition 10 of the 1991 Order.

III. Conclusion

In 1991, the LUC exercised its public trust duty to "conserve and protect" potable water for the benefit of the people of Hawaiʻi when it imposed Condition 10 to prohibit the use of potable water from Lānaʻi's high level aquifer to irrigate

[17] Thus, even under the chloride-based definition of potability suggested by the concurrence, the evidence supports the conclusion potable water was in Well 1.

a private commercial golf course. In so doing, the 1991 LUC applied the common sense definition of "potable," which incorporates EPA and DOH regulations, to include water that may be brackish. It also used the designation "e.g." to identify non-potable brackish water as one example of an "alternative non-potable source[] of water[.]" Incorrectly assuming "e.g." to mean "all," the LUC erroneously adopted the "brackish-means-non-potable" proposition to effectively allow all the water in Wells 1 and 9 to be used for golf course irrigation—regardless of whether the water is potable and brackish.

Respectfully, pursuant to the plain language of Condition 10, which prohibits the use of potable water for golf course irrigation and requires the use of "alternative non-potable sources of water (e.g., brackish water[])", and the definition of potable water under federal, state, and county law, Condition 10 requires a determination of whether the water being used by the Resort from Wells 1 and 9 to irrigate its golf course contains potable or non-potable brackish water. To find that all water in Wells 1 and 9 is presently non-potable brackish water without such a determination vitiates the plain meaning of Condition 10 and violates the LUC's public trust duty to "conserve and protect" Lānaʻi's limited drinking water resources for the benefit of the people of Hawaiʻi.

When the 1991 LUC approved the change in land use designation of 138.577 acres of rural and agricultural land to urban use, the Resort committed to utilizing only non-potable water from the HLA to irrigate its golf course. In addition to the grant of its request for a land use change, the Resort was given the use of public water–as long as it was non-potable. For twenty-nine years, the Resort has received both benefits without a determination–as required by our previous remand instructions–of whether Wells 1 and 9 contain potable brackish water. Absent such a determination, the 2017 LUC's conclusion that the Resort did not violate Condition 10 by using potable brackish water from Wells 1 and 9 for golf course irrigation is error. Consistent with our remand order in Lāna'i I, LSG should receive a hearing before the LUC to determine whether potable brackish water from Wells 1 and 9—as defined by county water quality standards—is being used in violation of Condition 10 of the 1991 Order.

/s/ Michael D. Wilson
Associate Justice