



LAW OFFICE OF
JENNIFER A. LIM LLC

February 16, 2022

VIA ELECTRONIC MAIL:

daniel.e.orođenker@hawaii.gov
(cc natasha.a.quinones@hawaii.gov)

Daniel Orođenker, Executive Officer
Land Use Commission
State of Hawaii
State Office Tower
Leiopapa A Kamehameha Building
235 South Beretania Street, Suite 406
Honolulu, HI 96813



Re: Annual Report: Docket No. A97-721 (Makena Resort)

Dear Executive Officer Orođenker:

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

I. BACKGROUND

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, island of Maui, state of Hawaii from the State Land Use Agricultural District into the State Land Use Urban District (hereinafter, the “**LUC Reclassified Property**”). The LUC Reclassified Property consists of six non-contiguous areas of various sizes, adjacent to, and largely surrounded by, pre-existing Urban District land. At that time, the LUC Reclassified Property was owned by Makena Resort Corp.

The ATC Entities, consisting of 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 (collectively, the “**ATC Entities**”, together with ATC Makena Hotel LLC, the “**ATC Makena Entities**”), acquired portions of the LUC Reclassified Property, and other properties, by three Commissioner's Deeds dated August 27, 2010. The three deeds are: (1) Document No. 2010-125618, which conveyed TMK No. (2) 2-1-005: 108; (2) Document No. 2010-125620, which conveyed TMK No. (2) 2-1-008: 090; and (3) Document No. 2010-125626, which conveyed TMK Nos. (2) 2-1-005: 086 (a portion of which is within the LUC Reclassified Property), and 125 (which is not within the LUC Reclassified Property).

The remaining portion of the LUC Reclassified Property (approximately 27.83 acres) is owned by H2R, LLC. Our understanding, based on public records, is that an entity called Hawaii Development LLC conveyed that property to H2R, LLC by deed recorded October 1, 2018. H2R, LLC is not affiliated with the ATC Makena Entities. The ATC Makena Entities never held title to that portion of the LUC Reclassified Property that is currently owned by H2R, LLC.

This Annual Report only covers those portions of the LUC Reclassified Property that are owned by the ATC Makena Entities, identified as TMK Nos.: (2) 2-1-005: 108 (por.), 2-1-008: 090 (por.), and 2-1-005: 086 (por.) (formerly TMK 2-1-007:004), collectively referred to herein as the “**Petition Area**”. This Annual Report does not address any properties owned by others, such as the portion of the Reclassified Property owned by H2R, LLC.

On August 27, 2012, the Commission filed an Order Granting With Modification Movant's Motion for Sixth Amendment to the Findings of Fact, Conclusions of Law, and Decision and Order, Filed on February 19, 1998, and for Release of Certain Conditions (the “**2012 Amendment**”), through which the Commission released the ATC Makena Entities from Conditions 4, 15, and 21, and amended Conditions 12 and 22 (thereafter renumbered to 11 and 19). An Amended and Restated Declaration of Conditions was recorded on September 7, 2012, in the Bureau as Doc. No. A-46330782.

II. STATUS OF COMPLIANCE WITH LUC CONDITIONS

The following 19 conditions (in italics) are the conditions set forth in the 1998 D&O, as amended by the 2012 Amendment. ATC Makena Entities' status of compliance is provided as a response after each 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: The ATC Makena Entities acknowledge that the Petitioner is subject to the provisions of said condition and will comply.

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 Iao aquifer.

Response: As provided in prior Annual Reports, this condition has been satisfied. Compliance was confirmed by letter from David Craddick, Director of the Department of Water Supply, County of Maui, dated February 18, 1999.

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 to a prior Annual Report submitted in this Docket.

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 ATC Makena Entities acknowledge this condition. Furthermore, the ATC Makena Entities understand that in 1976 the 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 Corp. constructed a 1.5-million-gallon water storage tank at the Makena Resort.

4. *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: ATC Makena Entities understand that this condition has been satisfied. Pursuant to an Educational Contribution Agreement for Makena Resort between the original Petitioner and the Department of Education dated August 17, 2000, the parties agreed upon a cash contribution by Petitioner to represent a fair share payment for the development, funding and/or construction of school facilities.

5. *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: This condition has been satisfied. Initially, at the request of the State Department of Defense (“DOD”), the ATC Makena Entities agreed to allow two emergency siren sites to be developed on land owned by the ATC Makena Entities. One at the Makena Wastewater Treatment Plant, and one near Makena State Park. As reported in the 15th Annual Report, the ATC Makena Entities executed Rights of Entry/License Agreements with the DOD in 2012. However, ATC was informed by DOD in 2016 that it had decided to install one of the two sirens at Makena State Park. In 2017, DOD completed installation of the siren at the Makena Wastewater Treatment Plant.

6. *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: The ATC Makena Entities acknowledge that the Petition Area is subject to the provisions of said condition and will comply.

7. *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: The ATC Makena Entities acknowledge that the Petition Area is subject to the provisions of said condition and will comply prior to any grading, clearing, grubbing or other land alteration in these areas.

8. *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: The ATC Makena Entities acknowledge that the Petition Area is subject to the provisions of said condition and will comply at the appropriate time prior to commencement of construction.

9. *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: The ATC Makena Entities continue to implement and fund 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 at least semi-annual sampling at four separate nearshore sites.

Enclosed is the Marine Water Quality Quarterly Monitoring Report prepared by AECOS Inc. dated November 5, 2021, for the quarterly tests performed in August of 2021. A copy of this report was sent to the Department of Health in December.

The ATC Makena Entities acknowledge that the Petition Area is subject to the provisions of said condition and will comply.

10. *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: ATC Makena Entities understand that this condition has been satisfied. As described in prior Annual Reports, a TIAR was prepared and submitted for State Department of Transportation (DOT) and County of Maui review 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 provided to the Commission with a prior Annual Report in this Docket.

In addition, as set forth in prior Annual Reports, the 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, and approved by the County on September 26, 2003.

11. *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 fourteen (14) years from June 1, 2000.*

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

This condition has been partially satisfied, as detailed below. Moreover, the ATC Makena Entities continue to engage with the DOT on an agreement to address the pro rata share of funding and participation toward transportation improvements related to the Petition Area. The ATC Makena Entities have continued to correspond with DOT and met most recently on February 2 to review the last draft of a memorandum of agreement.

The ATC Makena Entities first submitted a draft memorandum of agreement to DOT in 2019, and since that time have continued correspondence with DOT. DOT had expressed a desire to delay entering into a formal agreement with the ATC Makena Entities because DOT preferred that the agreement not be limited to the 120-acre Petition Area (most of which continues to be in golf course use). Instead, DOT would rather have an agreement that also covers the ATC Makena Entities' proposed development plans on a much larger land area in the vicinity of the Petition Area. DOT and the ATC Makena Entities are currently negotiating a MOA that will address anticipated traffic impacts from this larger area. The ATC Makena Entities will have the requisite traffic study prepared in conjunction with its upcoming HRS Chapter 343 environmental review process.

The current approach to satisfy this condition is different from the plan that was in effect for several years. Under the prior plan, which was coordinated with DOT, the condition was going

to be satisfied through a joint effort between the ATC Makena Entities, Honua`ula Partners, LLC, A&B Wailea LLC, and Keaka LLC. Therefore, these parties jointly prepared a Final Environmental Assessment to assess the impacts of a widening of Piilani Highway. DOT accepted the FEA and issued a FONSI (OEQC in May 2012). These same parties intended to enter an "Inter-Developer Agreement" to address the actual construction of improvements. However, after all of that effort it became apparent that the multi-party approach would not be feasible because the landowners were all at different stages of development and subject to different conditions of approval. The ATC Makena Entities understand that several of these landowners have pursued individual agreements with DOT. Therefore, the ATC Makena Entities are likewise pursuing such an agreement with DOT.

Partial satisfaction of this condition was achieved through the "Agreement for Planning and Design of Piilani Highway Expansion" between Makena Resort Corp. (the original Petitioner), and DOT in 2001. Under this Agreement, Petitioner agreed to fund the planning and design of the restriping and other improvements to Piilani Highway from Mokulele Highway to Kilohana Drive, to increase it from two lanes to four lanes. This work has been completed.

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

As reported in prior Annual Reports, Petitioner prepared a Drainage Master Plan, which was submitted to the County Department of Public Works and Environmental Management and Planning Department on July 1, 2003, and approved by the County on August 20, 2003.

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

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

14. *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: The ATC Makena Entities acknowledge that they are subject to the provisions of said condition and will comply. Traffic improvements required by DOT will be addressed pursuant to Condition 11.

15. *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: The ATC Makena Entities acknowledge that they are subject to the provisions of said condition and will comply.

16. *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: The ATC Makena Entities acknowledge that they are subject to the provisions of said condition and will comply.

17. *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 ATC Makena Entities acknowledge that they are subject to the provisions of said condition and will comply. The submittal of this Annual Report by the ATC Makena Entities is in compliance with this condition.

18. *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: The ATC Makena Entities acknowledge that they are subject to the provisions of said condition.

19. *Petitioner shall record the conditions imposed herein by the Commission and every amendment thereto with the Bureau of Conveyances pursuant to Section 15-15-92, Hawai'i Administrative Rules.*

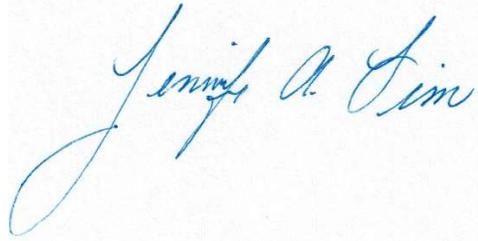
Response: This condition has been satisfied and the ATC Makena Entities acknowledge that they are subject to the provisions of said condition in the event of any amendments. The ATC Makena Entities recorded an Amended and Restated Declaration of Conditions Applicable To An Amendment to District Boundary From Agricultural to Urban, in the Bureau on September 7, 2012 as Document Number A-46330782, a copy of which was provided to the Commission as part of a prior Annual Report transmittal.

* * *

If you have any questions or require any further information, please feel free to contact me or Mr. Ka'imi Judd Vice President of Development, Mākena Golf & Beach Club, at 808-640-6023.

Sincerely,

LAW OFFICE OF JENNIFER A. LIM, LLC



cc: State of Hawaii, Office of Planning and Sustainable Development, via US Mail
County of Maui, Department of Planning, via US Mail

Encls. Marine Water Quality Quarterly Monitoring Report prepared by AECOS Inc. dated November 5, 2021, for the quarterly tests performed in August of 2021.