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BUREAU OF CONVEYANCES
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/s/ CARL T. WATANABE
REGISTRAR OF CONVEYANCES

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1100 Alakea Street, Suite 2100
Honolulu, Hawaii 96813

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LANIKEHA

DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS

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LANIKEHA

DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS

THIS DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS (this "Declaration") is made as of October 4, 2005, by SOUTH COURSE DEVELOPMENT, LLC, a Delaware limited liability company ("Developer").

Developer is the owner of that certain real property located in the County of Maui, State of Hawaii, described in Exhibit "A" attached hereto. Developer desires to develop such real property (referred to as the Property and defined in Section 1.77) as a high quality residential subdivision, and intends by this Declaration to impose upon the Property certain covenants, conditions, restrictions and easements under a general plan of development in order to provide a flexible and reasonable procedure for the overall development of the Property. Developer further intends by this Declaration to provide and establish a method for the administration, maintenance, preservation, use, regulation and enjoyment of the Property and the Project (as defined in Section 1.74).

Developer hereby declares that all of the Property, and any properties (whether developed in the future or currently developed) annexed hereto in accordance with the provisions of this Declaration, shall be held, sold, conveyed, encumbered, occupied, used and improved subject to the provisions of this Declaration, all provisions of which are for the purpose of protecting the value and desirability of, and shall run with, the real properties subjected to this Declaration. This Declaration shall be binding upon, and shall inure to the benefit of, Developer and all other parties having any right, title, or interest in the Property and such properties or any part thereof, and their heirs, personal and legal representatives, successors and assigns.

Article 1 **Definitions**

Defined terms appear throughout this Declaration with the initial letter of each such term capitalized. Unless the context clearly requires otherwise, the terms set forth in this Article 1 and used in this Declaration are defined and/or described as set forth below; provided, however, that this Article 1 may not include all the defined terms used in, or incorporated into, this Declaration.

Section 1.1 **Incorporation of Definitions.** Each of the defined terms contained in Article 1 and elsewhere in that certain Amended and Restated Declaration of Covenants, Conditions and Restrictions for Kaanapali Golf Estates dated June 18, 1992 and recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 92-097283, as amended and/or supplemented and as may be further amended and/or supplemented from time to time (the "Master Declaration"), unless separately defined in this Article 1 or elsewhere in this Declaration, is incorporated into this Declaration by this reference. In the event any of the terms defined in the Master Declaration are otherwise defined in this Declaration, the definition contained herein shall control in the interpretation of this Declaration (but shall not affect the Master Declaration) notwithstanding any

provision to the contrary, including Section 4.1, contained in this Declaration. Any defined term preceded by the term "Master" shall refer to and describe the term defined as set out in the Master Declaration, independent of the term as defined in this Declaration.

Section 1.2 **"Annexation"** means the process by which all or portions of the Annexation Property is annexed to the Property, thereby becoming a part thereof and subject to this Declaration, in accordance with Article 18.

Section 1.3 **"Annexation Property"** means the real property, if any, described in Exhibit "B" attached hereto, which may be annexed to the Property, thereby becoming a part thereof and subject to this Declaration, in accordance with Article 18.

Section 1.4 **"Articles of Incorporation"** or **"Articles"** means the Articles of Incorporation of the Association, as filed or to be filed with the Director of the Department of Commerce and Consumer Affairs of the State of Hawaii, as such Articles may be amended from time to time.

Section 1.5 **"Assessment Lien"** means the lien created and imposed by Section 7.1.

Section 1.6 **"Assessments"** include the following:

1.6.1. **"Benefited Assessment"** means the amount that is levied and assessed against Lots receiving benefits, items or services provided to less than all Lots within the Property, as provided in Section 7.5.

1.6.2. **"Capital Improvement Assessment"** is defined in Section 7.6.

1.6.3. **"General Assessment"** means the amount that is levied and assessed each year against each Lot to fund the actual and estimated costs and expenses of the Association applicable to all Lots within the Property, as provided in Section 7.3, but subject to such limitations as are provided herein.

1.6.4. **"Master Association Assessments"** means those assessments that are owed and payable to the Master Association pursuant to the Master Declaration, as provided in Section 7.17.

1.6.5. **"Reconstruction Assessment"** is defined in Section 11.1.

1.6.6. **"Special Assessment"** means the amount that is levied and assessed against a Lot for the purpose of enforcing the provisions of this Declaration, any Supplemental Declaration and/or the Design Documents against an Owner or such Owner's Lot, or for such other purposes as may be provided in Section 7.4.

Section 1.7 "**Association**" means the Lanikeha Owners Association, a Hawaii nonprofit corporation, its successors and assigns, formed or to be formed for the purposes described in Article 5 of this Declaration and in the Articles and Bylaws.

Section 1.8 "**Association Property**" means such part or parts of the Property and such Improvements thereon, and other real or personal property, in which the Association at any time and from time to time owns an interest. Such interest may include, without limitation, estates in fee, leasehold or easements.

Section 1.9 "**Association Rules**" or "**Rules**" are defined in Section 5.7.

Section 1.10 "**Benefited Expenses**" are defined in Section 7.5.

Section 1.11 "**Board of Directors**" or "**Board**" means the Board of Directors of the Association, being the body responsible for the administration of the Association.

Section 1.12 "**Building**" shall mean a building or structure constructed on a Lot or on any portion of the Common Areas.

Section 1.13 "**Bureau**" means the Bureau of Conveyances of the State of Hawaii.

Section 1.14 "**Bylaws**" means the Bylaws of the Association adopted in accordance with this Declaration.

Section 1.15 "**Common Areas**" are defined in Section 8.1.

Section 1.16 "**Common Expenses**" are defined in Section 8.3.

Section 1.17 "**Community-Wide Standard**" means the standard of conduct, construction, maintenance, repair or other activity generally prevailing throughout the Project, and consistent with a high quality residential community. Such standard may be more specifically determined and set forth by the Board, in accordance with this Declaration.

Section 1.18 "**County**" means the County of Maui.

Section 1.19 "**Declaration**" means this instrument, as it may be amended and/or supplemented from time to time in accordance with the terms hereof.

Section 1.20 "**Design Documents**" means the Master Declaration, this Declaration, the Master Design Guidelines and the Design Requirements.

Section 1.21 "**Design Requirements**" means the restrictions and requirements governing improvements to the Lots, as set forth in Article 14 of this Declaration, and such

supplementary restrictions and requirements as may be adopted by Developer or the Board pursuant to Section 14.8.

Section 1.22 **"Developer"** means South Course Development, LLC, a Delaware limited liability company, and its successors or assigns. A Person shall be deemed a successor and/or assign of Developer for purposes of this Declaration if such Person (a) is a purchaser at a foreclosure sale or a grantee under a deed-in-lieu-of-foreclosure (including a Mortgagee), but only in the event and at such time as such purchaser or grantee (or Mortgagee) succeeds to Developer's interest in the Property, or (b) is specifically designated in a duly Recorded written instrument as a successor or assign of Developer under this Declaration or under any Supplemental Declaration, and such Person shall be deemed a successor or assign of Developer only as to the particular rights or interests of Developer under this Declaration that are specifically designated in the Recorded written instrument. Any such instrument may be limited to specific rights of Developer hereunder and be subject to such conditions and limitations as Developer may impose in its sole and absolute discretion.

Section 1.23 **"Developer-Related Entities"** refers to, collectively and severally, South Course Development, LLC, South Course Associates, LLC, Hillwood Kaanapali, L.P., and their respective parents, partners, managers, members, stockholders, subsidiaries and affiliates, and any officer, director, member, manager, representative, consultant, employee and/or agent thereof.

Section 1.24 **"Drainage Facilities"** means all drainage retention and detention basins, channels, drain lines, walls, inlets, outlets, drywells and related drainage improvements, systems, facilities, equipment and swales serving the Project's surface and storm water discharge needs, including, without limitation, the Makai Retention Basin, the Mauka Drainage Improvements, the drainage improvements within the Drainage Easements that serve the Project and any other drainage improvements that serve the Project, even if not located within the Property.

Section 1.25 **"Drainage Facilities Monitoring and Maintenance Requirement"** means the periodic monitoring and maintenance of the Drainage Facilities, as described in Section 8.11 and as it may be modified from time to time by the Board in accordance with Section 8.11.3.

Section 1.26 **"Dwelling Unit"** means any Building or portion of a Building situated upon a Lot designed and intended for use and occupancy for Single-Family residential purposes.

Section 1.27 **"Easements"** refers to portions of real property within, adjacent to and in the vicinity of the Property designated or otherwise identified as easement areas, including, without limitation, those easements identified on the File Plan, the Subdivision Map, or any Plot Plan. Certain of the Easements burdening and benefiting the Property (or portions thereof) are set forth in the schedule attached hereto as Exhibit "C", as it may be amended from time to time in accordance with Section 18.3 or Section 21.4. Types of easements burdening and benefiting the Property (or portions thereof) include, without limitation, the following (as shown on Exhibit "C"):

1.27.1 **"Access Easements"**, being easements for vehicular and pedestrian ingress and egress purposes and related purposes, and which may include, without limitation, the following:

(a) **"Roadway Easements"**, being easements over all or portions of the Roadway Lots, as, for example, provided in Section 17.2.

(b) **"Future Construction Easements"**, being easements over Lots owned by Developer and over the Common Areas for access, grade modification and other purposes relating to construction of Improvements on adjacent land in connection with development of the Annexation Property and/or other lands in the vicinity of the Project, as provided in Section 17.12.

1.27.2 **"Utility Easements"**, being easements for various utilities and services purposes, and related purposes, and which may include, without limitation, the following:

(a) **"Drainage Easements"**, are the easements for surface and storm water runoff purposes and drainage facilities related thereto, including, without limitation, those identified in Exhibit "E" attached hereto.

(b) **"Electrical Easements"**, are easements for electrical purposes, as, for example, provided in Section 17.2, including, without limitation, those identified in Exhibit "C" attached hereto.

(c) **"Sewerline Easements"**, are the easements for sewerline purposes and sewerline facilities related thereto, including, without limitation, those identified in Exhibit "F" attached hereto.

(d) **"Water System Easement"**, being an easement for facilities associated with the Project's Water System, as provided in Section 17.11 or otherwise by Recorded grant of easement to Hawaii Water Service Company or successor or other entity providing potable water service to and within the Project.

Section 1.28 **"Environmental Claim"** means (a) any legal or administrative action or proceeding instituted or threatened in respect of one or more Lots or the Common Areas alleging a violation or a threatened violation of an Environmental Law, or (b) any and all claims for loss, damages, contribution, cost recovery, compensation, injunctive relief, penalties, fines or other relief resulting from an Environmental Event within or under one or more Lots or the Common Areas.

Section 1.29 **"Environmental Event"** refers to any accidental, reckless or intentional spilling, leaking, pumping, pouring, emitting, discharging, injecting, escaping, leaching, migrating, dumping or disposing into the air, land, surface water or ground water of Hazardous Materials, including the abandonment or discarding of receptacles containing any Hazardous Material or the presence on a Lot or the Common Areas of any Hazardous Material in violation of Environmental Laws.

Section 1.30 **"Environmental Laws"** means any and all present and future federal, state or local environmental, water pollution, hazardous substance, toxic material or waste laws, regulations, rules, ordinances or enforceable standards applicable to the Property or the Project, including, without limitation, the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq., the Resource Conservation and

Recovery Act, as amended, 42 U.S.C. Section 6901, et seq., the Hazardous Materials Transportation Act, as amended, 49 U.S.C. Section 1801, et seq., the Clean Water Act, as amended, 33 U.S.C. Section 1251, et seq., the Toxic Substances Control Act, as amended, 15 U.S.C. Section 2601 et seq., the Safe Drinking Water Act, as amended, 42 U.S.C. Sections 300f through 300j, and the Hawaii Environmental Response Law, as amended, Hawaii Revised Statutes, Chapter 128D.

Section 1.31 "**Excavation**" means any grading of the surface of the land or any disturbance of the surface of the land, except temporary disturbances for planting approved vegetation, which results in the removal of earth or rock or other substance to a depth of twelve inches or greater below the surface of the land.

Section 1.32 "**File Plan**" refers to the Recorded file plan for the Project, being File Plan No. 2398 and the file plan or file plans covering the lots created from the subdivision of Lot 68 from File Plan No. 2398, as each may be amended by Developer in accordance with this Declaration.

Section 1.33 "**Final Transition Date**" means that date set forth in Section 5.4.1 on which Developer's control of the Association terminates, as provided in this Declaration.

Section 1.34 "**First Mortgage**" means a Mortgage held by an institutional lender, which is the first and most senior of all Mortgages upon the same property.

Section 1.35 "**First Mortgagee**" means the holder of a First Mortgage the name, address and duplicate copy of the First Mortgage of which have been delivered to the Association.

Section 1.36 "**Golf Course**" means the Royal Kaanapali Golf Course (South Course), which borders portions of the Project. "**Golf Courses**" means both of the Royal Kaanapali Golf Courses (South Course and North Course).

Section 1.37 "**Grants of Easements**"

1.37.1. "**Grants of Drainage Easements**" means those certain documents identified in Exhibit "E" attached hereto granting drainage easement rights in favor of the Property and any amended or other grant of drainage easement rights in favor of the Property.

1.37.2. "**Grants of Sewerline Easements**" means those certain documents identified in Exhibit "F" attached hereto granting sewerline easement rights in favor of the Property and any amended or other grant of sewerline easement rights in favor of the Property.

Section 1.38 "**Guest**" means a person who enters upon the Project at the invitation or request (whether direct or indirect, express or implied) of an Owner or Occupant, including, without limitation, employees, servants, invitees, licensees, contractors, agents and family members (including the Adult children of Owners) who are not Occupants. Owners and Occupants shall have full responsibility for their Guests while the Guest is within the Project.

Section 1.39 "**Hazardous Material**" refers to any substance (a) the presence of which requires investigation or remediation under any Environmental Law applicable to any portion of the Property, or (b) which is or becomes defined as a hazardous or toxic substance, pollutant or contaminant under any Environmental Law, or (c) which contains gasoline, diesel fuel or other petroleum hydrocarbons, polychlorinated biphenyls (PCBs), asbestos or urea formaldehyde foam insulation, or (d) the presence of which on any portion of the Property causes or threatens to cause a nuisance upon the Property or to adjacent properties or poses or threatens to pose a hazard to the health or safety of persons on or about the Property.

Section 1.40 "**Improvement**" means any building, structure, parking area, loading area, fence, wall, hedge, shrub, tree, landscaping feature, planting, pole, driveway, pond, lake, sign, changes in any exterior color or shape, Excavation and all other site work, including, without limitation, grading, road construction, utility improvements, removal of trees or plantings and so forth, and any new exterior construction or exterior improvement which may not be included in the foregoing. "Improvement" does not include turf, shrub, or tree repair or replacement of a magnitude which does not change exterior colors or exterior improvements. "Improvement" does include both original improvements and all alterations.

Section 1.41 "**Kaanapali Golf Estates**" means that planned development created by, described in and subject to the Master Declaration, of which the Project described in this Declaration is part.

Section 1.42 "**KDC**" refers to Kaanapali Development Corp., a Hawaii corporation.

Section 1.43 "**KDC-Related Entities**" refers, collectively and severally, to KDC and its parents, partners, managers, members, stockholders, consultants, subsidiaries and affiliates, and any officer, director, member, manager, representative, employee and/or agent thereof.

Section 1.44 "**Lot**" means a parcel of land within the Property, whether developed or undeveloped, which is intended for residential purposes and the construction of a Dwelling Unit and accessory Improvements, specifically being the residential and accessory lots identified as such on the schedule attached hereto as Exhibit "D", as it may be amended from time to time in accordance with Sections 18.3 or 21.4.

Section 1.45 "**Lot Purchaser's Handbook**" means the Kaanapali Golf Estates Community Association, Inc. Lot Purchaser's Handbook, prepared January 1992, revised April 1993 and October 2003, as it may be further revised, amended, deleted and added to from time to time.

Section 1.46 "**Majority**" means those votes (which includes authorizations by ballots and written consents), by Owners, Members, or other group (including without limitation the Board of Directors), as the context may indicate, totaling more than fifty percent (50%) of the total eligible number.

Section 1.47 "**Makai Common Area Lots**" means the Common Area lots comprised of the Makai Common Area/Utility Lot and the lot containing the Makai Retention Basin.

Section 1.48 "**Makai Common Area/Utility Lot**" means the Common Area lot located along much of the western (makai) boundary of the Property and identified as such on the schedule attached hereto as Exhibit "D", as it may be amended from time to time in accordance with Sections 18.3 or 21.4.

Section 1.49 "**Makai Retention Basin**" means the real property and Improvements comprising the drainage retention basin located within or near the southwestern corner of the Property.

Section 1.50 "**Master Articles**" means the Articles of Incorporation of Kaanapali Mauka Community Association, Inc. (the name of which was changed to Kaanapali Golf Estates Community Association, Inc.), as filed with the Director of the Department of Commerce and Consumer Affairs of the State of Hawaii.

Section 1.51 "**Master Association**" means the Kaanapali Golf Estates Community Association, Inc., a Hawaii nonprofit, nonstock corporation, and its successors or assigns, as described in the Master Declaration.

Section 1.52 "**Master Association-Related Entities**" refers to, collectively and severally, the Master Association, the NCC, the KDC-Related Entities and their respective members, officers, directors, consultants, representatives, employees or agents.

Section 1.53 "**Master Bylaws**" means the Amended and Restated By-Laws of Kaanapali Golf Estates Community Association, Inc., attached to the Master Declaration as Exhibit "C", as they may be amended from time to time.

Section 1.54 "**Master Declarant**" means Kaanapali Development Corp., a Hawaii corporation, or other successor "Declarant" under the Master Declaration.

Section 1.55 "**Master Declaration**" means that certain Master Declaration described in Section 1.1 of this Declaration.

Section 1.56 "**Master Design Guidelines**" means the Kaanapali Golf Estates Parcel Developer's Guidelines, the Lot Purchaser's Handbook and any other rules, regulations, restrictions, architectural and construction standards and design guidelines applicable to construction activities within Kaanapali Golf Estates, including the Property described in this Declaration, pursuant to Article XI, Section 3 of the Master Declaration, as such guidelines may be amended from time to time.

Section 1.57 "**Master Project Documents**" means the Master Declaration, the Master Articles, the Master Bylaws and the Master Design Guidelines, as each may be amended and/or supplemented from time to time.

Section 1.58 "**Mauka Drainage Improvements**" are defined in Article 29 of this Declaration.

Section 1.59 "**Member**" means every Person who is entitled to membership in the Association, as provided in Article 6.

Section 1.60 "**Membership**" means a membership in the Association.

Section 1.61 "**Modifications Committee**" or "**MC**" means the Kaanapali Golf Estates Modifications Committee, established pursuant to Article XI, Section 2 of the Master Declaration.

Section 1.62 "**Mortgage**" means any Recorded or otherwise perfected security instrument in real property, which is not a fraudulent conveyance under Hawaii law, and which is given in good faith and for valuable consideration as security for the performance of an obligation, but shall not include any instrument creating or evidencing solely a security interest arising under the Hawaii Uniform Commercial Code (Hawaii Revised Statutes Chapter 490, as amended).

Section 1.63 "**Mortgagee**" means the holder of a note or other interest secured by a Mortgage.

Section 1.64 "**New Construction Committee**" or "**NCC**" means the Kaanapali Golf Estates New Construction Committee, established pursuant to Article XI, Section 2 of the Master Declaration.

Section 1.65 "**Occupant**" means any Person, other than an Owner, in rightful and actual possession of a Dwelling Unit, whether as a guest, tenant, lessee or otherwise.

Section 1.66 "**Owner**" or "**Lot Owner**" means the Record owner, whether one or more Persons, including Developer, of fee simple title, whether or not subject to any Mortgage, of any Lot, but excluding those having such interest merely as security for the performance of an obligation. If a Lot is sold under a Recorded agreement of sale, or is leased for a term of thirty or more years under a Recorded lease, the purchaser or lessee, respectively (rather than the fee owner) shall be considered the Owner.

Section 1.67 "**Person**" means a natural person, a corporation, a partnership, a limited liability entity, a trustee or other entity capable of holding title to real property, and such holder's respective heirs, personal representatives, successors and assigns.

Section 1.68 "**Pinnacle**" means the residential subdivision project located on Lot 10-M-1, as shown on the map titled Views at Kaanapali - Subdivision of Lot 10-M-1 of the Royal Kaanapali Golf Course Subdivision into Lots 1 through 38, inclusive (LUCA File No. 4.814).

Section 1.69 "**Pinnacle Retention Basin**" means the real property and Improvements comprising the drainage retention basin serving the Pinnacle and located within the Pinnacle Retention Basin Lot.

Section 1.70 "**Pinnacle Retention Basin Lot**" refers to the lot, upon which is located the Pinnacle Retention Basin, located near the northeastern entrance to the Project and identified as such on the schedule attached hereto as Exhibit "D", as it may be amended from time to time in accordance with Sections 18.3 or 21.4.

Section 1.71 "**Plot Plan(s)**" means and refers to the individual lot plot plans established by Developer for each Lot pursuant to Section 14.3.

Section 1.72 "**President**" means the duly elected or appointed president of the Association.

Section 1.73 "**Private Roads**" mean any subdivided lots intended for roadway use as shown on the File Plan or the Subdivision Map, any street, roadway, drive, sidewalk, walkway, path or other right-of-way included within or part of the Common Areas, or otherwise within the Project and intended for common use by the Owners, which has not expressly been dedicated to the County for public use (and include, without limitation, the streets and rights-of-way within the Common Areas designated as private access ways and public utility easements).

Section 1.74 "**Project**" means the planned development created on the Property by and subject to this Declaration, as well as all of the Improvements now or hereafter located thereon as described in this Declaration and any Supplemental Declaration.

Section 1.75 "**Project Development Plans**" means the development plans submitted by Developer to the NCC pursuant to the Design Review Procedures of the Master Design Guidelines, as such plans may be revised from time to time.

Section 1.76 "**Project Documents**" means this Declaration, the Articles, the Bylaws and the Association Rules, and any Supplemental Declaration, as each may be amended and/or supplemented from time to time in accordance with the provisions thereof.

Section 1.77 "**Property**" means the real property described in Exhibit "A" attached hereto (subject to withdrawal of portions thereof in accordance with Section 18.4), and any additional real property made subject to this Declaration by annexation pursuant to Article 18, but only after completion of such annexation, as such land may hereafter be further subdivided and/or consolidated in accordance with this Declaration, and all easements, rights, appurtenances and privileges belonging or in any way pertaining thereto.

Section 1.78 "**Railroad Lease**" means that certain Lease dated December 28, 1998, but effective as of May 23, 1998, between Pioneer Mill Company, Limited, as "Lessor", and Railroads of Hawaii, Inc., as "Lessee", which is described in Short Form Lease dated December 28, 1998, recorded in the Bureau as Document No. 99-064187, as may be amended from time to time.

Section 1.79 **"Railroad Tracks"** means those railroad tracks located within the Makai Common Area/Utility Lot and/or in the vicinity of the Makai Common Area/Utility Lot, which railroad tracks are being used pursuant to the Railroad Lease.

Section 1.80 **"Record", "Recorded", "Recording", "Recordation"** or a like reference means an instrument of record in, or the act of recording or filing or having recorded or filed an instrument with the Bureau.

Section 1.81 **"Recreational Park Facilities"** means the recreational park facilities, located on the Property from time to time and included within the Common Areas, which shall include the following: a clubhouse, a swimming pool and such other areas and facilities within the Common Areas used or intended for or in connection with any recreational or social purpose or activity, together with the Improvements, facilities and appurtenances thereon or relating thereto.

Section 1.82 **"Recreational Park Facilities Lot"** means the Common Area lot located near the northeastern entrance to the Project and identified as such on the schedule attached hereto as Exhibit "D", as it may be amended from time to time in accordance with Sections 18.3 or 21.4.

Section 1.83 **"Roadway Lots"** means the Common Area lots intended for roadway, underground utility and related purposes, and specifically being the lots identified as such on the schedule attached hereto as Exhibit "D", as it may be amended from time to time in accordance with Sections 18.3 or 21.4.

Section 1.84 **"Rock Mound"** refers to the Common Area lot located within the northeastern corner of the Property that contains a large geologic feature, is intended for open space and related purposes and is identified as open space on the schedule attached hereto as Exhibit "D", as it may be amended from time to time in accordance with Sections 18.3 or 21.4.

Section 1.85 **"Rock Mound Monitoring Requirement"** means the periodic monitoring and maintenance of the Rock Mound and improvements related thereto to address matters related to their continued physical integrity (including, without limitation, the matters referenced in Section 28.1), as such requirement may be modified from time to time in accordance with Section 28.4.

Section 1.86 **"Sewerline Facilities"** means all of the underground sewerline facilities serving the purpose of discharging sewage and wastewater from the Project to the nearby County wastewater station, including, without limitation, the sewerline facilities within the Sewerline Easements that serve the Project and any other sewerline facilities that serve the Project, even if not located within the Property.

Section 1.87 **"Sewerline Facilities Monitoring and Maintenance Requirement"** means the periodic monitoring and maintenance of the Sewerline Facilities, as described in Section 8.12 and as it may be modified from time to time by the Board in accordance with Section 8.12.3.

Section 1.88 "**Single-Family**" means (a) a group of one or more persons each related to the other by blood, marriage or legal adoption, or (b) a group of no more than five unrelated individuals who maintain a common household in a Dwelling Unit, whether on a transient or permanent basis.

Section 1.89 "**Special Use Fees**" means special fees that an Owner, Occupant or any other Person is or may be obligated by this Declaration or the Association Rules to pay to the Association for use of or access to an amenity, facility or other Improvement within the Common Areas, including, without limitation, the Recreational Park Facilities, or for the granting of a right or privilege with respect thereto, over, above, and in addition to any Assessment hereunder.

Section 1.90 "**Subdivision Map**" means the subdivision map prepared by Warren S. Unemori Engineering, Inc., showing Subdivision of Lot 10-M-4 of Royal Kaanapali Golf Course Subdivision into Lots 1 to 77, inclusive (Subdivision File No. 4.843), approved by the County on June 15, 2005, as may be amended and/or supplemented from time to time, and the subdivision map prepared by Warren S. Unemori Engineering, Inc., showing Subdivision of Lot 68 of Lanikeha – Phase I into Lots 1 to 69, inclusive (Subdivision File No. 4.885), approved by the County on September 2, 2005, as may be amended and/or supplemented from time to time.

Section 1.91 "**Super-Majority**" means those votes (which includes authorization by ballots and written consents), by Owners, Members or other group (including without limitation the Board of Directors), as the context may indicate, totaling seventy-five percent (75%) or more of the total eligible number. In the event the Board of Directors consists of three directors, a "Super-Majority" vote of the Board of Directors means a vote of more than fifty percent (50%) of the directors comprising the Board.

Section 1.92 "**Supplemental Declaration**" means a declaration containing covenants, conditions, restrictions, assessments, charges, servitudes, liens, reservations and/or easements, or similar instrument supplementing this Declaration as it relates to all or any portion of the Property or the Annexation Property, which is Recorded in accordance with this Declaration.

Article 2

Statement of Purpose and Imposition of Covenants

Developer intends to develop the Property, or portions thereof, by subdivision and otherwise into various Lots and Common Areas, and intends to develop, sell and/or otherwise convey the Lots and Common Areas. Developer may, with respect to the whole of the Property, Record one or more Supplemental Declarations which will incorporate this Declaration and may establish additional covenants, conditions, restrictions and easements affecting the Property and may also have the effect of merging or annexing the Property with other properties or projects owned or created by Developer, including the Annexation Property. Developer hereby declares that all of the real property comprising or constituting the Property is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part, subject to this Declaration and any Recorded Supplemental Declaration applicable thereto, as

amended or modified from time to time in accordance with the terms hereof and thereof; provided, however, that property, if any, that is dedicated to the public or a governmental entity for public purposes shall not be subject to this Declaration while owned by the public or the governmental entity, although restrictions imposed in this Declaration upon the Owners and Occupants concerning the use and maintenance of such public areas shall at all times apply to the Owners and Occupants.

This Declaration and any Supplemental Declaration are declared and agreed to be in furtherance of a general plan for the subdivision, improvement, sale, use and enjoyment of the Property and are established for the purpose of enhancing and perfecting the usefulness, value, desirability and attractiveness of the Property, the Project and every part thereof. All provisions of this Declaration shall run with the Property and every part thereof for all purposes and, as and to the extent provided in this Declaration, shall be binding upon and inure to the benefit of Developer and all other Persons having any right, title or interest in the Property or any part thereof, and their heirs, personal and legal representatives, successors and assigns. The Subdivision Map, the File Plan and any and all general plan or subdivision maps, development plans, plot plans or depictions of proposed improvements to areas surrounding the Property and the Project are intended to show only the layout, location, and dimensions of the Lots and are not intended to be and do not constitute any other representation or warranty by Developer.

Article 3 **Property Rights**

Section 3.1 Owners' Right of Enjoyment.

3.1.1. Every Owner shall have a nonexclusive easement for use and enjoyment in and to the Association Property, the Private Roads and the Recreational Facilities, in accordance with their intended purposes, subject to:

(a) All of the easements, covenants, conditions, restrictions, limitations and other provisions contained in the Project Documents, or in other applicable Recorded documents;

(b) The right of the Board (including Developer while it controls the Board), subject to applicable laws, to establish rules and regulations pertaining to or restricting the use of the Association Property, the Private Roads and/or the Recreational Park Facilities, or parts thereof, by Owners, Occupants or other Persons, including rules limiting the number of individuals per Lot or per Owner entitled to use rights and benefits relating to all or specified portions of the Association Property, including the Recreational Park Facilities, limiting the use of in whole or part and setting terms and conditions of the use of Association Property, including the Recreational Park Facilities, by Persons who are not Owners;

(c) The right of the Board (including Developer while it controls the Board) to limit the number of Guests of Owners and Occupants and to limit the use of the Association Property, the Private Roads and the Recreational Park Facilities, by Persons who are not Owners;

(d) The right of the Board (including Developer while it controls the Board) to charge fees for use of, or admission to, any amenity or facility within the Association Property, including the Recreational Park Facilities, by Owners or non-owners and other Special Use Fees;

(e) The right of the Board (including Developer while it controls the Board) to permit or prohibit non-Member use of the Association Property, the Private Roads and/or the Recreational Park Facilities, upon such terms and conditions as may be established by the Board;

(f) The right of the Board (including Developer while it controls the Board) to suspend the right of an Owner, Occupant or any Person (including without limitation a member of the family of an Owner) to use the Recreational Park Facilities or any designated portion thereof during any time in which any Assessment assessed against such Owner or such Owner's Lot remains unpaid and delinquent;

(g) The right of the Association, acting through the Board, to dedicate or transfer all or any part of the Association Property to any public or private agency, authority, or utility for such purposes and subject to such conditions or agreements as may be imposed upon or agreed to by the Board;

(h) The right of Developer to dedicate or transfer all or any part of the Property owned by Developer to the Association and/or any public or private agency, authority or utility for such purposes and subject to such conditions or agreements as Developer, in its discretion, may impose or agree to;

(i) The right of Developer to dedicate, transfer or assign any property, or interests in property, owned or held by Developer and relating to the Project to the Association, the Master Association and/or any public or private agency, authority or utility for such purposes and subject to such conditions or agreements as Developer, in its discretion, may impose or agree to, which property shall include, without limitation, the Rock Mound and the Makai Common Area Lots; and

(j) The restrictions or limitations, if any, contained in any deed or amendment to this Declaration or a Supplemental Declaration conveying to the Association or subjecting to this Declaration the Association Property or any portion thereof.

3.1.2. Nothing in this Declaration shall be deemed or interpreted to grant to the Association, or to any Owner or Member, any ownership interest in property, including Association Property, the Private Roads, the Recreational Park Facilities or other Common Areas, unless and to the extent specifically conveyed to the Association, or to an Owner or Member, in this Declaration or by separate deed or agreement.

Section 3.2 **Delegation of Use.** No Owner may delegate that Owner's right of use and enjoyment of the Association Property, the Private Roads or the Recreational Park Facilities to any Person, except to the members of that Owner's immediate family, to Occupants of that Owner's Lot, or to that Owner's Guests (if accompanied by the Owner), in each case as may be permitted by, and

subject to the terms and conditions of, this Declaration, the Bylaws and/or the Association Rules and subject to regulation by the Board and in accordance with such procedures as the Board may adopt.

Section 3.3 **Waiver of Use.** Except with respect to Developer, no Owner shall be exempt from personal liability for Assessments, nor shall any Lot owned by such Owner be released from the liens, charges and other provisions of the Project Documents or the Master Project Documents by voluntary waiver, suspension or restriction of such Owner's right to the use and enjoyment of the Association Property, the Private Roads or the Recreational Park Facilities, or the abandonment of such Owner's Lot.

Section 3.4 **Indemnification for Use of Association Property.** To the fullest extent permitted by law, the Association, and each Owner, Member and Occupant, at its or their sole expense, shall hold Developer harmless from and indemnify and defend Developer against any loss, liability, claim or expense, including attorneys' fees, resulting from or relating to property damage or personal injury arising out of or in connection with the use and/or enjoyment in any manner by the Association or such Owner, Member or Occupant, and their respective Guests, of any portion of the Association Property and/or Common Areas, including, without limitation, the Association Property, the Private Roads, the Recreational Park Facilities, the Makai Road Easements and the Rock Mound.

Section 3.5 **Golf Courses.** The Golf Courses and their property and related facilities are privately owned, are not owned or operated by the Association or the Master Association, and are not within the Common Areas hereunder. No provision of this Declaration gives, or shall be deemed to give, any Owner, Occupant or Member any ownership interest in, or the right to enter upon or use the Golf Courses, or any membership rights in the Golf Courses, by virtue of ownership or occupancy of a Lot or Membership in the Association or the Master Association.

Article 4

Master Declaration and Master Association

Section 4.1 **Master Declaration.** The Project is within and a part of the Kaanapali Golf Estates, and is subject to the Master Declaration and all of its provisions, as the same may be amended or supplemented from time to time. This Declaration supplements the Master Declaration, as to the Property covered hereby. Except as permitted under the Master Declaration, in the event of a direct conflict between the provisions of this Declaration and the Master Declaration, the provisions of the Master Declaration shall control, unless the provisions of this Declaration are more restrictive than the Master Declaration.

Section 4.2 **Membership in Master Association.** Every Lot Owner shall be a member of the Master Association as provided in and subject to the Master Declaration.

Section 4.3 **Voting Rights.** The voting rights of the members of the Master Association shall be as set forth in the Master Articles and the Master Bylaws.

Section 4.4 **Compliance.** The Association constitutes a "Neighborhood Association" under the Master Declaration. The Association and Members thereof shall observe and comply with all applicable provisions of the Master Declaration.

Article 5 **Owners Association**

Section 5.1 **Purpose of Association.** The Association has been, or will be, incorporated as a non-profit corporation to serve as the governing body for all the Owners for the acquisition, protection, improvement, alteration, maintenance, repair, replacement, management, administration and operation of the Association Property and the Common Areas, the assessment and collection of expenses, payment of losses, disposition of casualty insurance proceeds, and other matters as provided in the Project Documents. The Association shall not be deemed to be conducting a business of any kind, and all funds received by the Association shall be held and applied by it for the benefit of the Owners in accordance with the Project Documents.

Section 5.2 **Articles and Bylaws.** In addition to the rights and powers of the Association set forth in this Declaration, the Association and its directors, officers, employees, agents and Members shall have such rights, powers and duties as are set forth in the Articles and Bylaws that are not inconsistent with law, the Master Declaration or this Declaration. Such rights, powers and duties may encompass any and all things which a natural person could do or which now or hereafter may be authorized by law, that are not inconsistent with the provisions of the Master Declaration or this Declaration and are necessary, desirable or convenient in furtherance of the purposes set forth in this Declaration. After incorporation of the Association, a copy of the Articles and Bylaws shall be available for inspection by Owners at the office of the Association during reasonable business hours.

Section 5.3 **Board of Directors.** The Board of Directors of the Association shall control, manage and administer the affairs of the Association in accordance with this Declaration, the Articles and the Bylaws. The number of directors, their terms and their qualifications, powers, rights, privileges and duties shall be as provided by law and the Bylaws.

Section 5.4 **Developer's Control of Association.**

5.4.1 Notwithstanding anything in the Project Documents to the contrary, until the Final Transition Date, Developer shall maintain control over the Association, including, without limitation, the right to: adopt and/or amend the Articles (through control of the Board or otherwise); adopt and/or amend the Bylaws (through control of the Board or otherwise); adopt and/or amend the Association Rules (through control of the Board or otherwise); appoint all or a Majority of the members of the Board (as provided in the Bylaws); and appoint the President. Except as may be limited by applicable law, such rights can be exercised by Developer on its own accord or through its control of the Board of Directors. Until the Final Transition Date, only Developer will be entitled to cast any vote with respect to the appointment of such directors as specified in the Bylaws or removal of such directors. The Final Transition Date shall be the first to occur of the following: (a) when one hundred percent (100%) of the total acreage of the Property in the Project and the

Annexation Property has been conveyed to Persons other than Developer or to Persons other than developers holding title solely for the purpose of development and sale; (b) such date as Developer, in its sole discretion, requires the Members to assume control of the Association; or (c) December 31, 2015.

5.4.2 As a condition to, or otherwise upon, relinquishing control of the Association, Developer may reserve the right of prior written approval of certain actions by the Board including, without limitation, the following: (a) any action that increases Assessments on property owned by Developer or imposes a Special Assessment on property owned by Developer; and (b) any action that, in Developer's opinion, impairs or restricts (i) Developer's ability to develop and/or market property within the Project, (ii) the operation of any part of the Project and/or other projects developed by Developer or an affiliate of Developer which are adjacent to or in the vicinity of the Project, or (iii) any rights or reservations of Developer under this Declaration.

Section 5.5 **Acceptance of Property by the Association.** The Association shall accept and hold title to all Association Property and other property from time to time conveyed to it by Developer, as provided in Section 5.11. The Association may also acquire and accept title to any other property. The Association shall not carry on any business, trade, association or profession for profit; provided, however, that the Association may charge Special Use Fees or other reasonable fees for or relating to use of the Association Property (including the Recreational Park Facilities) to help defray the costs of construction, maintenance, repair or operation of the Association Property (including the Recreational Park Facilities) or other property owned or controlled by the Association.

Section 5.6 **Duties, Powers and Authority of the Association.** The Association shall have all of the duties and powers set forth in the Project Documents, together with those powers of a non-profit corporation granted under the laws of the State of Hawaii, subject, however, to such limitations upon the exercise of such powers as are expressly set forth in the Master Declaration, this Declaration, the Articles or the Bylaws. The Association shall have the power to do any and all lawful things that may be authorized, required or permitted to be done under and by virtue of the Project Documents and laws, and to do and perform any and all acts that may be necessary or proper for or incidental to the exercise of any of the express powers of the Association for the peace, health, comfort, safety and/or general welfare of the Owners and Members. Without in any way limiting the foregoing, the Association and the Board shall have the following duties, powers and authority:

5.6.1 Right of Entry. The Board, its duly authorized employees, agents, representatives and contractors, as well as duly authorized employees of the Association, shall have the power and right, which is hereby reserved and granted, at any time and from time to time, without liability to any Owner or Occupant for trespass, damage or otherwise, to enter upon any Lot to enforce any provision of the Project Documents and/or the Master Project Documents, to maintain and repair any portion of a Lot or the exterior of Improvements located thereon, if, for any reason whatsoever, the Owner or Occupant fails to maintain and repair any portion of a Lot or the exterior of Improvements located thereon, as required by said documents, to enter upon any Lot as reasonably necessary to satisfy the maintenance rights or obligations of the Association pursuant to Article 8.

5.6.2 Right to Bring Legal Action. Subject to the provisions of Article 32, the Association shall have the power and authority, but not the obligation, in its own name, on its own behalf or on behalf of any Owner(s) who consent thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach to the Project Documents and/or the Master Project Documents and to enforce the provisions of said documents.

5.6.3 Easements. In addition and without limitation to the easements granted or reserved in Article 17 or elsewhere in this Declaration, the Association is authorized and empowered to grant to any third party, on such terms as the Board may approve, such permits, licenses, easements and rights-of-way upon, across or under Association Property or other real property owned or controlled by the Association, for sewer lines, water lines, underground conduits, storm drains, telephone, television and telecommunication cables, and other similar public or private utility purposes, landscaping, drainage, roadways or other purposes as may be reasonably necessary and appropriate for the orderly maintenance, preservation, use and enjoyment of the Project or for the preservation of the health, safety, convenience and welfare of the Owners.

5.6.4 Manager or Managing Agent. The Board shall employ for the Association a professional manager or managing agent to perform such duties and services as the Board shall authorize. All or any of the powers, duties and rights of the Association or the Board, as provided by law, the Bylaws, the Rules and/or this Declaration, may be delegated by the Board to the manager or managing agent; provided, however, that the Board shall not delegate its policymaking authority. In the event of such delegation, the manager or managing agent shall, subject to the direction and control of the Board, be responsible for the day-to-day operations of the Association. The Board shall determine the compensation to be paid to the manager or managing agent. Any agreement for management, or any other contract providing for services to the Association, must be fair and reasonable, as determined by the Board, and shall not exceed a term of three years, which term may be renewed by agreement of the parties for successive one-year periods. Developer or an affiliate of Developer may be employed as managing agent or manager. The Board of Directors may delegate to one of its members the authority to act on behalf of the Board on all matters relating to the duties of the managing agent or manager, if any, which might arise between meetings of the Board. The Board shall not be liable for any omission or improper exercise by a manager or managing agent of any power, duty or right delegated to the manager or managing agent by written instrument executed by or on behalf of the Association or the Board.

5.6.5 Contracts with Others for Performance of Association's Duties. Subject to the restrictions and limitations contained in this Declaration, the Association may enter into contracts and transactions with others, including Developer and Persons affiliated with Developer, for the performance of the Association's duties and for other purposes deemed necessary by the Association, including, without limitation, maintenance and repair services, professional services and utility services. Such contracts or transactions shall not be invalidated or in any way affected by the fact that one or more directors or officers of the Association or members of any committee may be employed by or otherwise connected with Developer or its affiliates or other Person, provided that either the transaction or contract is or was fair when entered into or the material facts of the transaction and the director's interest were disclosed to the Board and the contract or transaction was authorized, approved or ratified by a majority of directors on the Board who have no direct or indirect interest in the transaction or contract, provided further that the transaction or contract

cannot be ratified by just one director. In any such case, however, the interested director, officer or committee member may be counted in determining the existence of a quorum at any meeting of the Board or committee that is considering any contract or transaction described above or granting or denying any approval sought by Developer or its affiliates or other Person.

5.6.6 Special Use Fees. The Association is authorized to impose, bill for, sue for, collect, administer and disburse Special Use Fees, and the payment of Special Use Fees shall be secured by the Assessment Lien. In establishing or adjusting the amounts of Special Use Fees from time to time, the Board may establish reasonable classifications among Owners, Occupants and other Persons.

5.6.7 Implied Rights. The Association may exercise any other right or privilege given to it expressly by this Declaration, and every other right or privilege as may reasonably be implied from the existence of any right or privilege given to the Association by this Declaration or reasonably necessary to effectuate any such right or privilege.

Section 5.7 **Association Rules**. The Board, on behalf of the Association, is empowered (but not required) to adopt, amend, enforce and/or repeal rules and regulations (the "**Association Rules**" or "**Rules**") governing the use and/or occupancy of any part of the Property, including Lots and the Common Areas, consistent with this Declaration and in furtherance of the purposes of the Association; provided, however, that, prior to the Final Transition Date, Developer must approve in writing any and all such rules and regulations and any amendments or repeal thereof. The Association Rules shall be effective upon adoption and promulgation or at such later time as may be specified at the time of adoption. Prior to the Final Transition Date, Developer (on its own accord or through the Board) shall have the right (but not the obligation) to adopt, amend and enforce the Association Rules. The Association Rules shall be binding upon all Persons subject to this Declaration. The Association Rules may include the establishment of a system of fines and penalties enforceable as Special Assessments or otherwise. The Association Rules shall govern such matters in furtherance of the purposes of the Association, including, without limitation, the use of the Common Areas, and fees for use of the amenities or facilities upon Association Property (including the Recreational Park Facilities); provided, however, that the Association Rules shall not be inconsistent with the Master Project Documents, this Declaration, the Articles or the Bylaws. The Association Rules shall be binding on the Owners and Occupants and all other Persons having any interest in, or making any use of, the Property. The Association Rules shall be available upon request at the principal office of the Association to each Owner or other Person with a bona fide interest in the Property or the Association. In the event of any direct conflict between any provision of the Association Rules and any provisions of the Master Project Documents, this Declaration, the Articles or the Bylaws, the provisions of the Association Rules shall be deemed to be subordinate to the applicable provisions of the Master Project Documents, this Declaration, the Articles and Bylaws, to the extent of any such conflict.

Section 5.8 **Enforcement**. Developer (until the Final Transaction Date) and the Association, acting through the Board, shall be authorized (but not obligated) to impose sanctions for violations of the Project Documents and the Master Project Documents, which sanctions may include, without limitation, monetary fines, suspension of the right to vote at Association meetings, suspension of the right to use the Recreational Park Facilities and such other penalties as shall be

imposed by the Board. In addition, pursuant to Section 8.3 of the Bylaws, the Association shall have the right to exercise self-help to cure violations. The Board shall also have the power to seek relief in any court for violations or to abate nuisances. Imposition of sanctions shall be subject to applicable procedures set forth in the Bylaws and the Rules. The Association, acting through the Board, shall have the right to enforce federal, state and local laws and ordinances applicable to the Project or any portion thereof, and may permit such governmental entities to enforce such laws and ordinances on the Project for the benefit of the Association and its Members.

Section 5.9 Indemnification. To the fullest extent permitted by law, every director and officer of the Association, every Board-appointed committee member and Developer (to the extent a claim may be brought against Developer by reason of its appointment, removal or control over members of the Board) shall be indemnified by the Association, and every other Person serving as an employee or direct agent of the Association, or on behalf of the Association as a member of a committee or otherwise, may, in the discretion of the Board, be indemnified by the Association against all expenses and liabilities, including without limitation attorneys' fees, reasonably incurred by or imposed upon him in connection with any proceeding to which he may be a party, or in which he may become involved, by reason of his being or having served in such capacity on behalf of the Association (or in the case of Developer by reason of having appointed, removed or controlled or failed to control members of the Board), or any settlement thereof, whether or not he is a director, officer or member of a Board-appointed committee or serving in such other specified capacity at the time such expenses are incurred, provided that the Board shall determine, in good faith, that such officer, director, member of a Board-appointed committee or other person, or Developer, did not act, fail to act, or refuse to act with gross negligence or willful misconduct or fraudulent or criminal intent in the performance of his duties. The foregoing rights of indemnification shall be in addition to and not exclusive of all other rights to which such persons may be entitled at law or otherwise.

Section 5.10 Non-Liability of Officials. To the fullest extent permitted by law, Developer, its officers, agents, representatives, employees, partners, principals, members or managers, the Board or any director, officer, committee or committee member thereof or of the Association shall not be liable to any Member, Owner, Occupant, the Association or any other Person for any damage, loss or prejudice suffered or claimed on account of any decision, approval or disapproval of drawings or specifications (whether or not defective), course of action, act, inaction, omission, error, negligence or the like that is made or not made and which Developer, the Board, the committee, the director, the officer or committee member reasonably believed to be within the scope of its duty or authority.

Section 5.11 Duty to Accept Association Property and Common Areas. The Association is obligated to and shall accept title to, or other designated interests in, any real or personal property, including any Improvements and related equipment and personal property, transferred to the Association by Developer, together with the responsibility to perform any and all duties associated with the property conveyed as designated by Developer. Upon conveyance or dedication to the Association, (a) the Association shall maintain the property at its expense for the benefit of the Members as provided in this Declaration and/or as set forth in the instrument of conveyance, and (b) Developer shall be released from any and all obligations to maintain the property and from any and all responsibility to perform any duties associated with the property.

Among the property that the Association shall have a specific duty to accept shall be the Rock Mound. Property interests transferred to the Association by Developer may include fee simple title, easements, leasehold interests and licenses to use; provided, however, that any property or interest in property transferred to the Association by Developer shall, except to the extent otherwise specifically approved by resolution of the Board, be transferred to the Association free and clear of all liens and encumbrances except as follows: (w) the lien for property taxes and assessments not then due and payable; (x) the terms of the Project Documents and the terms of the Master Project Documents; (y) easements, rights-of-way, reservations, covenants, encroachment agreements, conditions, restrictions and equitable servitudes or other non-financial encumbrances as Developer in its discretion may deem appropriate; and (z) such financial encumbrances as may be reasonably accepted and assumed by the Association and specifically approved by resolution of the Board. The property or interest in property transferred to the Association by Developer shall not impose any unreasonable or special burden on the Association other than the normal burdens of ownership and/or maintenance of property and the operation of facilities thereon; provided that the requirement that the Association comply with and abide by monitoring plans or requirements for the Rock Mound, as set forth in Article 28, shall not be considered or deemed to impose any unreasonable or special burden on the Association. Without limiting the generality of any other provision of this Section 5.11 or rights reserved to Developer in this Declaration, at any time following the conveyance of property by Developer to the Association, Developer may construct, reconstruct, refinish, alter or repair any Improvement upon, make or create any Excavation or fill upon, change the natural or existing drainage of or remove or plant any trees, shrubs or ground cover upon such property, if Developer shall determine that any such work: (i) is reasonably necessary for the installation or repair of utilities or drainage improvement serving any portion of the Property; (ii) is reasonably necessary for the construction or repair of any facility to be used by or for the benefit of the Association or Owners; (iii) is desirable in order to provide or improve access to or enhance the use and enjoyment of any portion of the Property or the Project; or (iv) is desirable to protect, support or preserve any portion of the Property or the Project.

Article 6 **Membership**

Section 6.1 **Membership Classes.** The Association shall have two classes of Membership, Class "A" and Class "B". Class "A" Members shall be comprised of every Owner of a Lot, including Developer so long as it owns any Lot. The Class "B" Member shall be Developer. The Class "B" Membership shall terminate on the Final Transition Date, as described in Section 5.4.1. The qualifications, rights, privileges, duties and obligations of Members shall be as set forth in and exercised and imposed in accordance with the provisions of the Project Documents.

Section 6.2 **Transfer of Membership.** The rights and obligations of a Class "A" Member shall not be assigned, transferred, pledged, conveyed or alienated in any way except upon transfer of ownership to an Owner's Lot, and then only to the transferee of the Lot. A transfer of ownership to a Lot may be effected by Recorded deed, Recorded agreement of sale by which the purchaser has the exclusive right to possession, Recorded lease having a term of thirty or more years, intestate succession, testamentary disposition, foreclosure of a Mortgage, or such other legal process as now in effect or as may hereafter be established under or pursuant to the laws of the State of Hawaii. Any attempt to make a prohibited transfer shall be void. A transfer of ownership to a Lot shall

operate to transfer the Membership(s) appurtenant to the Lot to the new Owner thereof. The Class "B" Member may transfer its Class "B" Membership in whole to a successor who is designated as a successor Developer in a Recorded instrument executed by the transferring party.

Article 7 **Assessments**

Section 7.1 Creation of Lien and Personal Obligation. Each Owner, by acceptance of a deed or other conveyance of an interest in a Lot, is deemed to covenant and agree to pay all Assessments imposed pursuant to the Project Documents, including General Assessments, Special Assessments, Benefited Assessments, Capital Improvement Assessments, Reconstruction Assessments and Master Association Assessments, as the foregoing Assessments, and any other such assessments as set forth in this Declaration or in the Master Declaration, may be established and collected from time to time, as provided in this Declaration or in the Master Declaration. General Assessments, Special Assessments and Benefited Assessments shall be paid to the Association. Master Association Assessments shall be paid to the Master Association or as otherwise required by the Master Declaration. The Assessments, together with interest thereon, late charges, attorneys' fees, court costs, and other costs of collection thereof, as hereinafter provided, shall be a continuing lien (the "Assessment Lien"), which Assessment Lien also secures payment of such other sums as provided in this Declaration, upon the Lot (or combined Lots as provided in Section 15.5) against which the Assessments are made. Each Assessment, together with such interest and other costs, shall be the separate, distinct and personal debt and obligation, as of the date of the assessment, of the Owner of the Lot against which the Assessment is made, and in the event a Lot is owned by more than one Person, shall be the joint and several obligations of all co-owners.

Section 7.2 Purpose of Assessments. The Assessments shall be used to promote the safety and welfare of the Owners, to enhance the beneficial enjoyment of Lots by their Owners, to preserve the value of the Project, to satisfy the liabilities of the Association, and to pay the costs of administration of the Project, this Declaration and the covenants and easements created hereby. Security, gas, electrical, water, sewer, or other similar services provided to a Lot are not provided by the Association, except as specifically provided herein, and the costs for such services shall be the personal obligation of the Owner of such Lot.

Section 7.3 General Assessments.

7.3.1 Except as otherwise specifically provided herein, each Owner shall pay General Assessments as provided in this Section 7.3, and payment of General Assessments shall be in such amounts and at such times as may be provided in the and Bylaws or as determined by the Board.

7.3.2 Not later than sixty days prior to the beginning of each fiscal year of the Association, Developer shall, so long as the Class "B" Membership exists, prepare and adopt a pro-forma operating statement or budget for the upcoming fiscal year. The operating statement or budget prepared by Developer shall not be subject to approval or disapproval by the Members. The operating statement or budget shall, among other things, estimate the total Common Expenses to

be incurred for such fiscal year and the amount of the General Assessment. Developer shall notify each Owner of its share of the General Assessment. After the Final Transition Date, the Board shall prepare annually and provide each Owner with a copy of the pro-forma operating statement or budget, the estimated amount of the General Assessment and the amount applicable to each Owner at least sixty days prior to adoption of the operating statement or budget by the Board. The operating statement or budget and the General Assessment shall become effective upon adoption by the Board unless disapproved by the Members at a special meeting called for the purpose. The Board shall have no obligation to call a meeting of Members for the purpose of considering the budget adopted by the Board, except upon a written petition for a special meeting signed by at least ten percent (10%) of the Members and presented to any officer of the Association within twenty days after notice of a General Assessment has been given. Upon adoption of the operating statement or budget by Developer or the Board, each Owner shall pay to the Association its share of the General Assessment in equal monthly installments on the dates and in the manner specified by Developer or the Board, as appropriate. The amount of the General Assessment shall be shared equally among all Lots (that is, one share per Lot). In the event Developer or the Board fails for any reason to determine the budget for any fiscal year or a proposed budget is disapproved by the Members, then and until such time as a budget shall have been determined as provided herein, the budget and General Assessment in effect during the previous fiscal year shall continue in effect for the upcoming fiscal year.

7.3.3 If Developer shall determine, in its sole discretion, prior to the Final Transition Date, or if the Board shall reasonably determine after the Final Transition Date that the total General Assessments for the current year are, or will become, insufficient to meet all Common Expenses for any reason, including Common Expenses in excess of the estimated Common Expenses used in preparation of the Association's budget for that year, but excluding any Common Expenses allocated as Special Assessments or Benefited Expenses, then Developer or the Board, whichever is applicable, shall then immediately determine the approximate amount of such deficiency and issue a supplemental estimate of the Common Expenses and determine the revised amount of General Assessments to be paid by Owners for the balance of the year, and the date or dates when payments due. If the estimated total General Assessments for a current year prove to be excessive in light of the actual Common Expenses, the Association may, at the discretion of the Board, retain such excess as additional working capital or reserves, reduce the amount of the General Assessments for the succeeding year, or abate collection of General Assessments for such period as it deems appropriate. No reduction or abatement of General Assessments because of any such anticipated surplus may diminish the quantity or quality of services upon which the Common Expenses for the year in question are based.

Section 7.4 **Special Assessments.** The Board may levy Special Assessments against an Owner and the Owner's Lot to reimburse the Association for:

7.4.1 Costs incurred in bringing an Owner or the Owner's Lot into compliance with the provisions of the Master Project Documents or the Project Documents;

7.4.2 Any other charge designated as a Special Assessment in the Project Documents;

7.4.3 Unbudgeted expenses of the Association;

7.4.5 Fines levied or fixed by the Board in accordance with the Association Rules, the Bylaws or as otherwise provided in this Declaration; and

7.4.4 Attorneys' fees, interest and other costs or charges provided to be paid as, or which are incurred in connection with, a Special Assessment in accordance with the Project Documents, provided, however, in the event a legal proceeding is brought, the cost of any such proceeding, including reasonable attorney's fees, shall be awarded to the prevailing party, if a prevailing party is determined by the appropriate decision-making authority, unless the allocation of such costs is covered by Section 32.5 of this Declaration.

Section 7.5 Benefited Assessments. The Board shall have the power and authority (but not the obligation) to provide, and to assess a specific Lot or Lots for the costs and expenses of providing, specific benefits, items or services to a Lot or Lots that are not provided to all Lots within the Property. The amount of the Benefited Assessment shall be those costs and expenses (the "**Benefited Expenses**") that the Association incurs or anticipates that it will incur to provide an Owner or an Owner's Lot the specific benefits, items or services requested by the Owner or to provide the specific benefits, items or services to an Owner's Lot pursuant to the Project Documents.

Except for benefits, items or services requested by the Lot Owner, seven days prior written notice shall be given by the Board to a Lot Owner before the Association or the Board takes an action that would result in a Benefited Assessment against an Owner or an Owner's Lot; provided, however, that in an emergency situation (as determined by the Board in its sole discretion) no prior written notice shall be required.

Section 7.6 Capital Improvement Assessments. The Board may adopt in any fiscal year, a Capital Improvement Assessment for the purpose of defraying, in whole or in part, the cost of any action or undertaking on behalf of the Association in connection with, or the cost of, any construction or replacement of capital improvements and necessary appurtenances upon the Common Areas, to the extent the same are not covered by Reconstruction Assessments. All amounts collected as Capital Improvement Assessments may only be used for capital improvements, shall be deposited by the Board in a separate account for such purposes and not co-mingled with other funds of the Association, and shall be deemed a contribution to the capital account of the Association by the Owners. A Capital Improvement Assessment in excess of \$50,000 or which increases the outstanding balance of all Capital Improvement Assessments above \$100,000, shall not become effective until approved by a Super-Majority vote of the Class "A" Members and the approval of the Class "B" Members, if Class "B" Membership exists. Notwithstanding the foregoing, no Capital Improvement Assessments adopted by the Board and approved by the Members shall become effective without Developer's approval so long as Class "B" Membership exists.

Section 7.7 Rate of Assessment. The amount of the General Assessments to be levied against each Lot for any fiscal year shall be determined by multiplying the budgeted Common Expenses, including reserves, by a fraction, the numerator of which shall be the number one (1), and the denominator of which shall be the total number of Lots within the Project. Capital Improvement Assessments and any Reconstruction Assessments shall be allocated among the Lots to which such Assessments relate, as determined in the discretion of the Board.

Section 7.8 Date of Commencement of Assessments. Assessments shall commence as to all Lots on the first day of the month following the conveyance of the first Lot to a Person other than Developer, or such later date as shall be determined by Developer with at least thirty days advance written notice to all Owners. Assessments shall commence for Lots contained in each phase of Annexation Property on the first day of the month following the later to occur of (a) the Recording of the Supplemental Declaration incorporating such Annexation Property into the Property, (b) the conveyance of the first Lot located in such Annexation Property to a Person other than Developer, or (c) such later date as Developer may, in its sole discretion, decide to commence Assessments against such Lots (provided that Developer shall subsidize the Association for expenses reasonably incurred by the Association on behalf of, or attributable to, such Lots from and after the later to occur of subparagraphs (a) and (b) above and until such later date for commencement of Assessments).

Section 7.9 Developer's Assessment Obligations. Developer may annually elect, by notifying the Association in writing, one of the following alternatives, or combination thereof, as a method of satisfying its Assessment obligations hereunder:

- (a) pay the Assessments in cash as set forth in Section 7.7 as an Owner of Lots;
- or
- (b) make "in kind" contributions of services and/or materials; or
 - (c) pay to the Association in the form of a subsidy the difference between the amounts received by the Association in Assessments from all Owners other than Developer and the amount of the actual expenditures required to operate the Association during the fiscal year. In the absence of a written election by Developer at least sixty days prior to the end of the fiscal year, Developer shall pay on the basis set forth in this subparagraph (c).

Payment under the foregoing options shall constitute full payment of all Assessment obligations of Developer under this Declaration. Nothing herein shall be interpreted to require Developer to establish, or pay over to the Association to establish, reserves or reserve accounts for capital improvements or for maintenance of any part of the Property.

Section 7.10 Manner of Payment. Assessments shall be due and payable by Owners in such manner and at such times as the Association shall designate. An Owner who is delinquent in the payment of Assessments shall be liable for attorneys' fees and other related costs incurred by the Association as a result of such delinquency, and if any suit, action or arbitration proceeding is brought to collect any such Assessment or charge, then there shall be added to the amount thereof costs of the suit, action or proceeding and reasonable attorneys' fees to be fixed by the court or arbitrator and included in any judgment or award rendered thereon.

Section 7.11 No Offsets. Subject to Developer's right to satisfy its Assessments obligations in the manner set forth in Section 7.9, all Assessments shall be payable in the amount specified in the Assessment or notice of Assessment and no offsets against such amount shall be

permitted for any reason, including, without limitation, a claim that: (a) the Association, the Board or Developer is not properly exercising its duties and powers as provided in this Declaration; (b) Assessments for any period exceed Common Expenses; or (c) an Owner has made, and elects to make, no use of the Common Areas (including the Recreational Park Facilities) or any portion thereof.

Section 7.12 Reserves. Any reserves included in the Common Expenses which are collected as part of the General Assessments shall be deposited by the Association in a separate bank account to be held for the purposes for which they are collected and are to be segregated from and not commingled with any other funds of the Association, except to the extent that the Association's accountant deems it desirable to do otherwise on the basis of standard accounting principles in similar contexts or the laws, tax or otherwise, of the State of Hawaii or the United States relating to non-profit corporations or homeowners associations. Such reserves shall be deemed a contribution to the capital account of the Association by the Owners. The responsibility of the Board (whether while controlled by Developer or the Class "A" Members) shall be only to provide for such reserves, if any, as the Board in good faith deems reasonable, and neither Developer nor the Board nor any director thereof shall have any liability to any Owner or to the Association if reserves prove to be inadequate.

Section 7.13 Certificate of Payment. Any Person acquiring an interest in any Lot shall be entitled to a certificate from the Association as of a date shortly prior to the acquisition setting forth the amount of due but unpaid Assessments, if any, relating to such Lot and any interest, costs, attorneys' fees and any late charges related to the Lot. Such Person shall not be liable for, nor shall any Assessment Lien attach to the Lot in excess of, the amount set forth in the certificate, except for Assessments which occur or become due after the date of the certificate and any interest, costs, attorneys' fees and any late charges related to such Assessments.

Section 7.14 Rules Regarding Billing and Collection Procedures. The Board shall have the right to adopt rules and regulations setting forth procedures for making the Assessments and for the billing and collection Assessments, provided that such procedures are not inconsistent with the provisions of this Declaration. The failure of the Association to send a bill to an Owner shall not relieve any Owner of his liability for any Assessment or charge under this Declaration. Assessment obligations may be communicated to Lot Owners by internet, e-mail communication, or other medium deemed convenient and reasonably appropriate by the Board; provided that an Assessment Lien shall not be foreclosed or otherwise enforced until the Owner has been given written notice at the address of the Owner on the records of the Association that the Assessment or any installment thereof is due and the amount due, and at least thirty days shall have expired without full payment having been made. Such notice may be given at any time after delinquency of such payment. The Association shall be under no duty to refund any payments received by it even though the ownership of a Lot changes during an assessment period. Successor Owners of Lots shall be given credit for prepayments, on a prorated basis, made by prior Owners.

Section 7.15 Enforcement of Lien. The Assessment Lien may be foreclosed by the Association in any manner provided or permitted for the foreclosure of mortgages in the State of Hawaii. All of the provisions of this Article 7 relating to the enforcement of the Assessment Lien

(including, without limitation, the provisions of this Section 7.15) shall apply with equal force in each instance provided for in this Declaration, any Supplemental Declaration or the Association Rules wherein it is stated that payment of a particular Assessment, charge or other sum shall be secured by the Assessment Lien. Nothing in this Section 7.15 shall be construed as requiring that the Association take any action authorized hereunder in any particular instance, and the failure or refusal of the Association to take such action at any time shall not constitute a waiver of the right to take such action at a later time or in a different instance.

Section 7.16 Borrowing; Pledge of Assessment Rights as Security. The Association shall have the power to borrow money for any legal purpose of the Association and shall have the power to pledge the right to exercise its assessment powers and rights provided for in this Declaration as security; provided, however, that any such pledge occurring after the Final Transition Date shall require approval by a Majority vote of the Members. The power of the Association to borrow shall be subject to such spending limits and for such purposes as may be provided in the Articles or Bylaws. The cost of borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to such borrowing, shall be a Common Expense.

Section 7.17 Master Association Assessments. Owners shall pay their share of Master Association Assessments, in such amounts, installments and manner as required by the Master Association Board, in accordance with and pursuant to the Master Declaration. Master Association Assessments shall be subject to the Assessment Lien and the Board shall have the power and authority (but not the obligation) to enforce the Assessment Lien as it relates to non-payment of Master Association Assessments.

Article 8

Common Areas, Common Expenses and Maintenance

Section 8.1 Common Areas. "Common Areas" means the Association Property, those areas that are used for the common benefit of all or any group of Owners, and those areas that the Association is maintaining and/or operating pursuant to this Declaration, pursuant to separate documentation, under the law and/or that the Association reasonably determines should be maintained and/or operated by the Association. The Common Areas shall include, but need not be limited to:

(a) the Recreational Park Facilities, the Mauka Drainage Improvements, the Rock Mound, the Pinnacle Retention Basin Lot (to the extent not conveyed to the Master Association), the Makai Retention Basin and the Makai Common Area Lots;

(b) the Easements and the Improvements installed thereon or therein by or on behalf of Developer or the Association;

(c) the landscaping, flora, walkways, parking areas and other Improvements and amenities, if any, located upon and within the Association Property;

(d) the Private Roads, including any trees, shrubs, plants and other landscaping placed within and along the Private Roads, as well as any fire hydrants, irrigation equipment and other private utility facilities within and along the Private Roads and serving the Project, except to the extent the Private Roads and appurtenances (or portions thereof) are conveyed to the Master Association for use by members of the Master Association;

(e) the trees, shrubs, plants and other landscaping placed within rights-of-way, if any, adjacent to the Property to the extent the Board determines that maintenance of such right of way is necessary or desirable to maintain the Community-Wide Standard;

(f) all entry gates and associated monuments, structures, buildings and landscaping features owned or maintained by the Association;

(g) all storage or other buildings and structures located on the Association Property;

(h) the Drainage Facilities, but not including any drainage improvement constructed by a Lot Owner on the Lot Owner's Lot, or by any previous Owner of such Lot other than Developer, on the Lot;

(i) the Sewerline Facilities, but not including any sewer/wastewater improvement constructed by a Lot Owner on the Lot Owner's Lot, or by any previous Owner of such Lot other than Developer, on the Lot;

(j) any property which becomes the responsibility of the Association by agreement with the County, the State of Hawaii, other governmental authority or other party; and

(k) such additional property, or interests therein, as may be designated or described as part of the Common Areas in this Declaration or property for which the Association is obligated to maintain pursuant to a right or reservation of Developer under this Declaration or otherwise pursuant to any contract or agreement.

Prior to the Final Transition Date, the Common Areas shall not be reduced by amendment of this Declaration or any other means without the prior written approval of Developer. A Common Area shall cease to be a Common Area to the extent its maintenance shall be assumed by the Master Association, the County or other legal entity that assumes responsibility for its maintenance.

Section 8.2 Association Obligation. The Association shall at all times maintain, manage and keep in good repair all Common Areas; provided, however, that the Association's obligation to manage and maintain the Drainage Facilities (as provided in, and in accordance with, Section 8.11) and the Sewerline Facilities (as provided in, and in accordance with, Section 8.12) shall not extend to any drainage improvement or to any sewer/wastewater improvement constructed by a Lot Owner on the Lot Owner's Lot, or by any previous Owner of such Lot other than Developer, on the Lot. Such maintenance by the Association shall be a Common Expense; provided, however, that each Owner as to its Lot shall be responsible for, and shall pay, all costs and expenses relating to the maintenance, upkeep and trimming of all trees and landscaping on a Lot, as well as those costs and expenses relating to the maintenance and repair of the Drainage Facilities and the Sewerline

Facilities that are located on the Owner's Lot and that were not constructed by or on behalf of Developer or the Association. The Association shall periodically inspect all Common Areas and keep them clear of all debris and other accumulated material that would create a nuisance or a hazard if not cleared.

Section 8.3 Common Expenses. Except as otherwise provided in this Declaration, all actual and estimated costs incurred or anticipated to be incurred by the Association and associated with ownership, management, operation, maintenance, repair and replacement of the Common Areas and other Association Property shall be Common Expenses, subject to the right of the Association to seek reimbursement from certain individual Members or other Persons responsible for certain portions of the Common Areas pursuant to this Declaration or other agreements. Common Expenses include, but are not limited to, the cost of the following:

8.3.1 Management, operation, administration, maintenance, repair and replacement of the Common Areas and all other areas in the Property that are managed or maintained by the Association;

8.3.2 Unpaid Assessments resulting from an Owner's failure to pay any Assessments;

8.3.3 Maintenance by the Association of areas within the right-of-way of any public or private streets or other areas in the vicinity of the Property which may be provided for in this Declaration or pursuant to agreements with the County or Developer;

8.3.4 Management and administration of the Association, including the costs of a professional managing agent;

8.3.5 Utilities and services and related matters, including, but not limited to, water, electricity, gas, sewer, cable television, trash pick-up and disposal, which are provided to the Association or the Common Areas, as set forth in this Declaration;

8.3.6 Landscaping maintenance and replacement and other services which generally benefit and enhance the value and desirability of the Property and which are provided to or for the benefit of the Association;

8.3.7 Insurance maintained by the Association as required or permitted in this Declaration and the Bylaws, including, specifically, the public liability insurance required by Section 10.2 below;

8.3.8 Reasonable reserves for contingencies, replacements and other proper purposes, to the extent deemed appropriate by the Board;

8.3.9 The costs that the Board elects to incur to bond officers and directors of the Association, any professional managing agent or any other person handling the funds of the Association;

8.3.10 All taxes of any kind paid by or imposed upon the Association or the Association Property, including real property taxes;

8.3.11 Amounts paid by the Association for discharge of any lien or encumbrance levied against the Common Areas;

8.3.12 The reasonable costs incurred by any committees established by the Board;

8.3.13 The costs of any security guards and any other security systems or services installed, operated or contracted for by the Association (including without limitation patrols for the Common Areas), as provided in Section 9.2, but excluding the cost of security service, if any, to individual Lots as described in Section 9.3;

8.3.14 Personnel, including management personnel, to implement services to be provided to or for the benefit of the Association, including salaries, wages, bonuses, contributions to qualified tax-deferred retirement or savings plans, payroll taxes, premiums for workmen's compensation insurance, unemployment compensation insurance, health and temporary disability insurance and other employment taxes and charges;

8.3.15 The costs of borrowing money;

8.3.16 Costs incurred by the Association for professional services and litigation or other dispute resolution costs;

8.3.17 Costs incurred by the Association in connection with the performance of its rights, duties and obligations under any contract(s) with Developer, the Master Association and/or other association(s), and/or other Persons regarding maintenance of common roadways and other facilities benefiting the Project and other properties in the vicinity of the Project;

8.3.18 Costs incurred by the Association in connection with the performance of its rights, duties and obligations under the Drainage Facilities Monitoring and Maintenance Requirement and under the Grants of Drainage Easements;

8.3.19 Costs incurred by the Association in connection with the performance of its rights, duties and obligations under the Sewerline Facilities Monitoring and Maintenance Requirement and under the Grants of Sewerline Easements;

8.3.20 Costs incurred by the Association in connection with the performance of its rights, duties and obligations under the Rock Mound Monitoring Requirement; and

8.3.21 Other expenses incurred by the Association for any reason whatsoever in connection with the Common Areas, or the costs of any other item or items designated by, or to be provided or performed by, the Association pursuant to any of the Project Documents, or in furtherance of the purposes of the Association or in the discharge of any duties or powers of the Association.

Section 8.4 Contracts with Owners. To promote uniformity and harmony of appearance throughout the Project, the Board may cause the Association to contract with Owners to provide maintenance services to Lots in exchange for the payment of such fees as the Association and the Owner may agree upon; provided, however, that the Board has reasonably determined that the provision of such additional services shall not subject the Association or the Board to increased liability. The fees for such services shall be charged to such Owners as a Benefited Assessment.

Section 8.5 Implementation. In providing for the maintenance, management and repair of the Common Areas pursuant to this Article 8, the Association may, subject to any applicable provisions relating to Capital Improvement Assessments and any other provisions of this Declaration, in the discretion of the Board:

8.5.1 Construct, reconstruct, repair, replace or refinish any Improvement or portion thereof upon the Common Areas;

8.5.2 Replace injured and diseased trees and other vegetation in the Common Areas, and plant trees, shrubs and ground cover to the extent that the Board deems necessary for the conservation of water and soil and for aesthetic purposes;

8.5.3 Place and maintain upon the Common Areas such signs as the Board may deem appropriate;

8.5.4 Grant, amend, convey, transfer, cancel, assign, relocate, realign or otherwise deal with any of the Common Areas; and

8.5.5 Do all such other and further acts which the Board deems necessary or appropriate to preserve and protect the Common Areas and their beauty, in accordance with the Community-Wide Standard and the general purpose of this Declaration.

The Board shall be the sole judge as to the appropriate maintenance of the Common Areas. Any cooperative action necessary or appropriate to the proper maintenance and upkeep of such properties shall be taken by the Board or by its duly delegated representatives. The Board may cause the Association to contract with others for the performance of the maintenance and other obligations of the Association under this Section 8.5.

Section 8.6 Owner's Responsibilities. Except as otherwise specifically provided in this Declaration, the Master Declaration or any agreement with the Association, the performance and cost of all maintenance and repair of each Lot and all structures, driveways, landscaping and other Improvements located on or within such Lot shall be the sole responsibility of the Owner thereof.

Section 8.7 Standard of Performance. The Property shall be maintained, managed and repaired by the Association and the Owners, as applicable, under this Declaration in a manner consistent with the Community-Wide Standard and all applicable covenants, conditions, agreements and restrictions. The obligation to maintain and manage, as imposed in this Declaration, shall include the obligation to maintain appropriate landscaping alive and in attractive and trimmed condition, and to implement and maintain erosion-sedimentation control measures.

Section 8.8 Assessment of Certain Costs. If loss or damage to the Common Areas is caused through the willful or negligent act of any Owner, Occupant or Guests, the cost of such maintenance or repairs (to the extent not actually recovered under the Association's insurance) shall be a Special Assessment against the Owner who, or whose Occupant or Guest, caused the loss or damage, secured by the Assessment Lien on such Owner's Lot.

Section 8.9 Improper Maintenance and Use. If the Board determines that (a) the condition of any Lot presents a public or private nuisance (as determined by the Board) with respect to other Owners or Occupants or materially detracts from the appearance or quality of the surrounding Lots or other portions of the Property, or (b) a Lot is being used in a manner which violates the Design Documents or the Association Rules, or the Owner is failing to perform some or all of its obligations under the Design Documents (including, but not limited to, maintenance in a manner consistent with the Community-Wide Standard), the Board may by resolution make a finding to such effect, specifying the particular condition or conditions which exist. The Board shall give notice to the offending Owner that unless corrective action is taken within the time specified in the notice (which shall not be less than five (5) days after notice is given), the Board may cause such action to be taken at the Owner's cost. If the requested corrective action has not been taken at the expiration of the specified period, the Board is authorized and empowered to cause such action to be taken, the cost of which shall be a Special Assessment against the offending Owner and the Owner's Lot, secured by the Assessment Lien. If the Board determines that, under the circumstances known to the Board, corrective action must be taken immediately, notice need not be given prior to the Board taking corrective action, provided that notice shall be given to the offending Owner as soon thereafter as reasonably practical.

Section 8.10 Maintenance of Unimproved Land. To maintain the appearance of the Property in accordance with the Community-Wide Standard, the Association may, at the discretion of the Board, provide temporary maintenance of the landscaping and flora of any and all unimproved Lots. Such maintenance may include or be limited to the cutting or trimming of vegetation on an unimproved Lot and such other actions as the Board may deem necessary or appropriate from time to time. The Board shall have no obligation to provide such temporary maintenance and by performing such maintenance from time to time, the Board shall not be deemed to have any continuing obligation to do so. The costs of maintenance pursuant to this Section 8.10 may be either (a) Common Expenses and included in General Assessments, or (b) Benefited Expenses to be charged and assessed as Benefited Assessments against the Owners of the subject Lots, secured by Assessment Liens, as the Board in the exercise of reasonable judgment may determine.

Section 8.11 Drainage Facilities.

8.11.1 Association Responsibilities. Without limiting any other provision hereof (but subject to Section 8.2), the Association shall, at all times, as a Common Expense and with respect to the Common Areas and the Association Property, be responsible for monitoring, maintaining, repairing and keeping in good condition and repair the Drainage Facilities. The Association's obligations shall be substantially in accordance with the following Drainage Facilities Monitoring and Maintenance Requirement:

(a) Sediment that accumulates in the catch basins, drain inlets, vegetated/concrete swales and retention basins shall be removed.

(b) Overgrown vegetation on the bottom, sides, and benches of the retention basins shall be removed by means of cutting, mowing and/or herbicide spraying.

(c) Overgrown vegetation along the Drainage Facilities shall be removed by means of cutting, mowing and/or herbicide spraying.

(d) Vegetative growth, debris, accumulated silt deposits and other material within the Drainage Facilities, including but not limited to all drainage outlets and all overflow weirs, shall be removed and kept clear.

(e) Mosquito infestation shall be controlled by removing stagnant water at the bottom of the retention basins.

(f) No less than once every two years and after the occurrence of a major storm event, the retention basins and related swales shall be visually inspected for accumulation of sediment and debris. Sediment buildup and debris greater than two feet above the basin floor shall be removed immediately after the storm event. Removal of sediment and debris shall be done after it is deemed safe to accomplish remedial work.

(g) All access paths to the retention basin shall be maintained and kept clear of obstructions. Vegetative growth and accumulated silt shall be removed. Loose gravel/dirt within access paths shall be compacted to maintain a safe route for vehicles used to maintain the retention basins.

Notwithstanding anything contained in this Section 8.11.1 to the contrary, if any vegetative growth, debris, accumulated silt deposits or other material in the Drainage Facilities is caused by a Lot Owner or is caused by anyone using the Property through a Lot Owner, the Board, on behalf of the Association, shall have the right to take such actions reasonably required or convenient to cause the Lot Owner to remove the item(s) from the Drainage Facilities and/or to enter such Owner's Lot and the Drainage Facilities and remove the item(s), the cost of which shall be charged to the Lot Owner.

8.11.2 Lot Owner Responsibilities. Each Lot Owner shall be responsible for monitoring and maintaining any drainage improvement constructed by such Lot Owner, or by any previous Owner of such Lot other than Developer, on such Owner's Lot. If such Lot Owner fails to maintain any such drainage improvement, the Board, on behalf of the Association, shall have the right to take such actions reasonably required or convenient to cause the Lot Owner to perform such maintenance and/or the right to enter the Lot and perform such maintenance, the cost of which shall be charged to the Lot Owner. The Lot Owner shall also be responsible for all costs reasonably incurred by the Association in repairing any damage to the Drainage Facilities caused by the Lot Owner or caused by anyone using the Property through the Lot Owner.

8.11.3 Modification of Drainage Facilities Monitoring and Maintenance Requirement. The Board shall have the right, subject to prior approval by the Class "B" Member, if any, to modify

the Drainage Facilities Monitoring and Maintenance Requirement from time to time in accordance with applicable law to address changed circumstances and drainage requirements relating to the Project.

8.11.4 Grants of Drainage Easements. Developer shall have the right to assign to the Association all of the rights, and to delegate to the Association all of the obligations, of the owner of "Lot 10-M-4" (generally defined as the "Benefitted Property") under one or more of the Grants of Drainage Easements. Such assignment and delegation may take place via the deed by which Developer conveys fee title to the Association Property to the Association; provided, however, that if such assignment and delegation are not made in the deed, the assignment and delegation shall automatically occur upon the Final Transition Date. Effective upon such assignment and delegation, the Association shall, as a Common Expense, have all of the rights, and be responsible for continued compliance with all of the obligations, of the owner of "Lot 10-M-4" under the Grants of Drainage Easements. Such obligations include, but are not limited to, contributing and paying a fair and equitable portion of all expenses reasonably required for the maintenance, repair and upkeep of the Drainage Facilities described in the Grants of Drainage Easements that are used for, or otherwise benefit, the Project and/or the Association and performing any indemnification obligation under the terms of the Grants of Drainage Easements.

Section 8.12 Sewerline Facilities.

8.12.1 Association Responsibilities. Without limiting any other provision hereof (but subject to Section 8.2), the Association shall, at all times, as a Common Expense and with respect to the Common Areas and the Association Property, be responsible for monitoring, maintaining, repairing and keeping in good condition and repair the Sewerline Facilities. The Association's obligations shall be substantially in accordance with the following Sewerline Facilities Monitoring and Maintenance Requirement:

(a) No less than once every year, visually inspect, for breakage or blockage, as many of the Sewerline Facilities as are reasonably accessible.

(b) No less than once every five years, inspect by means of remote access cameras the entirety of the Sewerline Facilities, for breakage or blockage.

8.12.2 Lot Owner Responsibilities. Each Lot Owner shall be responsible for monitoring and maintaining any sewer/wastewater improvement constructed by such Lot Owner, or by any previous Owner of such Lot other than Developer, on such Owner's Lot. If such Lot Owner fails to maintain any such sewer/wastewater improvement, the Board, on behalf of the Association, shall have the right to take such actions reasonably required or convenient to cause the Lot Owner to perform such maintenance and/or the right to enter the Lot and perform such maintenance, the cost of which shall be charged to the Lot Owner. The Lot Owner shall also be responsible for all costs reasonably incurred by the Association in repairing any damage to the Sewerline Facilities caused by the Lot Owner or caused by anyone using the Property through the Lot Owner.

8.12.3 Modification of Sewerline Facilities Monitoring and Maintenance Requirement. The Board shall have the right, subject to prior approval by the Class "B" Member, if any, to modify the Sewerline Facilities Monitoring and Maintenance Requirement from time to time in accordance

with applicable law to address changed circumstances and sewerline requirements relating to the Project.

8.12.4 Grants of Sewerline Easements. Developer shall have the right to assign to the Association all of the rights, and to delegate to the Association all of the obligations, of the owner of "Lot 10-M-4" (generally defined as the "Benefitted Property") under one or more of the Grants of Sewerline Easements. Such assignment and delegation may take place via the deed by which Developer conveys fee title to the Association Property to the Association; provided, however, that if such assignment and delegation are not made in the deed, the assignment and delegation shall automatically occur upon the Final Transition Date. Effective upon such assignment and delegation, the Association shall, as a Common Expense, have all of the rights, and be responsible for continued compliance with all of the obligations, of the owner of "Lot 10-M-4" under the Grants of Sewerline Easements. Such obligations include, but are not limited to, contributing and paying a fair and equitable portion of all expenses reasonably required for the maintenance, repair and upkeep of the Sewerline Facilities described in the Grants of Sewerline Easements that are used for, or otherwise benefit, the Project and/or the Association and performing any indemnification obligation under the terms of the Grants of Sewerline Easements.

Section 8.13 **Rights of Common Area Access and Maintenance**. The Board, and its duly authorized employees, agents and contractors, shall have and are hereby reserved and granted the right and a non-exclusive license to enter upon the Property, including any Lot, as reasonably necessary for the purpose of satisfying the maintenance rights or obligations of the Association pursuant to this Article 8.

Section 8.14 **Dedication of Common Areas**. Dedication of any portion of the Common Areas to the County or to the State of Hawaii or other governmental or quasi-governmental agency shall be in accordance with all ordinances, rules and regulations then in effect regarding dedication of such property. Developer does not represent that any portion of the Common Areas, including, without limitation, the Private Roads and associated street lighting, if any, is or will be constructed or maintained to current County dedication standards (and Developer expressly discloses that portions of the Common Areas, including the Private Roads and associated street lighting, if any, may not be constructed or maintained to current standards for dedication to the County). In the event the Association shall pursue dedication of any portion of the Common Areas, it shall be the responsibility of the Association, at its expense (funded by Capital Improvement Assessment), to improve all such property to the standards required for dedication. Dedication of any portion of the Common Areas shall not relieve the Association of its maintenance obligations pursuant to this Declaration, except to the extent agreed by the terms of the dedication.

Article 9

Security

Section 9.1 **No Obligation**. The Association, or its duly delegated representatives, may, but shall have no obligation whatsoever to, operate a security system on or related to the Project.

Section 9.2 **General Security**. Any security system may, but need not necessarily, include: guard gates and other security points, both manned and unmanned, at entries to various portions of the Property and the Project; patrol vehicles, patrolmen and security supervisors;

cameras, computers and/or other monitoring equipment; television monitoring devices; burglar and fire alarm devices installed in buildings located on the Common Areas and Association Property; communications equipment; direct line phones; and such other security protection devices as may be deemed appropriate by Developer or the Association. The costs of installation, maintenance and operation of any such security system shall be Common Expenses.

Section 9.3 Security for Individual Lots. The Association may require that any Owner wishing security service (including without limitation patrol service and fire and burglar alarm protection) for such Owner's particular Lot, as distinguished from general security service under Section 9.2, obtain the service from a Person (which may be the Association) selected by the Association to provide such service to all Owners in the Property wishing such service. The Association, however, may not require any Owner to have such service for the Owner's particular Lot. The cost of any such service would not be a Common Expense or included in the General Assessment, but, if provided by or through the Association, would be a Benefited Assessment against the Owner requesting the service and the Owner's Lot for which the service is provided. The cost of installation, maintenance and operation of any such service shall be reasonably competitive with the charges for similar services rendered by unaffiliated companies providing such services on a contract basis to other communities and customers in the area.

Section 9.4 Right of Entry. Representatives and agents of the Association, including security patrolmen, if any, shall have the right to enter upon all Lots and Common Areas when responding to alarms or when otherwise reasonably deemed necessary for the protection of Persons or property. Neither the Association, nor any representative or agent of the Association, shall have any liability to any Person when acting in good faith in effecting such entry. The Association shall not have any liability to any Owner, Occupant or other Person for any loss, damage or theft of property or injury or death to Persons not prevented by a security system or for any failures in a security system. The Board shall be the sole judge as to the appropriate level and type of security provided to the various portions of the Project. The Board may cause the Association to contract with third parties for the performance of any or all of the security described in this Article 9.

Section 9.5 Disclaimer. Neither Developer, the Association nor the Master Association shall in any way be considered insurers or guarantors of security within the Project or Kaanapali Golf Estates, and neither Developer, the Association nor the Master Association shall be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken. Each Owner and Occupant acknowledges and understands that Developer, the Association, the Master Association and the Board are not insurers and that each Owner and Occupant assumes all risks for loss or damage to property and death or injury to Persons and further acknowledges that Developer, the Association, the Master Association and the Board have made no representations or warranties nor has any Owner or Occupant relied upon any representations or warranties, expressed or implied, including any warranty of merchantability or fitness for any particular purpose, relative to any security measures undertaken within the Property. Project security measures, if any, are not intended to substitute for security of individual Dwellings, which shall be the responsibility of the Owner thereof.

Article 10
Insurance

Section 10.1 Authority and Obligation to Purchase. The Board shall have the power, authority and obligation to purchase with Association funds such public liability, fire and casualty, officers' and directors' liability and indemnity, workmen's compensation and other insurance and fidelity bonds as is required by this Declaration and as the Board shall otherwise deem necessary or appropriate from time to time. Subject to the requirements of this Article 10, such policies shall be on such terms and conditions as the Board shall direct. All such policies and claims under policies shall be administered by the Board.

Section 10.2 Types of Insurance to be Maintained by the Association.

10.2.1 To the extent reasonably available, the Association shall maintain at least \$10,000,000 of insurance (in the aggregate) against liability incurred as a result of death or injury to persons or damage to property on any portion of the Common Areas. Fire and casualty insurance shall be in an amount as near as possible to the full replacement value of all Improvements located on the Association Property. The Board may establish commercially reasonable deductibles for all insurance policies.

10.2.2 Anything to the contrary contained in this Declaration notwithstanding (including, specifically, the qualification of reasonable availability of insurance set forth in Section 10.2.1 above), the Association shall, at its sole cost and expense and for the mutual benefit of the Association, the Lot Owners, Occupants, Developer, the Master Association and KDC, procure and maintain at all times a policy or policies of public liability insurance covering the Project, all activities thereon and the use and occupancy thereof, including specifically, but without limitation, liability and claims relating to the Rock Mound. Such policy or policies shall name Developer, the Master Association, KDC, and their respective successors and assigns, as additional insureds and shall include the types of coverage and minimum limits of liability as follows:

Types of Coverage	Minimum Limits
Comprehensive General Liability	
General Aggregate	\$ 2,000,000.00
Products and Completed	\$ 2,000,000.00
Operations Aggregate	\$ 1,000,000.00
Personal & Advertising Injury	\$ 1,000,000.00
Each Occurrence	\$ 50,000.00
Fire Damage (any one fire)	\$ 5,000.00
Medical Expense (any one person)	\$ 1,000,000.00
Hired/Non-Owned Automobile	
(occurrence)	
Commercial Umbrella	
Each Occurrence	\$10,000,000.00
Liability Aggregate Limit	\$10,000,000.00
Retained Limit	

Section 10.3 Non-Liability of Association, Board and Officers. Neither the Association nor any Board member nor officer of the Association nor Developer shall be liable to any Owner, Mortgagee or other Person if any risks or hazards are not covered by insurance, if the amount of insurance is not adequate or if an insurer becomes insolvent; provided, however, that if the Association fails to fully and properly satisfy its obligation to maintain the public liability policy or policies described in Section 10.2.2, the Master Association may, but shall not be required to, procure such insurance, and all costs and expenses associated therewith shall be assessed solely against the Owners of Lots within the Project. It shall be the responsibility of each Owner to ascertain the coverage and protection afforded by the Association's insurance and to procure and pay for such additional insurance coverage and protection as the Owner may desire.

Section 10.4 Premiums. Premiums for insurance policies purchased by the Association shall be paid by the Association as a Common Expense, except that the amount of increase over any annual or other premium occasioned by the use, misuse, occupancy or abandonment of a Lot or its appurtenances, or of the Common Areas, by an Owner or Occupant or the agent, employee or invitee of either, shall be assessed against that particular Owner as a Special Assessment.

Section 10.5 Insurance Claims. The Association, through such Persons as the Board may delegate, is hereby irrevocably appointed and authorized, subject to the provisions contained in this Article 10, to adjust all claims arising under insurance policies purchased by the Association and to execute and deliver releases upon the payment of claims, and to do all other acts reasonably necessary to accomplish any of the foregoing. The Board, at its discretion, may appoint an authorized representative, or enter into an insurance trust agreement wherein the trustee shall have authority to negotiate losses under any policy purchased by the Association.

Section 10.6 Benefit. Except as otherwise provided in this Article 10, all insurance policies obtained by the Board shall be for the benefit of, and any proceeds of insurance received by the Association or any insurance trustee shall be held or disposed of for, the Association and the Owners, as their interests may appear.

Section 10.7 Provisions Common to Association Insurance. Any insurance coverage obtained by the Association pursuant to this Article 10 shall be subject to the following provisions and limitations:

(a) The named insured under any such policies shall be the Association, or its authorized representative, with Developer named as an additional insured; provided, however, that the Master Association, KDC and their respective successors and assigns shall be named as additional insureds on the public liability policy or policies described in Section 10.2.2 above.

(b) In no event shall the insurance coverage obtained and maintained by the Association be brought into contribution with insurance purchased by the Owners, Occupants, or their Mortgagees.

(c) The policies shall provide that coverage shall not be prejudiced by (i) any act or neglect of the Owners when such act or neglect is not within the control of the Association, or

(ii) failure of the Association to comply with any warranty or condition with regard to any portion of the Project over which the Association has no control.

(d) The policies shall provide that coverage may not be canceled or substantially modified (including cancellation for non-payment of premium) without at least 30 days' prior written notice to any and all First Mortgagees and insureds named therein.

(e) The public liability policy or policies described in Section 10.2.2 above shall provide for at least 30 days' prior written notice to Developer, the Master Association, KDC and their respective successors and assigns of any material change in coverage, cancellation or nonrenewal.

(f) All policies shall be issued by one or more companies licensed and authorized to do business in Hawaii and holding a rating of A or better in the financial strength category and a rating of VIII or better in the financial size category as established by A.M. Best Company, Inc., if reasonably available, or, if not reasonably available, the most nearly equivalent rating; provided, however, that the Board may require or allow for such other rating as it shall reasonably determine.

(g) Insurance policies shall include the following provisions, if reasonably available:

(i) A waiver of subrogation by the insurer as to any and all claims against the Association and any Owner and their respective agents, employees or tenants, and of any defenses based upon co-insurance or upon invalidity arising from the acts of the insured;

(ii) Notwithstanding any provisions which give the carrier the right to elect to restore damage in lieu of making a cash settlement, such option shall not be exercisable without the prior written approval of the Board or when in conflict with the provisions of any insurance trust agreement to which the Association may be a party or any requirement of law; and

(iii) No policy may be canceled, invalidated, or suspended on account of the conduct of any member of the Board, or any officer or employee of the Association or its duly authorized manager without prior demand in writing delivered to the Association to cure the defect and the allowance of a reasonable time thereafter within which the defect may be cured by the Association, its manager, any Owner or Mortgagee.

Section 10.8 **Annual Insurance Review; Delivery of Certificates.** The Board shall review the insurance carried by or on behalf of the Association, at least annually, for the purpose of determining the amount of liability and casualty insurance required. If economically feasible, the Board shall obtain a current appraisal of the full replacement value of the Improvements on the Association Property, without deduction for depreciation, from a qualified independent insurance appraiser, prior to every third such annual review. No less than once every 12 months, the Board

shall deliver current certificates of insurance to Developer, the Master Association, KDC and their respective successors and assigns, which certificates evidence the required insurance coverage.

Section 10.9 Individual Insurance. By taking title to a Lot, each Owner covenants and agrees with all other Owners, and with Developer and the Association, that such Owner shall carry or provide for blanket all-risk casualty insurance on such Owner's Lot and Improvements thereon on such terms and with such limits as a reasonably prudent person would obtain. Each Owner (other than Developer) further agrees that in the event of a partial loss or damage and destruction resulting in less than total destruction of Improvements on such Owner's Lot, the Owner shall proceed promptly to repair or to reconstruct the damaged Improvements in a manner consistent with the original construction, or in such other manner as may be approved pursuant to Article 14. In the event that an Improvement is totally destroyed and the Owner determines not to rebuild or to reconstruct, the Owner shall clear the affected Lot of all debris and return the land to substantially the condition existing prior to the beginning of construction of the Improvement thereon, provided that, at a minimum, the Lot shall be grassed and maintained in a neat and tidy manner, free of debris. The Board may impose more stringent requirements regarding the standards for rebuilding or reconstructing structures on each Lot and the standard for returning the Lot to its natural state in the event the Owner decides not to rebuild or reconstruct.

Article 11

Damage and Destruction of Common Areas

Section 11.1 Duty of Association to Restore and Repair. The Association shall restore and repair the Association Property pursuant to this Article 11 upon partial or total destruction unless the Members elect not to restore and repair pursuant to Section 11.2 below. If the Association Property is restored and repaired, the proceeds of any casualty insurance maintained by the Association shall be used to the extent available for restoration and repair, subject to the prior rights of Mortgagees whose interest may be protected by such policies, and subject to Section 11.2. If the amount available from the proceeds of any insurance policies for restoration and repair, together with any uncommitted or unreserved capital of the Association, shall be less than the estimated cost of restoration and repair, the Association shall levy an Assessment (a "**Reconstruction Assessment**") against each Owner for use in restoration of the damaged or destroyed Association Property unless such Assessment shall be rescinded by a Super-Majority vote of the Class "A" Members and the approval of the Class "B" Member, if Class "B" Membership exists. Reconstruction Assessments shall be levied and charged on the same basis as provided for General Assessments under Section 7.3.

Section 11.2 Decision Not to Restore or Repair. If the Owners shall decide by a Super-Majority vote of the Class "A" Members and the approval of the Class "B" Member, if Class "B" Membership exists, within 60 days after a casualty not to restore or repair the damaged or destroyed Improvements on the Association Property, or if such repair or restoration is rescinded pursuant to Section 11.1 above, the portion of the Improvements so damaged or destroyed shall be cleared and landscaped for such use as determined by the Board. Notwithstanding the foregoing, so long as Class "B" Membership exists, the decision of Members not to restore or repair shall not be effective without Developer's written approval.

Section 11.3 Excess Insurance Proceeds. In the event any excess insurance proceeds remain after any repair or reconstruction by the Association pursuant to this Article 11, the Board, in its sole discretion, may retain such sums in the general funds of the Association or may distribute all or a portion of such excess to the Owners in the ratio that they would pay a Reconstruction Assessment hereunder, subject to the prior rights of Mortgagees whose interest may be protected by the insurance policies carried by the Association. The rights of an Owner or the Mortgagee of a Lot as to such distribution shall be governed by the provisions of the Mortgage encumbering such Lot.

Section 11.4 Use of Reconstruction Assessments. All amounts collected as Reconstruction Assessments shall only be used for the purposes set forth in this Article 11 and shall be deposited by the Association in a separate account for such purposes. Such funds shall not be commingled with any other funds of the Association and shall be deemed a contribution to the capital account of the Association by the Owners. Any Reconstruction Assessment shall be secured by the Assessment Lien.

Section 11.5 Insurance Proceeds Trust. Upon receipt by the Association of any insurance proceeds, the Board may cause the insurance proceeds to be paid directly to a bank, savings and loan association, or trust company located in the State of Hawaii, designated by the Board as trustee (the "**Insurance Trustee**"). Such funds shall be received, held and administered by the Insurance Trustee subject to a trust agreement consistent with the provisions of this Declaration and which shall be entered into between the Insurance Trustee and the Board. Disbursements to contractors performing any repair or reconstruction upon the Property shall be made periodically as the work progresses in a manner consistent with procedures then followed by prudent lending institutions in the State of Hawaii.

Article 12 **Eminent Domain**

Section 12.1 Definition of Taking. The term "**Taking**" shall mean condemnation by eminent domain or sale under threat of condemnation of all or any portion of the Association Property.

Section 12.2 Representation in Condemnation Proceedings. The Owners hereby irrevocably appoint the Association through such Persons as the Board may delegate to represent all of the Owners in connection with a Taking or threatened Taking. The Association shall act in its sole discretion with respect to any awards being made in connection with the Taking and shall be entitled to make a voluntary sale to the condemner in lieu of engaging in a condemnation action.

Section 12.3 Award for Association Property. Any awards received by the Association on account of the Taking shall be paid to the Association. If a Taking involves a portion of Association Property on which Improvements have been constructed, then the Association shall restore or replace such Improvements so taken on remaining land included in the Association Property to the extent lands are available therefor, in accordance with plans approved by the Board,

unless the Owners shall decide otherwise by a Super-Majority vote of the Class "A" Members and the approval of the Class "B" Member, if Class "B" Membership exists, within 60 days of the date of the Taking. If such Improvements are to be restored or replaced, the provisions of Article 11 regarding the disbursement of funds relating to casualty damage or destruction shall apply. The Association may, in its sole discretion, retain any award of funds in excess of those required to restore or replace Improvements in the general fund of the Association or distribute all or any portion thereof to the Owners in the ratio they would pay a Reconstruction Assessment, or as their interests otherwise may appear. The rights of an Owner and the Mortgagee of his Lot as to any distribution shall be governed by the provisions of the Mortgage encumbering such Lot.

Article 13 **Rights of Mortgagees**

Section 13.1 General Provisions. Notwithstanding any other provisions of the Project Documents, the following provisions of this Article 13 shall apply to and benefit each First Mortgagee.

Section 13.2 Subordination of Lien. The Assessment Lien against a Lot shall be subordinate to the lien of a prior Recorded First Mortgage on the Lot, except to the extent the Assessment Lien secures the amount of any unpaid Assessments (together with any interest, costs, reasonable attorneys' fees and any late charges related thereto) which accrue from and after the date on which a First Mortgagee comes into possession of or acquires title to the Lot, whichever occurs first. If the Assessment Lien for any unpaid Assessments that become payable after Recordation of the First Mortgage, but prior to the date the First Mortgagee comes into possession of or acquires title to the Lot, is not extinguished by the process by which such First Mortgagee acquired title to the Lot, neither such First Mortgagee nor a third-party purchaser shall be liable for the unpaid Assessments, and, upon written request to the Association by such First Mortgagee or purchaser, the Assessment Lien shall be released in writing by the Association to the extent it secures the unpaid Assessments. Nevertheless, if the Owner against whom the original Assessment was made purchases or redeems the Lot, the Assessment Lien shall continue in effect and may be enforced by the Association or by the Board. Further, any such unpaid Assessment shall continue to exist as the personal obligation of the defaulting Owner of the respective Lot to the Association, and the Board may use reasonable efforts to collect the unpaid Assessment from that Owner even after he is no longer the Owner of the Lot. Any unpaid Assessments that are extinguished pursuant to this Section 13.2 may be reallocated by the Association among all Owners as part of the Common Expenses. Except as provided above (and except for liens for taxes and other public charges that by applicable law are made prior and superior), the Assessment Lien shall be prior and superior to any and all charges, liens or encumbrances which hereafter in any manner may arise or be imposed on any Lot.

Section 13.3 Mortgagee Liability. Except as expressly provided in this Article 13, a First Mortgagee shall not be personally liable for the payment of any Assessment or charge, nor for the observance or performance of any covenant, condition, restriction, servitude or reservation contained in the Project Documents or any management agreement, except for those matters which are enforceable by injunctive or other equitable actions not requiring the payment of money.

Section 13.4 Enforcement After Foreclosure Sale. An action to abate the breach of any of the covenants, conditions, restrictions, servitudes and reservations in the Project Documents may be brought against the purchaser of a Lot who has acquired title through foreclosure of a Mortgage or through any equivalent enforcement proceedings (excluding payment of an Assessment), and the successors in interest to said purchasers, even though the breach existed prior to the time said purchaser acquired an interest in such Lot.

Section 13.5 Exercise of Owner's Rights. During the pendency of any proceedings to foreclose a First Mortgage (including any period of redemption), the First Mortgagee, or a receiver appointed in any such action, may, but need not, exercise any or all of the rights and privileges of the Owner in default including, but not limited to, the right to vote as a Member of the Association in the place and stead of the defaulting Owner provided that all outstanding Assessments are paid or discharged prior to the exercise of such voting rights.

Section 13.6 Subject to Project Documents. At such time as a Mortgagee shall come into possession of or become record Owner of a Lot, the Mortgagee shall take title and/or possession of such Lot subject to all of the terms and conditions of the Project Documents, including, but not limited to, the obligation to pay all Assessments and charges accruing thereafter, in the same manner as any other Owner.

Section 13.7 Notices of Action. A First Mortgagee, having provided a written request to the Association with the name and address of such First Mortgagee and the address of the affected Lot, will be entitled to timely written notice of:

- (a) any proposed termination of the Association;
- (b) any condemnation loss or any casualty loss which affects a material portion of the Association Property or which affects the Lot subject to the First Mortgage held by such First Mortgagee;
- (c) any delinquency in the payment of Assessments or charges owed by an Owner of the Lot subject to the First Mortgage held by such First Mortgagee, where such delinquency has continued for a period of 60 days;
- (d) any lapse, cancellation, or material modification of any insurance policy or fidelity bond maintained by the Association; and
- (e) any proposed action which would require the consent of a First Mortgagee, pursuant to Section 13.8 or Article 31.

Section 13.8 Other Provisions for First Mortgagees. To the extent possible under Hawaii law, any restoration or repair of the Common Areas after a partial condemnation or damage due to an insurable hazard shall be substantially in accordance with this Declaration and the original plans and specifications, unless the approval of substantial changes from the original plans and

specifications is obtained from the First Mortgagees holding at least a Majority of the Lots upon which there are First Mortgages.

Section 13.9 Applicability of Article 13. Nothing contained in this Article 13 shall be construed to reduce the percentage vote that must otherwise be obtained under this Declaration, the Articles or Bylaws or Hawaii law for any of the acts set out in this Article 13.

Section 13.10 Failure of Mortgagee to Respond. Any Mortgagee given a written notice from the Board to respond or consent to any action shall be deemed to have approved such action if the Board does not receive a written response from the Mortgagee within 20 days of the date of the Board's request, provided such request is mailed to the Mortgagee by certified mail, return receipt requested, addressed to the Mortgagee at its most current address of which the Association has written notice or otherwise is reasonably aware.

Article 14 **Architectural and Landscape Control**

Section 14.1 Architectural and Landscape Control. No structure shall be placed, erected or installed upon any Lot, no construction (which term shall include within its definition staking, clearing, excavation, grading and other site work), no exterior alteration or modification of existing improvements, and no plantings or removal of plants, trees or shrubs (except as may be permitted by Article XII, Section 16 of the Master Declaration) shall take place except in strict compliance with Article XI of the Master Declaration and the Master Design Guidelines, and then only after the requirements of said Article XI have been fully met, and the appropriate committee (NCC or MC) has approved such construction, alteration, modifications or plantings pursuant to Article XI, Section 2 of the Master Declaration.

Section 14.2 Design Requirements. The Design Requirements set forth in this Article 14 shall supplement the Master Design Guidelines as to the Property, and except as permitted under the Master Declaration or the Master Design Guidelines, shall not be inconsistent with the Master Design Guidelines; provided, however, that the Design Requirements may be more stringent or restrictive than the Master Design Guidelines. Each Owner acknowledges that the Design Documents applicable to the Project include both the Master Design Guidelines and the Design Requirements set forth in this Article 14. The Board shall make the Design Documents available to Owners, builders, and developers who seek to engage in development of or construction upon all or any portion of the Property, and such Owners, builders and developers shall conduct their operations strictly in accordance therewith.

Section 14.3 Individual Lot Plot Plans. Developer shall establish a "Plot Plan" for each Lot, which Plot Plan shall be part of these Design Requirements and the Design Documents. Each Plot Plan shall be submitted to the NCC for review and approval and cannot be revised or amended without written approval of the NCC and, until the Final Transition Date, Developer. A copy of each Plot Plan shall be maintained at the principal offices of the Association and the NCC, and, upon written request, shall be available for review and inspection by each Owner and other Persons who are affected by or have a reasonable interest in a Plot Plan. Each Plot Plan may establish, indicate

or designate some or all of the following items applicable or relevant to construction on or relating to the Lot: (a) building height limitations; (b) building area limits and building setbacks (including applicable "open areas"); (c) easement areas; (d) certain use designations and limitations; (e) grading, fill and other limitations or requirements; (f) building coverage limitations; (g) approximate location of utilities and their connection points; and (h) planting areas;. Without limiting any other provision of the Design Documents, including these Design Requirements, each Lot, and development thereof, shall be subject to all items shown or referred to on its respective Plot Plan. As used in this Article 14, "open areas" refers to areas expressly designated or indicated as such on the Plot Plans, and does not necessarily correspond or correlate with any portions of the Property that may be within any County "Open" zoning district. All grades, elevations, contours, boundaries, utility locations, setbacks and other items shown or referred to on the Plot Plans are approximate, and subject to verification by the Owner of the affected Lot. Developer, the Association and/or the NCC make no representations or assurances, and shall have no liability, with respect to the accuracy of the information and other items shown or referred to on the Plot Plans.

Section 14.4 Views Not Assured. No representations, warranties or guarantees are made by Developer or its agents as to the preservation of any views or view planes from any portion of the Project or any Lot. The complete development of the Project (including the possible development of the Annexation Property) and the future development of land adjacent to or in the vicinity of the Project may have a detrimental effect on the views from the Lots and other parts of the Project. There are no view easements or rights appurtenant to the Lots or any other portion of the Project. Views from any of the Lots or from any other portion of the Project are not assured in any way. Notwithstanding the foregoing, the NCC and the MC shall have the power and authority (but shall not be obligated) to deny approval of any Building or other Improvement that would or might materially impair views from one or more Lots or from any other portion of the Project.

Section 14.5 Grading and Lot Drainage.

14.5.1 Each Owner acquiring a Lot from Developer accepts the condition of the Lot in an "as is" condition. There are no representations made by Developer or its agents that any prior fill material on or affecting the Lot has been compacted to achieve any engineered standards. All subsequent grading work performed by the Owner shall be in strict compliance with plans as approved by the NCC and all appropriate governmental authorities.

14.5.2 Each Lot shall be entitled to allow pre-development surface/storm water run-off flows from the Lot, along with post-development surface/storm water run-off from the Lot from up to 5,000 square feet of hard surface (e.g., house, driveway, walkways, pool deck) to enter the drainage system of the Project. It is the responsibility of each Owner to contain within such Owner's Lot all of the drainage from surface/storm water run-off beyond that amount.

14.5.3 Notwithstanding anything to the contrary contained in this Declaration, surface/storm water run-off from all of the hard surfaces on the Recreational Park Facilities Lot (e.g., driveways, parking lots, walkways, pool deck, out buildings, etc.), as well as predevelopment flows from the Recreational Park Facilities Lot, shall (and shall be permitted to) enter the drainage system of the Project.

Section 14.6 **Building Height.** The Plot Plan for each Lot shall indicate maximum building height limitations applicable to the Lot, provided such maximum building height shall not exceed that which is permitted by the County.

Section 14.7 **Minimum Dwelling Size.** Each Dwelling Unit constructed upon a Lot shall have a minimum enclosed living area of two thousand five hundred (2,500) square feet under roof, excluding the garage, external storage areas and lanai areas. Each Dwelling Unit shall have appurtenant to it an attached or detached enclosed garage for not less than two automobiles and within every garage shall be not less than one hundred (100) square feet of storage space. No carports are permitted within the Project. Porte-cocheres are permitted within the Project, provided they are supplemented by the required garage and storage areas.

Section 14.8 **Supplementary Standards and Requirements.** Developer may establish and promulgate supplementary standards and guidelines applicable to the Project, not inconsistent with the Master Design Guidelines or the Design Requirements set forth in this Article 14. Such supplementary standards and requirements may, but need not necessarily, include the following:

(a) Time limitations for the completion, within specified periods after approval or after commencement of construction, of the Improvements for which approval is required pursuant to the Design Documents;

(b) Procedures for supplementary review by Developer of an Owner's plans and specifications, as and to the extent deemed necessary or appropriate by the Board or Developer for compliance with this Declaration and the Design Requirements;

(c) Design Requirement interpretive drawings; and

(d) Such other limitations and restrictions as Developer in its reasonable discretion shall adopt, including, without limitation, the regulation of all landscaping (including the absolute prohibition of certain types of land use, lighting, signage, landscaping, trees and plants), construction, reconstruction, exterior addition, change or alteration to or maintenance of any building, structure, wall or fence, including, without limitation, the nature, kind, shape, height, materials, exterior color, surface texture, and location of any such Improvement.

Section 14.9 **Fee Assessment.** In addition to the fees assessed by the NCC and/or the MC pursuant to the Design Documents, Developer and/or the Board may assess reasonable fees to Owners in connection with their roles in assuring compliance with the Design Documents.

Section 14.10 **Authority.** Developer, the Board, the NCC and the MC shall have the authority and standing, but not the obligation, to enforce the Design Requirements; provided, however, that none of them shall enforce or attempt to enforce the Design Requirements in a discriminatory manner.

Section 14.11 **No Liability for Approval.** No approval of plans or specifications by NCC, the MC, Developer or the Board shall be construed as representing or implying that (i) such plans,

specifications will result in properly designed Improvements if followed, or (ii) any Improvement built in accordance therewith will be built in a good and workmanlike manner, or (iii) such Improvements shall comply with applicable laws, ordinances and regulations. By its part, if any, in assisting with the review and approval of any plans and specifications for a Lot, neither the Association, the Board, any officer or director of the Association, the NCC, the MC, nor Developer assumes any liability or responsibility therefor, or for assuring compliance with the Design Documents, or for any defect in any structure constructed from such plans and specifications. Neither the Association, the Board, any officer or director of the Association, the NCC, the MC, nor Developer shall be liable to any Owner or other Person for any damage, loss or prejudice suffered or claimed on account of (a) inaccuracy of items shown or referenced on the Plot Plan, (b) the approval or disapproval of any plans and specifications, whether or not defective, (c) the grant or denial of any requests for variances to the Design Documents, (d) the construction or performance of any work, whether or not pursuant to approved plans and specifications, (e) the development, or manner of development of any property within the Property, or (f) any change in the size, configuration or location of any Improvement or the changing of the natural grade of any Lot. Approval of plans and specifications by the NCC, the MC or (if applicable) Developer or the Board, or the approval of any change in the size, configuration or location of any Improvement, or a change in the natural grade of any Lot is not, and shall not be deemed to be, a representation or warranty by the Association, the Board, any officer or director of the Association, the NCC, the MC or Developer that said plans, specifications or changes comply with applicable governmental ordinances or regulations including, but not limited to, zoning ordinances and building codes. Approval of plans and specifications by the NCC, the MC or (if applicable) Developer or the Board shall not be deemed a representation by the Association, the Board, the NCC, the MC or Developer that such plans and specifications comply with this Declaration or the Design Documents, nor be deemed a waiver by the Association, the Board, the NCC, the MC or Developer of any rights hereunder to enforce this Declaration and the Design Documents.

Section 14.12 **Inspection.** Developer and any authorized consultant of Developer and any authorized officer, director, employee or agent of the Association, upon giving reasonable written notice to the Owner (in an emergency no notice shall be required), may, at any reasonable time, enter upon any Lot, except the interior of any completed Dwelling Unit, without being deemed guilty of trespass, in order to ascertain whether or not the Improvements constructed or under construction have been or are being built or changed in compliance with the Design Documents.

Section 14.13 **No Waiver of Future Approvals.** The approval of the NCC, the MC and/or (if applicable) Developer or the Board of any proposals or plans and specifications or drawings for any work done or proposed, or in connection with any other matter requiring the approval and consent of the NCC, the MC, Developer or the Board, shall not be deemed to constitute a waiver of any right to withhold approval or consent as to any similar proposals, plans and specifications, drawings or matters whatever subsequently or additionally submitted for approval or consent.

Section 14.14 **Right of Removal.** Any construction, alteration, or other work done in violation of the Design Documents or in violation of NCC or MC approval shall be deemed to be nonconforming. Upon written request from the Board, Developer, the NCC or the MC, an Owner shall, at such Owner's own cost and expense, and within a reasonable time, remove such nonconforming construction, alteration, or other work and shall restore the Lot to substantially the

same condition as existed prior to the nonconforming construction, alteration, or other work. Upon a breach of this obligation, the Board, Developer, the NCC, the MC or their designees shall have the right, but not the obligation, to enter the Lot, remove the nonconforming construction, alteration or other work and, to the extent reasonably practicable, restore the Lot to substantially the same condition as existed prior to the nonconforming construction, alteration or other work. The Board shall by Special Assessment recover from the Owner all costs of such entry, removal and restoration, together with interest at twelve percent per annum, and the Association shall have an Assessment Lien to secure the payment of such costs.

Section 14.15 Development by Developer. Any provision of this Declaration or the Design Requirements to the contrary notwithstanding, and except to the extent applicable pursuant to the Master Declaration and the Master Design Guidelines, the provisions of this Article 14 shall not apply to any Improvements, or other use of any portion of the Property, including the Lots, proposed or made by Developer in connection with its development, construction, promotion, marketing, sale or leasing of any Lot, Common Areas, or any other portion of the Property.

Article 15 **Use Restrictions**

Section 15.1 General. The Property shall be used in accordance with the covenants, conditions, restrictions and easements set forth in the Master Project Documents, this Declaration, any Supplemental Declaration, the Association Rules and the Design Requirements, as they may be amended from time to time, and applicable laws (including zoning ordinances and building codes). Nothing in this Article 15 shall restrict or limit any Supplemental Declaration, the Design Requirements, the Association Rules or any supplementary design standards and requirements from imposing more stringent or restrictive standards than those contained in this Declaration or in the Master Declaration.

Section 15.2 Property Restrictions. No covenants, conditions, restrictions or easements shall be Recorded by any Owner or other Person, except Developer, against any Lot without the provisions thereof having been first approved in writing by Developer (until the Final Transition Date) or the Board (from and after the Final Transition Date). Any covenants, conditions, restrictions or easements Recorded without Developer's or the Board's (as applicable) approval being evidenced thereon or attached thereto shall be null and void.

Section 15.3 Rezoning. No application for a general plan change or rezoning for or of any Lot, and no applications for variances, special permits, use permits or the like, shall be filed with any governmental authority unless the proposed use of the Lot has been first approved in writing by Developer (until the Final Transition Date) or the Board (from and after the Final Transition Date) and the proposed use otherwise complies with this Declaration; and the application has been submitted to and approved by the Board and, if prior to the Final Transition Date, Developer. This provision shall not in any way prohibit, restrict or otherwise limit the right of Developer to apply for, prosecute and receive rezoning and/or reclassification of any portion of the Property then owned by Developer, or to apply for, prosecute and receive variances or use permits relating to such property.

Section 15.4 **General Covenants, Conditions, Restrictions and Easements.** In addition to the applicable provisions of the Master Project Documents, the following covenants, conditions, restrictions and reservations of easements and rights shall apply to all Lots (and the Owners and Occupants thereof); provided, however, that except to the extent applicable pursuant to the Master Project Documents, the provisions of this Section 15.4 shall not apply to any Improvements or any use of any portion of the Property, including the Lots, proposed to be made or made by Developer in connection with its development, construction, promotion, marketing, sale or leasing of any Lot, the Common Areas, or any other portion of the Property.

(a) **Residential Use.** All Lots shall be used only for the construction and occupancy of Single-Family Dwelling Units and residential activities incidental thereto, and shall be used, improved, and devoted exclusively to residential use (whether transient or permanent) and incidental activities, in compliance with the Master Project Documents and applicable law (including zoning ordinances and building codes). No trade or business may be conducted in or from any Lot, except as provided in the Master Declaration. Except as first approved in writing by Developer (until the Final Transition Date) or the Board (from and after the Final Transition Date), and subject to the Design Documents, no structures whatsoever, other than private, Single-Family Dwelling Units, together with accessory structures authorized pursuant to the Design Documents and applicable law, shall be erected, placed or permitted to remain on any Lot.

(b) **Recreational Park Facilities.** The Recreational Park Facilities shall be operated as recreational park facilities, subject to the Bylaws and the Association Rules.

(c) **Violation of Law or Insurance.** No Owner or Occupant shall permit anything to be done or kept in or upon such Owner's Lot or in or upon any portion of the Common Areas that will result in the cancellation, increase in premium, or reduction in coverage of insurance maintained by the Association or that would be in violation of any law.

(d) **Animals.** The restrictions in Article XII, Section 4 of the Master Declaration relating to raising, breeding and keeping of animals, livestock and poultry on any portion of the Property, including the Lots, shall be adhered to at all times. In no event shall any animal that is allowed to be kept on the Property pursuant to the Master Declaration be permitted to run free away from its owner's Lot without a leash, or conduct itself so as to create an unreasonable annoyance. Pet owners shall be responsible for the immediate cleaning and repairing of any soiling of or damage to the Common Areas or other Lots caused by the pet. An animal or pet that is at or around a Lot for more than a total of 12 hours is considered to be kept.

(e) **Safe Condition.** Each Owner shall maintain and keep the Owner's Lot at all times in a safe, sound and sanitary condition and repair and shall correct any condition or refrain from any activity which might interfere with the reasonable enjoyment by other Owners of their respective Lots or the Common Areas.

(f) **Drainage.** Use of a Lot, and all Excavation and Improvements affecting a Lot, shall not interfere with the use and maintenance of the Drainage Facilities for the Project. Any alteration of drainage resulting from Excavation and/or Improvements to a Lot shall be in accordance with detailed plans therefor approved by the NCC or the MC and the public authority

having jurisdiction thereof. This Section 15.4(f) shall not be deemed to restrict or otherwise affect rights reserved to Developer to alter or change drainage patterns within or upon the Property. Each Lot shall be subject to, and shall accept, drainage from those portions of the Property that are uphill from the Lot.

(g) **Rental/Leasing of Dwelling Units.** An Owner of a Lot may rent or lease the Owner's Dwelling Unit either directly for its own account or as part of a rental pool; *provided, however,* that the Board (including Developer while it controls the Board) shall have the right, at any time, to adopt rules and restrictions relating to the operation of rental pools within Lanikeha, including rules requiring that rental pools be operated in a manner consistent with certain other rental pools in the Kaanapali area. An Owner who rents, leases or otherwise grants occupancy rights to such Owner's Lot to any Person shall be responsible for assuring compliance by the Occupant with all of the provisions of the Master Project Documents and the Project Documents, and shall be jointly and severally responsible for any violations by the Occupant.

(h) **Vehicles.** The Association Rules may prohibit or restrict the use of golf carts, "dirt bikes", all-terrain vehicles, and similar vehicles on the Private Roads and other Common Areas.

(i) **Maintenance.** Subject to the rights of the Association with respect to certain Easements, each Owner shall keep or cause to be kept all shrubs, trees, hedges, grass and plants of every kind located on the Owner's Lot (including setback areas), neatly trimmed, shall keep or cause to be kept all such areas properly cultivated and free of trash, weeds and other unsightly material and shall maintain all paved and concrete areas, including driveways, roadways and parking areas, in good condition and repair. No Person shall park, place, or store or permit to be parked, placed or stored any vehicle, boat, trailer, motorcycle, bicycle or other item on or within the Private Roads, except to the extent expressly permitted by the Association Rules. No Person shall cause or permit any nuisance or offensive use of the Private Roads.

(j) **Offensive Activity.** No noxious or offensive activity shall be conducted upon any Lot. No Lot shall be used, in whole or in part, for the storage of any property or thing that will cause such Lot to appear to be in an unclean or untidy condition. No substance, thing, or material shall be kept or maintained or permitted to exist upon any Lot that will emit foul or obnoxious odors or that will cause any noise or other condition that will or might disturb the peace, quiet, safety, comfort, or serenity of the occupants of surrounding property. There shall not be maintained any plants or animals or device or thing of any sort whose activities or existence in any way is noxious, dangerous, unsightly, unpleasant, or of a nature as may diminish or destroy the enjoyment of the Property. No Owner shall permit any thing or condition to exist upon any Lot that shall induce, breed or harbor infectious plant disease or noxious insects.

(k) **Repair of Improvements.** No Improvements on any Lot shall be permitted to fall into disrepair and each such Improvement shall at all times be kept in good condition and repair and adequately painted or otherwise finished. In the event any Improvement is damaged or destroyed, then, subject to the approvals required by Article 14, the Owner shall immediately repair or rebuild or demolish the Improvements and clear and restore the land to a presentable and safe condition.

(l) **Machinery and Equipment.** No machinery or equipment of any kind shall be placed, operated or maintained upon or adjacent to any Lot except (i) such machinery or equipment as is usual and customary in connection with the maintenance or construction (during the period of maintenance or construction) of Improvements, (ii) such machinery or equipment as is usual and customary in connection with the use of a completed Dwelling Unit and the landscaping appurtenant thereto, or (iii) that which Developer or the Association may require for the operation and maintenance of the Property.

(m) **Unightly or Unkempt Conditions.** The pursuit of hobbies or other activities, including, without limitation, the assembly and disassembly of motor vehicles and other mechanical devices shall not be pursued or undertaken on any Lot unless confined to an enclosed garage and then only to the extent other Owners are not unreasonably disturbed by those activities.

(n) **Timeshare Prohibited.** No timeshare use or ownership plan to which Hawaii Revised Statutes, Chapter 514E (or successor chapter) would be applicable shall be permitted with respect to all or any portion of the Property, including any Lot

(o) **Restriction on Declaring a Condominium Property Regime.** Without the prior written approval by Developer (until the Final Transition Date) or the Board (from and after the Final Transition Date) of such documents as Developer or the Board (as applicable) may require (including, without limitation, the declaration, bylaws and condominium map), which approval may be withheld for any reason in the sole and absolute discretion of Developer or the Board (as applicable), no Lot shall be made subject to a declaration of condominium property regime or other such declaration or documentation allowing a Lot Owner to separately convey or transfer less than all of the Improvements on such Owner's Lot. Nothing in this Article 15 shall prevent Developer from submitting any portion of the Property to a condominium property regime.

(p) **Implementation and Variances.** The Board (or Developer until the Final Transition Date) may implement the restrictions set forth in this Section 15.4, or otherwise restrict and regulate the use and occupancy of the Property and the Lots, by reasonable rules and regulations of general or specific application adopted by the Board from time to time and incorporated into the Association Rules. The Board (or Developer until the Final Transition Date) may, at its option and in extenuating circumstances, but subject to the Master Declaration, grant variances from the restrictions set forth in this Section 15.4 if the Board (or Developer) determines, in its discretion, (i) either (a) that a restriction would create a substantial hardship or burden on an Owner or Occupant, or (b) that a change of circumstances since the Recordation of this Declaration has rendered such restriction obsolete, and (ii) that the activity permitted under the variance, in the reasonable opinion of the Board (or Developer), will not have any substantial adverse effect on the Owners and Occupants of the Property and is consistent with the high quality of life intended for Owners and Occupants in the Project.

Section 15.5 **Restriction on Further Subdivision and Consolidation.**

(a) Except as specifically provided in this Section 15.5, no Owner shall subdivide or separate its Lot into smaller lots or parcels of land or convey or transfer less than all of any such

Lot or grant any easement or other interest that would have the effect of subdividing or separating a Lot into smaller parcels, without the prior written consent of Developer (until the Final Transition Date) or the Board (from and after the Final Transition Date) (which consent may be withheld for any reason in the sole and absolute discretion of Developer or the Board, as appropriate), the County, the NCC and the MC (if required). Any such consent must be evidenced on the map, plan or other instrument creating the subdivision, easement or other interest.

(b) Except as specifically provided in this Section 15.5, no Owner or Owners owning two or more contiguous Lots may combine or consolidate those Lots into one or more legal lots; provided, however, that, in unique circumstances and upon a showing of no adverse impact upon the Association or any other Lot or Lot Owner, an Owner or Owners of two or more contiguous Lots may combine or consolidate those Lots into one or more Lots, but only upon the prior written consent of Developer (until the Final Transition Date) or the Board (from and after the Final Transition Date) (which consent may be withheld for any reason in the sole and absolute discretion of Developer or the Board, as appropriate), the County, the NCC and the MC (if required). Any such consent must be evidenced on the map, plan or other instrument creating the consolidated Lot or Lots. Any such combination of Lots shall not reduce or alter the voting rights obtained by ownership of each Lot nor shall it reduce or otherwise alter the amount which would have been assessed against the Owner or Owners of such Lots pursuant to the terms of this Declaration or the Master Declaration in the absence of the consolidation. The Owner or Owners of such Lots will be entitled to the rights of Membership in the Association for each such Lot. The Assessments attributable to each of the former separate Lots shall be attributable to the entire combination of Lots and the entire combination shall be subject to the Assessment Lien.

(c) Unless Developer specifically elects otherwise in writing, the provisions of this Section 15.5 shall not apply to Lots owned by Developer, nor shall it in any way prohibit, restrict or otherwise limit Developer from subdividing, separating, consolidating or resubdividing any Lot or any other property at any time owned by Developer, or otherwise acting pursuant to rights reserved to Developer in the Project Documents.

Section 15.6 Restriction of Vehicular Access Rights. Each Lot affected by a restriction of vehicular access rights, as shown on the Subdivision Map and/or the File Plan, shall be owned, occupied, used and developed in accordance with such restriction.

Section 15.7 Landscape and Utility Easements. Easements within the Project for landscaping and utility purposes shall be reserved for landscaping, utility lines and appurtenances and drainage. No Buildings or other Improvements (except fencing or landscaping approved by the NCC or the MC in accordance with the Design Guidelines) shall be constructed, erected, placed or maintained within such easements for landscaping and utility purposes.

Article 16 **Hazardous Materials**

Section 16.1 Restriction on Use. Each Owner and Occupant shall comply with all Environmental Laws. No Owner or Occupant shall use, generate, manufacture, store, release,

dispose of or permit to exist in, on, under or about any Lot, the Common Areas or any portion of the Property, or transport to or from any portion of the Property, any Hazardous Materials, except commonly used consumer products that may contain Hazardous Materials (e.g., cleaning solvents, printing inks, pesticides and fungicides), provided that (a) such products are not stockpiled in large quantities and are used for their intended purpose, and (b) such use, generation, manufacture, storage, release, disposal or transportation is strictly in conformance with Environmental Laws.

Section 16.2 Notification. An Owner or Occupant shall give prompt notice to the Association if it becomes aware of (a) an Environmental Event on a Lot, the Common Areas, the Association Property, or on adjoining property that threatens to affect any part of the Property, or (b) any Environmental Claim is made or threatened against an Owner or Occupant with respect to any part of the Property, or (c) any investigation, enforcement, remediation or other regulatory action or proceeding shall be threatened or taken, in connection with or resulting from, the occupancy or use of a Lot, the Common Areas or the Association Property. The Association's receipt of notice of an Environmental Event not affecting Association Property shall not be deemed to create any obligation on the part of the Association to respond to the notice. However, the Association shall have the right, but not the obligation, (i) to participate in all oral or written communications with governmental agencies concerning environmental conditions on or about any such property, (ii) to join and participate in, and control, if the Board so elects, any action or proceeding initiated in respect of any Environmental Claim against an Owner or Occupant, and (iii) to negotiate, defend, approve and appeal any such action. An Owner or Occupant shall not enter into any settlement agreement, consent decree or other compromise with respect to any Environmental Claim in any way relating to the Owner's Lot without first notifying the Association and affording the Association at least ten business days in which to decide whether or not to participate in any such action or proceeding.

Section 16.3 Environmental Investigation. From time to time, the Association may engage a qualified environmental consultant to conduct an investigation of any Lot or the Association Property to determine whether there is contamination by Hazardous Materials in, about or beneath such property. Each Owner and Occupant shall cooperate with the Association's consultant and permit entry and reasonable access for this purpose. An Owner or Occupant shall reimburse the Association on demand for the cost of the investigation if an Environmental Event has occurred on or about the Owner's Lot.

Section 16.4 Remediation. Each Lot Owner with respect to its Lot, and the Association with respect to Association Property, shall promptly undertake and diligently complete, at its or their sole cost and expense and in strict compliance with applicable Environmental Laws, all investigative, corrective and remedial measures reasonably necessary to respond to any Environmental Event pertaining to its property. Such measures shall include, without limitation, treatment or removal and proper disposal of the Hazardous Material and restoration of all affected areas to the condition existing immediately prior to the Environmental Event to the extent reasonably possible. In the event any such Owner shall fail to clean up any contamination in violation of Environmental Laws, the Association, upon ten days' advance notice, may undertake remediation and recover the expenses so incurred from the Owner or Owners through a Special Assessment.

Article 17 **Easements**

The rights and easements set forth in this Article 17 are in addition and without limitation to any other rights and easements created by or set forth in this Declaration.

Section 17.1 Recorded Easements. The Common Areas, and all portions thereof, and each Lot shall be subject to all Easements and all building setback lines affecting such Common Areas and Lots, to any Recorded grant of such Easements, and to all rights relating to such Easements as provided herein.

Section 17.2 Easements. Developer shall have and hereby reserves the right for itself and its successors and assigns (a) to designate, delete, relocate, grant, amend, convey, transfer, cancel, assign, reserve or otherwise deal with any easements and rights of way over, across, on, under and through the Easements, including, but not limited to, the Utility Easements and the Access Easements, and/or other portions of the Project at any time necessary or desirable for the construction, reconstruction, installation, relocation, replacement, operation, maintenance, use, repair and/or removal of: roadway and related improvements, including without limitation landscaping, street lights, entry and other identification features, including street signs and monuments, irrigation systems, and related appurtenances and facilities; appliances, equipment, wires, cables, conduits, transformers, pads, systems, pipes, pipelines and facilities for transmission and distribution of electricity for light and power, television signals, communications (including telecommunications), control circuits, sanitary sewer, water, surface/storm water drainage and other services to Lots, the Association Property and other properties at the discretion and direction of Developer, and (b) to grant or assign easements therein (with or without Developer retaining its reserved rights therein) for such purposes to any governmental or quasi-governmental authorities, public or private utility or service companies, the Association, the Master Association or other Persons on terms customary and appropriate for such grants of easement, as deemed appropriate by Developer or Developer's successor or assign, as applicable.

Section 17.3 Landscape Easements. Developer shall have and hereby reserves to itself, the Association, and their respective successors and assigns, an easement upon, across, over, in, under and through any portion of the Property, including within the Common Areas, the Private Roads and the setbacks of the Lots, for constructing, replacing, installing, maintaining, repairing and removing landscaping, lights, street lights, shrubs, bushes, ground cover and other vegetation and irrigation systems and related appurtenances and Improvements. Such landscaping, to the extent installed by Developer or the Association, shall take precedence over landscaping installed by or on behalf of an Owner.

Section 17.4 Easement for Monitoring and Maintenance Purposes. Developer shall have and hereby reserves to itself, the Association, and their respective successors and assigns, an easement upon, across, over, in, under and through any portion of the Property, including the Lots, the Common Areas and the Private Roads, and a right to make such use of such property as may be necessary or appropriate to perform the rights, duties and functions that the Association is obligated or permitted to perform pursuant to this Declaration, including, without limitation, the right to enter upon any Lot for the purposes of: performing maintenance to the landscaping or the exterior of Improvements to such Lot; performing the Drainage Facilities Monitoring and Maintenance

Requirement; and performing the Sewerline Facilities Monitoring and Maintenance Requirement, all as and to the extent required or permitted by the Project Documents.

Section 17.5 Drainage Easements.

17.5.1 Generally. Developer shall have and hereby reserves to itself, the Association, and their respective successors and assigns, an easement upon, across, over, in, and under the Drainage Easements and the Private Roads for drainage purposes, and for the purpose of constructing, using, reconstructing, replacing, installing, maintaining, monitoring, repairing and removing the Drainage Facilities related thereto (in accordance with the Drainage Facilities Monitoring and Maintenance Requirement and otherwise), and for changing, correcting, or otherwise modifying the grade or drainage channels of any portion of the Property so as to improve the drainage of water onto, within and from the Property, together with a right of access over and across all Lots in the Project, as reasonably necessary for the exercise of said rights (*provided, however,* that such right of access shall not unreasonably interfere with the use of any Lot); together, also, with the right to grant easements therein for such purposes to governmental or quasi-governmental authorities, the Association, the Master Association or other Persons as deemed appropriate by Developer. Subject to the terms of the Drainage Facilities Monitoring and Maintenance Requirement and this Declaration, each Lot shall have a non-exclusive right and easement over and across the Drainage Easements for discharge of surface/storm water from such Lot.

17.5.2 Owners' Drainage Easement Rights. Each Owner shall have a non-exclusive easement over and upon the Drainage Easements for use of the Drainage Facilities within the Project. Each Owner's use of the Drainage Facilities shall be subject to the provisions of this Declaration and such rules and limitations as may be provided in the Association Rules and to the terms and conditions of agreements, if any, made by Developer and the Association relating to the use and maintenance of the Drainage Facilities.

Section 17.6 Sewerline Easements.

17.6.1 Generally. Developer shall have and hereby reserves to itself, the Association, and their respective successors and assigns, an easement upon, across, over, in, and under the Sewerline Easements and the Private Roads for sewerline purposes, and for the purpose of constructing, using, reconstructing, replacing, installing, maintaining, monitoring, repairing and removing the Sewerline Facilities related thereto (in accordance with the Sewerline Facilities Monitoring and Maintenance Requirement and otherwise), together with a right of access over and across all Lots in the Project, as reasonably necessary for the exercise of said rights (*provided, however,* that such right of access shall not unreasonably interfere with the use of any Lot); together, also, with the right to grant easements therein for such purposes to governmental or quasi-governmental authorities, the Association, the Master Association or other Persons as deemed appropriate by Developer. Subject to the terms of the Sewerline Facilities Monitoring and Maintenance Requirement and this Declaration, each Lot shall have a non-exclusive right and easement over and across the Sewerline Easements for discharge of wastewater from such Lot.

17.6.2 Owners' Sewerline Easement Rights. Each Owner shall have a non-exclusive easement over and upon the Sewerline Easements for use of the Sewerline Facilities within the Project. Each Owner's use of the Sewerline Facilities shall be subject to the provisions of this Declaration and such rules and limitations as may be provided in the Association Rules and to the terms and conditions of agreements, if any, made by Developer and the Association relating to the use and maintenance of the Sewerline Facilities.

Section 17.7 Additional Easements and Licenses. If Developer in its sole and absolute discretion determines that additional utility, roadway, drainage, sewer or other similar easements or licenses, whether or not contemplated or mentioned in this Declaration, over, across, under and through portions of the Property are reasonable, necessary and desirable to effectuate the purposes of this Declaration or to facilitate use or development of the Project and/or other properties adjacent to or in the vicinity of the Project (including without limitation the Annexation Property), then, upon the request of Developer, and provided the proposed additional easements and licenses will not unreasonably interfere with the development, use, occupancy, operation or access to any affected Lot, Developer may designate easements for such purposes and the Association, each Owner and Mortgagee, as applicable, agrees to grant such additional easements and licenses over, across, under and through the affected Lot, without charge, subject to terms customary and appropriate for such easements and licenses. Upon and in connection with any designation and grant of such additional easements, Developer shall, and shall have the right to, unilaterally amend this Declaration to modify Exhibit "C" hereto to appropriately reflect such designation and/or grant of additional easements.

Section 17.8 Easements for Encroachments. A reciprocal appurtenant easement shall exist and is granted for the maintenance of encroachments resulting from the unintentional placement or settling or shifting of Improvements, whether constructed, reconstructed, or altered (in accordance with the terms of this Declaration) along the boundary between a Lot and portions of the Association Property adjacent thereto to a distance of not more than one foot, as measured from any point on such common boundary, along a line perpendicular to such boundary at such point; provided, however, in no event shall an easement for encroachment exist if such encroachment occurred due to willful and knowing conduct on the part of an Owner, Occupant or the Association. Any such easements for encroachment shall be for duration of the encroachment and for its maintenance.

Section 17.9 Easement for Golf Balls. The Common Areas and each Lot shall be burdened by and subject to an easement permitting golf balls unintentionally to come upon the Common Areas and the Lots immediately adjacent to any golf course and for golfers to enter upon the Common Areas or the exterior portions of a Lot to search for and recover errant golf balls; provided, however, that (a) a golfer retrieving a golf ball shall do so in a reasonable manner and shall repair any damage caused by entry onto the Common Areas or a Lot to retrieve the golf ball; and (b) if a Lot is fenced or walled, the golfer will seek the Owner's permission before entering upon such Lot. The existence of this easement shall not relieve golfers of liability for damage caused by errant golf balls or the exercise of this easement. Under no circumstances shall Developer, the Association or the owner(s) of any golf course be held liable for any damage or injury resulting from errant golf balls or the exercise of this easement.

Section 17.10 **Easement Over Private Roads.**

17.10.1 Owners' Easement Rights. Each Owner shall have a non-exclusive right to enter upon and use the Private Roads for ingress and egress purposes. Such right of entry shall automatically terminate with respect to the Private Roads, or portions thereof, upon dedication, if any, of the Private Roads or such portions thereof to the County, the State of Hawaii or any other governmental authority for public access purposes. Each Owner's use of the Private Roads shall be subject to the provisions of this Declaration and such rules and limitations as may be provided in the Association Rules and to the terms and conditions of agreements, if any, made by Developer and the Association relating to the use and maintenance of the Private Roads for access to properties not included in the Project (which may include, without limitation the Annexation Property). Developer hereby discloses, and each Owner acknowledges, that the Private Roads may be used by Developer and others to conduct and perform construction and sales activities within the Project and relating to other properties adjacent to or in the vicinity of the Project (including without limitation the Annexation Property), and for access and utility service for or related to such other properties. These activities may, and likely will, result in traffic congestion, noise, dust and other nuisances and hazards, including without limitation temporary impairment of access to portions of the Project. Each Owner assumes all risks associated with use of the Private Roads and other roads providing access to and from the Project by such Owner, Occupants of such Owner's Dwelling Unit and their respective Guests. Each Owner shall indemnify and hold harmless the Developer-Related Entities from and against any and all claims and demands for damages made by, through or under such Owner in connection with the right of entry hereunder and/or use of the Private Roads for the foregoing purposes.

17.10.2 Rights Exclusive to Developer. Without limiting any other provision of this Declaration, Developer shall have and hereby reserves the exclusive right to negotiate and agree with the County and other appropriate entities as to the location and grade of the Private Roads, to enter upon affected parcels of land to change the grade or otherwise improve, modify or relocate the Private Roads, to designate easements for access, use, maintenance and other purposes relating to the Private Roads, and to convey or dedicate the Private Roads and/or such easements to the County, the Association, the Master Association and/or other appropriate Persons as may be required by the County or deemed appropriate by Developer in connection with the development, construction, promotion, sale, use and/or ownership of the Property and/or other properties adjacent to or in the vicinity of the Project (including without limitation the Annexation Property).

Section 17.11 Water System Easements. Developer shall have and hereby reserves an easement upon, across, over, in and under the Water System Easements for the construction, reconstruction, installation, relocation, operation, use, maintenance, repair and/or removal of pipelines and related facilities for the transmission and distribution of water, together with the right to grant easements therein for such purposes to governmental or quasi-governmental authorities, water companies (including without limitation Hawaii Water Service Company), the Association, the Master Association or other Persons as deemed appropriate by Developer.

Section 17.12 Easements for Ongoing and Future Construction. Developer, and its agents, employees, contractors, licensees, successors, mortgagees and assigns, shall have and hereby reserves: (a) easements upon, across, in and under the Future Construction Easements for access, grade modification and other purposes (including without limitation construction and maintenance of fences and/or walls, including retaining walls) relating to construction by Developer or others of Improvements on the Property, on adjacent land in connection with development of the Annexation Property and/or on other lands in the vicinity of the Project, together with the right to grant easements therein for such purposes to governmental or quasi-governmental authorities, utility companies, the Association, the Master Association or other Persons deemed appropriate by Developer; and (b) easements over, under and upon the Property, including the Lots, to create and cause traffic congestion, noise, dust, vibration and other nuisances or annoyances created by or resulting from any work connected with or incidental to the development, construction and/or sale of any Lot or Dwelling Unit or other Improvement on the Property and/or on other lands in the vicinity of the Project (including the Annexation Property). Each and every Owner and other Person acquiring any interest in the Property (or portions thereof) waives any and all rights, claims or actions that might otherwise be asserted against Developer, its agents, employees, contractors, licensees, successors, mortgagees and assigns, based on any such traffic congestion, noise, dust, vibration and other nuisances or annoyances. One or more of the Lots owned by Developer may be subject to Future Construction Easements and, thus, may be used to provide access for construction vehicles during the development and construction of Lots and Dwelling Units located within the Project, which Lots may be adjacent to, across from or in the direct vicinity of Lots owned by Persons other than Developer.

Section 17.13 Easements for Sales Activities. Developer, and its agents, successors, mortgagees and assigns, shall have the right and an easement to conduct extensive sales activities on and at the Project relating to the sale of any Lot and/or Dwelling Unit including the use of any Lot or Dwelling Unit owned by Developer (or by another Person, with the written permission of such Person) for model home displays, sales and management offices, parking and extensive sales displays and activities and the posting and maintenance of signs and other advertisements relating to such sales activities. The rights reserved in this Section 17.13 shall continue until December 31, 2015 (which date may be extended to the extent that Developer shall experience delays in development of any additional phase or increment of the Project, for reasons beyond Developer's reasonable control, but in no event beyond December 31, 2025).

Section 17.14 Repair Easement. Developer and its authorized agents, employees, contractors, licensees, successors, mortgagees and assigns shall have an easement over, under and upon any portion of the Project, including the Common Areas and any Lot, as may be reasonably necessary for Developer's completion of improvements to and correction of any defects and other "punchlist" items in the Project, provided that any such completion or correction shall be in Developer's sole discretion and provided further that Developer shall have no obligation with respect to any such completion or correction. The rights reserved in this Section shall continue until two (2) years after the "date of completion" of Developer's improvements to the Property (including the Annexation Property, if applicable), as evidenced by the filing of the Notice of Completion.

Section 17.15 Public Service Easements and Further Encumbrances. Fire, police, health and sanitation, park maintenance and other public service personnel and vehicles shall have a permanent and perpetual easement for ingress and egress over and across the Property as reasonably necessary to perform their respective functions. Further, Developer hereby reserves the

right (but is not obligated) to encumber the Common Areas with agreements in favor of the County, the State of Hawaii, public or private utilities and/or adjacent landowners with respect to any improvements that may be installed in the Common Areas by or on behalf of Developer.

Section 17.16 **Common Areas.** Developer, its contractors, subcontractors, licensees, mortgagees and assigns, and their respective employees and agents, shall have the right, and an easement in favor of Developer and its successors and assigns is hereby granted, at any time and from time to time prior to the twentieth (20th) anniversary date of this Declaration, to enter upon, use, remove, replace, add to, or otherwise alter the improvements in the Common Areas of the Project and to do all things reasonably necessary, desirable or useful for designing, developing, constructing or completing the Project and selling the Lots; provided that the exercise of the rights granted herein shall not cause any permanent or avoidable interruption in the service of utilities to the Property (or portions thereof), and provided further that any Person exercising such rights shall use reasonable efforts, without additional cost to Developer and consistent with maintaining the progress of the design, development, construction, completion and sale of the Project, to minimize interference with use and enjoyment of the Property (or portions thereof) by Owners.

Article 18

Annexation of Additional Property; Withdrawal

Section 18.1 **Additional Property.** It is contemplated that all or portions of the Annexation Property may be annexed to and become subject to this Declaration as hereinafter set forth.

Section 18.2 **Annexation.** Developer shall have the unilateral right, privilege, and option from time to time and at any time until the Final Transition Date, to annex the Annexation Property, or portion(s) thereof, whether in fee simple or leasehold, to this Declaration in increments of any size whatsoever, or to annex more than one such increment at any given time and in any given order; provided that Developer is then the owner of the property so annexed or, if not the owner, the owner consents to the annexation by execution of the applicable Supplemental Declaration. Although Developer shall have the ability and right to annex the Annexation Property as provided in this Article 18, Developer shall not be obligated to annex all or any portion of the Annexation Property or any other property, and any such property shall not become subject to this Declaration unless and until a Supplemental Declaration shall have been Recorded as provided in this Declaration, or at such later time as may be provided in the Supplemental Declaration. Developer may at any time unilaterally amend Exhibit "B" to this Declaration for the purpose of removing therefrom all or any portion of the real property described therein that has not been annexed or is not then being annexed to this Declaration.

Section 18.3 **Supplemental Declarations.** A Supplemental Declaration shall be a writing in Recordable form that may incorporate by reference all of the provisions of this Declaration and contain such other provisions as are set forth in this Declaration relating to Supplemental Declarations. Supplemental Declarations may contain such complementary or supplementary additions and modifications of the provisions of this Declaration as may be necessary to reflect the character of the property being annexed and may add, delete, or modify provisions of this Declaration as it applies to the property being annexed; including, without limitation, amending the schedules attached as Exhibits "C" and "D" hereto to appropriately cover and address the property

being annexed. Developer shall have the unilateral right to execute and Record one or more Supplemental Declarations amending the schedules attached hereto as Exhibits "C" and "D" as set forth in this Declaration.

Section 18.4 Withdrawal of Property.

18.4.1 By Developer. Developer may and hereby reserves the right to unilaterally at any time remove and release any portion of the Property from coverage of this Declaration and the jurisdiction of the Association, provided that: (a) Developer, or an affiliate of Developer, is the owner of such portion of the Property to be so removed and released, or if Developer or its affiliate is not the Owner, either the Owner consents to the withdrawal or the right to withdraw a portion of a Lot or such right is expressly reserved in the deed of the Lot from Developer to the Owners; and (b) this Declaration (including Exhibit "A") is amended by Developer to describe the property remaining subject to this Declaration upon completion of the withdrawal. Upon such withdrawal, Developer shall have the right (but not the obligation) to unilaterally amend Exhibit "B" to this Declaration to add thereto all or any portion of the real property that was removed and released from coverage of this Declaration, so that such real property can be later annexed in accordance with Section 18.2.

18.4.2 By Association. Subject to the Association's obligations with respect to the Pinnacle Retention Basin, as set forth in Article 26 of this Declaration, the Association shall have the right, upon a Super-Majority vote of the Board, to remove and release the Pinnacle Retention Basin Lot, or a subdivided portion thereof, from coverage of this Declaration and the jurisdiction of the Association, provided that: (a) the Association is the owner of such portion of the Pinnacle Retention Basin Lot to be so removed and released; (b) such removal and release is done only in connection with a conveyance of the Pinnacle Retention Basin Lot, or subdivided portion thereof, to the Master Association or to the owners association for the Pinnacle; (c) the Board has reasonably determined that such removal, release and conveyance will not have a negative impact on the Project; and (d) this Declaration is amended to describe the property remaining subject to this Declaration upon completion of the withdrawal.

18.4.3 Effect of Withdrawal. The removal and release of any portion of the Property shall be effective upon the date of Recordation of the amendment of the Declaration or such later date as may be provided in the amendment. The amendment shall contain a legal description of the portion of the Property withdrawn and state that it is released from the terms, covenants, conditions and restrictions of this Declaration. Upon the Recordation of the amendment of the Declaration, such portion of the Property shall be free and clear of, and no longer subject to, any of the terms, covenants, conditions, easements and restrictions contained in this Declaration or any Supplemental Declaration. No removal and release pursuant to this Section 18.4.3 shall cancel Assessments, if any, then due and payable by the Owner of such portion of the Property, nor cancel any Assessment Lien then existing against such portion of the Property.

Article 19 **Recreational Park Facilities**

Section 19.1 **Recreational Park Facilities.** Before the Final Transition Date, Developer shall develop for inclusion within the Common Areas certain Recreational Park Facilities (as defined

in Section 1.81), which will be recreational and/or social amenities of the Association and most of which are expected to be located within the Recreational Park Facilities Lot. Developer and the Association make no representations that any Recreational Park Facilities developed by Developer will continue in existence or operation indefinitely or that any of the Recreational Park Facilities will be available or sufficient to serve all eligible users should they choose to use the Recreational Park Facilities at the same time. Use of the Recreational Park Facilities shall be subject to rules and regulations adopted by the Board or by Developer, on behalf of the Board.

Section 19.2 Costs of Maintenance and Upkeep. Without regard to the ownership thereof, the cost of operating, maintaining and repairing the Recreational Park Facilities will be paid through the collection of Assessments, Special Use Fees, and consumer charges. The Board shall prepare budgets to include the fixed costs of operation and administration as well as the variable costs for the various services and facilities available at and through the Recreational Park Facilities. The Board shall, on an annual basis, determine the amount of such costs to be included as Common Expenses and the amount to be collected as Special Use Fees and consumer charges. The costs to be included as Common Expenses shall be collected as a General Assessment. The Board shall have the authority, in its discretion, to charge Special Use Fees and consumer charges for goods, services, and facilities, such as, in the way of explanation but not limitation, snack bar and other sales of food and beverage, equipment rental, use of facilities and rental for special events.

Section 19.3 Rights Reserved to Developer. Developer shall have the reserved rights relating to the Recreational Park Facilities as set forth in this Declaration (including all rights reserved to Developer relating to use of the Common Areas and all other portions of the Property) or as otherwise declared or reserved in connection with the conveyance thereof to the Association.

Section 19.4 Rights of the Board. The Board shall have the right to make, amend and repeal rules and regulations to govern and to control the use and operation of any or all of the Recreational Park Facilities, subject to Developer's reserved rights.

Article 20 **Water System**

Section 20.1 Generally. For water service, all Lots must utilize the State of Hawaii Public Utilities Commission ("PUC") regulated central water system (the "Water System") owned and operated by Hawaii Water Service Company ("HWSC"). Owners (other than Developer in connection with its development of the Project) will not be permitted to use individual water systems. Water service shall be provided to Owners pursuant to terms and conditions established by HWSC and its successors or assigns. Because the Water System will be owned and operated as a regulated utility pursuant to Hawaii Revised Statutes Chapter 269, as amended from time to time, the water service charges shall be as determined by the PUC. All Dwelling Units subject to this Declaration shall be connected to and serviced by the Water System, at the expense of the Lot Owner. Each Owner of each Lot shall enter into the standard service/connection agreement made available by HWSC and shall pay all such connection and service fees applicable thereto as provided in the tariff approved by the PUC. Each Owner acknowledges that such fees may include charges relating to the cost of the construction, acquisition, maintenance, repair and operation of the Water System.

Section 20.2 **Owners' Easement Rights.** Each Owner shall have a non-exclusive easement over and upon the Water System Easements for use of the Project's Water System. Each Owner's use of the Water System shall be subject to the provisions of this Declaration and such rules and limitations as may be provided in the Association Rules and to the terms and conditions of agreements, if any, made by Developer, the Association and/or HWSC relating to the use and maintenance of the Water System.

Article 21 **Rights and Reservations**

Section 21.1 **Reserved Rights.** The rights, reservations and easements of Developer set forth in this Declaration (a) shall be deemed excepted and reserved in each Recorded Supplemental Declaration, in each conveyance of any interest in property by Developer to the Association and in each deed or other instrument by which any portion of the Property is conveyed by Developer or any other Owner, whether or not specifically stated therein, (b) shall be prior and superior to any other provisions of this Declaration and any Supplemental Declaration, and (c) may not, without Developer's prior written consent, be modified, amended, rescinded or affected by any amendment of this Declaration or any Supplemental Declaration. Developer's consent to any one such amendment shall not be construed as consent to any other or subsequent amendment. The rights, reservations and easements of Developer set forth in this Article 21 are in addition to, and shall in no way affect or otherwise be interpreted to limit or restrict any of the rights, the reservations and easements of Developer contained elsewhere in the Project Documents.

Section 21.2 **Developer's Rights of Use.** Developer shall have and hereby reserves the right to the use of the Common Areas, and of services offered by the Association, in connection with the development, construction, promotion, marketing, sale, leasing and use of all or any portion of the Property. Without limiting the generality of the foregoing, Developer may: (a) erect and maintain on any part of the Common Areas such signs, temporary buildings and other structures as Developer may reasonably deem necessary or proper in connection with the development, construction, promotion, marketing, sale and leasing of all or any portion of the Property; (b) restrict the use of the Common Areas or the use of signs by any Owner or Occupant within the Project until all Lots have been conveyed to a third party; (c) use vehicles and equipment on the Common Areas, including the Private Roads, for developmental, construction and promotional purposes; (d) permit entry on and use of all or any portion of the Property (including, but not limited to, the Recreational Park Facilities) by prospective purchasers and other Persons who are not Owners; (e) make reference to the Association and to the Common Areas and services offered by the Association and to the Recreational Park Facilities in connection with the development, construction, promotion, marketing, sale and leasing of all or any portion of the Property; (f) adopt such name or names and change any names from time to time by which the Project or the Association is identified; and (g) temporarily make the Recreational Park Facilities unavailable to Lot Owners so that Developer can use the Recreational Park Facilities in connection with its Project sales efforts. Developer shall have the right to assign its rights under this Section 21.2 to qualified Persons, and any such assignment shall not diminish Developer's rights hereunder.

Section 21.3 Developer's Rights to Complete Development. No provision of this Declaration shall be construed to prevent or limit Developer's rights to complete the development, construction, promotion, marketing, sale and/or leasing of all or any portion of the Property (including any land added to the Project and subjected to the provisions of this Declaration); to construct or alter Improvements on any property (including Lots) owned by Developer within the Property; to maintain model homes, short term lodging facilities, parking areas, offices for construction, sales or leasing purposes or similar facilities on any property (including Lots) owned by Developer or owned by the Association within the Property; to post signs incidental to the development, construction, promotion, marketing, sale, leasing and/or use of the Property, or any portion thereof; or to apply for, process and receive zoning or changes in zoning or to uses of, or changes in density of, or other changes in any land use restrictions affecting all or any portion of the Property, so long as Developer or its affiliate or assign is the owner (or has the consent of the Owner) of the property affected. Nothing contained in this Declaration shall limit the right of Developer or require Developer to obtain approval to: (a) excavate, cut fill or grade any property owned by Developer or to construct, alter, remodel, demolish or replace any Improvements on any Common Areas or any property owned by Developer; (b) use any structure on any property owned or leased by Developer or any Common Areas as a construction office, model home, short term lodging facility or real estate sales or leasing office in connection with the sale of any such properties; (c) seek or obtain the approval of the NCC, the MC or the Association for any such activity or Improvement by Developer on any property owned by Developer or any Common Areas; or (d) apply for, process and receive zoning or changes in zoning or to uses of, or changes in density of, or other changes in any land use restrictions affecting all or any portion of the Property, so long as Developer or its affiliate or assign is the owner (or has the consent of the Owner) of the property directly affected by such action. It shall be expressly permissible for Developer to maintain and carry on upon the Common Areas or any property (including Lots) owned or controlled by Developer such facilities and activities as in the sole discretion of Developer may be required, convenient or incidental to the development, construction, promotion, marketing, sale, leasing and use of all or any portion of the Property.

Section 21.4 Developer's Rights Related to Subdivision Map, File Plan.

21.4.1 Developer shall have and hereby reserves the right for itself and its successors and assigns to further subdivide and/or consolidate all or any portions of the subdivided lots comprising the property owned by Developer, to designate, delete or relocate roads, easements and boundaries of such lots and otherwise modify and/or amend the Subdivision Map and/or the File Plan, provided that such changes, modifications, amendments, subdivision or consolidation shall not have a direct and material adverse effect on the interests of any Owners owning Lots at the time of such modification, amendment, subdivision or consolidation to the Subdivision Map or the File Plan, unless the Owner directly affected consents to the subdivision, consolidation, designation, deletion, relocation, amendment or the right to take such actions are expressly reserved in the deed from Developer to an Owner or is otherwise permitted under this Declaration. Upon and in connection with any such designation and/or deletion of easements, Developer shall, and shall have the right to, unilaterally amend this Declaration to modify Exhibit "C" hereto to appropriately reflect such designation and/or deletion of easements. Upon and in connection with any such subdivision and/or consolidation of lots, Developer shall, and shall have the right to, unilaterally amend this Declaration

to modify Exhibit "D" hereto to appropriately reflect such subdivision and/or consolidation and designation or redesignation of the resulting lots.

21.4.2 In the event the description of the Property in Exhibit "A" to this Declaration is not by reference to a file plan that has been recorded in the Bureau, but is, instead, by reference to the Subdivision Map or some other means, Developer shall have and hereby reserves the right to unilaterally amend this Declaration without the approval of the Board, the Members, the Owners or any Mortgagee for the purpose of modifying Exhibit "A" to reflect the file plan description of the Property.

Section 21.5 **Owner's Waiver.** Each Owner acknowledges and agrees that in the event Developer exercises one or more of the rights reserved in Section 21.4, each Owner not directly affected waives, to the fullest extent possible, its interest in the portion of the Property affected. Such action on the part of Developer need not include a separate written joinder or consent by such Owners. Further, if such Owners are required to join in or consent to the exercise of any right reserved in Article 21 pursuant to any statute, rule or other government requirement, such Owners agree to use diligent efforts to execute and deliver the appropriate instruments to effectuate such separate, written joinders or consents without cost to Developer (except for government processing or filing fees).

Section 21.6 **Developer's Rights Incident to Construction.** Developer, for itself and its successors and assigns, shall have and hereby retains a right and easement of ingress and egress over, in, upon, under, and across the Common Areas and the right to store materials thereon and to make such other use of the Common Areas as may be reasonably necessary or incident to the development of and/or construction on any portion of the Property, or any other property owned by Developer.

Section 21.7 **Construction at or Adjacent to Project and Access.** Each Owner, in purchasing or otherwise taking title to any Lot, shall do so with the express understanding and acknowledgment that construction activity by Developer or other Owners or Occupants may continue in the Project area and adjacent areas after such Owner has occupied the Lot and that this activity may result in traffic congestion, noise, dust and other annoyances to the Owner and may limit the Owner's access to portions of such Lot, the Common Areas or other adjacent areas. Each Owner accepts any such inconvenience or annoyance and expressly waives any rights, claims, or actions which the Owner might otherwise have against Developer or other Persons as a result of such circumstances.

Section 21.8 **Surrounding Operations and Surrounding Use Effects.** Each Owner, in purchasing or otherwise taking title to any Lot, does so with the express understanding and acknowledgment that the premises may be periodically affected by various nuisances, risks and hazards and by traffic congestion, noise, dust, smoke, soot, ash, odor, visual nuisances, surface/storm water runoff or other adverse conditions of any other kind (including but not limited to those attributable to winddrift and other weather factors) (collectively, "**Surrounding Use Effects**") created by surrounding historical, existing, and prospective agricultural, industrial, development, commercial, golf course, sales, and other non-residential uses and activities, and specifically approves all of those uses and activities (collectively, "**Surrounding Operations**"),

which include, but are not limited to: (a) golf course construction and maintenance, pest management (use of pesticides), and weed and fungus control (use of herbicides and pesticides); (b) construction, real estate development and other changes in use, grading, improvement, sales and maintenance of adjacent and surrounding properties, including residential and non-residential property and roadways (and including the Kaanapali 2020 development described in Section 21.13 below); (c) irrigation of any and all surrounding lands, Common Areas and golf course with reclaimed water, treated effluent, or other sources of non-potable water; (d) the use of irrigation lakes in the golf course to mix sewage effluent, reclaimed water and other non-potable water for irrigation purposes; (e) errant golf balls (which may cause personal injury and property damage), the existence of and events at the golf course, and other land uses in the vicinity, which may create noise, traffic congestion and loss of privacy; (f) use of the Railroad Tracks (or other portions of the Makai Common Area/Utility Lot) for operation of a commercial railroad service, pursuant to the Railroad Lease or otherwise; (g) electrical transmission and distribution lines and facilities within or in the vicinity of the Property and the Project; and/or (h) drainage from the Property and other properties, and the effects thereof on the Property.

Section 21.9 Transfer of Developer's Rights. Any or all of the rights, reservations and easements of Developer under this Declaration shall inure to the benefit of Developer's successors and assigns and may be transferred to any other Person by a written instrument signed by Developer, provided that the transfer shall not enlarge a right or reservation beyond that contained in this Declaration, and provided further that no such transfer shall be effective unless and until it is Recorded.

Section 21.10 Modifications to Infrastructure. If the ongoing development of the Project requires modification of an existing roadway or utility or other item of infrastructure in order to obtain necessary governmental approvals, or otherwise in connection with Developer's development and/or sale of the Property, or any portion thereof, any affected Owner and the Association, as appropriate, shall take all steps necessary to comply with the required modifications. The affected parties shall not be entitled to any payment on account of the modifications even if the modifications include dedication or grant of an easement for a roadway, utility, pedestrian access, or other purposes.

Section 21.11 Sewer Line Condemnation. Each Owner acknowledges that portions of the Makai Common Area/Utility Lot (as well as portions of certain Lots) are subject to the following: Complaint in Eminent Domain (Civil No. 93-0961(3), Circuit Court of the Second Circuit) filed by the State of Hawaii on December 8, 1993 (the "**Complaint**"); Order Putting Plaintiff in Possession dated December 9, 1993; and related pleadings and correspondence (collectively, the "**Sewer Line Condemnation**"). The Sewer Line Condemnation relates to the condemnation and acquisition of easements for sewer line purposes affecting, among other properties, a portion of the Property identified in the Complaint as Easement "B" (20 feet wide), which is within the Makai Common Area/Utility Lot and portions of certain other Lots. Until any final settlement of the Sewer Line Condemnation, the Makai Common Area/Utility Lot (and the other affected Lots) shall be used, developed, maintained, encumbered and conveyed subject to the Sewer Line Condemnation.

Section 21.12 Developer's Rights Incident to Easements and Reserved Rights. With respect to and in furtherance of any and all rights and easements reserved to Developer

pursuant to this Declaration, Developer shall have the right for itself and its successors and assigns, at its sole discretion and without being required to obtain the consent or joinder of any Person, including the Association, any Owner or any Mortgagee, lien holder, or any other Person who may have an interest in the Project, to file and/or Record any necessary documents, including maps, petitions, applications and amendments to this Declaration, with the County and the Bureau of Conveyances. Pursuant to Section 33.7, any such action shall, if necessary, be deemed taken by Developer as the true and lawful attorney-in-fact of the Owners, the Mortgagees and the Association. Each Owner, Mortgagee and other Person claiming through an Owner consents, upon request and without payment of additional consideration, to the filing or Recordation of such documents as may be necessary or convenient to effect the reserved rights and easements of Developer and agrees to join into and execute such documents and do such other things as may be necessary to effect such rights and easements.

Section 21.13 Kaanapali 2020 Development. Each Owner, in purchasing or otherwise taking title to any Lot, does so with the express understanding and acknowledgment that substantial portions of the land located to the south and east (mauka or mountainside) of the Project may be subject to a large-scale planned development (currently referred to as "Kaanapali 2020"), which may include various residential, commercial, agricultural, recreational and/or other components. As a result of the Kaanapali 2020 development, the Project may in the future be affected by Surrounding Use Effects in addition to those that currently impact the Project.

Section 21.14 Acceptance of Activities/Assumption of Risk/Waiver of Claims/Indemnify/Defend. Each Owner, in purchasing or otherwise taking title to any Lot, does thereby, on behalf of such Owner, Occupants of such Owner's Dwelling Unit and their respective Guests: (a) accept any and all inconveniences, irritations, annoyances or nuisances that the Owner or such other Person claiming by or through the Owner, may experience as a result of the uses, conditions, activities and developments described in this Declaration, including, without limitation, the Surrounding Operations, the Surrounding Use Effects and others described in this Article, and agrees to suffer and permit all actions and consequences incidental to such activities and conditions; (b) assume any and all risks associated with the Surrounding Operations and the annoyances, inconveniences, Surrounding Use Effects and other nuisances thereby created, as well as with the ongoing construction and sales activities; (c) expressly waive any and all rights, claims, or actions that the Owner might otherwise have against the Developer-Related Entities, the Association, and the Board, arising out of or in connection with the ongoing construction and sales activities, the Surrounding Operations and the annoyances, inconveniences, Surrounding Use Effects and other nuisances thereby created, the clean-up or remediation of the same, including but not limited to (i) any claim for damages attributable thereto or for the design or the placement of the Project, including the Lots therein, or related or adjacent facilities, or any part thereof, or (ii) claims for the abatement or elimination thereof (such waiver, however, shall not include claims arising out of or in connection with the gross negligence and/or willful misconduct of such entities); (d) indemnify and hold harmless the Developer-Related Entities, the Association, and the Board, from and against any and all claims, demands, actions, lawsuits, proceedings, fines, penalties, damages, liabilities, judgments, awards, expenses and costs (including attorneys' fees and costs) which may arise out of or may directly or indirectly be attributable to any and all of the foregoing Surrounding Use Effects, Surrounding Operations and ongoing construction and sales activities; and (e) defend the Developer-Related Entities, the Association, and the Board, against any and all claims, demands, actions, lawsuits, proceedings, fines, penalties, damages, liabilities, judgments, awards, expenses and costs (including attorneys' fees and costs) which may arise out of or may directly or indirectly be

attributable to any and all of the foregoing Surrounding Use Effects, Surrounding Operations and ongoing construction and sales activities.

Article 22

Developer's Disclaimer of Representations

Notwithstanding anything to the contrary in this Declaration, Developer makes no warranties, representations or assurances whatsoever that any plans presently envisioned for the complete development of the Project or Kaanapali Golf Estates can or will be carried out, or that any land now owned or hereafter acquired by Developer is or will be subjected to this Declaration, or that any such land (whether or not it has been subjected to this Declaration) is or will be committed to or developed for a particular (or any) use, or that if such land is once used for a particular use, such use will continue in effect. The Subdivision Map, the File Plan, and any and all general plan or subdivision maps, development plans, plot plans, depictions of proposed improvements to areas surrounding the Property and the Project, are intended to show only the layout, location, and dimensions of the Lots and are not intended to be and do not constitute any other representation or warranty by Developer.

Article 23

Limitation on Liability

Anything to the contrary in this Declaration notwithstanding, each Owner, by accepting title to any portion of the Property and becoming an Owner, acknowledges and agrees that none of the Developer-Related Entities shall have any personal liability to the Association, or to any Owner, Member or other Person, arising under, in connection with, or resulting from (including, without limitation, resulting from action or failure to act with respect to) this Declaration or the Association except, in the case of Developer (or its assignee), to the extent of its interest in the Property; and, in the event of a judgment, no execution or other action shall be sought or brought thereon against any other assets, nor be a lien upon such other assets, of any Developer-Related Entities.

Article 24

Resort-Related Activities

Section 24.1 Resort-Related Activities. Each Owner, by taking title to a Lot or interest therein, understands and agrees that the Project is, and the Owner's Lot may be, adjacent to or near hotels and other resort facilities and that numerous resort-related activities take place at and around the Property or in the vicinity of the Property which activities may include, but are not limited to, luaus, parties, concerts and meetings occurring at all times of the day and night. Each Owner acknowledges that the location of the Owner's Lot within the Property may result in annoyances, inconveniences, nuisances or hazards to Persons and property on the Lot as a result of resort-related activities. The nuisances or hazards include smoke, traffic congestion, loud noises, music and bright lights. Each Owner covenants for itself, its Occupants, heirs, successors, successors-in-title and assigns, that it accepts the foregoing conditions and assumes all risks associated with such location, including, but not limited to, the risk of property damage or personal injury arising from actions incidental to resort-related activities and shall indemnify the Association and Developer from any losses, liability, claims or expenses, including attorney's fees, arising from

or relating to such activities and any resulting nuisances. Each Owner covenants that the Association and Developer shall have the right, in the nature of an easement, to subject all or any portion of the Property to nuisances reasonably incidental to the maintenance, operation or use of the Recreational Park Facilities, and to the carrying out of resort-related activities on or in the vicinity of the Property.

Section 24.2 **Golf Courses**

24.2.1 Golf Course-Related Activities. Each Owner, by taking title to a Lot or interest therein, understands and agrees that the Project is, and the Owner's Lot may be, adjacent to or near the Golf Course and that golf course-related activities, including, without limitation, tournaments and other special events, may be held on or within the Golf Course. Each Owner acknowledges that being adjacent to or near the Golf Course may result in nuisances or hazards to persons and property on a Lot or Association Property as a result of golf course-related activities. Each Owner covenants for itself, its Occupants, heirs, successors and assigns, that it accepts these conditions and assumes all risks associated with golf course related activities, including, but not limited to, the risk of property damage or personal injury arising from actions incidental to such golf course-related activities (such as errant golf balls) and shall indemnify the Association and Developer from any liability, claims or expenses, including attorney's fees, arising from or relating to such property damage or personal injury. Under no circumstances shall Developer, the Association, or the owner(s) of the Golf Course be held liable for any damage or injury resulting from errant golf balls or other risks associated with such golf activities.

24.2.2 No Interest in Golf Courses. The Golf Courses and their property and related facilities are privately owned, are not owned or operated by the Association or the Master Association, and are not within the Common Areas hereunder. No provision of this Declaration gives, or shall be deemed to give, any Owner, Occupant or Member any ownership interest in or the right to enter upon or use the Golf Courses, or any membership rights in the Golf Courses by virtue of ownership or occupancy of a Lot or Membership in the Association or the Master Association.

Article 25 **Makai Common Area Lots**

Developer intends to convey to the Association, and the Association shall accept from Developer, fee simple title to the Makai Common Area Lots, which would be conveyed to the Association free and clear of all liens and encumbrances except as follows: (a) the lien for property taxes and assessments not then due and payable; (b) the terms of the Project Documents and the terms of the Master Project Documents; (c) easements, rights-of-way, reservations, covenants, encroachment agreements, conditions, restrictions and equitable servitudes or other non-financial encumbrances as Developer in its discretion may deem appropriate; (d) such financial encumbrances as may be reasonably accepted and assumed by the Association and specifically approved by resolution of the Board; and (e) the duty of the Association to comply with and abide by any and all monitoring and maintenance plans or requirements for the Makai Common Area Lots that may be adopted by Developer prior to conveyance of the Makai Common Area Lots to the Association, by the Master Association or by the County or other governmental entity. Developer may decide to landscape portions of the Makai Common Area Lots, which landscaping the

Association will be obligated to maintain in good order. The Makai Retention Basin shall be used and maintained as a retention basin, the intent of which would be to accept a portion of the surface/storm water runoff emanating from the Lots and the Private Roads. Portions of the Makai Common Area Lots may also be used to provide vehicular access to and from the Makai Retention Basin located thereon for repair and maintenance of the Makai Retention Basin. The Association and the Lot Owners assume all risks, liabilities and obligations associated with the Makai Common Area Lots (including flooding, erosion and others currently unforeseen), and waive any rights, claims, or actions which the Association and the Lot Owners might have against the Developer-Related Entities as a result thereof.

Article 26

Pinnacle Retention Basin

Section 26.1 **Generally.** The Pinnacle Retention Basin is a retention basin that is intended to accept a portion of the surface/storm water runoff emanating from The Pinnacle. The Master Association shall have the obligation to repair and maintain the drainage facilities within the Pinnacle Retention Basin at the expense of the owners of lots within The Pinnacle.

Section 26.2 **Landscape Obligation.**

26.2.1 The Board, on behalf of the Association, is irrevocably bound and obligated to install and maintain in good condition and appearance the landscaping and related facilities, including irrigation system(s), within the Pinnacle Retention Basin Lot, in accordance with the standards set forth in the Master Declaration (the "Landscape Obligation"). All costs associated with the Landscape Obligation shall be a Common Expense of the Project, whether paid directly or as a reimbursement to the Master Association or to an owners association for The Pinnacle. Developer, until the Final Transition Date, and, thereafter, the Board, on behalf of the Association, shall be entitled to determine and agree on the amount of such direct payment or reimbursement. Developer, until the Final Transition Date, and, thereafter, the Board, on behalf of the Association, shall be entitled to convey the Pinnacle Retention Basin Lot, or a subdivided portion thereof, to the Master Association or to The Pinnacle lot owners (or an association thereof); subject, however, to the Association's ongoing Landscape Obligation.

26.2.2 In the event the Association shall fail to fully and properly satisfy the Landscape Obligation, the Master Association may install and/or maintain such landscaping and related facilities within the Pinnacle Retention Basin Lot, as it deems appropriate in accordance with the Master Declaration, and all costs and expenses associated therewith shall be "Neighborhood Expenses" assessed as a "Neighborhood Assessment" solely against the Owners of Lots within the Project, pursuant to and in accordance with the Master Declaration.

26.2.3 This Section 26.2 shall not be amended without the prior written approval of the Master Association.

Section 26.3 **Risks and Liabilities.** The Association and each Lot Owner understands, acknowledges and agrees that there may be risks and liabilities associated with The Pinnacle Retention Basin and the Landscape Obligation, including flooding, erosion and others currently

unforeseen. The Association and each Lot Owner assume any and all such risks and waive any rights, claims, or actions they might have against the Developer-Related Entities as a result thereof.

Article 27 **Railroad**

Section 27.1 **Railroad Lease.** The Railroad Tracks located within portions of the Makai Common Area/Utility Lot are used for the operation of a commercial railroad service pursuant to the Railroad Lease. For as long as Developer is the fee simple owner of the Makai Common Area/Utility Lot: (a) payments made for use of the Railroad Tracks by or on behalf of the operator of the railroad pursuant to the Railroad Lease (the "**Railroad Lease Payments**") shall be made to and be the sole property of Developer; and (b) Developer shall be entitled to negotiate with the operator of the railroad with respect to any extension, modification or termination of the Railroad Lease or with respect to the location of the Railroad Tracks within the Makai Common Area/Utility Lot. In the event fee simple title to the Makai Common Area/Utility Lot is conveyed to the Association, for as long as the Association is the fee simple owner of the Makai Common Area/Utility Lot: (y) the Railroad Lease Payments shall be made to the Association; and (z) the Board, on behalf of the Association, shall be entitled to negotiate with the operator of the railroad with respect to any extension, modification or termination of the Railroad Lease or with respect to the location of the Railroad Tracks within the Makai Common Area/Utility Lot. The Railroad Lease Payments, or any other such payments, collected by the Association shall be deposited into the Association's general operating account to offset Common Expenses.

Section 27.2 **Effects of Railroad Operation.** Each Owner, in purchasing or otherwise taking title to any Lot, does so with the express understanding and acknowledgment that portions of the Makai Common Area/Utility Lot and other lands in the vicinity of the Makai Common Area/Utility Lot will be used for operation of a commercial railroad service pursuant to the Railroad Lease. As a result of such use, the Project, including the Lots may be affected by various hazards and by noise, dust, smoke, soot, ash, odor or other adverse environmental conditions (including but not limited to those attributable to winddrift and other weather factors). Each Owner does thereby accept any such inconvenience, annoyance or nuisance, and expressly waives any rights, claims, or actions which the Owner might otherwise have against the Developer-Related Entities as a result of such circumstances, including but not limited to (a) any right to seek damages attributable thereto or for the design or the placement of the Project, any portion thereof, any Lot thereon, or related or adjacent facilities, (b) any right to contest, intervene or interfere with the continued use of the Railroad Tracks by the commercial railroad service during the term of the Railroad Lease, or (c) the abatement or elimination thereof.

Article 28 **Rock Mound**

Section 28.1 **Assumption of Risk/Waiver of Claims.** The Association and each Lot Owner understand, acknowledge and agree that there may be risks, liabilities and obligations associated with the Rock Mound and improvements related thereto (including, but not limited to, erosion, steep slopes, rock slides, flooding, the presence of underground bagasse and others currently unforeseen). Each Owner, in purchasing or otherwise taking title to any Lot, does thereby,

as a Lot Owner and as a Member of the Association, on behalf of such Owner, Occupants of such Owner's Dwelling Unit and their respective Guests: (a) expressly assume any and all risks associated with the Rock Mound, improvements related thereto and any annoyances, inconveniences and other nuisances related thereto; (b) expressly waive any and all rights, claims and actions that the Owner might otherwise have against the Developer-Related Entities, the KDC-Related Entities and the Master Association-Related Entities relating to, arising out of or in connection with the Rock Mound, improvements related thereto, the Rock Mound Monitoring Requirement and/or the Master Association's and the NCC's review and approval of the Project Development Plans; and (c) expressly release the Developer-Related Entities, the KDC-Related Entities and the Master Association-Related Entities from any and all rights, claims and actions relating to, arising out of or in connection with the Rock Mound, improvements related thereto, the Rock Mound Monitoring Requirement and/or the Master Association's and the NCC's review and approval of the Project Development Plans.

Section 28.2 No Liability. The Master Association-Related Entities and the KDC-Related Entities shall not be responsible or liable in any way for or in connection with the Rock Mound, improvements related thereto and/or the Master Association's and the NCC's review and approval of the Project Development Plans. Further, none of the Developer-Related Entities and none of the KDC-Related Entities shall be responsible or liable in any way for or in connection with the Rock Mound and/or improvements related thereto.

Section 28.3 Acceptance of Conveyance. The Association is obligated to and shall accept title to the Rock Mound from Developer, together with the responsibility to perform any and all duties associated with the Rock Mound. At its expense and for the benefit of the Owners, the Association shall monitor and maintain the Rock Mound and comply with and abide by the Rock Mound Monitoring Requirement. The Rock Mound shall be conveyed to the Association free and clear of all liens and encumbrances except as follows: (a) the lien for property taxes and assessments not then due and payable; (b) the terms of the Project Documents and the terms of the Master Project Documents; (c) easements, rights-of-way, reservations, covenants, encroachment agreements, conditions, restrictions and equitable servitudes or other non-financial encumbrances as Developer in its discretion may deem appropriate; (d) such financial encumbrances as may be reasonably accepted and assumed by the Association and specifically approved by resolution of the Board; and (e) the duty of the Association to comply with and abide by the Rock Mound Monitoring Requirement and any and all other monitoring and maintenance plans or requirements for the Rock Mound that may be adopted by Developer prior to conveyance of the Rock Mound to the Association, by the Master Association or by the County or other governmental entity.

Section 28.4 Rock Mound Monitoring Requirement. The Association shall, at its sole cost and expense, be obligated to perform the Rock Mound Monitoring Requirement to address matters related to the continued physical integrity of the Rock Mound and improvements related thereto (including, without limitation, the matters referenced in Section 28.1). The obligation to perform the Rock Mound Monitoring Requirement shall be irrevocably binding on the Association. Developer, until the Final Transition Date, and the Board, from and after the Final Transition Date, shall have the right to modify the Rock Mound Monitoring Requirement as Developer or the Board (as applicable) shall deem necessary and/or to meet the requirements of the Master Association, the County or other governmental authority.

Section 28.5 **Zoning and Use.** The parcel of land upon which the Rock Mound is located is split-zoned "agriculture" and "residential", yet is designated on the community plan as "open space". No structures or other improvements, except approved landscaping and such structures or improvements as may be allowed by the County, are allowed to be constructed or placed on the Rock Mound. The Board, on behalf of the Association, may permit passive recreational use of the Rock Mound, provided such use is permitted by the County, is consistent with the open space community plan designation of the Rock Mound, and does not conflict with the Project Documents or the Master Project Documents.

Article 29

Mauka Drainage Improvements

Section 29.1 **Generally.** Developer intends (but is not obligated) to construct drainage improvements within an approximately ten-foot wide easement area located within the eastern (mauka or mountainside) portions of those Lots located along the eastern boundary of the Project, as well as within the easternmost boundary of the Rock Mound. If constructed, the drainage improvements may include berms, swales, ditches, walls and/or other facilities (the "**Mauka Drainage Improvements**"). Developer shall have the right to designate drainage easements within the Rock Mound and within those Lots on which the Mauka Drainage Improvements are located, even if such designation occurs after the respective Lots have been conveyed to third party purchasers. Developer shall also have the right (even after the respective Lots have been conveyed to third party purchasers) to grant those drainage easements to the Association, which easements the Association shall be obligated to accept. Upon such grant, the Association shall be obligated to perform any and all required monitoring, repair and maintenance of the Mauka Drainage Improvements, and shall otherwise abide by any and all pertinent requirements of the grant of easement. The Association and each Lot Owner understand, acknowledge and agree that there may be risks, liabilities and obligations associated with surface/storm water runoff from lands located to the east of the Project and with the Mauka Drainage Improvements (including, without limitation, costs to monitor, repair and maintain the Mauka Drainage Improvements, liability and property insurance costs, risks associated with flooding and erosion and other risks, liabilities and obligations currently unforeseen). The Association and each Lot Owner assume any and all such risks, liabilities and obligations and waive any rights, claims, or actions which they might have against the Developer-Related Entities as a result thereof.

Section 29.2 KDC Mauka Right of Entry Agreement.

29.2.1 Developer may (but is not obligated to) enter into an agreement with KDC (the "**KDC Mauka Right of Entry Agreement**") pursuant to which Developer will have a non-exclusive right of entry and license to enter upon and use portions of KDC-owned lands (the "**Licensed Area**") to perform certain erosion control work within the Licensed Area that benefits the Project. The right of entry and license to perform the work shall be subject to and in accordance with the covenants, terms and conditions set forth in the KDC Mauka Right of Entry Agreement.

29.2.2 Developer shall have and hereby reserves the right to assign its rights and delegate its duties as "Licensee" under the KDC Mauka Right of Entry Agreement to the Association. The Association is obligated to and shall accept such assignment and delegation from Developer. Upon such assignment and delegation, the Association shall be obligated to perform the Licensee's obligations under the KDC Mauka Right of Entry Agreement, which obligations include, but are not limited to, indemnifying KDC and other Persons under certain circumstances. Further upon such assignment and delegation, Developer shall be deemed to have been fully released from any further responsibilities with respect to the performance of the obligations under the KDC Mauka Right of Entry Agreement. Costs incurred by the Association in connection with the performance of its rights, duties and obligations under the KDC Mauka Right of Entry Agreement shall be Common Expenses.

Article 30 **Amendment**

Section 30.1 Amendment to Declaration. Amendments to this Declaration shall be made by an instrument in writing entitled "Amendment to Declaration", which sets forth the entire amendment. Except as otherwise specifically provided in this Declaration (including, without limitation, Section 30.3.2 below), (a) any proposed amendment must be approved by a Majority of the Board prior to submission of the proposed amendment to the Members for adoption, (b) an amendment shall be adopted upon the vote or written assent of the Members representing at least 75 percent of the total votes of the Class "A" Membership, and (c) the amendment when adopted shall bear the signature of the President or a vice president of the Association and shall be attested by the secretary or an assistant secretary of the Association, who shall state whether the amendment was properly adopted, and shall be acknowledged by them as officers of the Association. Amendments once properly adopted shall be effective upon Recording of the Amendment to Declaration, or at such later date as may be specified in the amendment.

Section 30.2 Effect of Amendment. Any amendment to this Declaration properly adopted will be completely effective to amend any and all provisions of this Declaration which may be affected and any or all clauses of this Declaration, unless otherwise specifically provided in the Section being amended or the amendment itself.

Section 30.3 Required Approvals. Notwithstanding the foregoing provisions of this Article 30:

30.3.1 Limitations on Rights to Amend.

30.3.1.1 Until the Final Transition Date, this Declaration may not be amended by the Members pursuant to Section 30.1 without the written consent of Developer, which consent may be withheld for any reason in the sole and absolute discretion of Developer. The following provisions of this Declaration may not be amended at any time (including after the Final Transition Date) without the written consent of Developer (which consent may be withheld for any reason in the sole and absolute discretion of Developer): Sections 3.4, 5.9, 5.10, 5.11, 7.9, 14.11, 14.15, 19.3, 30.3, and 33.7; and any of the provisions contained in Articles 17, 18, 21, 22, 23 and

31. This Declaration may not be amended at any time without the prior written consent of Developer to remove, revoke or modify any right or privilege of Developer under this Declaration.

30.3.1.2 The following provisions of this Declaration (collectively, the "**KDC-Related Provisions**") may not be amended at any time (including after the Final Transition Date) without the prior written consent of Developer, the Board of Directors of the Master Association, the Master Declarant and KDC (which consent shall not be unreasonably withheld, conditioned or delayed): Sections 1.42, 1.43, 1.51, 1.52, 1.54, 1.84, 1.85, 10.2.2, 10.3, 10.7(a), 10.7(d), 10.7(e), 10.7(f), 10.8, 30.3.1.2, 30.3.3 and 32.3; and any of the provisions contained in Article 28. In addition, this Declaration may not be amended in any manner that would result in a material modification of the effect of any of the KDC-Related Provisions without the prior written consent of Developer, the Board of Directors of the Master Association, the Master Declarant and KDC (which consent shall not be unreasonably withheld, conditioned or delayed).

30.3.2 Developer's Right to Amend. Subject to the limitations on amendments recited in Section 30.3.1.2 above, until the Final Transition Date, Developer reserves the right to unilaterally amend this Declaration for any reason without the approval of the Board, the Members, the Owners or any Mortgagee; provided, however, that after the conveyance of the first Lot to an Owner other than Developer, any such amendment shall have no direct and material adverse effect upon the rights or obligations of any Owner other than Developer, except as expressly permitted in this Declaration or except as consented to in writing by the affected Owner. From and after the Final Transition Date, this Declaration may be amended only in the manner provided in Section 30.1. Nothing contained in this Article 30 shall be deemed or construed to limit or restrict the right of Developer to unilaterally amend this Declaration as expressly provided in this Declaration.

30.3.3 Effect on Master Declaration. This Declaration may not be amended in any manner that affects the obligations of the Owners relative to the Master Declaration and the Master Design Guidelines, without the prior written consent of the appropriate entity under those documents.

Section 30.4 Requested Amendment; Legislative Change. Subject to the limitation on Developer's right to amend this Declaration in Section 30.3.2, but without limiting Developer's reserved right to amend this Declaration as provided in Section 30.3.2, Developer specifically reserves the right to amend all or any part of this Declaration to such an extent and with such language as may be requested by the Federal Housing Administration ("**FHA**"), the Veterans Administration ("**VA**"), the Federal National Mortgage Association ("**FNMA**") or the Federal Home Loan Mortgage Corporation ("**FHLMC**"), and to further amend to the extent requested by any other federal, state or local governmental agency that requests such an amendment as a condition precedent to such agency's approval of this Declaration, or by any established lending institution as a condition precedent to lending funds upon the security of any Lot or any portions thereof. It is the desire of Developer to retain control of the Association and its activities for so long as Developer desires to do so. If any amendment requested pursuant to the provisions of this Section 30.4, or if any federal, state or other legislation hereafter enacted, diminishes or alters such control, Developer shall have the right to prepare, provide for and adopt as an amendment to this Declaration, other and different control provisions to achieve such control or equivalent control.

Article 31
Term: Termination

This Declaration, as amended from time to time, shall be effective upon the date it is Recorded and shall continue in full force and effect for a term of thirty years, and thereafter shall continue for successive periods of fifteen years each, unless terminated as provided in this Article 31. This Declaration may be terminated by the vote or the written assent of the Members representing at least ninety percent (90%) of the total votes of Class "A" Members and the approval of the Class "B" Members, if Class "B" Membership exists, obtained not more than 360 days prior to a date upon which the term would be automatically extended. Anything to the contrary notwithstanding, a determination to terminate this Declaration shall not be effective unless and until the written consent to such termination has been obtained, within the 360-day period, from the holders of Recorded First Mortgages on seventy-five percent (75%) of the Lots upon which there are such Recorded First Mortgages. If the necessary votes and consents are obtained, the Board shall cause to be Recorded a Certificate of Termination, duly signed by the President or a vice president of the Association and attested by the secretary or an assistant secretary of the Association. Thereupon, this Declaration shall terminate and have no further force and effect as of the date the next extension of the term would otherwise have commenced, and the Association shall be dissolved.

Article 32
Dispute Resolution and Limitation of Litigation

Section 32.1 **Master Declaration Requirements.** Article XVII of the Master Declaration sets forth specific requirements and procedures for resolving certain disputes between the Master Association, the Master Declarant, all Persons subject to the Master Declaration and others involving the properties subject to the Master Declaration. Because the Property that is subject to this Declaration is also subject to the Master Declaration and because Persons subject to this Declaration are also subject to the Master Declaration, the dispute resolution procedures set forth in Article XVII of the Master Declaration, as set forth below (but with additional references and revisions with respect to matters and provisions concerning the Project Documents), shall be followed for the Project. In the event Article XVII of the Master Declaration is modified, such modification shall be deemed to be included in this Article 32. In the event Article XVII of the Master Declaration is deleted, this Article 32 shall be deemed to be deleted.

Section 32.2 **Agreement to Avoid Costs of Litigation and to Limit Right to Litigate Disputes.** The Association, Developer, all Persons subject to this Declaration, and any Person not otherwise subject to this Declaration who agrees to submit to this Article (collectively, "**Bound Parties**") agree to encourage the amicable resolution of disputes involving the Properties, and to avoid the emotional and financial costs of litigation if at all possible. Accordingly, each Bound Party covenants and agrees that all claims, grievances or disputes between such Bound Party and any other Bound Party involving the Property, including, without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement of the Master Declaration, the Master Bylaws, the Master Association rules, the Master Articles or any of the Project Documents (collectively "**Claim**"), except for those Claims authorized in Section 32.3, shall

be resolved using the procedures set forth in Section 32.4 in lieu of filing suit in any court or initiating proceedings before any administrative tribunal seeking redress or resolution of such Claim.

Section 32.3 **Exempt Claims.** The following Claims ("**Exempt Claims**") shall be exempt from the provisions of Section 32.4.

(a) any suit by the Master Association against any Bound Party to enforce the provisions of Article X (Assessments) of the Master Declaration and any suit by Developer or the Association against any Bound Party to enforce the provisions of Article 7 (Assessments) of this Declaration;

(b) any suit by the Master Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and such other ancillary relief as the court may deem necessary in order to maintain the status quo and preserve the Master Association's ability to enforce the provisions of Article XI (Architectural Standards) and Article XII (Use Restrictions) of the Master Declaration and any suit by Developer, the Association or the Master Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and such other ancillary relief as the court may deem necessary in order to maintain the status quo and preserve Developer's, the Association's and/or the Master Association's ability to enforce the provisions of Article 14 (Architectural and Landscape Control) and Article 15 (Use Restrictions) of this Declaration; and

(c) any claim brought by KDC, KDC-Related Entities, Master Declarant and/or Master Association-Related Entities to enforce any of the obligations of Developer and/or the Association under Article 10 or under Article 28 of this Declaration expressly benefiting KDC, KDC-Related Entities, Master Declarant and/or Master Association-Related Entities.

Any Bound Party having, or responding to, an Exempt Claim may submit, or agree to the submission of, such Claim to the alternative dispute resolution procedures set forth in Section 32.4, but there shall be no obligation to do so.

Section 32.4 **Mandatory Procedures For All Other Claims.** All Claims other than Exempt Claims shall be resolved using the following procedures:

(a) **Notice.** Any Bound Party having a Claim ("**Claimant**") against any other Bound Party ("**Respondent**"), other than an Exempt Claim, shall notify each Respondent in writing of the Claim (the "**Notice**"), stating plainly and concisely:

1. the nature of the Claim, including date, time, location, persons involved, and Respondent's role in the Claim;

2. the basis of the Claim (i.e., the provisions of the applicable Project Document, the Master Declaration, the Master Bylaws, the Master Articles or Master Association rules or other authority out of which the Claim arises);

3. what Claimant wants Respondent to do or not do to resolve the Claim;

and

4. that Claimant wishes to resolve the Claim by mutual agreement with Respondent, and is willing to meet in person with Respondent at a mutually agreeable time and place to discuss in good faith ways to resolve the Claim.

(b) Negotiation.

1. Each Claimant and Respondent (the "**Parties**") shall make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good faith negotiation.

2. Upon receipt of a written request from any Party, accompanied by a copy of the Notice, the Board may appoint a representative to assist the Parties in resolving the dispute by negotiation, if in its discretion it believes its efforts will be beneficial to the Parties and to the welfare of the community.

(c) Mediation.

1. If the Parties do not resolve the Claim through negotiation within 30 days of the date of the Notice (or within such other period as may be agreed upon by the Parties) ("**Termination of Negotiations**"), Claimant shall have 30 additional days within which to submit the Claim to mediation under the auspices of Mediation Services of Maui, Inc., Dispute Prevention & Resolution, Inc. ("**DPR**") or such other independent agency providing similar services upon which the Parties may mutually agree.

2. If Claimant does not submit the Claim to mediation within 30 days after Termination of Negotiations, Claimant shall be deemed to have waived the Claim, and Respondent shall be released and discharged from any and all liability to Claimant on account of such Claim; provided, nothing herein shall release or discharge Respondent from any liability to Persons not a Party to the foregoing proceedings.

3. If the Parties do not settle the Claim within 30 days after submission of the matter to the mediation process, the mediator shall, within five days of the termination of the mediation proceedings, provide the Parties with a written non-binding recommendation for resolution of the Claim (the "**Mediator's Recommendation**").

(d) Final and Binding Arbitration.

1. If the Parties do not agree in writing to accept the Mediator's Recommendation within 10 days after receipt of notice thereof, the Claimant shall have 30 additional days to submit the Claim to arbitration in accordance with the Rules of Arbitration contained in Exhibit "D" to the Master Declaration or the Claim shall be deemed abandoned, and Respondent shall be released and discharged from any and all liability to Claimant arising out of such Claim; provided, nothing herein shall release or discharge Respondent from any liability to Persons not a Party to the foregoing proceedings.

2. This subsection (d) is an agreement of the Bound Parties to arbitrate all Claims except Exempt Claims and is specifically enforceable under the applicable arbitration law of the State of Hawaii. The arbitration award (the "**Award**") shall be final and binding, and

judgment may be entered upon it in any court of competent jurisdiction to the fullest extent permitted under the laws of the State of Hawaii.

Section 32.5 **Allocation of Costs of Resolving Claims.**

(a) Each Party shall bear all of its own costs incurred prior to and during the proceedings described in Section 32.4(a), (b) and (c), including the fees of its attorney or other representative. Each Party shall share equally all charges rendered by the mediator(s) pursuant to Section 32.4(c).

(b) Each Party shall bear all of its own costs (including the fees of its attorney or other representative) incurred after the Termination of Negotiations under Section 32.4(c) and shall share equally in the costs of conducting the arbitration proceeding (collectively, "**Post Mediation Costs**"), except as otherwise provided in this subsection (b).

1. If any of the Parties rejects the Mediator's Recommendation and any nonrejecting Party pursues arbitration under Section 32.4(d), and the final judgment is either the same as the Mediator's Recommendation or more advantageous to any nonrejecting Party, each nonrejecting Party shall be entitled to recover its Post Mediation Costs from the rejecting Party. If there is more than one rejecting Party, such nonrejecting Party's Post Mediation Costs shall be allocated pro rata among all rejecting Parties.

2. If the Mediator's Recommendation involves a monetary sum and all Parties reject the Mediator's Recommendation:

(a) and the Award to any Party is equal to or greater than one hundred fifty percent (150%) of the Mediator's Recommendation for that Party, then each of the Parties receiving such an Award shall, in addition, be awarded its Post Mediation Costs.

(b) and the Mediator's Recommendation for any Party is equal to or greater than one hundred fifty percent (150%) of the Award for such Party, then such Award shall require such Party to pay each of the other Parties' Post Mediation Costs.

Section 32.6 Enforcement of Resolution. If the Parties agree to resolve any Claim through negotiation or mediation in accordance with Section 32.4 and any Party thereafter fails to abide by the terms of such agreement, or if the Parties agree to accept the Award following arbitration and any Party thereafter fails to comply with such Award, then any other Party may file suit or initiate administrative proceedings to enforce such agreement or Award without the need to again comply with the procedures set forth in Section 32.4. In such event, the Party taking action to enforce the agreement or Award shall be entitled to recover from the non-complying Party (or if more than one non-complying Party, from all such Parties pro rata) all costs incurred in enforcing such agreement or Award, including, without limitation, attorneys fees and court costs.

Section 32.7 Limitations on Initiating Legal Proceedings. Anything to the contrary in Article 32 notwithstanding (but without limiting Section 32.8.1), after the Final Transition Date, no legal, judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by a Super-Majority vote of the Members. Notwithstanding the foregoing, the Board may approve by a Majority vote of the Board the commencement or prosecution of: (a) actions or proceedings brought by the Association to enforce the provisions of the Master Project

Documents or the Project Documents (including without limitation, the foreclosure of liens); (b) actions or proceedings brought for the imposition and collection of Assessments as provided in Article 7; (c) actions or proceedings involving challenges to ad valorem taxation; (d) counterclaims brought by the Association in proceedings instituted against it; (e) other actions or proceedings where actions or proceedings have been brought against the Association; and (f) Exempt Claims.

Section 32.8 **Rights of Enforcement.**

32.8.1 In General. The Board, on behalf of the Association, shall have the power and authority to enforce the provisions of the Master Project Documents, the Project Documents and/or any and all covenants, restrictions, reservations, charges, servitudes, assessments, conditions, liens or easements provided for in any contract, deed, declaration or other instrument which (a) shall have been executed pursuant to, or subject to, the provisions of this Declaration, or (b) shall indicate that the provisions of such instrument were intended to be enforced by Developer or the Association. Until the Final Transition Date, Developer shall also have the power and authority (but not the obligation) of such enforcement.

32.8.2 Representation of Owners. After the Final Transition Date, the Board, on behalf of the Association, shall have the power and authority on behalf of any Owner(s) who consents in writing thereto, to commence and maintain legal actions to restrain and enjoin any breach or threatened breach of the Master Project Documents or the Project Documents and to enforce any of the provisions of the Master Project Documents and the Project Documents. If, however, after the Final Transition Date, the Board shall fail or refuse to enforce or commence proceedings to enforce the Project Documents or any provision thereof for a period of sixty days after written request to do so by an Owner, then the Owner may enforce or commence proceedings to enforce such provisions on behalf of the Association by any appropriate legal action.

32.8.3 Master Association Rights. In addition to rights under the Master Project Documents, the Master Association, the NCC and the MC shall have the right, but not the obligation, to enforce this Declaration.

32.8.4 Costs and Expenses of Litigation. The power and authority of the Board and Association to commence, prosecute and defend legal actions, arbitration or administrative proceedings shall include the hiring of legal counsel, as may be reasonably necessary for such actions or proceedings. Unless the allocation of costs is covered by Section 32.5 above, the costs of actions or proceedings duly initiated, prosecuted or defended, including reasonable attorney's fees and costs, shall be paid by the losing party to the prevailing party, if and to the extent determined by the appropriate decision-making authority.

Section 32.9 **Limitations on Awards.** Any provision in this Declaration to the contrary notwithstanding, no punitive or consequential damages shall be awarded in any claim (whether in court or through the arbitration proceedings) against Developer or any other Developer-Related Entities.

Article 33

General Provisions

Section 33.1 **Record of Ownership.** Within 30 days after taking title to a Lot, every Owner shall file with the Association or the managing agent a copy of the instrument of conveyance by which the Owner acquired title to and an interest in the Owner's Lot, together with the Owner's current mailing address, telephone number, email address and such other information and/or documentation as the Board may reasonably request. Lot Owners shall be obligated to inform the Association or the managing agent of any change in the Owner's current mailing address, telephone number or email address within 30 days after such a change.

Section 33.2 **Notice.** All notices permitted or required to be given under this Declaration shall be in writing. Notices to the Association shall be addressed to the Association in the manner and at the address specified in the Bylaws. The Association may designate a different address or addresses for notice by giving written notice of such change of address to all Owners. If notice of any action or proposed action by Developer, the Association, the Board or any committee or of any meeting is permitted or required to be given to any Owner or Occupant by applicable law or the Project Documents, such notice shall be given in the manner provided in the Bylaws.

Section 33.3 **Captions; Construction.** Captions given to various Articles and Sections and the Table of Contents for this Declaration are for convenience only and are not intended to modify or affect the meaning of any of the substantive provisions of this Declaration. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development and operation of the Property and the Project.

Section 33.4 **Severability.** If any provision of any Project Document, or any section, clause, sentence, phrase or word, or the application thereof in any circumstance, is held invalid, the validity of the remainder of such Document, and the application of any such provision, section, sentence, clause, phrase or word in any other circumstances, shall not be affected, and the remainder of the affected Project Document shall be construed as if such invalid part were never included therein.

Section 33.5 **Rule Against Perpetuities.** If any of the options, privileges, covenants or rights created by this Declaration shall be unlawful, void or voidable for violation of the rule against perpetuities, then such provision shall continue until the later to occur of (a) twenty-one years after the death of the last survivor of the now living descendants of George H.W. Bush, former president of the United States, or (b) the latest date that such provision may continue to exist without violating any applicable rule against perpetuities.

Section 33.6 **Mortgage of Lots.** Each Owner shall have the right, subject to the provisions of this Declaration, to Mortgage the Owner's Lot and appurtenant easements and rights. No Owner shall have the right or authority to make or create or cause to be made or created any Mortgage or other lien or security interest on or affecting any other part of the Property.

Section 33.7 **Power of Attorney.** Unless otherwise specifically restricted by the provisions of this Declaration, in any instance in which the Association, Developer or other Persons are empowered to take any action or do any act, including but not limited to actions or acts in connection with the Common Areas or sale of the Common Areas or the exercise of reserved rights by Developer or the Association that may at any time be deemed to require the act of an Owner or Member, the Owners and Members and each of them hereby constitute and appoint the Association, Developer or such other Person, as appropriate, as their attorney-in-fact with rights of substitution for the purposes of taking such action or doing such acts, including but not limited to, executing, acknowledging and delivering any instruments or documents (including conveyance instruments, grants of easements, releases, amendments to this Declaration, the Articles and Bylaws, and applications to governmental agencies, and casting votes on behalf of such Persons) necessary, appropriate or helpful for such purposes. It is acknowledged that this power of attorney is irrevocable and coupled with an interest and shall not be affected by the disability of the principal, and by becoming an Owner or a Member of the Association or by the acceptance of a conveyance of a Lot or by signing a contract for purchase of a Lot or by succeeding in any other manner to the ownership of a Lot, or any interest therein, or a Membership in the Association, each Owner and Member shall be deemed and construed to have ratified and expressly granted the above power of attorney.

Section 33.8 **Gender.** Masculine, feminine and neuter references herein each shall include the others as the context requires.

Section 33.9 **References to Declaration in Deeds.** Deeds to and instruments affecting any Lot or any other part of the Property may incorporate by reference the provisions of this Declaration; but regardless of whether any such reference is made in any deed or instrument, all of the provisions of this Declaration shall be binding upon each successor Owner or other Person claiming through any instrument and his heirs, executors, administrators, successors and assigns as though set forth in full in such instrument.

Section 33.10 **Incorporation of Exhibits.** Exhibits "A", "B", "C", "D", "E" and "F", as they may be amended from time to time in accordance with this Declaration, are incorporated into this Declaration by this reference.

Section 33.11 **No Waiver.** Nothing in this Declaration shall be construed as requiring that Developer, the Board or the Association take any action authorized hereunder in any particular instance. The failure or refusal of Developer, the Board or the Association to take such action at any time shall not constitute a waiver of the right to take such action at a later time or in a different instance.

Developer has duly executed this Declaration as of the date first referenced above.

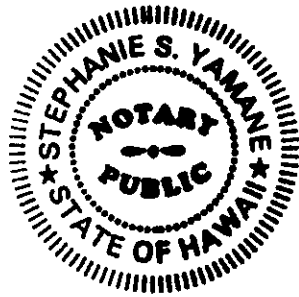
SOUTH COURSE DEVELOPMENT, LLC,
a Delaware limited liability company


By South Course Associates, LLC,
a Hawaii limited liability company
Its Managing Member

By Edward T. Dewey
Name: Edward T. Dewey
Title: President

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

On this 4th day of October, 2005, before me personally appeared EDWARD T. DEWEY, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacities.





Notary Public, State of Hawaii
Type or Print Name: Stephanie S. Yamane
My commission expires: October 19, 2007

EXHIBIT "A"

Description of the Property

All of those certain parcels of land situate at Hanakao, District of Lahaina, Island and County of Maui, State of Hawaii, being Lots 1 through 77, inclusive, of "Lanikeha – Phase I", as shown on File Plan Number 2398, filed in the Bureau of Conveyances of the State of Hawaii.

EXHIBIT "B"

[RESERVED]

EXHIBIT "C"

List of Easements

PHASE I

File Plan No. 2398		File Plan No. 2398
<u>Easement No.</u>	<u>Purpose</u>	<u>Burdened Lots</u>
A-1	Vehicular Access, Drainage, Utility and Landscape	73 to 77, inclusive
E-1	Electrical	2
E-2	Electrical	4
E-3	Electrical	6
E-4	Electrical	8
E-5	Electrical	10
E-6	Electrical	12
E-7	Electrical	13
E-8	Electrical	15
E-9	Electrical	17
E-10	Electrical	32
E-11	Electrical	37
E-12	Electrical	39
E-13	Electrical	41
E-14	Electrical	43
E-15	Electrical	44
E-16	Electrical	53
E-17	Electrical	54
E-18	Electrical	55
E-19	Electrical	57
E-20	Electrical	58
E-21	Electrical	67
E-22	Electrical	69
E-23	Cable Television	69
E-24	Electrical	71
E-25	Electrical	71
L-1	Landscaping	69

S-1	Sewerline	16
SD-1	Drainage and Sewerline	1 to 8, inclusive
SD-2	Drainage and Sewerline	25, 26 and 29 to 33, inclusive
SD-3	Drainage and Sewerline	21, 46, 58 to 61, inclusive, and 68*
SD-4	Drainage and Sewerline	40 to 45, inclusive
SD-5	Drainage and Sewerline	48 and 53 to 57, inclusive
SD-6	Drainage and Sewerline	63, 66 and 67
W-1	Waterline	21
W-2	Waterline	35 and 45
W-3	Waterline	53
W-4	Waterline	62

*Lot 68, as shown on File Plan No. 2398, has been subdivided into Lots 1 through 69, as shown on that certain subdivision map entitled "Lanikeha – Phase II", dated August 31, 2005, approved by the County of Maui on September 2, 2005 (Subdivision File No. 4.885).

<u>PHASE II</u>		
Subdivision Map**		Subdivision Map**
Easement No.	Purpose	Burdened Lots
A-2	Vehicular Access, Drainage, Utility and Landscape	67, 68 and 69
D-1	Drainage	41
E-26	Electrical	12
E-27	Electrical	16
E-28	Electrical	21
E-29	Electrical	28
E-30	Electrical	30
E-31	Electrical	31
E-32	Electrical	42
E-33	Electrical	43
E-34	Electrical	44
E-35	Electrical	45
E-36	Electrical	46
E-37	Electrical	47
E-38	Electrical	49

E-39	Electrical	51
E-40	Electrical	53
E-41	Electrical	55
E-42	Electrical	57
E-43	Electrical	59
E-44	Electrical	61
E-45	Electrical	63
E-46	Electrical	15
L-2	Landscape and Drainage	52 to 63, inclusive
S-2	Sewerline	40 to 51, inclusive, and Lot 66
SD-7	Drainage and Sewerline	1 to 4, inclusive
SD-8	Drainage and Sewerline	5 to 10, inclusive
SD-9	Drainage and Sewerline	19, 20, 21, 24
SD-10	Drainage and Sewerline	22 and 23
SD-11	Drainage and Sewerline	34, 35, 36 and 39
W-5	Waterline	20
W-6	Waterline	33
W-7	Waterline	46
----- (existing)	Sewerline (pending condemnation)	40 and 41
28 (existing)	Electrical	52 and 57
SD-3*** (existing)	Drainage and Sewerline	31, 32 and 33

**The Subdivision Map refers to that certain subdivision map entitled "Lanikeha – Phase II", dated August 31, 2005, approved by the County of Maui on September 2, 2005 (Subdivision File No. 4.885).

***Although Easement SD-3 was designated on File Plan No. 2398, which covers Lanikeha – Phase I, it is shown as an existing easement on the Subdivision Map, referenced above, covering Lanikeha – Phase II.

Note: Some or all of the Lots may be subject to additional easements, with some or all of such easements being created and/or granted by Developer pursuant to a deed from Developer or pursuant to this Declaration.

EXHIBIT "D"

List of Lot Types

PHASE I

File Plan No. 2398

<u>Lot No.</u>	<u>Description in Declaration</u>	<u>Purpose</u>
1 through 67, inclusive	Lots	residential and accessory
69	Rock Mound	open space
70	Pinnacle Retention Basin Lot	retention basin
71	Recreational Park Facilities Lot	recreational park facility
72	Makai Common Area/Utility Lot	open space and utility
73 through 77, inclusive	Roadway Lots	roadways

PHASE II

Subdivision Map*

<u>Lot No.</u>	<u>Description in Declaration</u>	<u>Purpose</u>
1 through 65, inclusive	Lots	residential and accessory
66	Makai Retention Basin lot	retention basin
67 through 69, inclusive	Roadway Lots	roadways

*The Subdivision Map refers to that certain subdivision map entitled "Lanikeha – Phase II", dated August 31, 2005, approved by the County of Maui on September 2, 2005 (Subdivision File No. 4.885), which reflects the subdivision of Lot 68 of Phase I, as shown on File Plan No. 2398, into Lots 1 through 69 of Phase II.

EXHIBIT "E"
Drainage Easements and Grants of Drainage Easements

1. Easement A-1, burdening Lots 73 to 77, inclusive, of File Plan No. 2398.
2. Easement SD-1, burdening Lots 1 to 8, inclusive, of File Plan No. 2398.
3. Easement SD-2, burdening Lots 25, 26 and 29 to 33, inclusive, of File Plan No. 2398.
4. Easement SD-3, burdening Lots 21, 46, 58 to 61, inclusive, of File Plan No. 2398, and Lots 31, 32 and 33 of the Subdivision Map for Subdivision File No. 4.885.
5. Easement SD-4, burdening Lots 40 to 45, inclusive, of File Plan No. 2398.
6. Easement SD-5, burdening Lots 48 and 53 to 57, inclusive, of File Plan No. 2398.
7. Easement SD-6, burdening Lots 63, 66 and 67 of File Plan No. 2398.
8. Easement A-2, burdening Lots 67, 68 and 69, of the Subdivision Map for Subdivision File No. 4.885.
9. Easement D-1, burdening Lot 41 of the Subdivision Map for Subdivision File No. 4.885.
10. Easement L-2, burdening Lots 52 to 63, inclusive, of the Subdivision Map for Subdivision File No. 4.885.
11. Easement SD-7, burdening Lots 1 to 4, inclusive, of the Subdivision Map for Subdivision File No. 4.885.
12. Easement SD-8, burdening Lots 5 to 10, inclusive, of the Subdivision Map for Subdivision File No. 4.885.
13. Easement SD-9, burdening Lots 19, 20, 21, 24 of the Subdivision Map for Subdivision File No. 4.885.
14. Easement SD-10, burdening Lots 22 and 23 of the Subdivision Map for Subdivision File No. 4.885.
15. Easement SD-11, burdening Lots 34, 35, 36 and 39 of the Subdivision Map for Subdivision File No. 4.885.
16. Easements D-5A, D-5-B, D-6-A and D-6-B, burdening Lot 10-N-1, as granted by Grant of Drainage Easements dated September 9, 2003, recorded in the Bureau as Document No. 2003-191221, as amended by First Amendment to Grant of Drainage Easement dated December 11, 2003, recorded in the Bureau as Document No. 2003-273332
17. Easements D-6-C and D-8, burdening Lot 10-C-2, as granted by Grant of Drainage Easements dated September 9, 2003, recorded in the Bureau as Document No. 2003-191222
18. Easement 265, as shown on Land Court Map 88, burdening Lot 73-B as shown on Map 77 of Land Court Application No. 1744, as granted by Grant of Drainage Easements dated September 9, 2003, filed as Land Court Document No. 2990056, as clarified by Clarification of Grant of Drainage Easements dated December 11, 2003, recorded in the Bureau as Document No. 2003-273333

19. Easement SD-1, burdening Lot 10-K, as granted by Grant of Drainage Easement dated December 11, 2003, recorded in the Bureau as Document No. 2003-273337
20. Easement D-7, burdening "HALELO STREET", being a portion of Lot 36 of File Plan No. 1135, as granted by Grant of Drainage Easement dated December 11, 2003, recorded in the Bureau as Document No. 2003-273338
21. Easement DR-1, burdening Lot 6 of the "Honokowai Subdivision", as granted by Grant of Drainage Easement dated December 11, 2003, recorded in the Bureau as Document No. 2003-273339
22. Easement through Hahakea Gulch, as assigned by Partial Assignment of Drainage Easement dated December 11, 2003, recorded in the Bureau as Document No. 2003-273341
23. Easement 126, as shown on Land Court Map 47, affecting Lot 66 as shown on Map 29 of Land Court Application No. 1744, as granted by Grant of Drainage Easement dated December 11, 2003, recorded in the Bureau as Document No. 2003-273342
24. Easement "A", burdening portions of Lots 10-D-1 and 10-K of the "Royal Kaanapali Golf Course Subdivision", and Easement "B", burdening a portion of Lot 10-K, as granted by Declaration of Grant of Easements (Roadway and Utility) dated December 11, 2003, recorded in the Bureau as Document No. 2003-273331

EXHIBIT "F"

Sewerline Easements and Grants of Sewerline Easements

1. Easement A-1, burdening Lots 73 to 77, inclusive, of File Plan No. 2398.
2. Easement S-1, burdening Lot 16 of File Plan No. 2398.
3. Easement SD-1, burdening Lots 1 to 8, inclusive, of File Plan No. 2398.
4. Easement SD-2, burdening Lots 25, 26 and 29 to 33, inclusive, of File Plan No. 2398.
5. Easement SD-3, burdening Lots 21, 46, 58 to 61, inclusive, of File Plan No. 2398, and Lots 31, 32 and 33 of the Subdivision Map for Subdivision File No. 4.885.
6. Easement SD-4, burdening Lots 40 to 45, inclusive, of File Plan No. 2398.
7. Easement SD-5, burdening Lots 48 and 53 to 57, inclusive, of File Plan No. 2398.
8. Easement SD-6, burdening Lots 63, 66 and 67 of File Plan No. 2398.
9. Easement A-2, burdening Lots 67, 68 and 69, of the Subdivision Map for Subdivision File No. 4.885.
10. Easement S-2, burdening Lots 40 to 51, inclusive, and 66 of the Subdivision Map for Subdivision File No. 4.885.
11. Easement SD-7, burdening Lots 1 to 4, inclusive, of the Subdivision Map for Subdivision File No. 4.885.
12. Easement SD-8, burdening Lots 5 to 10, inclusive, of the Subdivision Map for Subdivision File No. 4.885.
13. Easement SD-9, burdening Lots 19, 20, 21, 24 of the Subdivision Map for Subdivision File No. 4.885.
14. Easement SD-10, burdening Lots 22 and 23 of the Subdivision Map for Subdivision File No. 4.885.
15. Easement SD-11, burdening Lots 34, 35, 36 and 39 of the Subdivision Map for Subdivision File No. 4.885.
16. Easement "SD-1", burdening Lot 10-K of the "Royal Kaanapali Golf Course Subdivision", as granted by Grant of Sewerline Easement dated 12/11/2003, recorded as Doc. No. 2003-273343
17. Easements A-1, A-2 and A-3, burdening Lot 10-D-1, Easement A-7, burdening TMK No. (2) 4-4-6:14, Easements A-5 and A-6, burdening Lot 10-K, and Easement A-4, burdening Lot 10-J, as granted by Declaration and Grant of Easements (Roadway and Utility) dated 9/9/2003, recorded as Doc. Nos. 2003-191211 and 2003-191212
18. Easements S-1 and A-1, burdening Lot 10-N-1, as granted by Grant of Easement (Sewerline) dated 9/9/2003, recorded as Doc. No. 2003-191223
19. Easement "A", burdening portions of Lots 10-D-1 and 10-K of the "Royal Kaanapali Golf Course Subdivision", and Easement "B", burdening a portion of Lot 10-K, as granted by Declaration of Grant of Easements dated 12/11/2003, recorded as Doc. No. 2003-273331.