

EXHIBIT LWL-24

C

Supreme Court of Hawai'i.
 LANAI COMPANY, INC., Appellant-Appellee,
 v.
 LAND USE COMMISSION and Lanaians for Sensi-
 ble Growth, Appellees-Appellants
 and
 Office of State Planning and County of Maui Plan-
 ning Department, Appellees-Appellees.
 No. 22564.

Sept. 17, 2004.

Background: Developer appealed order of Land Use Commission (LUC), finding that developer had violated condition of LUC order amending land use district boundary from rural and agricultural district to urban district to facilitate development of golf course, which condition LUC interpreted as precluding developer's use of any and all water from a high level groundwater aquifer. The Circuit Court reversed the LUC decision, finding that its interpretation of the condition was clearly erroneous. Citizens' group and LUC appealed.

Holdings: The Supreme Court, Acoba, J., held that:
 (1) civil procedure rule requiring statement of facts in "actions tried upon the facts" did not apply to circuit court's review of LUC decision;
 (2) condition of LUC order was properly interpreted as precluding only developer's use of potable water from high level groundwater aquifer; and
 (3) LUC findings in support of order were inadequate for determination as to whether developer had violated condition by using proscribed potable water, and thus remand was required.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] Administrative Law and Procedure 15A
 ⚡683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Deci-
 sions

15AV(A) In General
15Ak681 Further Review

15Ak683 k. Scope. Most Cited Cases
 Review of a decision made by a circuit court upon its review of an administrative decision is a secondary appeal, and the standard of appellate review is one in which the Supreme Court must determine whether the court under review was right or wrong in its decision.

[2] Administrative Law and Procedure 15A
 ⚡683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Deci-
 sions

15AV(A) In General
15Ak681 Further Review
15Ak683 k. Scope. Most Cited Cases

In an appeal from a circuit court's review of an administrative decision, the appellate court will utilize identical standards applied by the circuit court, and thus, the clearly erroneous standard governs review of an agency's findings of fact by the appellate court.

[3] Administrative Law and Procedure 15A
 ⚡683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Deci-
 sions

15AV(A) In General
15Ak681 Further Review
15Ak683 k. Scope. Most Cited Cases

In an appeal from a circuit court's review of an administrative decision, the appellate court will utilize identical standards applied by the circuit court, and thus, the appellate court may freely review an agency's conclusions of law.

[4] Zoning and Planning 414 ⚡723

414 Zoning and Planning
414X Judicial Review or Relief
414X(D) Determination
414k723 k. Findings. Most Cited Cases
 Civil procedure rule requiring statement of facts in

“actions tried upon the facts” did not apply to circuit court’s review of order of Land Use Commission (LUC), finding that developer had violated condition of LUC order amending land use district boundary from rural and agricultural district to urban district to facilitate development of golf course, as circuit court was acting in appellate capacity, pursuant to statute, in reviewing LUC’s findings and conclusions. HRS § 91-14(g); Rules Civ.Proc., Rule Rule 52(a).

[5] Zoning and Planning 414 ↪160

414 Zoning and Planning

414III Modification or Amendment

414III(A) In General

414k160 k. Contracts for Amendments; Conditions. Most Cited Cases

Condition of order of Land Use Commission (LUC) amending land use district boundary from rural and agricultural district to urban district to facilitate development of golf course, which condition provided that developer “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” was properly interpreted as precluding only developer’s use of potable water from high level groundwater aquifer, given plain language of condition, and use of “potable” and “non-potable” as separate and distinct terms in other parts of order, and thus LUC clearly erred in concluding that condition precluded developer’s use of any and all water from the aquifer, as such conclusion reflected version of condition which LUC had previously rejected.

[6] Administrative Law and Procedure 15A ↪781

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak781 k. In General. Most Cited Cases

Where an administrative agency’s conclusion of law presents mixed questions of fact and law, it is judicially reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case. HRS § 91-14(g).

[7] Administrative Law and Procedure 15A

↪781

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak781 k. In General. Most Cited Cases

An administrative agency’s mixed determination of law and fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made. HRS § 91-14(g).

[8] Appeal and Error 30 ↪760(1)

30 Appeal and Error

30XII Briefs

30k760 References to Record

30k760(1) k. In General. Most Cited Cases

The Supreme Court is not obligated to sift through a voluminous record to verify an appellant’s inadequately documented contentions.

[9] Administrative Law and Procedure 15A ↪301

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak301 k. In General. Most Cited Cases

Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies.

[10] Administrative Law and Procedure 15A ↪301

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(A) In General

15Ak301 k. In General. Most Cited Cases

An administrative agency has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed.

[11] Zoning and Planning 414 ↪728

414 Zoning and Planning

414X Judicial Review or Relief

414X(D) Determination

414k728 k. Further Proceedings by Local Authority. Most Cited Cases

Findings of Land Use Commission (LUC) in support of determination that developer had violated condition of LUC order amending land use district boundary from rural and agricultural district to urban district to facilitate development of golf course, which condition LUC erroneously interpreted as precluding developer's use of any and all water from a high level groundwater aquifer, were inadequate for determination as to whether developer had violated condition, as properly interpreted, by using proscribed potable water from aquifer, and thus remand was required.

[12] Zoning and Planning 414 ↪160

414 Zoning and Planning

414III Modification or Amendment

414III(A) In General

414k160 k. Contracts for Amendments; Conditions. Most Cited Cases

Statute expressly authorized Land Use Commission (LUC) to impose conditions relating to a boundary change and to order a reversion of the land to the prior classification if such conditions were not met, and thus determination whether there was breach of such condition was properly made by LUC, but power to enforce LUC's conditions and orders relating to district classifications by cease and desist order lay with various counties. HRS §§ 205-4(g), 205-12. ****373 *297 Russell A. Suzuki** and James J.S. Chang, Deputy Attorneys General, on the briefs, for appellee-appellant Land Use Commission.

Alan T. Murakami and Carl C. Christensen (Native Hawaiian Legal Corporation), on the briefs, Honolulu, for appellee-appellant Lanaians for Sensible Growth.

Gary W. Zakian, Deputy Corporation Counsel, County of Maui, on the briefs, for appellee-appellee County of Maui.

Bruce L. Lamon and Ellen Cirangel (Goodsill Ander-

son Quinn & Stifel), on the briefs, Honolulu, for appellant-appellee Lanai Company, Inc.

MOON, C.J., LEVINSON, NAKAYAMA, ACOBA, and DUFFY, JJ.

Opinion of the Court by ACOPA, J.

In this appeal, Appellees-Appellants Land Use Commission (the LUC) and Lanaians for ****374 *298** Sensible Growth (Sensible Growth) contest the April 26, 1997 order of the Circuit Court of the Second Circuit (the court) ^{FN1} reversing the LUC's May 17, 1996 order (1996 Order) which, *inter alia*, required Appellant-Appellee Lanai Company, Inc. (LCI)(1) to immediately cease and desist any use of water from the high level aquifer for irrigation of the Manele golf course on the island of Lanai pursuant to Condition 10 of its April 6, 1991 Order (1991 Order) and (2) to file a detailed plan with the LUC within sixty days, specifying how it will comply with the LUC's 1991 Order requiring water use from alternative non-potable water sources outside of the high level aquifer. For the reasons set forth herein, we (1) hold that Hawai'i Rules of Civil Procedure (HRCPP) Rule 52(a) does not apply to a circuit court's review in an appeal from an agency decision; (2) affirm the court's conclusion that the LUC's 1996 Order was clearly erroneous to the extent it interpreted Condition No. 10 of its 1991 Order as precluding the use by LCI of "any" or all water from the high level aquifer; and (3) remand the case to the court, with instructions that the court remand this case to the LUC for clarification of its findings, or for further hearings if necessary, on the issue of whether LCI used potable water from the high level aquifer in violation of Condition No. 10.

^{FN1} The Honorable Shackley Raffetto presided.

I.

On November 29, 1989, LCI's predecessor in interest, Lanai Resort Partners, ^{FN2} petitioned the LUC to amend the land use district boundary at Manele, on the island of Lanai, from rural and agricultural districts to an urban district. ^{FN3} LCI planned to develop an eighteen-hole golf course as an amenity of the Manele Bay Hotel. On October 10, 1990, Sensible Growth, the Office of Hawaiian Affairs (OHA), and LCI signed a memorandum of agreement (the

Agreement).^{FN4} It appears from the record that the Agreement was included as Appendix K of the *Manele Golf Course and Golf Residential Project Environmental Impact Statement* (Environmental Impact Statement or EIS), "accepted by the Maui Planning Commission as an accurate environmental disclosure document."^{FN5} The Agreement provided in relevant part that LCI, in "consideration of the mutual promises and agreements" between the parties, agreed to "[e]nsure that no high level ground water aquifer^[FN6] will be used for golf course maintenance or operation (other than as water for human consumption) and that all irrigation of the golf course shall be through alternative non-potable water sources."

FN2. As stated, Lanai Resort Partners was the predecessor in interest to LCI. LCI is a subsidiary of Castle and Cooke, Inc. For the sake of simplicity, the three companies will hereinafter collectively be referred to as "LCI."

FN3. On February 9, 1990, the Office of Hawaiian Affairs (OHA), Sensible Growth, Solomon Kaopuiki, John D. Gray, and Martha Evans petitioned to intervene. On March 9, 1990, the LUC permitted OHA and Sensible Growth to intervene, but denied the petition as to Solomon Kaopuiki, John D. Gray, and Martha Evans.

FN4. Initially, Sensible Growth intervened in opposition to the proposed golf course, but later withdrew its opposition after entering into the Agreement.

FN5. Both Sensible Growth and LCI acknowledge that the Agreement was attached as Appendix K to the EIS accepted by the Maui Planning Commission.

FN6. "Aquifer" is defined as "a water-bearing stratum of permeable rock, sand, or gravel." *Webster's Seventh New Collegiate Dictionary*, 44 (1965) [hereinafter *Webster's*].

Sensible Growth and LCI submitted proposed findings of fact (findings), conclusions of law (conclusions), and orders, in February of 1991.^{FN7} Sensible Growth's proposed order recommended that the LUC

impose a condition that "no high level ground water aquifer will be used for golf course maintenance or operation (other than water for human consumption) and that all irrigation of the golf course shall be through alternative non-potable water sources."

FN7. Sensible Growth only submitted a proposed decision and order, and did not submit proposed findings or conclusions.

By the 1991 Order, the LUC granted LCI's petition. The LUC made the following relevant findings, conclusions, and Decision and Order (order), describing, *inter alia*, the **375 *299 sources of water for golf course irrigation and granting reclassification of the land:

FINDINGS OF FACT

IMPACT UPON RESOURCES OF THE AREA

....

Water Resources

45. Lanai draws its *domestic water and pineapple irrigation supply from the high level aquifer* which has a sustainable yield of [six million gallons per day (mgd)].

46. The proposed golf course at Manele of which the Property is to be a part, *will be irrigated with nonpotable water from sources other than potable water from the high level aquifer.*^[FN8]

FN8. The term for "potable" water is ordinarily defined as "suitable for drinking." *Webster's* at 664. The 1991 Order did not define the term "potable" or "nonpotable." The parties attributed other meanings to the term "potable" and disagree as to the means of measuring potability. LCI notes that the Maui County Code defines as potable, for the purposes of golf course irrigation, any water containing less than 250 milligrams per liter of chlorides. Maui County Code § 24.240.020. LCI notes that this definition of potability is also used by the United States Environmental Protection Agency (EPA) as a secondary standard and by the State of

Hawai'i Department of Health as a recommended guideline.

Sensible Growth challenges LCI's interpretation of potability, and questions why Maui County should determine that the water from wells 1 and 9 referred to herein are "non-potable" solely because it is above 250 parts per million in chloride, when it has determined that water with similar or higher chloride readings in other parts of Maui County to be "potable." Sensible Growth further contends that Maui County Code § 24.240.020 defines " 'potable water' not on chloride levels alone, but on other contaminant levels established by the EPA." The LUC is not clear as to the definition to be given "potable water." See discussion *infra*.

47. [LCI's] golf course design consultant ... is projecting that 624,000 [gallons per day (gpd)] will be required for irrigation of a "target" golf course,^{FN9} but [LCI] is conservatively projecting 800,000 gpd for irrigation of the golf course.

FN9. A "target" golf course is described in an earlier finding by the LUC as a golf course in which the turf will be used "for the tees, the fairways and the greens with intervening areas between some of the tees, fairways and greens which intervening areas are left undeveloped in their natural states."

48. [LCI] proposes to provide alternate sources of water for golf course irrigation by developing the brackish water supply.^{FN10} According to [LCI], Wells Nos. 9 and 12 which have capacities of about 300,000 gpd and 200,000 gpd, respectively, have been tested but are not yet operational. Well No. 10 which has a capacity of approximately 100,000 gpd with a possible potential of 150,000 gpd has also been tested and will be available. Currently available also is brackish water from Well No. 1 which is operational and which has a capacity of about 600,000 gpd.

FN10. "Brackish" is defined as "somewhat salty, distasteful." Webster's at 101.

49. [LCI's] civil, sanitary and environmental engi-

neering consultant, James Kumagai [(Kumagai)], stated that it is only a matter of cost to develop wells for brackish water sources that are already there. The consultant also state [d] that the brackish water sources necessary to supply enough water for golf course irrigation could be developed and be operational within a year.

....

Water Service

89. [LCI] is now in the process of developing the brackish water supply for irrigation of the proposed golf course. According to [LCI], Well No. 1, which is operational and available, and Well Nos. 9, 10 and 12, which have been subjected to full testing, have aggregate brackish source capacity in excess of the projected requirements of 624,000 gpd to 800,000 gpd for the Manele golf course.

....

91. [LCI] intends to irrigate the golf course with nonpotable water, leaving only the clubhouse which will use potable water, the requirement for which should be insignificant.

CONFORMANCE WITH THE HAWAII STATE PLAN

....

**376 *300 117. [LCI] has stated that the Manele golf course will be irrigated with nonpotable water from sources other than the potable water from the high level aquifer.

....

CONFORMANCE TO STATE LAND USE URBAN DISTRICT STANDARDS

122. The Property is proposed to be developed as a golf course to serve as an amenity of the Manele Bay Hotel.

CONCLUSIONS OF LAW

Pursuant to Chapter 205 of the [HRS] and the [LUC] Rules, the [LUC] finds upon a preponderance of the evidence that the reclassification of the Property ... subject to the conditions in the Order, for a golf course ... is reasonable, nonviolative of Section 205-2, [HRS] ... and is consistent with the Hawaii State Plan ... and conforms to the Hawaii [LUC] Rules.

ORDER

IT IS HEREBY ORDERED that the Property ... for reclassification from the Rural Land Use District to the Urban Land Use District as to 110.243 acres thereof, shall be and is hereby approved, and the District Boundaries are amended accordingly, subject to the following conditions:

....

10. [LCI] 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 addition, [LCI] shall comply with the requirements imposed upon [LCI] by the State [of Hawai'i] Commission on Water Resource Management [(the Water Commission)] as outlined in the [Water Commission's] Resubmittal-Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990.^{FN11}

FN11. The Water Commission's Resubmittal-Petition for Designating the Island of Lanai as a Water Management Area contains the following relevant provisions:

Hawaii's Water Code, HRS § 174C-44 establishes eight criteria which the [Water] Commission must consider in deciding whether to designate a ground water area as a water management area under the Code....

None of the ground-water criteria cited in § 174C-44, HRS, has been met to support the designation of the island as a water

management area....

(Emphasis added.) The Water Commission went on to make recommendations which required LCI to report water use to the Water Commission, and to formulate a plan in the event of a water shortage. The Water Commission also recommended that there be annual public informational meetings regarding the island's water conditions.

At some undefined point, the Water Commission issued a permit to LCI to use Well No. 9, one of the wells at issue in this case. LCI argues that the Water Commission thus specifically approved the use of non-potable, brackish water from the high level aquifer for irrigation of the golf course. However, in a letter dated October 26, 1993, the Water Commission noted that "[w]ater usage generally is not a consideration for the issuance of well construction and pump installation permits."

The Commission went on to state that, in regard to Well No. 9, "aquifer harm from the use of water was not evident; hence, the question of prudence in allowing non-potable water to be used for irrigation at Manele Bay, as raised at the LUC hearing, was not material to the [Water] Commission deliberations when it issued the Well 9 permit." Thus, the Water Commission neither approved, nor disapproved the use of high level aquifer water for purposes of golf course irrigation.

11. [LCI] shall 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.

....

18. Non[-]potable water sources shall be used towards all nonconsumptive uses during construction of the project.

....

20. [LCI] shall develop the property in *substantial compliance with representations made to the [LUC] in obtaining reclassification of the property. Failure to so develop may result in reclassification of **377 *301 the property to its former land use classification.*

....

(Emphases added.)

II.

Subsequent to the reclassification of the land and pursuant to the 1991 Order, the Maui County Council (the County Council), on February 17, 1993, submitted a letter to then-Mayor Linda Crockett Lingle (Mayor Lingle). The County Council noted that “[LCI] ha[d] gone to the [LUC] and stated that water [would] be needed from the high level aquifer, an existing source, which violate[d] the commitment made during the approval process.” The County Council explained that “[w]hen the approval was given, it was understood that [LCI] was committed to finding a new source or sources of water to adequately take care of the irrigation needs of the Manele Project.” As such, the County Council requested that the Mayor’s office direct the Land Use and Codes Division to stop work on the golf course until LCI developed a new source of water.

LCI responded to the County Council’s letter in correspondence dated March 4, 1993, addressed to Mayor Lingle. LCI declared that “[b]rackish and treated effluent [would] be used for golf course and landscape irrigation.... These brackish wells for the golf course irrigation are in compliance to [sic] Ordinance No.2066 enacted by the County Council on December 17, 1991.”^{FN12} Mayor Lingle wrote on March 4, 1993, in response to the City Council, that “[she did] not find a specific prohibition on the use of high-level *brackish* water.” (Emphasis in original.)

^{FN12} Maui County Ordinance Number 2066, codified as Maui County Code Chapter 20.24, entitled “Restrictions on use of potable water for golf courses,” reads in per-

minent part as follows:

§ 20.24.010(B)

A golf course can use as much as one million gallons of water per day for irrigation and other nondomestic purposes and it is inappropriate to use potable water for such a purpose. *The purpose of this chapter is to prevent the use of potable water for irrigation and other nondomestic purposes at golf courses* by restricting the approval of any permit necessary for golf course construction, if that golf course cannot show that it will use a nonpotable source of water.

(Emphasis added.)

On March 12, 1993, Appellee-Appellee County of Maui Planning Department [hereinafter Maui Planning Dept. or County] wrote to Mr. Thomas Leppert (Leppert), President of Castle and Cooke Properties, Inc.^{FN13} In this letter, the Maui Planning Dept. acknowledged that “recent correspondence from [the County Council] have raised questions in regards [sic] to use of high-level water and the meaning of the water-related conditions attached to the various land use approvals for the golf course.” The Maui Planning Dept. went on to indicate that it understood “that the golf course and resort residential irrigation would not draw from the island’s limited high-level aquifer.” The Maui Planning Dept. cited both Condition No. 10 from the 1991 Order and the Agreement to support its contention. *See supra* Part I.

^{FN13} *See supra* note 2.

After discussions with Leppert, the Maui Planning Dept. again reiterated to LCI, in a letter dated March 17, 1993, that the parties had “agreed to ‘ensure that no high level ground water [would] be used for golf course maintenance or operation ... and that all irrigation of the golf course shall be through alternative non-potable water sources.’ ” (Emphasis in original.) The Maui Planning Dept. further noted that it and “the [County Council] based their [sic] respective decisions to allow the Manele golf course to proceed” on such representations made by LCI. As such, the Maui Planning Dept. directed that “based on ... your previous representations, [LCI] ...shall not use any

water drawn from the high level aquifer for golf course construction, dust control, or irrigation purposes." (Emphasis in original.)

On March 25, 1993, LCI responded to the Maui Planning Dept., reporting that it was "in compliance with all conditions imposed ... in connection with this project...." LCI also argued that, in the Agreement, "the term 'high level ground water aquifer' was not used in a technical sense, but rather in **378 *302 its colloquial sense on Lanai as being synonymous with potable or drinking water...."

III.

On October 13, 1993, pursuant HRS § 205-4 (1993),^{FN14} the LUC issued an order to show cause [hereinafter OSC or Order to Show Cause] as to why the land "should not revert to its former classification or be changed to a more appropriate classification." This OSC was based upon the LUC's belief that LCI had "failed to perform according to Condition No. 10" and LCI "[had] failed to develop and utilize alternative sources of non-potable water for golf course irrigation requirements."

FN14. HRS chapter 205 established the LUC. HRS § 205-4(g) provides in relevant part as follows:

The commission may provide by condition that absent substantial commencement of use of the land *in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.*

(Emphasis added.)

The OSC provided, in pertinent part, as follows:

ORDER TO SHOW CAUSE

TO: [LCI]

YOU ARE HEREBY COMMANDED, under the

authority of [HRS § 205-4], and Hawaii Administrative Rules [(HAR) §] 15-15-93, to appear before the [LUC], State of Hawaii, ... on December 14, 1993, ... to show cause why that certain land at Manele, Lanai, Hawaii, ... referred to as the Subject Area, ...*should not revert to its former land use classification.*

The [LUC] has reason to believe that you have failed to perform according to Condition No. 10 of the [1991 Order] in that you have failed to develop and utilize alternative sources of non-potable water for golf course irrigation requirements. Condition No. 10 was imposed by the [LUC] after [LCI] made representations that water from the high level groundwater aquifer would not be used for golf course irrigation.

[HRS § 205-4] authorizes the [LUC] to impose conditions necessary to "assure substantial compliance with representations made by [LCI] in seeking a boundary change" and that "absent substantial commencement of use of the land in accordance with such representations, the [LUC] shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification."

Accordingly, the [LUC] will conduct a hearing on [this] matter in accordance with the requirements of chapter 91, [HRS] and subchapters 7 and 9 of [HAR chapter 15-15]. All parties in this docket shall present testimony and exhibits to the [LUC] as to whether [LCI] has failed to perform according to Condition No. 10 and the representations made by [LCI] in seeking the land use reclassification.

(Emphases added.)

The LUC held a pre-hearing conference on November 8, 1993, and conducted a series of hearings, which included LCI, the Maui Planning Dept., Appellee-Appellee the Office of State Planning, and Sensible Growth.^{FN15} On November 22, 1993, Sensible Growth submitted a position statement, maintaining that (1) LCI previously represented to the LUC that it would not be taking any water from the high level aquifer, and would instead be relying solely on alternative sources of water and (2) LCI was indi-

rectly using potable water from the high level aquifer. LCI responded on November 29, 1993, asserting that (1) Condition No. 10 only prohibited the use of potable water from the high level aquifer and that the water being used by LCI was nonpotable and (2) LCI had made good faith efforts to develop alternate sources of water.

FN15. Hearings took place on October 6 and 7, 1994, December 14 and 15, 1994, March 8 and 9, 1995, and February 1 and 2, 1996. These hearings culminated in the LUC's findings, conclusions, and order dated May 17, 1996.

On November 23, 1993, the Maui Planning Dept. submitted testimony which included its determination that LCI had "complied with [C]ondition No. 10 as written and narrowly interpreted." However, the Maui Planning **379 *303 Dept. did point out that LCI had failed to perform according to its representations:

[LCI's] inclusion of more specific language in the [Agreement] between [LCI] and [Sensible Growth], as well as in County Land Zoning Ordinance No. 2132,^[FN16] would indicate the representation of [LCI] *not to use any of the high level source. Therefore, the County finds that [LCI] has failed to perform according to its representations made during the proceedings, but that such failing was not intentional nor in bad faith....* The County recommends that the [Manele land] should not revert to its former classification.

FN16. Maui County Ordinance No. 2132, codified as Maui County Code Chapter 19.70, entitled "Lanai project district I (Manele)," read in pertinent part as follows:

§ 19.70.085(D)

Irrigation. No high level ground water aquifer will be used for golf course maintenance or operation (other than as water for human consumption) and that all irrigation of the golf course shall be through alternative nonpotable water sources.

(Emphases added.) The language of Maui

County Ordinance No. 2132, § 19.70.085(D), is identical to the language found in section six, part d, of the Agreement between LCI and Sensible Growth. *See supra* Part I. Maui County Ordinance No. 2408 revised § 19.70.085 in 1995. The relevant revised portion reads in pertinent part as follows:

§ 19.70.085(C)

Irrigation. 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 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.

(Emphases added.)

(Emphasis added.)

On December 29, 1993, LCI moved for an order modifying Condition No. 10. LCI requested that condition 10 be modified to read as follows:

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....*

(Emphasis added.) ^{FN17}

FN17. LCI submitted an amendment to the motion for an order modifying Condition

No. 10 on August 9, 1995. In this amended motion, LCI requested that Condition No. 10 be worded as follows:

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 [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.

This language is verbatim the language of amended Maui County Ordinance No. 2408, § 19.70.085(C). *See supra* note 16.

On May 17, 1996, "the [LUC] having heard and examined all testimonies, evidence, and arguments presented by [LCI], [Maui Planning Dept.], the Office of State Planning, and [Sensible Growth]," and the entire record therein, issued the following relevant findings, conclusions, and order:

FINDINGS OF FACT

Procedural Matters

1. On October, 13, 1993, the [LUC] issued an [OSC] ... commanding [LCI] to appear before the Commission to show cause why the [p]roperty should not revert back to its former land classification or be changed to a more appropriate classification.... The OSC was issued due to the [LUC's] reason to believe that [LCI] has failed to perform according to Condition No. 10 of the ... [1991 Order,] ... and has failed to develop and utilize only alternative**380 *304 non-potable water sources for golf course irrigation requirements.

....

Property Description

....

7. The subject Property is located at Manele, Lanai, and is identified as Tax Map Key No.: 4-9-02: portion of 49 (formerly Tax Map Key No.: 4-9-02: portion of 1).

8. The [p]roperty was reclassified from the Rural and Agricultural Districts to the Urban District pursuant to [Findings], [Conclusions], and Decision and order issued April 16, 1991....

....

10. The [p]roperty is currently being utilized for the golf course, and other related uses, including a clubhouse.

Condition No. 10

....

11. Condition No. 10 of the [1991 Order] reads as follows:

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

12. The Water Resources Development Plan for the Island of Lanai defined alternative sources as water resources that are *outside of the high-level aquifer, particularly low-level fresh and brackish waters that underlie Palawai Basin and beyond, and reclaimed sewage effluent.*