

ATC MAKENA HOLDINGS LLC
1 Aloha Tower Drive, Suite 3100
Honolulu, HI 96813

LAND USE COMMISSION
STATE OF HAWAII

2012 MAR 14 P 2: 27

March 12, 2012

Land Use Commission
State of Hawaii
235 South Beretania Street, Suite 406
P. O. Box 2359
Honolulu, Hawaii 96804

SUBJECT: Fourteenth Annual Report for Land Use Commission
Docket No. A97-721 (Makena Resort)

Dear Chair and Members of the Commission:

On behalf of the ATC Makena Entities (identified below), we hereby submit this Fourteenth Annual Report for Docket No. A97-721.

I. **INTRODUCTION**

On February 19, 1998, the Land Use Commission of the State of Hawaii (the "**Commission**") filed its "Findings of Fact, Conclusions of Law and Decision and Order" (the "**1998 D&O**"), which reclassified 145.943 acres of land in Makena, Maui, Hawaii from the State Land Use Agricultural District into the State Land Use Urban District (hereinafter, the "**LUC Reclassified Property**").

II. **STATUS OF THE PROJECT**

The LUC Reclassified Property is currently owned by multiple owners, including ATC Makena N Golf LLC, ATC Makena S Golf LLC, ATC Makena Land SF1 LLC, ATC Makena Land MF1 LLC, ATC Makena Land MF2 LLC, ATC Makena Land MF3 LLC, ATC Makena Land C1 LLC, ATC Makena Land U1 LLC, ATC Makena Land B1 LLC, ATC Makena Land MF4 LLC, ATC Makena Land SF2 LLC, and ATC Makena Land AH1 LLC all Delaware Corporations collectively known as ATC Makena Entities.

The LUC Reclassified Property was purchased through foreclosure action on August 27, 2010. The foreclosed property does **not** include the portion of the LUC Reclassified Property that is owned by Keaka LLC identified by the following Tax Map Key Nos. 2-1-05:83, 84, 85 and 2-1-07:4.

III. RESPONSE TO LUC CONDITIONS

The following are the conditions set forth in the **1998 D&O** and description of efforts that are being made to comply with each stated condition:

1. Petitioner shall provide affordable housing opportunities for low, low-moderate, and gap group income residents of the State of Hawai'i in accordance with applicable laws, rules, and regulations of the County of Maui. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between Petitioner and the County of Maui.

Response: ATC Makena Entities acknowledge that the Petitioner is subject to the provisions of said condition.

2. Petitioner shall coordinate with the County of Maui Board of Water Supply to incorporate the proposed project into the County Water Use and Development Plan for the area. Prior to the granting of the first discretionary permit for the single-family and multi-family residential development described in paragraph 20 of the Decision and Order or the hotel described in paragraph 21 of the Decision and Order and by or before one year from the issuance date of this Decision and Order, Petitioner shall furnish the Commission with a letter from the County of Maui Board of Water Supply confirming that (a) the potable water allocation that will be credited to Petitioner will be available to and sufficient for the proposed project as it is described in the Petition, (b) the availability of potable water will not be an obstacle or impediment to the development of the proposed project as described in the Petition and (c) the proposed project as it is described in the Petition has been incorporated into the County Water Use and Development Plan for the area and that this plan will prevent the continued overpumping of the sustainable yield of the lao aquifer.

Response: As provided in Petitioner's Second Annual Report, this condition was complied with as set forth in a letter from David Craddick, Director of the Department of Water Supply, County of Maui, dated February 18, 1999. This letter was attached to said Second Annual Report.

Additional letters regarding compliance with this condition, dated October 1, 2003 from Petitioner to the Department of Water Supply and the response from George Tengan, Director of Water Supply, dated October 7, 2003, were attached as Exhibit "A" and Exhibit "B" to the Sixth Annual Report.

ATC Makena Entities understand that this condition has been complied with.

3. Petitioner shall participate in the funding and construction of adequate water source, storage, and transmission facilities and improvements to accommodate the proposed project in accordance with the applicable laws, rules and regulations of the County of Maui, and consistent with the County of Maui water use and development plan.

Response: The Receiver acknowledges that the Petitioner is subject to the provisions of said condition. The Receiver understands that, in 1976, Petitioner participated in the Central Maui Source Development Joint Venture and also the Central Maui Transmission Joint Venture which developed water sources in Waiehu, Maui and a transmission line from the newly developed water sources down to the Wailea and Makena regions. Further, in 1985, Makena Resort constructed a 1.5 million gallon water storage tank at the Makena Resort.

4. Petitioner shall participate in the funding and construction of adequate wastewater treatment, transmission and disposal facilities to accommodate the proposed project under such terms as are agreeable between Petitioner and the County of Maui.

Response: As provided in the Second Annual Report, the construction of a wastewater system, comprising of collection lines, pump stations and wastewater reclamation plant at Makena, commenced on February 10, 2000, and the entire wastewater reclamation system was completed and operable in October 2002.

ATC Makena Entities understand that this condition has been complied with.

5. Petitioner shall contribute to the development, funding, and/or construction of school facilities, on a pro rata basis for the residential developments in the proposed project, as determined by and to the satisfaction of the State Department of Education ("DOE"). Terms of the contribution shall be agreed upon by Petitioner and DOE prior to Petitioner acquiring county rezoning or prior to Petitioner applying for building permits if county zoning is not required.

Response: The Receiver understands that, pursuant to an Educational Contribution Agreement for Makena Resort between Petitioner and the Department of Education (DOE), dated August 17, 2000, the parties have agreed upon a cash contribution by Petitioner which shall represent a fair share payment for the development, funding and/or construction of school facilities by Petitioner. A copy of said agreement was attached to the Third Annual Report.

ATC Makena Entities understand that this condition has been complied with.

6. Petitioner shall participate in the pro rata funding and construction of adequate civil defense measures as determined by the State of Hawai'i and County of Maui civil defense agencies.

Response: The Receiver acknowledges that the Petitioner is subject to the provisions of said condition. The Receiver understands that Petitioner has had discussions with the State of Hawai'i and County of Maui civil defense agencies with regard to this condition, and that both agencies have previously indicated to Petitioner that no civil defense measures are warranted for the property. A siren warning simulator for civil defense is installed in the security department of the 310-room Makena Beach & Golf Resort (formerly Maui Prince Hotel), which security department is manned 24 hours a day.

ATC Makena Entities understand that Petitioner executed agreements with the State for the installation of new Civil Defense Sirens (Siren 157, Makena Resort and Siren 158, Big Beach-Makena). Copies of the agreements were attached as Exhibit "B" and Exhibit "C" to the Eleventh Annual Report.

ATC Makena Entities have been in discussion with the State of Hawaii Department of Accounting and General Services (DAGS) on behalf of the State Civil Defense to authorize installation of the sirens. Additionally, ATC Makena Entities are working with DAGS to formalize license agreements relating to the sirens.

7. Should any human burials or any historic sites such as artifacts, charcoal deposits, stone platforms, pavings, or walls be found, Petitioner shall stop work in the immediate vicinity and contact SHPD. The significance of these finds shall then be determined and approved by SHPD, and an acceptable mitigation plan shall be approved by SHPD. SHPD must verify that the fieldwork portion of the mitigation plan has been successfully executed prior to work proceeding in the immediate vicinity of the find. Burials must be treated under specific provisions of Chapter 6E, Hawai'i Revised Statutes.

Response: ATC Makena Entities acknowledge that they are subject to provisions of said condition and will comply.

8. Petitioner shall follow the State DLNR recommendations for Petition Areas 1, 2 and 3, for archaeological data recovery and preservation. An archaeological data recovery plan (scope of work) must be approved by SHPD. That plan then must be successfully executed (to be verified in writing by the SHPD), prior to any grading, clearing, grubbing or other land alteration in these areas. In Petition Area 1, three significant historic sites (1969, 2563, 2569) are committed to preservation. A preservation plan must be approved by SHPD. This plan, or minimally its interim protection plan phase, must be successfully executed (to be verified in writing by the SHPD), prior to any grading, clearing, grubbing or other land alteration in these areas.

Response: ATC Makena Entities acknowledge that they are subject to provisions of said condition and will comply.

9. Petitioner shall implement efficient soil erosion and dust control measures during and after the development process to the satisfaction of the State Department of Health and County of Maui.

Response: ATC Makena Entities acknowledge that they are subject to provisions of said condition and will comply at the appropriate time prior to commencement of construction.

10. Petitioner shall initiate and fund a nearshore water quality monitoring program. The monitoring program shall be approved by the State Department of Health in consultation with the U.S. Fish and Wildlife Service, the National Marine Fisheries Services, and the State Division of Aquatic Resources, DLNR. Petitioner shall coordinate this consultation process with the concurrence of the State Department of Health. Mitigation measures shall be implemented by Petitioner if the results of the monitoring program warrant them. Mitigation measures shall be approved by the State Department of Health in consultation with the above mentioned agencies.

Response: ATC Makena Entities understand that since August 1995, Petitioner (under prior ownership) has implemented and funded a nearshore water quality monitoring program. This program initially collected base line water samples and analyzed the same to determine turbidity, chemical compound contents and biota sampling. This monitoring program continues with semi-annual sampling at four separate nearshore sites.

ATC Makena Entities is providing the two most recent reports along with copies of their transmittals to State of Hawaii Department of Health: a.) dated May 13, 2011 for work conducted in March 2011 **See Exhibit "A-1"**, and b.) dated January 6, 2012 for work conducted in October 2011 **See Exhibit "A-2"**. ATC Makena Entities has contracted for this work with Marine Research Consultants, Inc.

ATC Makena Entities acknowledge that they are subject to provisions of said condition and will comply with said provisions.

11. Petitioner shall submit a Traffic Impact Analysis Report (TIAR) for review and approval by the State Department of Transportation and the County of Maui.

Response: As set forth in the Second Annual Report, a TIAR was prepared and submitted for review by the State Department of Transportation (DOT) and the County of Maui as part of the change in zoning application. Following certain comments by DOT, revisions were made to the TIAR which DOT agreed with as set forth in a letter from Kazu Hayashida, Director of Transportation, dated May 2, 2000, a copy of which was attached to the Third Annual Report.

In addition, the Receiver understands that Petitioner prepared and submitted a Makena Resort Master Traffic Study, dated June 6, 2003 (Revised September 14, 2003), which was submitted to the SDOT and County of Maui. This Master Traffic Study was attached as Exhibit "F" to the Sixth Annual Report. The County approved the study on September 26, 2003 as noted in Exhibit "G" attached to the Sixth Annual Report.

ATC Makena Entities understand that this condition has been complied with.

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 rezoning is not required.

Response: ATC Makena Entities understands that following discussion with representatives of DOT relating to revisions to the TIAR as set forth in response to Condition No. 11 above, on May 11, 2000, Petitioner filed Petitioner Makena Resort Corp.'s Motion for First Amendment to the Findings of Fact, Conclusions of Law and Decision and Order, filed on February 19, 1998 (D&O), requesting that this Condition No. 12 be amended. Said Motion was supported by the Affidavit of Roy Figueiroa, General Manager of then Petitioner. The County of Maui Planning Department filed a Response to Motion wherein it stated that it had no objections to the Motion. The Office of Planning (OP) filed a Response to Motion wherein it stated that DOT was satisfied by the fact that Petitioner had acknowledged responsibility for its pro rata share of the cost of the transportation improvements proposed in the Maui Long Range Land Transportation Plan for the Kihei-Makena region and that OP supported the position of DOT. Upon consideration of Petitioner's Motion, supporting affidavit, and the oral and written arguments presented by the parties, this Commission ordered that Condition No. 12 of the D&O, be amended as follows:

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

In complying with Condition No. 12, as amended, Petitioner has and continues to engage in discussions with the DOT relating to improvements to regional transportation infrastructure, specifically, with regard to the implementation of certain interim improvements to the State Piilani Highway from Mokulele Highway to Kilohana Drive. On July 16, 2001, Petitioner entered into an agreement with DOT to fund the planning and design of the restriping and other improvements to Piilani Highway to increase travel lanes from two (2) to four (4) lanes. As noted in the Fourth Annual Report, the planning and design work was ninety percent (90%) complete and the project was scheduled to begin construction in the summer 2002 and completed within one year. The improvements were completed in 2003.

As provided in the Second Annual Report, Petitioner continued the development of the roadway and utility improvements to portions of Makena Alanui, Honoiki Street and Makena-Keoneoio Road, all within the Makena Resort. Construction commenced on January 10, 2000, and was completed in April, 2001.

On May 7, 2002, Petitioner filed a Motion for Second Amendment to the Findings of Fact, Conclusions of Law, and Decision and Order, filed on February 19, 1998 requesting that this Condition No. 12 be further amended. Said Motion was supported by the Affidavit of Roy Figueiroa, General Manager of then Petitioner. The County of Maui Planning Department filed a Response in Support of the Petitioner's Second Amendment on June 19, 2002. On June 20, 2002, the Motion came on hearing before this Commission, with appearances by Petitioner, County and Office of Planning. Upon consideration of Petitioner's Motion, supporting affidavit, and the oral and

written argument presented by the parties, this Commission ordered that Condition No. 12 of the Amended Decision and Order dated February 19, 1998, be amended to impose a four-year agreement deadline from June 1, 2000, 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 24, 2004, Petitioner filed a motion for Third Amendment to the Finding of Fact, Conclusions of Law, and Decision and Order requesting that Condition No. 12 be further amended to extend this agreement deadline beyond June 1, 2004. Said Motion was supported by the Affidavit of Roy Figueiroa, Vice-President of then Petitioner.

On June 4, 2004, the Motion came on hearing before this Commission with appearances by Petitioner, County of Maui, State Office of Planning and State Department of Transportation. The County of Maui stated no objections to Petitioner's request for an extension of time to satisfy Condition No. 12, however, questioned whether the two additional years would be an adequate amount of time to satisfy the condition. Upon consideration of Petitioner's Motion, supporting affidavit and written and oral argument presented by the parties, this Commission ordered 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 eight (8) years from June 1, 2000.

The Commission further ordered that the State Department of Transportation file written annual status reports detailing the status of the agreement between Petitioner and DOT as to the level of funding and other participation in constructing local and regional transportation improvements and programs.

Petitioner met with the State Department of Transportation and had agreed to participate in design and construction of the four-lane widening of Piilani Highway from Kilohana Drive to Wailea Ike Drive.

Letters from the State Department of Transportation, dated September 12, 2007 and January 25, 2007, were attached as Exhibit C to the Tenth Annual Report.

On May 23, 2008, Petitioner filed a motion for Fourth Amendment to the Finding of Fact, Conclusions of Law, and Decision and Order requesting that Condition No. 12 be further amended to extend this agreement deadline beyond June 1, 2008. Said motion was supported by the Affidavit of Roy Figueiroa, project manager of Makena Hotel, LLC and Makena Golf, LLC.

On August 21, 2008, the Motion came on hearing before this Commission with appearances by Petitioner, County of Maui, State Office of Planning and State Department of Transportation. Upon consideration of Petitioner's Motion, supporting affidavit and written and oral argument presented by the parties, this Commission ordered 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 (ADOT) 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 March 17, 2010, the Receiver filed a motion for Fifth Amendment to the Findings of Fact, Conclusions of Law, and Decision and Order (as amended) requesting that Condition No. 12 be further amended to extend this agreement deadline beyond June 1, 2010.

On April 21, 2010, the Motion came on hearing before this Commission with appearances by Stephen K.C. Mau on behalf of the Receiver. Upon consideration of Receiver's Motion, supporting affidavits and written and oral argument presented by the parties, this Commission ordered that Condition No. 12 of the Amended Decision and Order dated February 19, 1998, be further 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.

In March 2011, December 21, 2011, and February 1, 2012, ATC Makena Entities met with the DOT relating to its participation in the design and construction of the four-lane widening of Piilani Highway from Kilohana Drive to Wailea Ike Drive. ATC Makena Entities are presently formalizing an agreement with DOT that will satisfy this condition.

ATC Makena Entities acknowledge that they are subject to provisions of said condition.

13. Petitioner shall fund the design and construction of drainage improvements required as a result of the development of the Property to the satisfaction of the appropriate State of Hawai'i and County of Maui agencies.

Response: As provided in the Eleventh Annual Report, as part of the proposed development described in Response No. 4 above and further described in the SMA use permit discussed in Response No. 4 as set forth in the Second Annual Report, Petitioner also proposed certain drainage improvements at the Makena Resort.

As reported in the Fifth Annual Report the Petitioner was preparing a Drainage Master Plan to be submitted to the County Department of Public Works and Environmental Management and Planning Department. The Master Plan was submitted on July 1, 2003 and approved by the County on August 20, 2003.

ATC Makena Entities acknowledge that they are subject to provisions of said condition.

14. The Petition Areas will be developed in accordance with the Kihei-Makena Community Plan.

Response: ATC Makena Entities acknowledge that development of the Petition Areas is to be in accordance with the Kihei-Makena Community Plan.

15. Petitioner shall obtain appropriate changes in zoning from the County of Maui for the Petition Areas.

Response: ATC Makena Entities note that the Petitioner submitted, and the County approved, a change in zoning for the petition area, effective January 7, 2009.

ATC Makena Entities understand that this condition has been complied with.

16. Petitioner shall fund, design and construct all necessary traffic improvements necessitated by development of the Petition Areas as required by the State Department of Transportation and the County of Maui Department of Public Works and Waste Management.

Response: ATC Makena Entities acknowledge that it is subject to the provisions of this said condition.

17. Petitioner shall develop the Property in substantial compliance with the representations made to the Commission. Failure to so develop the Property may result in a reversion of the Property to its former classification, a change to a more appropriate classification, or other reasonable remedy as determined by the Commission.

Response: ATC Makena Entities acknowledges that it is subject to the provisions of this said condition.

18. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Property, prior to development of the Property.

Response: A July 11, 2000 letter from Eric T. Maehara, Esq., attached as Exhibit "H" to the Sixth Annual Report, notified the Commission of name changes to corporations holding property in the Petition Areas.

By letter dated July 29, 2005, attached as Exhibit "D" to the Eighth Annual Report, Petitioner, through its attorney Christopher T. Kobayashi, notified the Commission of the sale of certain parcels of real property within the petition area to Keaka LLC, a Delaware limited liability company.

By letter dated March 7, 2007, attached as Exhibit "K" to the Ninth Annual Report, Petitioner, through its attorney Burt T. Lau, notified the Commission of the intent to sell the remainder of the Makena Resort properties to Honua LLC, a Delaware limited liability company.

A foreclosure auction occurred on May 28, 2010. By letter dated April 30, 2010, attached as Exhibit "B" to the Thirteenth Annual Report, Commissioner Christopher L. Lau notified the Commission of the foreclosure auction

On August 23, 2010, Commissioner Christopher L. Lau and the ATC Makena Entities notified the Commission of the pending closing and their acknowledgement of the Conditions. Closing

occurred on August 27, 2010. See Exhibit "C" attached to the Thirteenth Annual Report.

19. Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of Planning, and the County of Maui Planning Department in connection with the status of the subject project and Petitioner's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.

Response: The submittal of this Fourteenth Annual Report by ATC Makena Entities is in compliance with this condition.

20. The commission may fully or partially release or amend the conditions provided herein as to all or any portion of the petition area upon timely motion and upon the provision of adequate assurance of satisfaction of these conditions by Petitioner.

Response: ATC Makena Entities acknowledge that the Petitioner may submit a timely motion to fully or partially release or amend the conditions upon compliance with the same.

21. Within seven (7) days of the issuance of the Commission's Decision and Order for the subject reclassification, Petitioner shall (a) record with the Bureau of Conveyances a statement that the Property is subject to conditions imposed herein by the Land Use Commission in the reclassification of the Property, and (b) shall file a copy of such recorded statement with the Commission.

Response: ATC Makena Entities understand that this condition has been complied with.

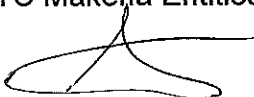
22. Petitioner shall record the conditions imposed herein by the Commission with the Bureau of Conveyances pursuant to Section 15-15-92, Hawai'i Administrative Rules.

Response: ATC Makena Entities understand that this condition has been complied with.

If you have any questions or require any further information, please contact Becky Broudy Collins at (808)547-2253 or bcollins@stanfordcarr.com.

Sincerely,

Sean Hehir
Authorized Signor
ATC Makena Entities



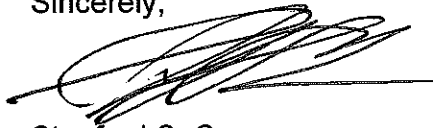
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cc: State of Hawaii, Office of Planning
County of Maui, Department of Planning
Munekiyo & Hiraga, Inc.

Encl. **Exhibit "A-1"** Marine Monitoring Report with transmittal to State of Hawaii Department of Health dated May 13, 2011, for work conducted in March 2011

Exhibit "A-2" Marine Monitoring Report with transmittal to State of Hawaii Department of Health dated January 6, 2012, for work conducted in October 2011.

Sincerely,



Stanford S. Carr
Authorized Signor
ATC Makena Entities