

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

May 22, 2015

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Maui

Approve Mediated Settlement of Rent Reopening Dispute in Grant of Easement No. S-4112, Association of Apartment Owners of Mana Kai-Maui, a Hawaii nonprofit corporation, Grantee, located at Kamaole, Wailuku (Kula), Maui, Hawaii, TMK No. (2) 3-9-004:portion of 001, for the Period of September 25, 2012 Through September 24, 2022, and Additionally Approve the Rent Reopening for the Period of September 25, 2022 Through September 24, 2032; and Consent to the Assignment of Grant of Easement No. S-4112 After-The-Fact.

APPLICANTS:

Association of Apartment Owners of Mana Kai-Maui (AOAO of Mana Kai-Maui), a Hawaii nonprofit corporation, Grantee, and Land Division, Department of Land and Natural Resources.

LEGAL REFERENCE:

Sections 171-17 and 171-36, Hawaii Revised Statutes, as amended.

LOCATION:

Piilani Highway to Grant 1977 to Kaneioholani and Grant 2539 Apana 2 to Noholoa at Kamaole, Wailuku (Kula), Maui, Hawaii, as shown on the attached map labeled Exhibit A.

AREA:

17,421 square feet

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CHARACTER OF USE:

Access purposes only

TERM OF LEASE:

The entire term of the Grant of Easement is for 65 years. The dispute is over the reopening of rent as of the expiration of the 45th year of the term (period commencing on September 25, 2012 and expiring on September 24, 2022).

Additionally, Grantee and Land Division also mediated the rent for the next and last reopening period commencing on September 25, 2022 and expiring on September 24, 2032.

ANNUAL RENTAL:

For the ten-year period of September 25, 2012 through September 24, 2022, the rent would be \$6,000 per year.

For the period of September 25, 2022 through September 24, 2032, the rent would be \$7,800 per year.

DCCA VERIFICATION:

Place of business registration confirmed:	YES <u>X</u>	NO <u>__</u>
Registered business name confirmed:	YES <u>X</u>	NO <u>__</u>
Good standing confirmed:	YES <u>X</u>	NO <u>__</u>

REMARKS:

Mediation of Rent

For the last fifteen-year period, from September 25, 1997 to September 24, 2012, the Grantee has paid an annual rent of \$900.

The department hired an independent real estate appraiser to determine the reopened rental value ¹ for the last two ten-year reopening periods of the easement. The appraiser determined the following market rental values over this twenty-year span:

9/25/12 - 9/24/17	\$10,540 per year
9/25/17 - 9/24/22	\$11,870 per year

¹ The Grant of Easement provides that the rental for any reopening period shall be the higher of the rent for the immediately prior period or the fair market rent at the time of reopening.

9/25/22 - 9/24/27	\$13,110 per year
9/25/27 - 9/24/32	\$14,470 per year

Grantee did not accept the department's appraised rent and hired its own real estate appraiser. Grantee's appraiser determined the rental value to be \$3,502 per year as of September 25, 2012.

Disputes in rent reopenings for leases of public lands are governed by Hawaii Revised Statutes Section 171-17, as amended. Prior to July 1, 2014, rent disputes were generally arbitrated by a three-member arbitration panel. However, the Legislature amended HRS Section 171-17 effective as of July 1, 2014 to require (non-binding) mediation by a single mediator prior to (binding) arbitration.² Under this amended provision, the parties agreed to have real estate appraiser Edward W. Becker, MAI, CGA-581, serve as the mediator and scheduled mediation for April 16, 2015 in Honolulu.

At the mediation the Grantee was represented by Scott Miller, president of the AOA of Mana Kai-Maui. The department was represented by Russell Tsuji, Land Division administrator, and Pamela Matsukawa, Land Division appraisal and real estate specialist.

During the course of the mediation session, Land Division representatives became aware that an area adjoining the easement area that is under Revocable Permit No. S-7723 to the AOA of Mana Kai-Maui for gravel parking lot and propane gas tank purposes is also being used by the public for parking. In order to get to the parking area, the public uses the subject access easement. In the land board submittal dated July 24, 1998 requesting the issuance of the revocable permit, in the remarks section, it is noted that "...Condition No. 3 of the SMA Minor Permit requires the parking lot to be identified as 'Public Parking'." The use of the access easement by the public was taken into account in the mediated rental values.

The mediation was in fact successful. Subject to the approval of the Board, the terms of the mediated settlement on rent are as follows:

Rent is established as follows:

1. For the ten-year period of September 25, 2012 through September 24, 2022, the rent is \$6,000 per year.
2. For the next and last rent reopening, rent will be increased by 30%. Therefore, for the period of September 25, 2022 through September 24, 2032, the rent is \$7,800 per year.

² Additionally, under the amended law, arbitrations are now submitted to a single arbitrator for determination, rather than to a three-member panel. The amending act is Act 168 Session Laws of Hawaii 2014.

After-the Fact Consent to Assign

Grant of Easement No. S-4112 was issued on September 25, 1967 to Fenton Radford and Herb T. Mead, general partners of Kihei Shores, a limited partnership, and James R. Christman, general partner of Maui Shores Syndicate, a limited partnership, as tenants in common. On August 29, 1974, a consent to an assignment of S-4112 was executed in behalf of the Board. The assignment was from Kihei Shores, a limited partnership of Seattle, Washington, to Seaside Developers, a Hawaii limited partnership. Grant of Easement No. S-4112 was thereby held by Seaside Developers and Maui Shores Syndicate as tenants in common.

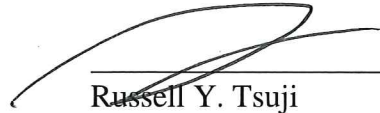
Land Division's records do not show any assignment of the easement from Seaside Developers to the AOA of Mana Kai-Maui. Shortly after the mediation, upon Land Division's request, Land Division was provided through Scott Miller a copy of a 1973 document adding Grant of Easement No. S-4112 to the common areas and facilities of a horizontal property regime established for the Mana Kai-Maui project. (See copy of document attached as Exhibit B.) It appears that, in effect, the AOA of Mana Kai-Maui was assigned the interest in the easement held by Maui Shores Syndicate. The AOA of Mana Kai-Maui has been paying the rent for the easement. Staff therefore requests that the Board consent to the assignment of the interest in the easement held by Maui Shores Syndicate to the AOA of Mana Kai-Maui, after the fact.

RECOMMENDATION:

That the Board:

1. Approve the mediated settlement for the rent reopening in Grant of Easement No. S-4112 for the period of September 25, 2012 through September 24, 2022 at \$6,000 per year; and additionally approve the rent reopening for the period of September 25, 2022 through September 24, 2032 at \$7,800 per year.
2. Consent to the assignment of the interest in Grant of Easement No. S-4112 held by Maui Shores Syndicate to the AOA of Mana Kai-Maui, after the fact, subject to the following.
 - a. The standard terms and conditions of the most current consent to assignment form, as may be amended from time to time;
 - b. Review and approval by the Department of the Attorney General; and
 - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Russell Y. Tsuji
State Lands Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

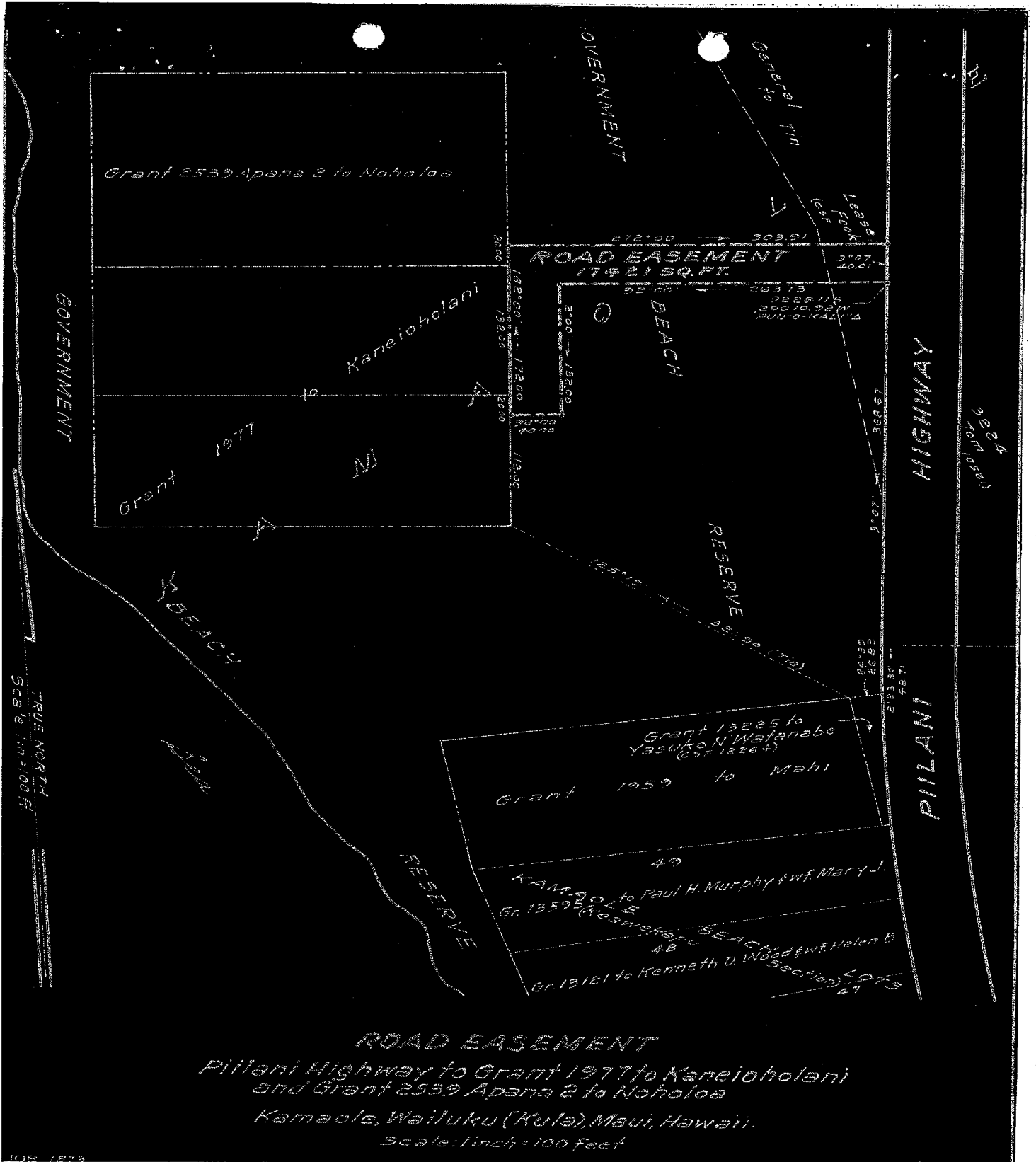


EXHIBIT A

RECORDATION REQUESTED BY:
TITLE GUARANTY ESCROW SERVICES, INC.
AFTER RECORDATION, RETURN TO:
TITLE GUARANTY ESCROW SERVICES, INC.

73- 61286

STATE OF HAWAII
BUREAU OF CONVEYANCES
RECEIVED FOR RECORDATION

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1973 AUG -8 PH 2: 38

[Signature]
INDEXED REGISTRAR

TG

#119586

RETURN BY: MAIL () PICKUP (/)

AMENDMENT TO ENABLING DECLARATION
ESTABLISHING A PLAN FOR CONDOMINIUM OWNERSHIP

Condominium Map No. 213

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, JAMES R. CHRISTMAN, general partner for and on behalf of MAUI SHORES SYNDICATE, a Hawaii limited partnership, owner in fee simple of that certain parcel of land situate in Kihei, Island and County of Maui, State of Hawaii, hereinafter called the "OWNER", and CONDO RESORT DEVELOPERS, a Hawaii partnership, a developer of said parcel, hereinafter called the "DEVELOPER"; and

WHEREAS, said Owner and Developer in and under that certain Enabling Declaration Establishing a Plan for Condominium Ownership, dated December 27, 1971, and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 8035 at Page 250, and as amended, agreed to submit said property to the regime established by Chapter 514, Hawaii Revised Statutes, thereby establishing a horizontal property regime with respect to the property; and

WHEREAS, said Owner and Developer have obtained from the State of Hawaii a roadway easement (S-4112) granting

EXHIBIT B

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access from Kihei Road to the project and a 10-foot wide utility easement (S-4375) within said roadway easement; and

WHEREAS, in said Enabling Declaration (a) the authorized use of said apartment units in the MANA KAI-MAUI project was not clearly set forth, and (b) a change in the person to receive service of process should be noted; and

WHEREAS, construction of the apartment buildings described in said Declaration of Horizontal Property Regime has been completed and the Developer wishes to amend said Declaration of Horizontal Property Regime to add a verified statement of the architect/engineer, as required by Section 514-13, Hawaii Revised Statutes, as amended,

WHEREAS, said Owner and Developer are now desirous of making the necessary amendments to said Enabling Declaration; now, therefore,

W I T N E S S E T H T H A T:

For and in consideration of the foregoing premises, the Owner and Developer agree to amend the Enabling Declaration as follows:

a. Include in the list of common areas and facilities in Paragraph A.2.

Roadway easement S-4112 and utility easement S-4375.

b. Substitute a new paragraph G.2.

That the "apartments" shall be occupied and used by the respective owners only as provided by the laws of the State of Hawaii and ordinances of the County of Maui consistent with the following intent and purpose: The purpose for which said apartment is intended and restricted as to use is for living accommodations; provided, that this shall not be

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construed to prohibit the renting or leasing or subleasing of all or a portion thereof for any length of time for profit, individually or otherwise, so long as the authorized occupancy of said apartment is for living accommodations, as distinguished from a place in which to carry on a trade or business.

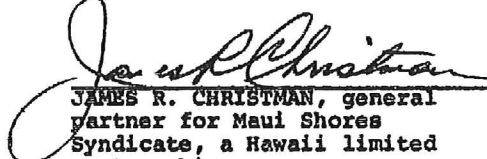
c. Substitute a new paragraph Q.

Until changed, the person to receive service of process in the cases provided for in said Chapter 514, is B. MARTIN LUNA, whose residence is 275 Ekoa Street, Wailuku, Hawaii, and whose place of business is 2103 Wells Street, Wailuku, Hawaii.

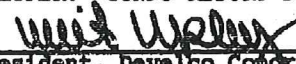
d. Include the Certificate of Architect as attached hereto as Exhibit A and made a part hereof.

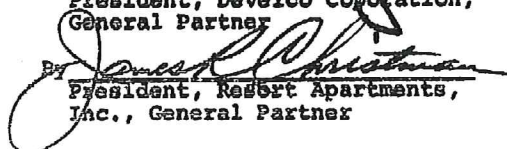
IN WITNESS WHEREOF, the Owner and Developer have caused these presents to be duly executed on this 26th day of June, 1973.

OWNER:


JAMES R. CHRISTMAN, general partner for Maui Shores Syndicate, a Hawaii limited partnership

DEVELOPER: CONDO RESORT DEVELOPERS

By 
President, Develco Corporation,
General Partner

By 
President, Resort Apartments, Inc., General Partner

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STATE OF HAWAII)
City and COUNTY OF Honolulu) SS.

On this 26th day of June, 1973, before me personally appeared JAMES R. CHRISTMAN, general partner for Maui Shores Syndicate, a Hawaii limited partnership, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Karen M. Wakeman
Notary Public, 1st Judicial
Circuit, State of Hawaii.

My commission expires: 4-18-77

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STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this 2ND day of JULY, 1973, before me appeared ROBERT R. EPLEY, to me personally known, who, being by me duly sworn, did say that he is the President of DEVELCO CORPORATION, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said ROBERT R. EPLEY acknowledged said instrument to be the free act and deed of said corporation.

Paul Y. Dominguez
Notary Public, First Judicial
Circuit, State of Hawaii.

My commission expires: 6-24-77

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this 26th day of June, 1973, before me appeared James R. Christman, to me personally known, who, being by me duly sworn, did say that he is the President of RESORT APARTMENTS, INC., and that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said James R. Christman acknowledged said instrument to be the free act and deed of said corporation.

Karen M. Wakeman
Notary Public, First Judicial
Circuit, State of Hawaii

My commission expires: 4-18-77

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PROFESSIONAL ARCHITECT'S CERTIFICATE

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

BERNARD G. NOBLER, being first duly sworn, on oath
states as follows:

That he is a professional architect registered by
the State of Hawaii, Registration No. 2766-A;

That the set of plans previously filed in the Bureau
of Conveyances of the State of Hawaii as Condominium Map No.
213 accurately depict the layout, location, apartment numbers
and dimensions of the apartments in the project as built.

Bernard G. Nobler
BERNARD G. NOBLER

Subscribed and sworn to before me
this 15 day of June, 1973.

Margaret M. Nege
Notary Public, First Judicial
Circuit, State of Hawaii

My commission expires: Sept. 29, 1976