

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the matter of the Petition of

MĀKENA RESORT CORP.

To Amend the Land Use District
Boundary of Certain Land Situated
at Mākena, Island of Maui, State of
Hawai'i, Consisting of
Approximately 146.209 acres from
the Agricultural to the Urban
District, TMKs 2-1-05:83, 84, 85, por.
108; 2-1-07: 4, and 2-1-8: por. 90

DOCKET NO. A97-721

ORDER GRANTING RECEIVER'S
MOTION FOR FIFTH AMENDMENT
TO THE FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER, FILED ON
FEBRUARY 19, 1998

ORIGINAL

ORDER GRANTING RECEIVER'S MOTION FOR FIFTH
AMENDMENT TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER, FILED ON FEBRUARY 19, 1998

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawai'i.

May 10, 2010 by

ORLANDO DAVIDSON
Executive Officer



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On March 17, 2010, Miles Furutani Mākena Receivers LLC ("Receiver"), the court appointed receiver representing Mākena Golf LLC and Mākena Hotel LLC (collectively, "Petitioner") filed a Motion for Fifth Amendment to the Findings of Fact, Conclusions of Law, and Decision and Order, Filed on February 19, 1998 ("Receiver's Motion"), pursuant to sections 15-15-70 and 15-15-94, Hawai'i Administrative Rules ("HAR"), requesting that the Land Use Commission ("Commission" or "LUC") amend Condition No. 12 of this Commission's Findings of Fact, Conclusions of Law, and Decision and

Order dated February 19, 1998 ("Decision and Order"). The Receiver does not represent Keaka LLC, which owns a portion of the LUC reclassified property.

Condition No. 12 of the Decision and Order originally read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained prior to Petitioner acquiring county zoning or prior to Petitioner securing county building permits if county zoning is not required."

On May 11, 2000, Petitioner's predecessor in interest, Mākena Resort Corp. ("MRC") filed Petitioner's Motion for First Amendment to the Findings of Fact, Conclusions of Law, and Decision and Order filed on February 19, 1998 ("Motion for First Amendment"). The Motion for First Amendment came on for hearing before this Commission on June 1, 2000, in Honolulu, Hawai'i. The Decision and Order was amended by Order Granting In Part and Denying in Part Petitioner's Motion for First Amendment to the Findings of Fact, Conclusions of Law, and Decision and Order, Filed on February 19, 1998, dated June 20, 2000, ("Amended Order"), and revised Condition No. 12 to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui.

Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within two (2) years from June 1, 2000."

On May 7, 2002, MRC filed a Motion for Second Amendment to the Amended Order ("Motion for Second Amendment"), requesting the Commission to further revise Condition No. 12 of the Amended Order to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within two (2) years from June 1, 2002."

At the June 20, 2002 hearing, the Commission considered MRC's Motion for Second Amendment, the oral and written arguments presented by the parties, and further representations made by MRC during the hearing. The Amended Order as amended by Order Granting Petitioner's Motion For Second Amendment To The Findings Of Fact, Conclusions Of Law, And Decision And Order, Filed On February 19, 1998, dated June 27, 2002, revised Condition No. 12 to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within four (4) years from June 1, 2000."

On May 25, 2004, MRC filed a Motion for Third Amendment to the Amended Order ("Motion for Third Amendment") to further revise Condition No. 12 of the Amended Order to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within two (2) years from June 1, 2004."

At the June 4, 2004 hearing, the Commission considered MRC's Motion for Third Amendment, the oral and written arguments presented by the parties, and further representations made by MRC during the hearing. The Amended Order as amended by Order Granting Petitioner's Motion For Third Amendment To The Findings Of Fact, Conclusions Of Law, And Decision And Order, Filed On February 19, 1998, dated January 12, 2005, revised Condition No. 12 to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within eight (8) years from June 1, 2000."

On May 23, 2008, MRC filed a Motion for Fourth Amendment to the Amended Order ("Motion for Fourth Amendment") to further revise Condition No. 12 of the Amended Order to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within ten (10) years from June 1, 2000."

At the August 21, 2008 hearing, the Commission considered MRC's Motion for Fourth Amendment, the oral and written arguments presented by the parties, and further representations made by MRC during the hearing. The Amended Order as amended by Order Granting Petitioner's Motion For Fourth Amendment To The Findings Of Fact, Conclusions Of Law, And Decision And Order, Filed On February 19, 1998, dated September 17, 2008, revised Condition No. 12 to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within ten (10) years from June 1, 2000."

On April 15, 2010, the County of Maui filed a statement of no opposition to Petitioner's Motion for Fifth Amendment.

On April 21, 2010, Thomas D. Welch, Jr., attorney for Keaka LLC, owner of TMKs (2) 2-1-5:83, 84 and 85, which are a portion of the Petition Area, filed a statement advising that Keaka LLC has not formally joined as a party to these proceedings, however, Keaka LLC consents to the Receiver's two year extension request, but with the

reservation that said consent may not be taken or construed as Keaka LLC's consent or acquiescence, express or implied, as to any action which the Commission may take beyond granting the two-year extension, or as to any other issue or position stated or implied in the Receiver's motion.

The Motion for Fifth Amendment came on for hearing before the Commission on April 21, 2010, in Honolulu, O`ahu, Hawai`i, with appearances by the Petitioner and the Office of Planning, Department of Business, Economic Development & Tourism (OP"). OP expressed no objections during the hearing to Petitioner's Motion for Fifth Amendment, however indicated that it may oppose any future extension requests. [The County of Maui did not appear, but filed no opposition?]

At the hearing, the Receiver requested that Condition No. 12 of the Amended Order be amended to read as follows:

"12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within twelve (12) years from June 1, 2000."

Exhibit 5 to the Receiver's Motion (Eleventh Annual Report), indicates a draft agreement addressing Condition 12 was submitted to the State Department of Transportation ("DOT") for its review and comment, after the September 17, 2008 LUC Order Granting Fourth Amendment of Condition 12. Exhibit 6 to the Receiver's Motion

consists of the draft agreement submitted to the DOT entitled "Inter-Developer Agreement for Highway Improvements and Impact Fee Credits" ("Inter-Developer Agreement").

The Receiver believes an additional two years (until June 1, 2012) are necessary to correct and negotiate the Inter-Developer Agreement with all the affected parties and for the DOT's review and ultimate approval.

After discussion and deliberation by the Commissioners, a motion was made and seconded to grant a two-year time extension of Condition No. 12. There being a vote tally of 7 ayes, 0 nays, 1 absent, and 1 commissioner being recused, the motion carried.

ORDER

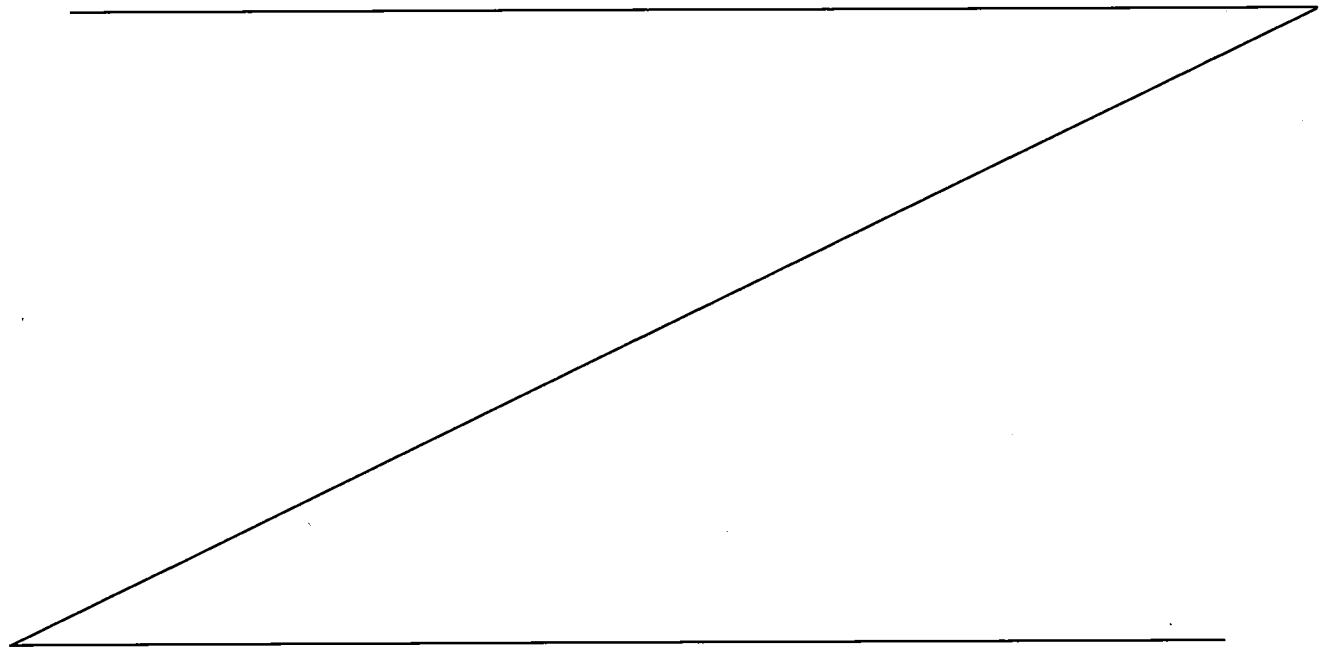
Having duly considered Receiver's Motion for Fifth Amendment, the supporting Affidavits and Declaration, Exhibits 1-6, the oral and written arguments presented by the parties, and further representations made during the hearing, and a motion having been made and seconded at a hearing on April 21, 2010, in Honolulu, O`ahu, Hawai`i, and the motion having received the affirmative votes required by §15-15-13, HAR, and good cause appearing therefor, this Commission GRANTS the Receiver's Motion and ORDERS that Condition No. 12 of the Amended Decision and Order dated February 19, 1998, be amended to read as follows:

- "12. Petitioner shall participate in the pro rata funding and construction of local and regional transportation improvements and programs, including dedication of rights of way as determined by the State Department of

Transportation ("DOT") and the County of Maui. Agreement between Petitioner and DOT as to the level of funding and participation shall be obtained within twelve (12) years from June 1, 2000."

All other conditions to the Amended Decision and Order dated February 19, 1998, are affirmed and continue in full force and effect.

This ORDER shall take effect upon the date this ORDER is certified and filed by the Commission.



Dated: Honolulu, Hawai'i, May 10, 2010

APPROVED AS TO FORM



Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAII

By 

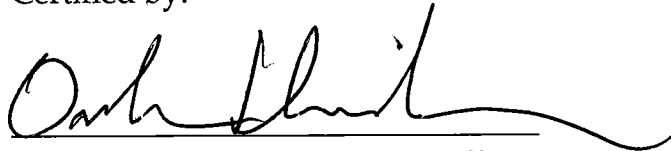
RANSOM PILTZ

Chair

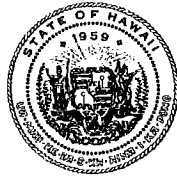
Filed and effective on

May 10, 2010

Certified by:



Orlando Davidson, Executive Officer



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CERTIFICATE OF SERVICE

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I hereby certify that a certified copy of the ORDER GRANTING
RECEIVER'S MOTION FOR FIFTH AMENDMENT TO THE FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER, FILED ON FEBRUARY 19,
1998 was served upon the following by either hand delivery or depositing the same in
the U. S. Postal Service by regular or certified mail as noted:

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Dated: Honolulu, Hawai`i, May 10, 2010.



ORLANDO DAVIDSON
Executive Officer