

# Resolution

No. \_\_\_\_\_

## AUTHORIZING THE GRANTING OF AN EASEMENT TO ATC MAKENA LAND SF2 LLC

WHEREAS, the County of Maui is the owner of a road right-of-way, situate at Makena, Maui, Hawaii; and

WHEREAS, ATC Makena Land SF2 LLC ("Grantee"), wishes to be granted a non-exclusive perpetual easement for the limited purpose of building, constructing, reconstructing, rebuilding, repairing, operating, relocating, removing and maintaining private underground sewerlines and appurtenant equipment under, along and through a portion of the Makena-Keoneoio Road in Makena, Kihei, Maui, described as Lot 6 on Map 1 of Land Court Application 1846. The easement area is Easement "S-1" as described in Exhibit "A" of the Grant of Non-Exclusive Easement, attached hereto as Exhibit "1", and made a part hereof; and

WHEREAS, pursuant to Section 3.44.020 of the Maui County Code, the County Council may waive public hearing requirements and grant easements by a resolution approved by a majority of its members; and

Resolution No. \_\_\_\_\_

WHEREAS, the County desires to grant an easement under, across, over and through the County Parcel in favor of the Grantee; now, therefore,


BE IT RESOLVED by the Council of the County of Maui:

1. That it does hereby grant an easement to the Grantee, in accordance with the terms and conditions of that certain Grant of Non-Exclusive Easement Agreement which is attached hereto as Exhibit "1"; and

2. That it does hereby authorize the Mayor of the County of Maui, or the Mayor's duly authorized representative, to execute all necessary documents in connection with the granting of the easement; and

3. That certified copies of this Resolution be transmitted to the Grantee, the Mayor, and the Director of Public Works.

APPROVED AS TO FORM  
AND LEGALITY:

  
\_\_\_\_\_  
MICHAEL HOPPER  
Deputy Corporation Counsel  
County of Maui

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LAND COURT

REGULAR SYSTEM

COUNTY OF MAUI

Department of Finance 200 South High Street  
Wailuku, Maui, Hawaii 96793

Maui Tax Key No.: (2) 2-1-007: 092;  
(2) 2-1-007:999 (por.) (Makena Road)

GRANT OF NON-EXCLUSIVE EASEMENT  
FOR PRIVATE SEWERLINE PURPOSES

GRANTOR: COUNTY OF MAUI, a political subdivision and  
body corporate of the State of Hawaii, whose mailing address is  
200 South High Street, Wailuku, Hawaii 96793.

GRANTEE: ATC MAKENA LAND SF2 LLC, a Delaware limited  
liability company, whose mailing address is Two Manhattanville  
Road, Suite #203, Purchase, N.Y., 10577.

THIS INDENTURE made this \_\_\_\_\_ day of \_\_\_\_\_,  
2013, by and between Grantor named above and Grantee named  
above.

W I T N E S S E T H:

That the Grantor, in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) and other valuable consideration to it paid by the Grantee, the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee, its successors and assigns, subject to the terms and conditions set forth in this agreement, a non-exclusive, perpetual easement for the limited purpose of building, constructing, reconstructing, rebuilding, repairing, operating, relocating, removing and maintaining private underground sewerlines and appurtenant equipment (collectively the "Lines") under, along and through a portion of the Makena-Keoneoio Road in Makena, Kihei, Maui, Hawaii, described as Lot 6 on Map 1 of Land Court Application 1846. The easement area is Easement "S-1" as described on Exhibit "A" attached hereto and made a part hereof, and depicted on the diagram attached hereto as Exhibit "B" and made a part hereof (the "Easement Area").

TO HAVE AND TO HOLD the same unto the Grantee, its successors and assigns, as an easement appurtenant to that certain parcel of real property located at Makena, and further described in Exhibit "C" attached hereto and made a part hereof.

The foregoing grant is made and accepted upon the following terms and conditions which shall be binding upon the

Grantor, the Grantee, and their respective successors and assigns:

1. The Grantee shall be solely responsible for making repairs to said Lines, whether said Lines be damaged by the public or by equipment belonging to the Grantee or the Grantor, but the Grantee shall not be precluded from seeking damages or obtaining recourses from parties whose negligence causes such damages. The relocation of said Lines, due to future County improvements, shall be undertaken by the Grantee and at no cost to the Grantor. It shall be the responsibility of the Grantee to obtain permission from the State of Hawaii wherever any of said Lines crosses State property.

2. The Grantee shall pay, at its sole expense, for all costs of constructing, relocating, maintaining, operating, repairing, replacing or removing the Grantee's Lines under, along and through the Easement Area, and the Grantee shall defend, indemnify and hold harmless the Grantor from any and all such costs, including but not limited to attorney's fees.

3. After the installation of the Grantee's Lines, or after any subsequent relocation, removal, maintenance, replacing or repair/work thereon has been completed, the Easement Area and all surrounding grounds, to the extent such surrounding grounds shall be disturbed, shall be restored by the Grantee to their

original condition, to the extent that such restoration is reasonably possible.

4. The Grantee shall defend, indemnify and hold harmless the Grantor and the Grantor's officers, employees, agents, successors and assigns, against any and all claims for property damage, personal injury, or wrongful death by whomsoever suffered or brought, arising in any manner whatsoever, directly or indirectly, from the Grantee's Lines or their placement, construction, reconstruction, maintenance, operation, repair, replacement, removal, or relocation.

5. The Grantee shall defend, indemnify and hold harmless the Grantor and the Grantor's officers, employees, agents, successors and assigns, from and against any and all damage to Grantee's Lines resulting from the public's use of the Easement Area, as a public roadway, or from the Grantee's use, construction, and maintenance of the Easement Area, or from the Grantor's construction, reconstruction, maintenance, operation, repair or removal of any waterline, sewerline or any other improvements in the Easement Area; provided, however that the Grantor's officers, employees, agents, contractors, successors and assigns did not purposely or through negligence cause such damage.

6. Within ninety (90) days after written notice from the Grantor to the Grantee requesting Grantee to relocate its

Lines to a different location, the Grantee shall relocate its Lines to another area, as designated by the Grantor. PROVIDED, HOWEVER, the Grantor covenants with the Grantee that any new location shall be within the Easement Area, or any widening thereof, in which area Grantor shall grant to the Grantee an easement to build, construct, reconstruct, rebuild, repair and maintain Grantee's Lines. PROVIDED FURTHER, HOWEVER, at the sole option of the Grantee, upon the Grantee's receipt of the relocation notice from the Grantor, the Grantee may choose to completely remove its Lines and terminate its rights under this agreement as provided in paragraph 15.

7. The Grantee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the Easement Area, or any part thereof, nor, without the prior written consent of the Grantor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing within the Easement Area.

8. The Grantee shall comply with all of the requirements of all County, State and Federal authorities and observe all County, State and Federal laws now in force or which may hereinafter be in force pertaining to the Easement Area and Grantee's Lines.

9. The Grantee shall not commit or suffer any act or neglect whereby the Easement Area or any improvement thereon

shall become subject to any attachment, lien, charge or encumbrance whatsoever, and shall defend, indemnify and hold harmless the Grantor from and against all attachments, liens, charges and encumbrances caused by any act or omission of the Grantee, its officers, employees or agents, and all expenses resulting therefrom.

10. The Grantee shall defend, indemnify and hold harmless the Grantor from and against any claim or demand for loss, liability or damage, including but not limited to claims for property damage, personal injury or death resulting from the granting of this easement or the Grantee's Lines or their placement, construction, maintenance, operation, repair, replacement, removal or relocation, or arising out of any accident in the Easement Area occasioned by any act or nuisance made or suffered by the Grantee within the Easement Area, or growing out of or caused by any failure on the part of the Grantee to maintain the Easement Area in a safe condition, or by any act or omission of the Grantee, and from and against all actions, suits, damages and claims by whomsoever brought or made by reason of the Grantee's non-observance or non-performance of any of the terms, covenants and conditions herein or the rules, regulations, ordinances and laws of the Federal, State, or County governments applicable to the Easement Area or Grantee's Lines.



So long as this agreement remains in effect, the Grantee, its successors and assigns, shall procure at its own cost and expense and maintain a policy or policies of comprehensive liability insurance in a minimum amount of ONE MILLION AND 00/100 DOLLARS (\$1,000,000.00) naming the County of Maui as an additional named insured, insuring and defending the Grantee and the County of Maui against any and all claims and demands for loss liability or damage, including but not limited to, claims for property damage, personal injury or death, resulting from the granting of this easement. A certificate of insurance naming the County of Maui as an additional insured shall be submitted within five (5) days of the execution of this agreement.

11. If the Grantor shall be made a party to any litigation commenced by or against the Grantee (other than condemnation proceedings or actions against the Grantor challenging its title to the Easement Area or its authority to grant this easement), having to do with the construction, maintenance, operation, repair, replacement, removal or relocation of the Lines, the Grantee shall pay all costs and expenses incurred by or imposed on the Grantor, including but not limited to Grantor's attorney's fees; furthermore, the Grantee shall pay all costs and expenses, including but not limited to attorney's fees, which may be incurred by or paid by

the Grantor in enforcing the covenants and agreements of this easement.

12. The Grantee shall, at its own expense, from time to time and at all times during the term hereof, substantially repair, maintain and keep in good and safe repair, order, and condition, reasonable wear and tear excepted, the Grantee's Lines.

13. In the event condemnation proceedings shall be initiated by the Grantor against the Easement Area, the Grantee hereby acknowledges that the Grantee shall not be entitled to nor will the Grantee assert any claim for compensation arising from the rights granted by this agreement; but Grantee may make a claim for compensation for the taking of the Lines including severance damages.

14. The Grantor does not warrant the conditions of the Easement Area. The Grantee accepts the Easement Area in the condition it is in at the commencement of this easement, and the Grantee hereby acknowledges that the Grantor has made no representations concerning the conditions of the Easement Area or its suitability for the use intended to be made thereof. The Grantee accepts and assumes all risks with respect to entry upon the Easement Area and the conditions thereof including, without limitation, any dangerous conditions (latent or patent).

15. In the event the Grantee shall at any time completely remove the Lines from the Easement Area and for a period of twelve (12) months thereafter fail to reinstall the Lines, the Grantee shall, at the Grantor's request, forthwith execute and deliver to the Grantor an instrument suitable for recordation in the appropriate registry office of the State of Hawaii as shall be sufficient to evidence the termination and surrender of the easement granted under this agreement.

16. This agreement shall be construed and governed by the laws of the State of Hawaii.

17. The term "Grantee" wherever used herein shall be held to mean and include the undersigned Grantee, and its personal representatives, devisees, heirs, successors and assigns; the term "Grantor" wherever used herein shall be held to mean the County of Maui, its officers, employees, agents, successors and assigns; and this instrument shall be binding upon and shall inure to the benefit of the parties hereto and their respective personal representatives, devisees, heirs, successors and assigns. Grantee may grant, convey, dedicate and assign all or a portion of its interests under this agreement to third parties, such as the County of Maui, the State of Hawaii, or any public or private utility service provider, without the approval of Grantor, by written instrument. Grantee shall promptly notify Grantor of any such grants or assignments.

18. This written agreement represents the entire agreement of the parties hereto. This agreement may be amended only by written amendment executed by all of the undersigned parties.

19. This agreement shall be recorded at the State of Hawaii Bureau of Conveyances or the Land Court of the State of Hawaii, as the case may be, at the Grantee's expense.

20. If the Grantee fails to observe or perform any of the terms and conditions provided herein to be observed or performed by the Grantee, then an essential condition of this agreement shall be conclusively presumed to have been breached and the Grantee shall be deemed to be in default and Grantor can cancel this agreement as follows:

At any time after a breach shall have occurred, the Grantor shall notify the Grantee in writing of its intention to cancel this agreement. If, within ninety (90) days of the notice of intention to cancel being mailed by the Grantor to the Grantee, the Grantee shall undertake to cure the default and shall with due diligence thereafter promptly cure the default, then the Grantor shall not have grounds to cancel this agreement on account of such default. If, within ninety (90) days of the notice of intention to cancel being mailed by the Grantor to the Grantee, the Grantee shall not undertake to cure the default or, having undertaken to cure the default, shall not cure the

default promptly thereafter, then the Grantor shall have the right to apply to the Second Circuit Court of the State of Hawaii or other court of competent jurisdiction for an order declaring this agreement cancelled and of no further force and effect, and upon receiving such an order from the Court, the Grantor shall be entitled to remove the Grantee's Lines from the Easement Area.

Nothing in this paragraph 20 shall be construed to limit or preclude the Grantor from exercising any other available remedy at law or in equity with respect to the Grantee's breach of the terms of this agreement.

TO HAVE AND TO HOLD the same unto the Grantee and its personal representatives, devisees, heirs, successors and assigns, subject to the terms and conditions hereinabove set forth.

IN WITNESS WHEREOF, the parties hereto have caused  
this instrument to be duly executed this \_\_\_\_\_ day of  
\_\_\_\_\_, 2013.

GRANTOR:

COUNTY OF MAUI

By \_\_\_\_\_  
ALAN ARAKAWA  
Its: Mayor

GRANTEE:

ATC MAKENA LAND SF2 LLC

By \_\_\_\_\_  
SEAN HEHIR

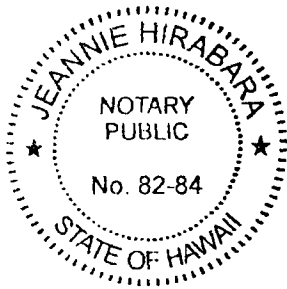
Its CO-PRESIDENT

APPROVED AS TO FORM AND LEGALITY:

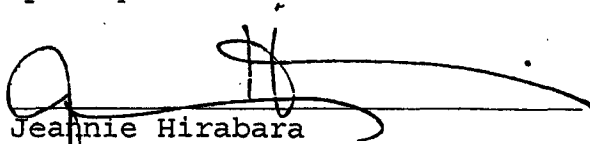
  
\_\_\_\_\_  
Deputy Corporation Counsel,  
County of Maui  
**MICHAEL J. HOPPER**

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

On this 28th day of October 2013, before me personally appeared SEAN HEHIR, to me personally known/proved to me on the basis of satisfactory evidence, who, being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.



(Notary's Stamp or Seal)

  
Jeannie Hirabara  
Notary Public, State of Hawaii

My commission expires: 2/7/14

NOTARY CERTIFICATION STATEMENT

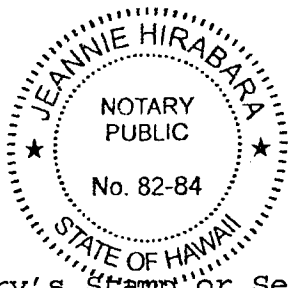
Document Title/Description: GRANT OF NON-EXCLUSIVE EASEMENT  
FOR PRIVATE SEWERLINE PURPOSES

Document consists of: - 17 - pages

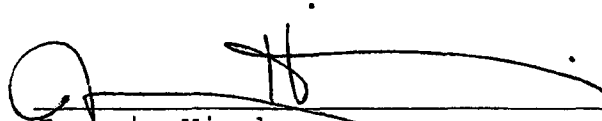
Date of Document: Undated

Date of Notarial Act & Notary Certification Statement: 10/28/13

Jurisdiction in which notarial act performed: First Judicial  
Circuit, State of Hawaii



(Notary's Stamp or Seal)

  
Jeannie Hirabara  
Notary Public, State of Hawaii

My commission expires: 2/7/14

STATE OF HAWAII )  
 ) SS:  
COUNTY OF MAUI )

On this \_\_\_\_\_, before me personally appeared \_\_\_\_\_, to me personally known/proved to me on the basis of satisfactory evidence, who, being by me duly sworn or affirmed, did say that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable in the capacity(ies) shown, having been duly authorized to execute such instrument in such capacity(ies).

\_\_\_\_\_  
Signature of \_\_\_\_\_  
Notary Public, State of Hawaii

My commission expires: \_\_\_\_\_

(Notary's Stamp or Seal)

**NOTARY CERTIFICATION STATEMENT**

Document Title/Description: GRANT OF NON-EXCLUSIVE EASEMENT  
FOR PRIVATE SEWERLINE PURPOSES

Document consists of: \_\_\_\_\_ pages

Date of Document: \_\_\_\_\_

Date of Notarial Act & Notary Certification Statement: \_\_\_\_\_

Jurisdiction in which notarial act performed: \_\_\_\_\_ Judicial  
Circuit, State of Hawaii

\_\_\_\_\_  
Signature of \_\_\_\_\_  
Notary Public, State of Hawaii

My commission expires: \_\_\_\_\_

(Notary's Stamp or Seal)



EXHIBIT "A"

EASEMENT B-1  
(FOR SEWER PURPOSES)

Being a portion of Makena-Keoneoio Road, being also a portion of Lot 6 (Map 1) of Land Court Application 1846.

Situate at Papaanui, Honououla, Makawao, Maui, Hawaii.

Beginning at the Northwest corner of this easement, being an azimuth and distance of 179°30' 30.35 feet from the Southeast corner of Lot 2-A (Map 1), on the West side of Makena-Keoneoio Road, Lot 6 (Map 1) of Land Court Application 1846, the coordinates of said point of beginning referred to Government Survey Triangulation Station "PUU-O-KOHA" being 7,390.28 feet South and 19,689.89 feet West thence running by azimuths measured clockwise from true South:

1. 322° 58' 65.35 feet along the remainder of Makena-Keoneoio Road being Lot 6 (Map 1) of Land Court Application 1846 to Existing Wastewater Utility Easement No. 4;
2. 53° 22' 24" 10.00 feet along same;
3. 142° 58' 51.78 feet along same;
4. 179° 30' 16.80 feet along Lot 2-A (Map 1) of Land Court Application 1846, to the point of beginning and containing an area of 586 square feet.



Description Prepared By:

*Erik S. Kaneshiro* [Signature]

ERIK S. KANESHIRO  
Licensed Professional Land Surveyor  
Certificate No. 9826

Honolulu, Hawaii  
October 23, 2008

TMK: (2) 2-1-007: For. 082  
z:\2007\07-221\descriptions\Easement B-1-rev.doc



AUSTIN, TSUTSUMI & ASSOCIATES, INC.

CIVIL ENGINEERS • SURVEYORS

301 SUMNER STREET, SUITE 201  
HONOLULU, HAWAII 96817-2001

1871 WILI PA LOOP, SUITE A  
WAILUKU, MAUI, HAWAII 96793

EXHIBIT "B"

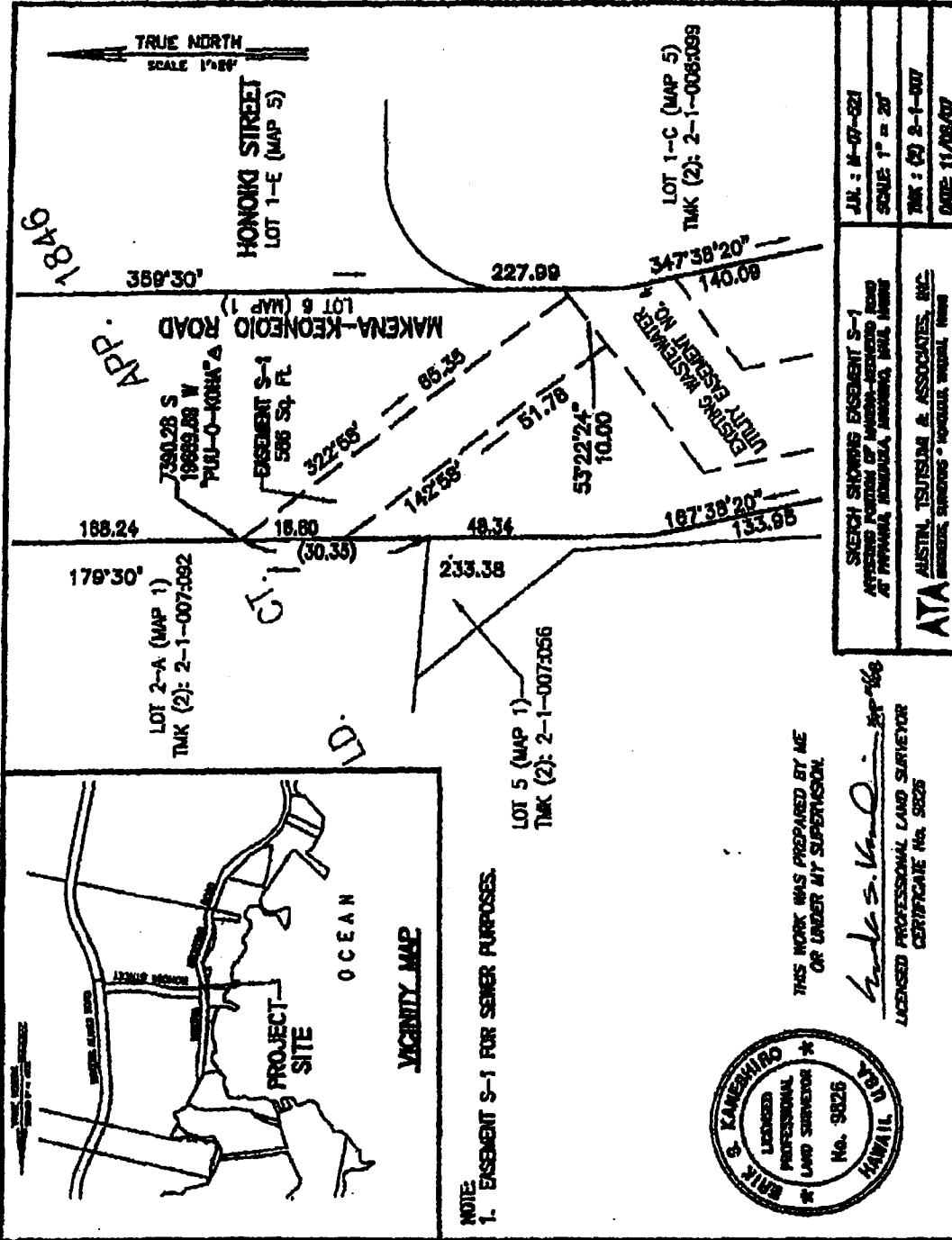


EXHIBIT "C"

All of that certain parcel of land situate at Papanui, Waipao, Kalihi, and Keauhou, Honuaula, District of Makawao, Island and County of Maui, State of Hawaii, described as follows:

LOT 2-A, area 0.420 acres, as shown on Map 1, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii with Land Court Application No. 1846 of Ulupalakua Ranch, Inc.

Being land(s) described in Transfer Certificate of Title No. 864,774 issued to the Grantee herein.

Being the premises conveyed to the Grantee herein by deed of Makena Aina Corp. filed in the said Land Court as Document No. 3620073.

END OF EXHIBIT "C"

Tax Key: (2) 2-1-007-092

**FACT SHEET  
FOR  
GRANT OF NON-EXCLUSIVE EASEMENT**

1. Project Name: **ATC MAKENA LAND SF2 LLC**
2. Tax Map Key No.: **(2) 2-1-007:092 & portion of 999 (Makena Road)**
3. Owner: **ATC Makena Land SF2 LLC**
4. Applicant: **Adrienne Wong  
Austin, Tsutsumi & Associates, Inc.  
1871 Wili Pa Loop, Suite A  
Wailuku, Hawaii 96793**
5. Area of easement to be dedicated: **586 square feet**
6. Confirmation that all improvements have been completed. Specific agency and date of approval will be listed. If improvements were not made, we will indicate so and provide an explanation.  
  
***The improvements have not been installed at this time. The applicant must first obtain this easement prior to installation of the sewerline.***
7. A statement that the dedication is consistent with conditions of approval and are in conformance with County standards:  
  
***This statement is not applicable as this is a granting of an easement and not a dedication to the County of Maui.***
8. Title of the proposed Resolution: **Authorizing the Granting of an Easement to ATC Makena Land SF2**