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## Lana'i Co. v. Land Use Comm'n, 97 P.3d 372 (Haw. 2004)

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a water right superior to the rights of any user outside of Pasco County. Thomas relied on the Florida Water Production statute, § 373.1961(1)(e), and other evidence to prove the legislature's intent to preserve the water rights of the residents of Pasco County. The Florida District Court of Appeals disagreed based the supremacy and exclusivity of the SFWMD's permitting authority set forth in the Florida Superseded Laws and Regulations statute, § 373.217.

Thus, the court affirmed the decision of the SFWMD and held that the SFWMD possessed exclusive permitting authority pursuant to the Florida Superseded Laws and Regulations statute.

*Christina Valerio*

## HAWAII

**Lana'i Co. v. Land Use Comm'n, 97 P.3d 372 (Haw. 2004)** (holding: (1) the land use commission's interpretation of agreement and order for water use to develop golf course was clearly erroneous; and (2) remand was necessary because evidence implying real estate developer breached agreement and order for water use existed).

Lana'i Company, Inc. ("LCI") sought to expand the Manele Bay Hotel on the island of Lana'i by constructing a golf course near the resort. The Land Use Commission ("LUC") approved LCI's petition to reclassify land for the golf course on the condition that LCI not use potable water from a high-level aquifer for the project. When LCI used water from the high-level aquifer, several parties appealed to LUC demanding that LCI stop such water use. LUC issued an order commanding LCI to stop using high-level aquifer water. LCI appealed to the Second Circuit Court, which reversed LUC's order. LUC and others appealed to the Hawai'i Supreme Court.

LCI's predecessor in interest filed a petition with LUC to amend the land use district boundaries at Manele, from rural and agricultural districts to urban districts, for purposes of developing a golf course. The following year, Lanaians for Sensible Growth ("Sensible Growth"), the Office of Hawaiian Affairs, and LCI signed a memorandum of agreement ("Agreement"). The Agreement stated that LCI would (1) not use water from high-level ground water aquifers to maintain or operate the proposed golf course; and (2) achieve all irrigation for the golf course through alternative, non-potable water sources. Sensible Growth and LCI submitted proposed findings of fact ("findings"), conclusions of law, and orders to LUC. LUC subsequently granted LCI's petition in 1991 ("1991 Order") and ordered reclassification of the Manele land.

Pursuant to the 1991 Order, the Maui County Council ("Council") submitted a letter to Maui's mayor. The letter noted that LCI sought use of water from a high-level aquifer in direct violation of the Agree-

ment. The letter requested the mayor stop development of the golf course pursuant to LCI's Agreement violation. LCI responded that it planned to use brackish effluent from the high-level aquifer in compliance with local law. Maui's mayor subsequently agreed with LCI, noting there was no specific prohibition against using high-level brackish water.

The County of Maui Planning Department ("County") joined the Council to contend that LCI was violating the Agreement, as well as the 1991 Order, by using high-level aquifer water. The County argued that approval of the golf course project was based on representations made by LCI that LCI would not use high-level aquifer water for golf course construction. LCI responded that it was complying with all conditions imposed upon it with respect to the project.

Subsequent to the Council and the County's complaints, LUC issued an order for all involved parties to show cause why the Manele land should not revert to its former classification ("Show Cause Order"). LUC based the Show Cause Order on the belief that LCI failed to act pursuant to the 1991 Order by using high-level aquifer water. In 1996, after Sensible Growth, the County, and LCI submitted testimonies and arguments, LUC found that LCI had failed to act in accordance with the 1991 Order. LUC ordered LCI to cease use of high-level aquifer water, as well as file a detailed plan outlining how LCI would use water from alternative non-potable water sources, excepting the high-level aquifer ("1996 Order"). LCI appealed LUC's decision to the circuit court.

The circuit court initially upheld both LUC's finding that LCI violated the 1991 Order and LUC's order that LCI submit a plan to obtain water from sources outside of the high-level aquifer. LCI filed a motion to alter or amend the judgment, specifically requesting that the 1996 Order be reversed. Following a denial of that motion by the circuit court and a dismissal of appeal by the court, the circuit court reversed the 1996 Order. The circuit court held that LUC's conclusion that LCI violated the 1991 Order was arbitrary and capricious and clearly erroneous. LUC appealed to the Hawai'i Supreme Court.

The court noted it reviewed agency decisions that presented mixed questions of fact and law under the clearly erroneous standard because the agency decisions were based upon facts and circumstances specific to the given case. The court stated that a mixed decision was clearly erroneous when (1) the record lacked substantial evidence to support the decision; or (2) an appellate court was left with a firm conviction that a mistake had been made, despite substantial evidence supporting the decision.

In addressing the circuit court's ruling that LUC's determination that the 1996 Order was clearly erroneous, the court first looked at the plain language of the 1991 Order, specifically the 1991 Order's mandate ordering LCI not to use high-level aquifer water. LCI argued the

language of the 1991 Order only prohibited the use of potable water from the high-level aquifer and, therefore, use of non-potable water from that aquifer was permissible. LUC and Sensible Growth responded that the 1991 Order prohibited use of all water from the high-level aquifer. The court found that the plain language of the 1991 Order did not prohibit use of all high-level aquifer water. Specifically, the language of the 1991 Order did not forbid use of non-potable water from the high-level aquifer, nor did the 1991 Order's language indicate that the high-level aquifer only contained potable water. As such, the court found the 1996 Order to be clearly erroneous because of the lack of evidence that the 1991 Order meant to exclude LCI from using non-potable water from the high-level aquifer.

The court next considered LUC's explicit rejection of Sensible Growth's recommended version of the 1991 Order. Sensible Growth proposed that no water from the high-level aquifer should be used for golf course purposes. The court noted that LUC, after looking at Sensible Growth's proposal, adopted LCI's proposed findings regarding the high-level aquifer into the 1991 Order. Specifically, LUC entered findings into the 1991 Order that were identical to LCI's proposals. The court found that because LUC expressly rejected Sensible Growth's proposal to forbid use of all high-level aquifer water, LUC could not reasonably assert that it intended to prohibit LCI from using any high-level aquifer water.

The court lastly noted that a map submitted to LUC clearly indicated that water sources not precluded from use by LCI were inside the high-level aquifer. Specifically, although a well and the Palawai Basin were both located inside the high-level aquifer, LUC did not expressly bar use of those water sources. In fact, a finding from the 1991 Order recommended use of these water sources because of their brackish waters. In light of the aforementioned three analyses, the court found the information submitted pursuant to the Show Cause Order was insufficient to support the conclusion that the 1991 Order barred LCI from using any high-level aquifer water. As such, the court held the 1996 Order was clearly erroneous.

The court also addressed whether LCI had violated the 1991 Order. Sensible Growth argued that, even if the 1991 Order did not bar LCI from using any high-level aquifer water, the 1991 Order did bar LCI from using high-level aquifer potable water. Specifically, Sensible Growth claimed that the circuit court erred in reversing the 1996 Order because LCI had used potable water from the high-level aquifer in violation of the 1991 Order. Because LUC had made no specific findings regarding whether LCI had used potable water from the high-level aquifer, the court remanded the issue back to the circuit court. The court instructed the circuit court to remand the issue to LUC to clarify whether LCI had used high-level aquifer potable water. The court thus

upheld the circuit court's reversal of the 1996 Order, but remanded the case to LUC to clarify whether LCI had violated the 1991 Order.

*Kyle K. Chang*

## IDAHO

**McKay v. Boise Project Bd. of Control, No. 28660, 2004 Idaho LEXIS 149 (Idaho 2004)** (reversing the lower court's award of damages for the destruction of a cash crop when the Boise Project Control Board raised the reservoir water level pursuant to a flowage easement since the plain language of the easement contained no ambiguity, the activity remained within the parameters of the easement, and the activity was reasonable; affirming the lower court's holding that the Boise Project Control Board does not qualify for immunity because the decision to raise reservoir levels was operational and not discretionary).

In 1979 the Boise Project Control Board ("Project") obtained a flowage easement from a judgment that allowed the Project to raise the level of water in the Hubbard Reservoir to 2,771 feet for any routine irrigation purpose. The judgment did not require the Project to give any notice before changing the water level in the reservoir. In 1992 Darwin and Patricia McKay ("McKay") leased a parcel of land located on the Hubbard Reservoir, which they used to grow turf grass as a cash crop. During the spring of 1997, the Project raised the water level in the Hubbard Reservoir to 2,767.8 feet as part of a plan to provide water for irrigation. The high water damaged a portion of McKay's crop.

McKay sued the Project for the damage to his crop in the District Court of the Fourth Judicial District. McKay claimed the Project negligently used the flowage easement and the Project intentionally trespassed on his leasehold. The district court rejected the Project's defense of governmental immunity for performing discretionary functions. The district court then awarded McKay damages because the Project breached its duty to manage the flowage easement in a reasonable manner and in accordance with the 1979 judgment. Accordingly, the district court issued a permanent injunction that changed the scope of the flowage easement from allowing flooding for routine irrigation operations the Project may desire, to provide that the Project can only flood McKay's estate in the good faith pursuit of legitimate irrigation goals. The Project appealed the district court's decision to the Supreme Court of Idaho.

On appeal, McKay argued he lacked privity to the 1979 flowage easement. McKay asserted he was not a party to the 1979 judgment and thus not bound by that judgment. However, the court determined McKay failed to raise the issue in a timely manner as required by Idaho Appellate Rule 15. Therefore, the court refused to consider the issue of privity.