

DECLARATION OF COVENANTS,  
CONDITIONS AND RESTRICTIONS

This Declaration made this 14th day of May, 1990, by KOHALA BY THE SEA., a Hawaii general partnership, having its principal place of business at Kawaihae, Hawaii, and its post office address at P. O. Box 44394, Kawaihae, Hawaii 96743, hereinafter referred to as the "Declarant";

WITNESSETH

WHEREAS, Declarant is the owner of certain real property situated at Kahua 1st, Kahua and Waika, North Kohala, island, County and State of Hawaii, more particularly described in Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, Declarant intends to develop said property into a subdivision to be known as "Kohala By the Sea" and desires to insure the attractiveness of the individual lots and improvements within said subdivision and to prevent any future impairment thereof, to prevent nuisances, and to protect, preserve and enhance the values and amenities of said subdivision;

NOW, THEREFORE, Declarant hereby declares that all of the lots and parcels now or hereafter included within Kohala By the Sea, as hereinafter defined shall be held, sold, conveyed, encumbered, leased, rented, used, occupied and improved, subject to the provisions of this Declaration and to the covenants, conditions and restrictions herein contained, all of which are declared and agreed to be in furtherance of a plan for the development, improvement and sale of said lots and parcels and are established for the purpose of enhancing and protecting the value, desirability and attractiveness of said property and for the mutual benefit of the owners of any interest therein.

ARTICLE I

DEFINITIONS

Unless the context otherwise specifies or requires, the following words, when used in this Declaration, shall have the following meanings:

1.01. Annexation Property. "Annexation Property" means all of the real property added or annexed to the property described in Exhibit "A" attached hereto, together with all the property released from this Declaration from time to time pursuant to Article VIII.

1.02. Articles. "Articles" means the Articles of Incorporation of the Association filed pursuant to Chapter 415B of the Hawaii Revised Statutes, as amended, a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference, and any amendments thereto.

1.03. Association. "Association" means the Kohala By the Sea Community Association, a non-profit corporation, described in Article VI, and its successors and assigns.

1.04. Board. "Board" means the Board of Directors of the Association.

1.05. Building Envelope. "Building Envelope" means that area on each lot, defined by building lines, within which buildings or structures in excess of seventy-two (72) inches in height may be erected.

1.06. Building Height. "Building Height" means the vertical distance measured between the highest point on a roof or portion of the building or structure above the roof to the ground surface immediately below that point.

1.07. Building Line. "Building Line" means a line on a plat indicating the limit beyond which buildings or structures may not be erected.

1.08. By-Laws. "By-Laws" means the By-Laws of the Association which are attached hereto as Exhibit 'C' and are incorporated herein by reference, and any amendments thereto.

1.09. Common Area. "Common Area" means all of the real property which has been or as may be conveyed in fee or leased to the Association, pursuant to the provisions hereinafter set forth, together with all of the improvements from time to time constructed thereon.

1.10. Declarant. "Declarant" means Kohala By the Sea, a Hawaii general partnership, its successors and assigns, including such other person or persons whom Kohala By the Sea may, by a recorded document, designate as having the powers and functions of Declarant or some of the powers and functions of Declarant.

1.11. Declaration. "Declaration" means this Declaration of Covenants, Conditions and Restrictions, as the same may from time to time be amended.

1.12. Design Committee. "Design Committee" means the committee created pursuant to Article V hereinafter set forth.

1.13. Design Requirements. "Design Requirements" means the design and construction requirements referred to in Section 5.04 hereof which establish certain standards and procedures for the approval of and for the construction of improvements within Kohala By the Sea as the same may be amended from time to time.

1.14. Development. "Development" means all of the real property referred to in Section 2.01 which shall be publicly known as "Kohala By the Sea."

1.15. Improvements. "Improvements" means all buildings, outbuildings, grading, landscaping, roads, driveways, parking areas, fences, retaining walls and other walls, stairs, decks, hedges, windbreaks, poles, signs and any other structures of any type or kind.

1.16. Lot. "Lot" means a portion of the real property which is shown as a separately numbered or lettered parcel on a subdivision map.

1.17. Maintenance Assessment: "Maintenance Assessment" means any assessment levied pursuant to Section 7.02.

1.18. Operating Fund. "Operating Fund" means the fund created pursuant to Section 7.01.

1.19. Owner. "Owner" means any person (including Declarant) who is or any persons who are, jointly or in common, the record owner or owners of a fee simple interest in any lot. An owner may assign all or a portion of the owner's rights and privileges and delegate all or a portion of the owner's duties and obligations as owner, except for voting rights, to tenants, contract purchasers, purchasers under an agreement of sale or lessees under a lease. An owner may assign the owner's voting rights hereunder only to purchasers under an agreement of sale, contract purchasers, or lessees having a lease with a term of at least ten years. Such assignee and delegate shall, with respect to such assigned rights and privileges and such delegated duties and obligations, be considered the 'owner' of the lot; provided, however, that nothing contained herein shall relieve the fee owner of the lot from ultimate liability for all duties, obligations and liabilities of an owner under this Declaration or the Design Requirements.

1.20. Person. "Person" means a natural individual, a corporation, a partnership or any other legal entity.

1.21. Private Area. "Private Area" means a lot, together with all improvements from time to time constructed thereon, except for any roadway or road lot for the common use of all owners.

1.22. Record. The terms "Record", "Recorded" and "Recordation" or any other form of these words mean, with respect to any document, that such document has been recorded in the Bureau of Conveyances of the State of Hawaii and/or filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii.

1.23. Road. "Road" means any paved vehicular way constructed within or upon any portion of the common area, except any apron or other paved area constructed for the purpose of providing paved access from such way to any private area.

1.24. Single-Family. "Single-Family" means one or more persons, each related to each other by blood, marriage, or legal adoption, or a group of not more than three (3) persons not so related, together with his or her domestic servants and transient guests.

1.25. Special Assessment. "Special Assessment" means any assessment levied pursuant to Section 7.04.

## ARTICLE II

### PROPERTY SUBJECT TO DECLARATION

Section 2.01. Kohala By the Sea Development. The Development shall be all of the property described in Exhibit 'A' attached hereto and made a part hereof, and any property which may hereafter be annexed thereto pursuant to Article VIII, and the same shall be held, sold, conveyed, encumbered, leased, rented, used, occupied and improved subject to this Declaration. Said property shall constitute the Development to be publicly known as "Kohala By the Sea".

## ARTICLE III

### LAND CLASSIFICATIONS AND USE RESTRICTIONS

Section 3.01. Land Classifications. All land within the Development has and shall be classified into the following areas:

- (a) private area; and
- (b) common area.

Section 3.02. Private Area: Uses: Restrictions. Each lot in the private area shall be for the exclusive use and benefit of the owner thereof, subject, however, to all of the following limitations and restrictions:

(a) No Violation of Law. No owner shall do or keep anything or permit anything to be done or kept in or on any lot which would be in violation of any statute, rule, ordinance, regulation, permit, or other validly imposed requirement of any governmental body.

(b) Improvements Must be Approved. Any new improvement or any existing improvement which is materially altered on any lot, unless excluded by this Declaration, must be approved by the Design Committee, prior to construction of the improvement. Notwithstanding the foregoing, approval by the Design Committee shall not be required for any construction done by or for Declarant, including without limitation any construction of model homes or sales offices by Declarant and employees or contractors in connection with the construction of subdivision improvements required by the County of Hawaii or in connection with the construction of any roadways, signage or landscaping or any electrical, cable television, communication, water or other utilities.

(c) Waiver of Declaration During Construction Period. During the course of actual construction of any improvement permitted hereunder, the provisions contained in this Declaration shall be deemed waived to the extent necessary to permit such construction, provided that such construction is carried out with all due diligence and that during the course of construction, nothing is done which will result in a violation of any provision of this Declaration upon completion of construction.

(d) Power Lines. Antennae and Similar Structures. Wiring. No overhead power, telephone, cable or other utility lines shall be erected on any lot except by the Declarant or by a public or private utility authorized to do so by the Declarant. No wind generators or windmills shall be erected or maintained on any lot without the prior approval of the Design Committee.

Antennae, aerials, satellite discs and other devices for the reception or transmission of radio or television broadcasts or other means of communication may be erected if screened or hidden from view from other lots and roads and approved by the Design Committee.

Wiring for electrical or telephone installations, television antennae, security system components, air conditioning units, appliances, machines or similar devices may be permitted on the exterior surface of any improvement or may protrude through the walls or roof of any improvement, if screened or hidden from view by architectural treatment which blends and is compatible with adjacent finishes and shapes or by landscaping which screens its view without negatively impacting view corridors, and approved by the Design Committee.

This paragraph (d) shall not apply to, nor restrict, master antennae and systems for cable television systems installed by Declarant or by a franchise cable television operator with Declarants approval, nor shall this paragraph (d) apply to structures and power lines existing as of the date this Declaration is originally executed.

(e) Laundry Facilities. All laundry facilities shall be screened and shall be located so as not to be visible from any road in the Development or from any adjacent lot.

(f) Garbage and Refuse Disposal. All garbage and refuse shall be removed regularly, but not less than once a week, so as not to create a hazard or nuisance to adjacent property. Each owner of an occupied dwelling on any lot shall subscribe to available weekly garbage collection service, if it is available. No owner shall burn or permit the burning of garbage, trash or other household refuse on any lot, nor shall any owner accumulate or permit to be accumulated on any lot any litter, refuse or garbage, except in receptacles designed for such purposes, screened from public view.

(g) Flooding and Erosion. No owner shall construct or permit to be constructed on any lot any improvement which will create a problem of flooding, erosion. or interference with natural water flow or original runoff pattern damaging to such lot. the common areas, or adjacent properties, nor shall any owner fail to reasonably act so as to minimize runoff damage or

interference with the natural flow of storm waters. Each owner shall provide for the installation of necessary culverts and drainage facilities upon the owner's lot and for keeping the culverts and drainage facilities in good repair. Each owner shall keep all the drainage facilities and culverts so installed on the owner's lot, as well as any other drainage facilities and culverts located on the owner's lot, free and unobstructed.

(h) Maintenance of Lots. Each lot, whether occupied or unoccupied, and any and all improvements placed thereon, shall at all times be maintained in good, dean and attractive condition and in such manner as to prevent such lot and improvements from becoming unsightly, unsanitary or a hazard to health. Without limiting the generality of the foregoing, each owner shall, at the owner's own expense (1) keep the lot free from rubbish and litter; (2) restore and repair all damage and destruction caused by casualty to the lot or any improvement thereon; (3) maintain, cultivate and keep in good condition all shrubs, trees, grass, lawns, plantings and other landscaping originally located on or (ram time to time placed upon the lot; (4) trim and restrain all trees, shrubs and plantings so that they shall not overhang or otherwise encroach upon, any walkway or road, unless prior approval of the Association is obtained; (5) maintain in good condition and repair and preserve the finish of all fences located on or from time to time placed on the lot; (7) maintain all paved surfaces and keep them clean, reasonably dry and free of oil and other extraneous matter; and (8) maintain all slope areas upon the lot. If not so maintained by the lot owner (the "defaulting lot owner"), Declarant, the Association, or any other lot owner may, upon thirty (30) days prior written notice to the defaulting lot owner, maintain, restore or repair such lot and such improvements, the cost of which shall be reimbursed (together with interest thereon at the rate of one percent (1%) per month) by the defaulting lot owner. The Declarant, the Association, or any lot owner who maintains, restores, or repairs such lot or improvements for the defaulting lot owner shall have a lien against the defaulting lot owner's lot to secure such reimbursement, plus all costs and expenses of collecting the unpaid amount, including reasonable attorney's fees and court costs. The lien may be foreclosed in the manner provided for foreclosure of mortgages in the State of Hawaii. The foregoing remedy shall be in addition to any other remedies provided by law for the enforcement of such obligations. Neither Declarant nor the Association, nor any of their members, agents, employees or contractors shall be liable for any claim for damage which may result from any maintenance, restoration or repair work performed hereunder, provided that the person against whom the claim is made has, upon the basis of such information as may be actually possessed by that person, acted in good faith and without willful or intentional misconduct.

(i) No Noxious or Offensive Activity. No activity which is or may be noxious or offensive to a reasonable person shall be carried on or upon any lot nor shall anything be done or placed on any lot which is or may become a nuisance or cause embarrassment, disturbance or annoyance to a reasonable person. Without limiting the generality of the foregoing, no odor or noise which is or may be noxious or offensive to a reasonable person shall be emitted from any lot.

(j) No Hazardous Activities. No activities shall be conducted on any lot and no improvements shall be constructed on any lot which are or might be unsafe or hazardous to any person or property. Without limiting the generality of the foregoing, no fire or barbecue shall be started or maintained on any lot except (1) cooking fires, imus and barbecues while attended and contained within barbecue units or other proper enclosures, (2) fires contained within safe and well-designed interior fireplaces which are fitted with well-maintained spark arrestors, and (3) agricultural burning performed in compliance with all applicable governmental requirements and after having obtained all requisite governmental permits.

(k) Signs. The only signs or billboards permitted to be displayed on any lot are as follows, which signs shall be approved by the Design Committee:

(1) Directional signs established by Declarant or approved by the Association;

(2) Any signs that may be required by State statute, County ordinance, or legal proceeding;

(3) Identification signs of a combined total face area of one hundred forty-four (144) square inches or less for each lot;

(4) During the time of construction of any improvement, one job identification sign having a maximum face area of four (4) square feet;

(5) One "for sale or "for rent sign, having a maximum face area of four (4) square feet, which sign refers only to the premises on which it is situated;

(6) Signs, billboards and other advertising or directional devices or structures used by Declarant in connection with the development, subdivision, advertising, and sale of lots; and

(7) Such other signs as may specifically be approved by the Association or Declarant.

(l) Drilling and Mining. No drilling, refining, quarrying or mining operation of any kind shall be permitted on any lot; provided, however, that nothing contained herein shall prevent the Declarant from drilling or digging water wells or from otherwise exercising any water rights it now or hereafter may hold.

(m) Repair and Storage of Vehicles. No truck more than one ton in capacity, trailer, camper, vehicle or boat shall be kept, parked, constructed, reconstructed, repaired or stored upon any lot in such a manner that such construction, reconstruction, repair or storage is visible from any road or public view, nor shall any nonoperable vehicle be kept upon any lot so as to be visible from any road or public view.

(n) Open Storage. Open storage of materials or other goods and

chattels, and outside clotheslines or other outside clothes drying or airing facilities shall be permitted on any lot only where the same are screened or not visible from any road or public view.

(o) Use of Lots. Each lot shall be used exclusively for agricultural and dwelling/residential purposes; provided, however, that nothing in this paragraph (o) shall prevent:

(1) The Declarant from maintaining a real estate sales office, or model home, or from otherwise conducting sales activities on any lot; or

(2) Any artist, artisan or craftsman from pursuing that person's artistic calling upon the lot, if such artist, artisan or craftsman also uses the lot for dwelling purposes, is self-employed and has no employees working on the lot, does not advertise any product or work of art for sale to the public upon or from such lot, and obtains the appropriate governmental permits, if any; or

(3) The leasing of any lot from time to time by the owner thereof to a tenant, provided that no lease shall be for a term of less than one month; subject, however, to all covenants, conditions and restrictions of this Declaration; or

(4) Any lot owner from (i) maintaining a personal professional library within the single family dwelling; (ii) keeping personal business or professional records or accounts in the single family dwelling; or (iii) handling personal business or professional calls or correspondence from the single family dwelling.

(p) Piggeries. Poultry Farms and Kennels. No piggery or poultry farm shall be maintained on any lot and no pig shall be raised, bred or kept on any lot. Commercial kennels shall not be permitted on any lot; provided that nothing contained in this paragraph shall prevent an owner from raising fowl which does not squawk or crow or dogs on any lot for non-commercial purposes.

(q) Association Rights. The Association, or its duly authorized agents, shall have the rights set forth in Section 6.05 with respect to each lot.

(r) Pests. No owner of a lot shall permit any thing or condition to exist on any portion of the lot which shall induce, breed or harbor infectious plant diseases, or noxious insects, or vermin.

(s) Destroyed Improvements. No improvement which has been partially or totally destroyed shall be allowed to remain on any lot in such a condition for more than ninety (90) days from the date of such destruction.

(t) Hunting: Firearms. Neither hunting nor the discharge of any firearm shall be permitted on any lot.



Section 3.03. Private Area: Construction and Alteration of Improvements:

Excavations: Etc. The right of an owner to construct, reconstruct, refinish, alter or maintain any improvement upon, under, or above any lot of a private area or to make or create any excavation or fill thereon, or to make any change in the natural or existing surface drainage thereof, or to install any utility line (wire or conduit) thereon or thereover, shall be subject to all of the following limitations and conditions of this section:

(a) Permitted Improvements. Single family dwellings, private garages, structures designed for the protection of animals, such other improvements as are necessary or customarily incident to single family dwellings or to the conduct of permitted agricultural activity shall be allowed on any lot. Guest houses for non-paying friends and relatives and accommodations for persons employed on a lot as domestic and agricultural employees shall be permitted. No structure or portion of a structure, designed to be rented, sold or otherwise transferred as an ohana dwelling or as a bread and breakfast accommodation shall be permitted on any lot.

(b) Dwelling Requirements. Each single family dwelling erected on a lot in the Development shall have a total floor area of not less than two thousand (2,000) square feet, exclusive of lanais, porches, patios, garages, exterior stairways and landings; provided, however, that if a single family dwelling is financed by means of a Farmers Home Administration (FmHA) loan, the maximum permissible sized dwelling under the FmHA loan program will be permitted. Each single family dwelling shall be single story unless split level or two-story construction is specifically approved for that lot by the Design Committee.

(c) Parking Requirements. Each single family dwelling constructed on a lot shall have as an accessory thereto a garage large enough to accommodate at least two (2) automobiles. In addition, two (2) guest parking spaces shall be provided on each lot.

(d) Setbacks: Building Envelopes. The required front and rear yard setbacks shall be thirty (30) feet from and the side yard setbacks shall be twenty (20) feet from the respective boundaries of each lot. In the case of flag lots and corner lots, thirty (30) foot front and rear yard setbacks and twenty (20) foot side yard setbacks shall be required as provided in Chapter 25 of the Hawaii County Code. The Design Committee shall establish building envelopes on each lot which may impose additional restrictions on the location of buildings or structures on the lot.

No building, patio, fence, wall or other improvement except (i) a fence or wall not more than seventy-two (72) inches in height; (ii) landscaping; or (iii) driveways and walkways shall be placed in whole or in part upon or over any portion of any lot which is designated as a setback area.

No paving, except for paving of driveways and walks, and no storage or other use of the front yard setback area shall be permitted, except that the setback area may be landscaped. No walls may be erected or placed within the first fifteen (15) feet of a setback area along any road.

(e) Building Height. The maximum building height for any building, structure or other improvement (except landscaping) constructed or placed on a lot, shall be thirty (30) feet. The Design Committee shall establish special zones within the building envelope on each lot where more restrictive height limits may apply to protect the ocean views for other lot owners in the development.

(f) Disposal of Sanitary Waste. No outside toilet shall be constructed on any lot. All plumbing fixtures, toilets or sewage disposal systems shall be connected to a septic tank, cesspool or other sewage system approved by the appropriate governmental authorities.

(g) Outbuildings. Trailers and Temporary Structures. No temporary buildings or structures, outhouse sheds, trailers or tents, except for the Declarant's temporary sales offices, trailers, tents or other temporary structures necessary in connection with any permitted construction, shall be erected, placed or permitted to remain on any lot. No garage, shed, trailer, mobile home, tent, temporary building, or partially completed building shall be used for human habitation.

(h) Concealment of Utilities and Fuel Storage Tanks. All utilities within the boundaries of any lot, and between any road or right-of-way pole source, shall be placed underground. Every fuel storage tank on any lot shall be either buried below ground or screened.

(i) Exterior Lighting. The source of all exterior lighting on a lot shall be subject to approval of the Design Committee.

(j) Site Grading. Grading shall be kept to a minimum and shall be blended with the natural contours of the lot. Cuts or fills, in excess of thirty-six (36) inches are improvements which require approval by the Design Committee. No grading or filling shall affect an adjacent lot without the consent of the owner of 'such lot. All excavated material not immediately used as fill elsewhere on a lot must be removed from the lot within one hundred eighty (180) days.

Where the proposed grading on any Lot requires a permit from the County of Hawaii or a conservation plan approved by a Soil and Water Conservation District, a copy of the permit or approval shall be delivered to the Design Committee prior to the commencement of any grading work or improvement on the lot.

Each owner shall control the emission of dust and other airborne particles while performing any grading, grubbing or fill work on any lot, so as to minimize the inconvenience and annoyance to other lot owners. Each owner shall also provide erosion and mud control measures as necessary to prevent silt or mud from being washed or tracked from the property.

(k) Completion of Construction. Except for improvements in the nature of landscaping, every improvement constructed on a lot, once construction is begun, shall be completed within twelve (12) months or such other time period (longer or shorter) as may be specifically permitted or imposed by the Design Committee. Improvements not completed within such time period,

improvements for which construction is interrupted for ninety (90) days, and improvements partially or totally destroyed and not rebuilt within such time period shall be deemed nuisances. The time for completion of any construction, repair or rebuilding shall be extended for a period of time equal to the number of days during which construction is prevented or unreasonably interfered with because of strikes, lockouts, embargoes, unavailability or shortages of labor or materials, wars, insurrections, rebellions, acts of God or other causes beyond the owner's reasonable control (financial inability excepted).

(l) Occupancy. No improvement, intended for human occupancy, shall be occupied until the improvement has been substantially completed in accordance with the plans and specifications approved by the Design Committee.

(m) Landscaping. Within twelve (12) months after the transfer of title or the delivery of occupancy of a lot from the Declarant to an owner, whichever occurs later, the owner shall complete the installation of landscaping, including appropriate irrigation, with an installed value of at least \$12,500.00 in 1990 dollars, as approved by the Design Committee. Prior to the conveyance by the Declarant of the first lot to be sold in the Development, the Design Committee shall adopt standard landscaping designs which, if followed by an owner will satisfy the landscaping requirement of this Section 3.03(m). Alternative landscaping designs proposed by an owner may be approved by the Design Committee if the designs equal or exceed the quality and density of the standard landscaping designs.

Plans for landscaping the total area of each lot must be submitted to the Design Committee together with plans for the primary single family dwelling. As a condition of the approval of the plans for the primary single family dwelling on a lot, the Design Committee may require the completion of the total lot landscaping within a reasonable period of time after completion of the primary single family dwelling. Trees which, because of their location and height to which the species is known to grow, may block ocean views from other lots in the development, will not be approved.

(n) Design Committee Approval. Any construction or reconstruction of, or the refinishing or alteration of, any part of the exterior of any improvement on any lot is prohibited until and unless the owner of such lot first obtains approval therefor from the Design Committee as herein provided, and otherwise complies with all of the provision of this paragraph. Any owner proposing to construct or reconstruct, or to refinish or alter, any part of the exterior of any improvement on or within the owner's lot or to perform any other work which under the provisions of this paragraph requires prior approval of the Design Committee, shall apply to the Design Committee for approval thereof as follows:

(1) Submission and Approval of Plans. The owner shall submit to the Design Committee for approval prior to construction, plans and specifications for the proposed work, which shall include without limitation, floor, elevation, plot and grading plans; specifications for the principal exterior materials; descriptions of color schemes; provisions made for automobile parking; outside lighting plans, if any; and a detailed description of the location, character and method of utilization of all utilities. The Design

Committee shall review any such plans and specifications within fifteen (15) working days after the submission of the plans to it and shall return such plans to the owner either with approval or with disapproval, in which latter case the general nature of the objections shall be indicated. In the event of the Design Committee's failure to return the plans within the fifteen (15) day period, the owner shall submit a written notice thereof to the Design Committee. Failure of the Design Committee to act within ten (10) working days after submission of this written notice shall be deemed to mean that the plans are approved. The Design Committee may require the payment of a reasonable fee for the review of plans. Such fee shall not exceed one-tenth of one percent (0.10%) of the estimated cost of the improvement.

(2) Exceptions. No approval from the Design Committee is required for any of the following:

(i) Interior improvements or alterations to a previously approved structure.

(ii) Reconstruction, refinishing, maintenance or repair in conformance with plans previously approved by the Design Committee.

(iii) Grading, consisting of cuts and fills of a maximum depth of thirty-six (36) inches or less, and excavations, regardless of depth, for planting wells.

(iv) Exterior alterations or improvements which are less in value than one percent (1%) of the value of the primary single family dwelling on the lot and which are not visible from neighboring properties or roads.

(3) Inspection of Improvements: Noncompliance. Upon the completion of any construction, reconstruction, alteration or refinishing, or the completion of any other work for which approved plans are required pursuant to this section, the owner shall give written notice thereof to the Design Committee, which shall, within thirty (30) days, inspect such improvement to determine whether it was constructed, reconstructed, altered or refinished in substantial compliance with the approved plans and specifications, if the Design Committee finds that the construction is in substantial compliance with approved plans and specifications, it shall notify the owner in writing of such approval. If the Design Committee finds that such construction, reconstruction, alteration or refinishing was not done in substantial compliance with such approved plans and specifications, it shall notify the owner of such noncompliance and require the owner to remedy such noncompliance, if the owner fails to remedy such noncompliance within sixty (60) days from the date of such notification, or such longer time as may reasonably be required and approved by the Design Committee, the Design Committee shall notify the Association of such failure, and the Association shall either remove the improvement or remedy the noncompliance, and the owner shall reimburse the Association for all expenses incurred in connection therewith.

(4) Design Standards to Comply with Declaration. The Design Committee shall have no power, either deliberately or through inadvertence, to vary any of the standards

and restrictions set forth in this Declaration, except as may be specifically permitted herein, and in the event of violation of any of such standards and restrictions by an owner, whether or not the Design Committee approved the plans and specifications, the Association or any other owner may commence and pursue any remedy provided in this Declaration for the violation by an owner of the restrictions.

(5) Standards of Review. In reviewing plans and specifications, the Design Committee shall consider the requirements and restrictions in Sections 3.02 and 3.03, and the Design Requirements adopted pursuant to Section 5.04 and also shall consider whether the proposed improvement:

- (i) Is compatible and in harmony as to quality and type of materials and workmanship and as to external design with reference to existing structures and other improvements in the area and with reference to the location of the proposed improvement with respect to topography and ground elevation;
- (ii) Conforms to the general plan of the entire Development;
- (iii) Constitutes a suitable and adequate development for the lot; and
- (iv) Is, in the case of the principal building, substantially as valuable an improvement as the other comparable buildings in the Development, or exceeds the same.

Section 3.04. Restoration by Association. The Association may, in the event of any violation of the provisions of Section 3.02 or 3.03, restore the private area to its state existing immediately prior to the violation. The owner of the lot shall reimburse the Association for all expenses incurred by it in performing its obligations under this section.

Section 3.05. Common Area: Uses: Restrictions. The exclusive use of the common area shall be reserved equally to all owners, except as herein specifically provided, and every owner shall have a right and easement for enjoyment in and to the common area, which easement shall also be appurtenant to and shall pass with the title to every lot, subject, however, to the following limitations and restrictions:

(a) Rules Established by Association. The use of the common area shall be subject to rules established or to be established by the Association.

(b) Easements and Rights-of-Way. The use of the common area shall be subject to such easements and rights-of-way reserved therefrom at the time of conveyance thereof to the Association, to such road and public utility easements and rights-of-way as may from time to time be taken under the power of eminent domain, and to such other road and public and private utility easements as may from time to time be granted or conveyed by the Association, pursuant to the provisions of Section 6.05 (d).

(c) Prohibited Activities. Except to the extent otherwise permitted pursuant to the provisions of paragraph (b) above and Section 3.06, the following activities are prohibited within the common areas:

(1) There shall be no camping in common areas, except as permitted by the Board by written license.

(2) There shall be no fires started or maintained in common areas, except fires started and controlled by the Association incidental to the maintenance and preservation of property within the Development.

(3) There shall be no use of the paved portions of the roads within the common areas by vehicles or machinery without rubber tires.

(4) No vehicle shall use any road within the common areas if the weight of that vehicle exceeds the maximum load bearing capacity of the road.

(d) Right to Use Common Areas. The right to use and enjoy the common areas shall extend to the members of the families of all owners and to their invitees.

Section 3.06. Common Area: Construction and Alteration of Improvements. No improvement, excavation, or work which in any way alters any common area from its natural or existing state on the date when such common area was acquired by the Association shall be made or done, except in strict compliance with and within the restrictions and limitations of the following provisions of this section:

(a) Persons Prohibited from Altering Common Areas. Except to the extent otherwise provided in paragraph (d) below or approved by the Association, no person other than the Association, or its duly authorized agents, shall construct, reconstruct, refinish, alter or maintain any excavation or fill upon, or shall change the natural or existing drainage of, or shall destroy or remove any tree, shrub or other vegetation from, or plant any tree, shrub or vegetation upon any common area.

(b) Improvement Standards. Except to the extent otherwise provided in paragraph (c) below, if the Association proposes to construct, reconstruct, refinish or alter the exterior of any improvement located or to be located upon any common area, or if the Association proposes to make or create any excavation or fill or to change the natural or existing drainage of surface waters, or to remove any trees, shrubs or ground cover or plant any trees, shrubs or round cover upon any common area, the Association shall submit to the Design Committee for approval the final plans and specifications for any such work in such form and containing such information as the Design Committee may from time to time require. The Design Committee shall approve plans and specifications submitted to it pursuant to this paragraph only if it finds that:

(1) The plans to construct any new improvement, including any alteration of the exterior appearance of any existing improvement, comply with the standards and restrictions set forth in Section 3.03 with respect to private areas; and

(2) The design of such improvement is reasonably necessary or desirable in order to carry out the aims of the Association and is in harmony with other improvements and the overall appearance of the Development; and

(3) The proposed work shall not, because of its design, materially prejudice the Development or any owner therein in the use and enjoyment of its property.

(c) Improvements Permitted. The Association may, at any time and from time to time:

(1) Reconstruct, replace, or refinish any improvement or portion thereof upon a common area in accordance with the last plans thereof approved by the Design Committee, or if such improvement existed upon the common area when such common area was conveyed to the Association, then in accordance with the original design, finish or standard of construction of such improvement when such common area was conveyed to the Association.

(2) Construct, reconstruct, replace or refinish any road improvement upon any portion of the common area designated on a subdivision map as a road.

(3) Replace any destroyed trees or any other vegetation upon a common area, and to the extent the Association deems necessary, for the conservation of water and soil, plant trees, shrubs and ground cover.

(4) Place and maintain upon any common area such street lights, signs and markers as the Association may, in its sole discretion deem necessary for the identification of the Development and of roads, for the regulation of traffic, including parking, for the regulation and use of the common area, and for the health, welfare and safety of owners and the public; provided, that the design of any such signs or markers is first approved by the Design Committee.

(d) Construction of Individual Subsurface Utilities. Driveways. Walks. Mailboxes and Landscaping. Any owner may, at any time, and from time to time, install and maintain within a common area any subsurface utility system, driveway, walk, mailbox or landscaping, provided the same is approved by the Design Committee.

Section 3.07. Presumption of Compliance. All of the following improvements, excavations, fill and other work for the purposes of this Declaration shall be conclusively presumed to be in compliance with and within the restrictions and the provisions of this Article III:

(1) Those existing or maintained within or upon any property within the Development at the time such property became a part of the Development.

(2) Those existing or maintained within a private area at the time such private area was first conveyed by the Declarant to an owner.

(3) Those from time to time constructed, reconstructed, refinished, altered, installed or maintained upon any property by the Declarant, or, if not in conflict with any specific restriction in this Declaration, pursuant to plans and specifications approved by the Design Committee.

Section 3.08. Governmental. Public Utility. Eleemosynary. Religious. Educational. Community and Civic Organizations. Anything in the foregoing sections of this Article III to the contrary notwithstanding, the restrictions on improvements, use and occupancy set forth in said sections shall not apply to any lot or other area while and so long as the same is owned, leased, or otherwise acquired by the State of Hawaii or County of Hawaii, or any governmental agency or public utility, and used for public, governmental or public utility purposes, whenever and to the extent, but only to the extent, that such restrictions shall prevent reasonable use of such lot for said purposes. On cessation of such use, the restrictions of this Article III shall become applicable again in their entirety. The Declarant and the Association shall each have the power to release any lot or other area owned by it, temporarily or forever, from any restrictions in this Article III if, in its discretion, such waiver shall be necessary or advisable to obtain acceptance of the same by said State of Hawaii, County of Hawaii, agency, public utility, institution or organization. While so owning, leasing or otherwise acquiring, and so using, said State of Hawaii, County of Hawaii, agency, public utility, institution or organization shall have no right to vote as a member of the Association, nor shall it be liable for any assessments under the provisions of Article VII, but shall be liable for all costs and expenses incurred by the Association in enforcing against it any of the provisions of this Declaration or arising out of any default by it of said provisions.

#### ARTICLE IV

##### AGRICULTURAL RESTRICTIONS

Section 4.01. Agricultural Activity. Agricultural activity shall be developed on each lot in the Development. As used herein, "agricultural activity" means the cultivation of crops, including but not limited to flowers, vegetable, foliage, fruits, forage and timber; game propagation; raising of livestock, including but not limited to poultry, bees, fish or other animal or aquatic life that are propagated for economic or personal use.

#### ARTICLE V

##### DESIGN COMMITTEE

Section 5.01. Design Committee: Organization- Power of Appointment and Removal of Members.



(a) Organization. There shall be a Design Committee consisting of not less than three nor more than five members. Every member other than an initial member and other than a member appointed by Declarant, shall also be an owner. The Declarant shall appoint the initial members of the Design Committee.

At least one member of the Design Committee shall be an architect or other person similarly knowledgeable in the area of building construction methods and materials, if such person is available to serve on the Design Committee and at least one member shall be a landscape architect or other person similarly knowledgeable about plant materials, care and growth, if such person is available to serve on the Design Committee.

(b) Term of Members. Each member of the Design Committee shall hold office for a term of two (2) years or until such time as that person has resigned or a successor has been appointed, as herein set forth. A person may be appointed for more than one term.

(c) Appointment of Members by the Declarant. Except as provided in paragraph (d) below, the right from time to time to appoint and remove all members of the Design Committee shall be and is hereby reserved and vested solely in the Declarant.

(d) Appointment of Members by the Association. The right from time to time to appoint and remove members of the Design Committee shall be reserved to and vested in the Association as follows:

(1) From and after one (1) year from the date of this Declaration, the Association shall have the right to appoint and remove one member of the Design Committee, who shall be the member who is the most recently appointed member as of the date such right is first exercised.

(2) From and after five (5) years from the date of this Declaration, the Association shall have the right to appoint and remove two members of the Design Committee.

(3) The Association shall have the right to appoint and remove all members of the Design Committee from and after seven (7) years from the date of this Declaration; provided, however, that if the Declarant fails to exercise its rights under paragraph (c) above, or records a declaration waiving such rights, the Association shall thereupon and thereafter have the right to appoint and remove all members.

(e) Resignation of Members. Any member of the Design Committee may at any time resign from the Design Committee upon written notice delivered to the Declarant or to the Association, whichever then has the right to appoint and remove members.

Section 5.02. Design Committee Duties. It shall be the duty of the Design Committee to consider and act upon such proposals or plans from time to time submitted to it, pursuant to the provisions of Article III, to adopt Design Requirements pursuant to Section 5.04 and to perform such other duties from time to time delegated to it by this Declaration or the Association.

Section 5.03. Design Committee Meetings. Actions. Compensation and Expenses. The Design Committee shall meet from time to time as necessary to properly perform its duties hereunder, The vote or written consent of a majority of its members shall constitute the act of the Design Committee, unless the unanimous action of its members is otherwise required by this Declaration. The Design Committee shall keep and maintain a record of all actions from time to time taken by the Design Committee at such meetings or otherwise. Unless otherwise authorized by the Association, the members of the Design Committee shall not receive any compensation for services rendered. All members shall be entitled to reimbursement for reasonable expenses incurred by them in connection with their performance of any Design Committee function.

Section 5.04. Adoption and Amendment of Design Requirements. Prior to the conveyance by Declarant of the first lot to be sold in the Development, the Design Committee shall adopt design and construction requirements which establish the procedures for submission and approval of plans, specifications and other materials pertaining to the erection, construction, installation, alteration, placement, maintenance and remodeling of, and the construction of additions to, improvements within the Development, which delineate any building envelopes and special zones where more restrictive height limits apply to lots in the Development, and which establish design standards for all buildings, landscaping, grading, and other improvements within the Development. The Design Committee may from time to time adopt additional design and construction requirements and amend or repeal the existing design and construction requirements. The design and construction requirements as so adopted, amended or repealed shall constitute the Design Requirements. A copy of the Design Committee Design Requirements shall be kept available at all times at the office of the Association and at the office of Declarant, for the inspection by any owner, architect or agent of the owner or architect.

Section 5.05. Non-Waiver. The approval by the Design Committee of any plans and specifications for any work done or proposed or in connection with any other matter requiring the approval of the Design Committee under this Declaration shall not waive any right of the Design Committee to withhold approval as to any similar plan, drawing, specification or matter whenever subsequently or additionally submitted for approval.

Section 5.06. Variances. The Design Committee may permit reasonable variances from the provisions of Article III in order to overcome practical difficulties and prevent unnecessary hardships, provided that the Design Committee finds that the variance will not be materially detrimental to other lots in the Development.

Section 5.07. Estoppel Certificate. Within thirty (30) days after written demand therefor is delivered to the Design Committee by any owner, and upon payment therewith to the Association of a reasonable fee from time to time to be fixed by the Association, the Design Committee shall deliver to such owner an estoppel certificate executed by any two of its members in form suitable for recording in the Bureau of Conveyances of the State of Hawaii and the Office of the Assistant Registrar of the Land Court of the State of Hawaii, certifying with respect to any lot of said owner that, as of the date thereof, either (a) all improvements and other work made or done upon or within said lot comply with the Declaration, or (b) such improvements or work do not so comply, in which event the certificate shall also (i) identify the

noncomplying improvements or work, and (ii) set forth with particularity the cause or causes for such noncompliance. Any purchaser or lessee from the owner or mortgagee or other encumbrancer of the property shall be entitled to rely on said certificate with respect to the matters therein set forth, such matters being conclusive as between the Association, Declarant and all owners and such purchaser, lessee, mortgagee or other encumbrancer.

Section 5.08. Liability of Design Committee Members. Neither the Design Committee nor any member thereof shall be liable to the Association or to any owner or to any other person for any damage, loss or prejudice suffered or claimed on account of the following, provided that the person against whom the claim is made has, upon the basis of such information as may be actually possessed by that person, acted in good faith and without willful or intentional misconduct:

(1) The approval or disapproval of any plans, specifications and other materials, whether or not defective; or

(2) The construction or performance of any work, whether or not pursuant to approved plans, specifications and other materials; or

(3) The development or manner of development of any property within the Development; or

(4) The execution and filing of an estoppel certificate pursuant to Section 5.07, whether or not the facts therein are correct; or

(5) The performance of any other function pursuant to the provisions of this Declaration or the Design Requirements.

Neither Design Committee nor any member thereof shall be liable in damages to anyone submitting plans to them for approval, or to any owner or other person by reason of mistake in judgment, negligence, or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve any plans and specifications. Each owner or other person who submits plans to the Design Committee for approval agrees, by submission of such plans and specifications, that the person will not bring any action or suit against the Design Committee or any member thereof to recover damages. Approval by the Design Committee or any member shall not be deemed to be a representation or warranty that the owner's plans or specifications or the actual construction of a dwelling or other improvement comply with applicable governmental ordinances or regulations, including but not limited to zoning ordinances and local building codes, and it shall be the sole responsibility of the owner or other person submitting plans to the Design Committee or performing any construction to comply therewith.

Section 5.09. Professional Advice. The Design Committee may employ the services of an attorney, architect, landscape architect, or structural or civil engineer licensed to practice in the State of Hawaii or any other consultant to render professional advice, and may pay a reasonable compensation for such services, which compensation may be charged to any person who has submitted plans, specifications or other materials requiring review by such attorney, architect,

landscape architect, engineer or consultant. Failure to obtain professional advice shall not constitute misconduct on the part of the Design Committee.

Section 5.10. Non-Existence of Design Committee. In the event that at any time through death, absence from the State, resignation, or for any other reason, there shall not be a Design Committee, or there shall not be the members necessary to act on a particular matter for which the approval or action by the Design Committee is required hereunder, and such situation lasts for a period of not less than twenty (20) days, then all matters requiring such approval or action may be approved or done by the president of the Association, or any vice-president thereof, and the president or vice-president's certificate that there has been no Design Committee, or that the required members were not present, and that the president or vice-president was acting pursuant to the authority of this section, shall be conclusive between the owners, Association, any other purchaser, lessee/mortgagee or other encumbrancer, and any other persons. The president or vice president acting hereunder shall be entitled to employ an architect or engineer to render technical advice and to receive reasonable compensation to be set by the Board for such services.

## ARTICLE VI

### KOHALA BY THE SEA COMMUNITY ASSOCIATION

#### Section 6.01. Organization.

(a) The Association is a non-profit corporation charged with the duties and empowered with the rights set forth herein and in its Articles and By-Laws.

(b) In the event that the Association as a corporate entity is dissolved, all of the assets of the corporation shall be disposed of as set forth in the Articles.

#### Section 6.02. Membership.

(a) Each owner of any lot within the Development shall be a member of the Association, provided, however, that no person other than an owner may be a member of the Association.

(b) The rights, duties, privileges and obligations of an owner as a member of the Association shall be those set forth in, and shall be exercised and imposed in accordance with, the provisions of this Declaration, the Articles and the By-Laws of the Association.

Section 6.03. Voting Rights. The voting rights of the members shall be as set forth in the Articles and By-Laws, and the members shall be divided into two classes with voting powers as follows:

Class A. Each owner, with the exception of the Declarant, shall have Class A voting rights, and shall be entitled to one vote per lot. When more than one person holds an interest in any lot, all such persons shall be members; and the vote for such lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any one lot.

Class B. The Declarant shall have Class B voting rights, and shall be entitled to three (3) votes for each of its lots or a total of two hundred nineteen (219) votes, based upon 73 lots for the entire Development, including 44 lots in Increment I and 30 lots in Increment II, which 30 lots are to be annexed to this Development in accordance with Article VIII. The class B voting rights shall cease and be converted to Class A voting rights when the total number Class A voting rights then existing equals the total number of Class B votes then existing, or when the Declarant in its discretion so determines, whichever occurs first.

Notwithstanding anything to the contrary contained herein, the rights of members of the Association to voting shall be subject to the voting requirements of Chapter 415B, Hawaii Revised Statutes, for purposes of voting on matters specified in Chapter 415B.

Section 6.04. Duties and Obligations of the Association. The Association shall have the rights, obligations and duties, subject to this Declaration, to do and perform each and every one of the following for the benefit of the owners and for the maintenance and improvement of the Development.

(a) The Association shall accept title to all common areas and other property from time to time conveyed to it by the Declarant. The Association may also acquire and accept title to any other property, real, or personal, nothing herein to be construed to authorize the Association to acquire or invest in property simply for the purpose of acquiring income or otherwise making a financial profit therefrom, but the Association shall not carry on any business, trade, association or profession for profit.

(b) The Association shall maintain or provide for the maintenance of common areas and other property owned by the Association, including without limitation, security systems and all improvements of whatever kind and for whatever purpose from time to time located on the common areas, if any, and other such property in good order and repair; provided, however, that notwithstanding the foregoing, the Association shall have no obligation to maintain in good order and repair any improvement constructed upon the common areas by any owner, but may use all legal means to compel such owner to maintain the same itself.

(c) The Association may maintain or provide for the maintenance of all lots which are undeveloped by the owners, including those on which no residence has been constructed, the cost of which shall be allocated to the owners in an equitable manner and included in the maintenance assessments to be determined and set by the Board; provided, however, that art owner may elect to be responsible for the maintenance on its lot in accordance with standards established by the Board for all lots.

(d) To the extent not assessed to or paid by the owners, the Association shall pay all real property taxes and assessments levied upon any portion of the common areas.

(e) Unless provided by the State or the County, the Association may contract for, employ or otherwise provide police, security, and refuse disposal services, but the Association has no responsibility to provide such services.

(f) The Association shall obtain and maintain in full force the following policies of insurance:

(1) Fire and extended coverage insurance on all improvements, if any, from time to time owned by the Association in such amounts and on such terms as may be determined from time to time by the Board of the Association.

(2) Comprehensive general liability insurance in such amounts and on such terms as may be determined from time to time by the Board of the Association, covering all roads, drainage structures and easements through or adjoining the Development, or arising out of ownership, maintenance or use thereof by the Association.

The policies referred to hereinabove shall name as insured, the Declarant (so long as the Declarant is the owner of any lots), the Association and its officers, the Board of the Association and all of the members of the Board, the Design Committee and all of the members of the Design Committee, and with respect to any liability arising out of the maintenance or use of any common areas, the owners. The Association may obtain and maintain in force any policies of insurance covering any other reasonable risk as may be determined to be proper and necessary or advisable in the discretion of the Board of the Association. Each and every policy of insurance obtained by the Association shall expressly waive any and all rights of subrogation against the Declarant, the Board and their respective representatives and employees, the Design Committee and its members, and against any owner.

If the Declarant provides the insurance policies referred to above, the Association shall pay its pro rata share for the cost of the insurance.

(g) The Association shall from time to time make establish, promulgate, amend and repeal rules relating to the use of the common areas in the Development.

(h) To the extent provided for in Article V, the Association shall exercise its rights to appoint and remove members of the Design Committee to insure that at all reasonable times there is available a duly constituted and appointed Design Committee.

**Section 6.05. Powers and Authority of Association.** The Association shall have all the powers set forth in the Articles, together with its general powers as a nonprofit corporation, subject, however, to the limitations upon the exercise of such powers as are expressly set forth in the Articles and By-Laws and in this Declaration, to do any and all lawful things which may be authorized, required or permitted to be done by the Association under and by the virtue of this Declaration, and to do and perform any and all acts which may be necessary or proper for, or incidental to, the exercise of any of the express powers of the Association, or for the peace, health, comfort, safety and general welfare of the owners of the Development. Without in any way limiting the generality of the foregoing, the Association shall have the following powers:

(a) The Association shall have the power and authority at any time, and from time to time and without liability to any owner or owners for trespass, damage or otherwise, to enter

upon any private area for the purpose of maintaining and repairing any such area if for any reason whatsoever the owner or owners thereof fail to maintain and repair such area as required under Article III hereinabove, or for the purpose of removing any improvement constructed, refinished, altered or maintained upon such area in violation of said Article III. The Association may maintain and repair any roads, sidewalks, or other public areas in or adjoining the Development, including landscaping and planting the same and repairing improvements thereon when public authorities, in the opinion of the Board, have failed to do so in a manner befitting the standards of the community. The Association shall also have the power and authority from time to time in its own name, on its own behalf, or in the name and behalf of any owner or owners who consent thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration, or to enforce by mandatory injunction or otherwise all of the provisions of this Declaration.

(b) In fulfilling any of its obligations or duties under this Declaration, including without limitation, its obligations or duties for the maintenance, repair, operation or administration of the common areas and maintenance on the lots, and to the extent necessary by the failure of the owners thereof of private areas, or in exercising any of its rights to construct improvements or other work upon any common area, the Association shall have the power and authority:

(1) To contract and pay for, or otherwise provide for, the maintenance, restoration and repair of all improvements of whatever kind or for whatever purpose from time to time located upon common areas, and to contract and pay for, or otherwise provide for, the construction of improvements or other work upon common areas, or otherwise, in carrying out its functions as set forth in this Declaration on such terms and conditions as the Association deems appropriate, and to pay and discharge all liens arising out of any work;

(2) To obtain, maintain and pay for such insurance policies or bonds, whether or not required by Section 6.04, as the Association deems appropriate for the protection or benefit of the Development, the Association, the members of the Board, the members of the Design Committee, or the owners, including but without limitation, war risk insurance, builders' risk insurance, workers' compensation insurance, malicious mischief insurance, automobile, non-ownership insurance and performance and fidelity bonds;

(3) To contract and pay for, or otherwise provide for, utility services including, but without limitation, water sewer, garbage, electrical, telephone, cable television and gas services as may from time to time be required;

(4) To contract and pay for, or otherwise provide for, the services of architects, engineers, attorneys, and certified public accountants, or such other professional or non-professional services as the Association deems necessary;

(5) To contract and pay for, or otherwise provide for fire, police and such other protection services as the Association, from time to time, deems necessary

for the benefit of the Development, any property located within the Development, and the owners; and

(6) To contract and pay for, or otherwise provide for, such materials, supplies, furniture, equipment and labor as and to the extent the Association deems necessary, and to pay and discharge any and all liens from time to time placed or imposed upon any common areas on account of any work done or performed by the Association in the fulfillment of any of its obligations and duties of maintenance, repair, operation or administration.

(c) The Association shall have the right from time to time to pay, compromise or contest any or all taxes and assessments levied against all or any part of the common areas, or upon any personal property belonging to the Association; provided, however, that prior to the sale or disposition of any property to satisfy the payment of any such tax assessments, the Association shall pay and discharge the lien imposed with respect to such property.

(d) The Association shall have the authority to exchange, to sell and convey, or to otherwise dispose of, for cash or on such terms as it shall approve, any portion or portions of the common area with improvements thereon, or other property of the Association, the retention of which is no longer necessary, advantageous or beneficial for the Association or for the owners, and to borrow money, without limit as to the amount, for any purpose with the powers and authority of the Association, or any part thereof; provided, however, that no such exchange, sale or other disposition of any real property in fee, and no such borrowing and mortgaging, shall be made unless the same shall have been approved by an affirmative vote of not less than two-thirds (2/3) of each class of members who may vote in person or by proxy at a meeting of the Association duly called, the notice for which shall describe the real property to be sold or otherwise disposed of, or the amount of the borrowing and the security to be mortgaged, and shall be invested by the Association in additional property acquired for the benefit of the Association and the owners, or in improving the properties of the Association.

Section 6.06. Liability of Members of the Board. No member of the Board shall be personally liable to any owner, guest, lessee, or to any other person, including the Declarant, for any error or omission of the Association, its representatives and employees, or the Design Committee; provided, however, that such member has, with actual knowledge possessed by that member, acted in good faith.

Section 6.07. Exclusive Powers of the Association. The Association, through the Board and its duly authorized representatives, shall have the exclusive right to exercise the powers and authorities referred to in paragraphs (b) through (d) inclusive of Section 6.05.

## ARTICLE VII

### FUNDS AND ASSESSMENTS



Section 7.01. Operating Fund. There shall be an operating fund in which the Association shall deposit all monies paid to it as

(1) Maintenance assessments;

(2) Special assessments;

(3) Miscellaneous fees; and

(4) Income and profits attributable to the operating fund, and from which the Association shall make disbursements in performing the functions for which the foregoing assessments are levied.

Section 7.02. Maintenance Assessment.

(a) Within thirty (30) days prior to the commencement of each fiscal year, the Board shall estimate the costs and expenses to be incurred by the Association during such fiscal year in performing its functions under Article VI (including a reasonable provision for contingencies, reconstruction and replacements and for alterations, modifications and improvements to existing facilities, and in paying all expenses of the Design Committee and its operations), and shall subtract from such estimate an amount equal to the anticipated balance (exclusive of any accrued reserves from contingencies and replacements) in the operating fund at the start of such fiscal year which is attributable to assessments.

(b) The sum or net estimate determined pursuant to Section 7.02(a) shall be divided and assessed by the Board as a maintenance assessment against the owners in proportion to the number of lots owned by each owner.

(c) Any increase in maintenance assessments in any amount greater than the previous year's maintenance assessment must be approved by an affirmative vote of a majority of the Board.

(d) If at any time, and from time to time, during any fiscal year, the maintenance assessment proves inadequate for any reason, including nonpayment of any owner's share thereof, the Board may levy a further assessment in the amount of such actual or estimated inadequacy, which further assessment shall be assessed to the owners in the manner set forth in paragraph (b) above.

(e) Subject to the provisions hereof, the Board shall have the power and authority to determine all matters in connection with assessments, including without limitation, the power and authority to determine where, when and how assessments shall be paid to the Association, and each owner shall comply with all such determinations. Assessments shall become due and payable as specified by the Board, and in any event, thirty (30) days after any notice of the amount due is given by the Association to the owner, and any such amount shall bear interest at a rate specified by the Board, but in no event greater than the maximum amount permitted by law, from the date due and payable until paid.

Section 7.03. Initial Maintenance Assessment. Prior to the substantial completion by Declarant of construction of the subdivision improvements required by the County of Hawaii pursuant to the grant of subdivision approval for the property described in Exhibit "A" attached hereto, the Association shall estimate the costs and expenses to be incurred by the Association from the time of such substantial completion of construction until the commencement of the first full fiscal year. The estimate shall be assessed to each owner, as provided herein, as a Maintenance Assessment as of the date of the substantial completion of construction of subdivision improvements described in this Section 7.03. Declarant shall be responsible for the Assessments on lots which it owns. All costs and expenses incurred prior to such substantial completion of construction shall be the sole responsibility of Declarant.

Section 7.04. Special Assessments. The Board shall levy a special assessment against any owner who, as a direct result of whose acts or failure or refusal to act or to otherwise comply with this Declaration, or the Design Requirements, has caused monies to be expended from the operating fund by the Association in performing its functions under this Declaration.

Such assessments shall be in the amount so expended and shall be due and payable to the Association when levied, together with interest thereon as provided for in Section 7.02 hereof. Monies so expended shall include, without limitation, actual engineers', architects', attorneys' and accountants' fees where reasonably incurred by the Association.

Section 7.05. Default in Payment of Assessments.

(a) Each assessment under this Article VII shall be a separate, distinct, personal debt and obligation of the owner against whom it is assessed, and each owner of any lot, by acceptance of a deed therefor or execution of an agreement of sale, lease or other instrument of conveyance, whether or not it shall be so expressed in any such deed, agreement of sale, lease or conveyance, is deemed to covenant and agree to pay the same to the Association. If the owner does not pay such assessment or any installment thereof when due, the owner shall be deemed in default and the amount of the assessment not paid, together with the amount of any subsequent default, plus interest as provided for in Section 7.02 hereof and actual costs, including reasonable attorneys' fees and court costs, shall be and become a lien upon the lot or lots of such owner upon recordation by the Association of a notice of default. Such lien shall be subject and subordinate to the lien of any mortgage upon the lot or lots of such owner, and the sale or transfer of any lot in foreclosure of any such mortgage, whether by judicial proceedings or pursuant to a power of sale contained in such mortgage, or the transfer or conveyance to the mortgagee in lieu of foreclosure, shall extinguish the lien as to payments of assessments which become due prior to such sale, transfer or conveyance, but no such sale, transfer or conveyance shall relieve such lot or the purchaser or transferee thereof with regard to assessments thereafter becoming due. The Association shall record such notice of default within ninety (90) days following the occurrence of such default and shall commence proceedings to enforce such lien within six (6) months following such recordation. Such lien may be foreclosed by suit by the Association in like manner as a mortgage of real property, and the Association shall have power to bid on the lot at foreclosure sale and to acquire and hold, lease, mortgage or convey the same. A suit to recover a money judgment for unpaid assessments shall be maintainable without foreclosing or waiving

the lien securing the same. The foregoing remedies shall be in addition to any other remedies provided by law for the enforcement of such assessment obligation.

(b) The Association shall execute and acknowledge a certificate stating the indebtedness secured by the lien upon any lot or lots, and such certificate shall be conclusive upon the Association and the owners in favor of all persons who rely thereon in good faith as to the amount of such indebtedness as of the date of the certificate. The Association shall furnish a copy of such certificate to any owner upon request at a reasonable fee.

## ARTICLE VIII

### ANNEXATION OF SUBSEQUENT PHASES OR PARCELS

Section 8.01. Annexation by Declarant. Declarant reserves the right to expand the Development from time to time by annexing thereto all or any portion of the annexation property. Such annexation by Declarant shall not require the consent of any other owner or any other person.

Section 8.02. Manner of Annexation. Declarant shall effect such annexation by recording a map of the real property to be annexed (if no appropriate map has already been recorded), or by recording a description of the property being annexed, and by recording an annexing declaration which shall:

- (a) Describe the real property being annexed;
- (b) Declare that such annexed real property is held and shall be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied and improved subject to the provisions of this Declaration; and
- (c) Set forth any new, different or modified terms, limitations, restrictions, covenants or conditions which may be applicable to such annexed real property including any special provisions for the release of such annexed real property from this Declaration.

Section 8.03. Expansion of Definitions. In the event of such annexation, the definitions used in this Declaration shall be expanded automatically to encompass and refer to the Development as so expanded by such annexation. Thus, for example, "Development" shall mean the land and interest in land described in Exhibit "A" hereto plus any additional land and interest in land added by the annexing declaration(s). In the event of such annexation, reference to the Declaration shall mean this Declaration as so modified by the annexing declaration(s).

Section 8.04. Declaration Operative on New Land and Improvements. Any such annexed land or interest in land, and the buildings and improvements thereon shall be subject to all the terms, limitations, restrictions, covenants and conditions of this Declaration and of such annexing declaration or declarations upon recordation of the annexing declaration(s).

Section 8.05. Amendment of Annexing Declaration. So long as Declarant is the owner of any lot which was annexed by way of an annexing declaration, Declarant shall have the right,

without the consent of any other owner or any other person, to amend such annexing declaration to modify or amend any of the terms, limitations, restrictions, covenants or conditions applicable to such lot.

Section 8.06. Scope of Declaration. No land or interest in land except that described in Exhibit "K" and that annexed thereto as provided in this Article VIII shall be deemed subject to this Declaration, whether or not any such land or interest in land is shown on any subdivision map filed by Declarant or is described or referred to in any document executed or recorded by Declarant. No designation, on any map recorded or filed by Declarant, of any parcel, Lot, easement or other area as a lot, road, Street, or as any other type of parcel, lot, easement or area is or will be used or restricted to such use, except with respect to parcels, lots easements or areas described in said Exhibit "A" or annexed to the Development as herein provided and so designated by Declarant in a recorded document. No owner shall acquire nor shall the public nor any public body or agency nor any other person acquire any interest or rights in any land by reason of such designation or recording or filing except as aforesaid. Nothing herein or in any amendment hereto or on any maps shall be deemed to be a representation, warranty or commitment that Declarant Will commit to the Development subject to this Declaration any land or interest in land it may now own or may hereafter acquire other than that described in said Exhibit "A".

Section 8.07. Release of Property from Declaration. Except as otherwise specifically provided in an annexing declaration with respect to the property annexed thereby, release of all or any portion of the Development from this Declaration (and from the terms, limitations, covenants, conditions and restrictions contained herein) shall be by amendment to this Declaration, as provided in Section 9.02 hereof; provided, however, that Declarant shall have the right and power, without having to obtain the consent or approval of any lot owner or any other person, to release any and all lots at any time prior to the first conveyance by Declarant of such lot or lots. Upon occurrence of any such event of release, the property so released shall be free and clear of, and shall no longer be held subject to, the terms, limitations, covenants, conditions, and restrictions of this Declaration.

## ARTICLE IX

### MISCELLANEOUS PROVISIONS

Section 9.01. Enforcement of Declaration. Each provision of this Declaration shall be enforceable by Declarant, by the Association, or by any owner by a proceeding for a prohibitive or mandatory injunction or by a suit or action to recover damages. If any court proceedings are instituted in connection with the right of enforcement and remedies provided in this Declaration, the prevailing party shall be entitled to recover from the losing party its costs and expenses in connection therewith including reasonable attorneys' fees and court costs.

Section 9.02. Amendment. Any provision contained in this Declaration may be amended or changed, and additional provisions may be added hereto, (i) by the recording of a written instrument or instruments specifying the amendment or change, signed by owners who hold not less than seventy-five percent (75%) of the voting power of the Association and by Declarant or

its assigns, except that Article IV can only be amended with the consent, in writing, of the County of Hawaii Planning Director, or the Planning Director's successor; or (ii) by Declarant at any time prior to the first sale by Declarant of an interest in any lot in the Development, by recording a written instrument specifying the amendment or change, signed by the Declarant.

Section 9.03. Violations by Family Members or Guests. A violation of any provision of this Declaration by any owner's guest, invitee or family member shall be treated as a violation by such owner and shall be enforceable in accordance with the provisions hereof.

Section 9.04. Subdivision and Consolidation.

(a) No lot within the Development shall be subdivided by any owner, unless the proposed subdivision has been first approved by the Association.

(b) No two or more lots within the Development shall be consolidated into one lot by the owner or owners thereof without the approval of the Association.

(c) Nothing contained in this section shall apply to the subdivision of any lot owned by the Declarant or the consolidation of two or more lots into one or more lots by the Declarant.

Section 9.05. Ohana Dwellings Prohibited. No ohana dwelling, as defined by Chapter 25 (Zoning) of the Hawaii County Code or any amendment thereof, shall be permitted on any lot in the Development.

Section 9.06. Condominium Property Regimes Prohibited. Condominium property regimes, as defined by Chapter 514A, Hawaii Revised Statutes, or any amendment thereof, shall be prohibited on any lot or portion thereof in the Development.

Section 9.07. Duration of Declaration. This Declaration and the covenants, conditions and restrictions contained herein, as amended from time to time, shall run with the land and shall be and remain in full force and effect for a term of sixty (60) years from the date of recordation of this Declaration; after which time said Declaration shall be automatically extended for successive periods of ten (10) years, unless an instrument, in writing signed by not less than seventy-five percent (75%) of the then owners of lots within the Development (based on one vote per lot), has been recorded at least one (1) year prior to the end of any such period, agreeing to change or terminate this Declaration or said covenants, conditions, and restrictions in whole or in part.

Section 9.08. Conveyance of Common Area: Reservation of Easements and Rights-of Way and Classification of Land Area, Sewer and Water System.

(a) The Association shall accept all of the real property and interests in real property conveyed to it as common areas by the Declarant; provided that the Association need not accept any such property in fee subject to any exceptions, liens and encumbrances, except as follows:

(1) The lien of any real property taxes and assessments;

(2) Any easements and rights-of-way on, over or under all or any part thereof as may be reserved to the Declarant or granted to any owner in accordance with the provisions of this Declaration;

(3) Any easements and rights-of-way on, over or under all or any part thereof as may be reserved to the Declarant for access to real property contiguous to the common areas, and such easements and rights-of-way on, over or under all or any part thereof as may be reserved by this Declaration or granted to or for the benefit of the United States, the State of Hawaii, the County of Hawaii, or any other political subdivision or public organization, any public utility corporation, or any lot for the purpose of constructing, erecting, operating and maintaining thereon, therein and thereunder at any time or at any time in the future, (i) roads, streets, driveways, walks, parkways and park areas, (ii) poles, wires and conduits for the transmission of electricity for lighting, heating, power, telephone, television and other purposes and for necessary facilities in connection therewith, and (iii) public and private sewers, sewage disposal systems, storm water drains, land drains and pipes, water systems, water sprinkler systems, water, heating and gas lines or pipes, and any and all equipment in connection therewith;

(4) The obligations imposed directly or indirectly by virtue of any statute, law, ordinance, resolution or regulation of the United States, the State of Hawaii, the County of Hawaii or any other political subdivision or political or governmental organization having jurisdiction over such property;

(5) The rights reserved to the Declarant pursuant to this Declaration;

(6) Easements for roads, pipelines, ditches, telephone, gas and electric lines and any other utilities in favor of public utilities, governmental agencies or private corporations or individuals; and

(7) Any other lien, encumbrance or defect in title of any kind whatsoever (other than of a type which would at any time or from time to time create a lien upon such properties to secure an obligation to pay money) which would not materially and actually prejudice the owners in their use and enjoyment of such property.

(b) The land classification of any property within the Development which is not a common area may be changed to a common area by the transfer of such property to the Association from all persons having any right, title or interest therein, and the acceptance by the Association of such property. Notwithstanding anything else herein, the Declarant may change the land classification of any property not previously designated as common area and to which it is the owner and may convey such property to the Association pursuant to the provisions of paragraph (a) of Section 9.08 hereinabove, and the Association shall accept the same and such property shall thereupon become common area for all purposes hereunder.

(c) At any time, and from time to time following conveyance of common area by the Declarant to the Association pursuant to this section, the Declarant may construct, reconstruct,

refinish or alter any improvement upon, or make or create any excavation on or fill upon or change the natural or existing drainage of or remove or plant any trees, shrubs or ground cover upon, such common area, if the Declarant determines that any such work (i) is reasonably necessary for any utility installation serving any property within the Development, (ii) is reasonably necessary for the construction of any facility for use by the owners, (iii) is desirable in order to provide or improve access to or to enhance the use and enjoyment of such common area, or (iv) is desirable to protect, support or preserve any property which constitutes a part of the Development.

Section 9.09. Dedication of Roads. It is intended that the Roads within the Development are to be owned and maintained by the Association, and are not intended to be dedicated or conveyed to the County of Hawaii. In the event that the owners desire, at some future date, to dedicate the Roads to the County of Hawaii, the owners shall be responsible for making any necessary improvements to the Roads that may be required by the County of Hawaii at the time of such dedication in order to make the roads conform to the then existing standards for publicly owned roads.

Section 9.10. Maintenance of Culverts and Drainageways by the Association. Any culvert constructed within the Development which is at least thirty-six (36) inches in diameter, whether located within a private area or a common area, shall be maintained and kept free and unobstructed and in good repair by the Association, and the owner of the lot in which the culvert is located shall be relieved of any responsibility for the repair and maintenance of the culvert. The Association shall also maintain any drainageway leading to any culvert at least thirty-six (36) inches in diameter in a condition that is free and unobstructed, in order to minimize any interference with the natural flow of storm waters.

Section 9.11. Effect of Provisions of Declaration. Each provision of this Declaration, and any agreement, promise, covenant and undertaking to comply with each provision of this Declaration, and any necessary exception or reservation or grant of title, estate, right or interest to effectuate any provision of this Declaration:

(a) Shall be deemed incorporated in each deed or other instrument by which any right, title or interest in the Development or in any lot is granted, devised or conveyed, whether or not set forth or referred to in such deed or other instrument;

(b) Shall, by virtue of acceptance of any right, title or interest in the Development or in any lot by an owner, be deemed accepted, ratified, adopted and declared as a personal covenant of such owner, and as a personal covenant, shall be binding on such owner and such owner's heirs, personal representatives, successors and assigns and, as a personal covenant of an owner, shall be deemed a personal covenant to, with, and for the benefit of each and every other owner; and

(c) Shall be deemed a real covenant by Declarant for itself, its successors and assigns, and also an equitable servitude, running, in each case, as a burden with and upon the title to the Development and each lot and, as a real covenant and also as an equitable servitude, shall be deemed a covenant and servitude for the benefit of the Development and each lot.

Section 9.12. Protection of Encumbrancer. No violation or breach of, or failure to comply with, any provision of this Declaration and no action to enforce any such provision shall affect, defeat, render invalid or impair the lien of any mortgage or other lien on any lot taken in good faith and for value and recorded prior to the time of recording of an instrument describing the lot and listing the name or names of the owner or owners of fee simple title to the lot and giving notice of such violation, breach or failure to comply; nor shall such violation, breach, failure to comply or action to enforce the holder of any such mortgage, or other lien, or title, or interest acquired by any purchaser upon foreclosure or any such mortgage or other lien (or upon conveyance in lieu of foreclosure) result in any liability, personal or otherwise, of any such holder or purchaser. Upon foreclosure of any such mortgage or other lien (or conveyance in lieu of foreclosure), no such holder who thereby assumes title to a lot shall be required to correct past violations hereof with respect to said lot so long as said lot is neither occupied nor used for any purpose by such holder but is merely held for prompt resale, and provided that all money obligations accruing pursuant to this Declaration subsequent to such foreclosure or such conveyance in lieu of foreclosure shall be paid by such holder. Any such purchaser on foreclosure or other purchaser or holder shall, however, take title subject to this Declaration.

Section 9.13. Construction. The provisions of this Declaration shall be liberally construed to promote and effectuate the fundamental concepts of the Development as set forth in this Declaration, and no provision hereof shall be construed to excuse any person from observing any law or regulation of any governmental body having jurisdiction over the Development.

Section 9.14. Assignment of Powers. Any and all of the rights and powers vested in the Declarant pursuant to this Declaration may be delegated, transferred, assigned, conveyed or released by the Declarant to any person or persons or to the Association. Any such delegation, transfer, assignment, conveyance or release shall be effective upon the recording by the Declarant of a notice of such delegation, transfer, assignment, conveyance or release.

Section 9.15. Limited Liability. Neither Declarant, nor the Association, nor the Design Committee, nor any officer, director, agent or employee of any of the foregoing, shall be personally liable to any Owner or to any other party for any damage, loss or prejudice claimed on account of any act, omission, error or negligence of Declarant, or the Association, or the Design Committee, or any officer, agent or employee of any of the foregoing, provided that the person against whom the claim is made has, upon the basis of such information as may be actually possessed by that person, acted in good faith and without willful or intentional misconduct.

Section 9.16. Successors and Assigns. This Declaration shall be binding upon and shall inure to the benefit of the Declarant and each owner and the heirs, personal representatives, successors and assigns of each.

Section 9.17. Severability. Invalidity or unenforceability of any provision of this Declaration in whole or in part shall not affect the validity or enforceability of any other provision or any valid and enforceable part of a provision of this Declaration.



Section 9.18. Captions. The captions and headings in this Declaration are for convenience only and shall not be considered in construing any provisions of this Declaration.

Section 9.19. No Waiver. Failure to enforce any provisions of this Declaration shall not operate as a waiver of any such provision or of any other provision of this Declaration.

Section 9.20. Further Assurances. Each owner hereby agrees to do such further acts and execute and deliver such further instruments as may reasonably be required to effectuate the intent of this Declaration.

Section 9.21. Notices. Any notice, information or material required to be given hereunder shall be deemed furnished or delivered to a party at the time a copy thereof is deposited in the mail or at a telegraph office, postage or charges prepaid, addressed to the party, and in any event, when such party actually received such notice, information or material.

Section 9.22. Word Usage. Any use of the masculine, feminine or neuter gender herein shall be deemed to include all such genders and any use of the singular or plural shall be deemed to include the other, whenever the context so requires.

Section 9.23. Condemnation of Common Area. If at any time, or from time to time, all or any portion of the common area or any interest therein be taken by the right of eminent domain or by purchase in lieu of eminent domain, the entire award and compensation shall be paid to the Association. No owner shall be entitled to any portion of such award and no owner shall be entitled to participate as a party or otherwise in any proceedings relating to such condemnation, such right of participation being herein reserved exclusively to the Association, which shall, in its name alone, represent the interest of all owners.

Section 9.24. Obligations of Owners. Avoidance. Termination.

(a) No owner, through its non-use of any common area, or abandonment of its lot, may avoid the burdens or obligations imposed on it by this Declaration by virtue of being an owner.

(b) Upon the conveyance, sale, assignment or other transfer of a lot to a new owner, the transferring owner shall not be liable for any assessments levied with respect to such lot and payable after the date of such transfer, and no person, after the termination of the owner's status as an owner and prior to the person again becoming an owner, shall incur any of the obligations or enjoy any of the benefits of an owner under this Declaration following the date of such termination.