

KONA VIEW ESTATES
DECLARATION OF COVENANTS, CONDITIONS
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INSERT

*CERTIFIED TO BE A TRUE AND CORRECT COPY OF THE
ORIGINAL RECORDED ON _____ IN THE BUREAU OF
CONVEYANCES OF THE STATE OF HAWAII*

KONA VIEW ESTATES PHASE I

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

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KONA VIEW ESTATES PHASE I

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS ("Declaration) is made this ____ day of June, 2006, by 327 KONA, LLC, a Delaware limited liability company, who principal place of business and mailing address is 4054 McKinney Avenue, Dallas Texas 75204 (hereinafter referred to as "Declarant").

ARTICLE I: RECITALS

Section 1.1 Description of Property.

(a) The land to which this Declaration applies is the land described in Exhibit A attached hereto and made a part hereon and any additional property which is made a part of Kona View Estates (the "Project") in the future by Recording one or more Supplemental Declarations (hereinafter the "Property").

(b) No property, except that described in Exhibit A and hereby made subject to this Declaration and except that specifically annexed as provided herein, shall be deemed subject to this Declaration, whether or not shown on any subdivision map or file plan filed by Declarant or described or referred to in any document executed and Recorded by the Declarant. No designation of any parcel, lot or other area on any map or plan Recorded by the Declarant as a common area, road, street, school or park or as any other type of parcel, lot or area shall be deemed to be a dedication or commitment or representation that such parcel, lot or area is or will be used, devoted to, or restricted to such use, except with respect to parcels, lots or areas specifically described in Exhibit A, or specifically later annexed as provided herein, and so designated on a subdivision map or file plan for such else; nor shall any Owner, or the public, or any public body or agency or any other person, corporation or entity acquire any interest or rights therein by reason of such designation or filing, except as provided herein. Nothing in this Declaration or in any amendment to this Declaration, or in any Recorded or unrecorded subdivision map or file plan, nor in any picture, drawing, brochure or other representation of a scheme of development, shall be deemed to be a representation, warranty or commitment that the Declarant will commit or subject (or be construed as requiring the Declarant to commit or subject to this Declaration) any real property situated in North Kona, other than that described in Exhibit A or any amendment thereto.

Section 1.2 Land Use Approvals, Restrictions and Conditions.

(a) The Property that is submitted to this Declaration is subject to various land use approvals, restrictions, and conditions imposed by the (1) State of Hawaii, (2) the County of Hawaii, and (3) such other conditions that have been imposed or maybe imposed throughout the course of development of the Property. These conditions and approvals impose significant obligations and restrictions on the Association, Declarant, and the Owners.

(b) This document does not and is not intended to create a condominium under Hawaii law.

Section 1.3 Binding Effect.

(a) All property described in Exhibit A, and any additional property which is made a part of the Project in the future by Recording one or more Supplemental Declarations, shall be owned, conveyed, and used subject to all of the provisions of this Declaration, which shall run with the title to such property. This Declaration shall be binding upon all Persons having any right, title, or interest in any portion of the Project, their heirs, successors, successors-in-title, and assigns.

(b) This Declaration, as it may be amended, shall remain in effect and shall be enforceable by Declarant, the Association, any Owner, and their respective legal representatives, heirs, successors, and assigns, for a term of twenty (20) years from the date it is recorded. After such time, this Declaration shall be extended automatically for successive periods of ten (10) years each, unless an instrument signed by a majority of the then Owners has been recorded within the year preceding any extension, agreeing to terminate this Declaration. In the latter case, it shall terminate as of the date specified in such instrument. Notwithstanding this, if any provision of this Declaration would be unlawful, void, or voidable by reason of any Hawaii law restricting the period of time that covenants on land maybe enforced, such provision shall expire 21 years after the death of the last survivor of the now living descendants of Elizabeth II, Queen of England. Nothing in this Section shall be construed to permit termination of any easement created in this Declaration without the consent of the holder of such easement.

Section 1.4 Exhibits.

The following documents, as they maybe amended from time to time, attached hereto as Exhibits A through F, are hereby made a part of this Declaration:

- Exhibit A** - Land Initially Submitted
- Exhibit B** - Land Subject to Annexation
- Exhibit C** - Articles of Incorporation of the Association
- Exhibit D** - By-Laws of the Association
- Exhibit E** - Initial Rules and Regulations
- Exhibit F** - Design Guidelines described in Article V
- Exhibit G** - List of Names Reserved by Declarant

Section 1.5 Governing Documents.

(a) The Project's Governing Documents consist of the following, as they may be amended from time to time:

- This Declaration and such Recorded Supplemental Declarations;
- The Articles of Incorporation and Bylaws of the Association;

- Rules and Regulations of the Project;
- Design Guidelines and;
- Resolutions of the Board of Directors.

(b) Nothing in this Section shall preclude any Supplemental Declaration or other Recorded covenants applicable to any portion of the Project from containing additional restrictions or provisions which are more restrictive than those of this Declaration and, in such case, the more restrictive provision shall control.

(c) The Association may, from time to time and subject to the provisions of this Declaration, adopt, amend, and repeal the Rules and Regulations. The Rules and Regulations are to be certified by the Secretary of the Association. A copy of the Rules and Regulations shall be filed in and available at all times at the office of the Association and duplicate copies shall be delivered to each Owner upon the Owner's acquisition of a Lot. A copy of each new rule or of any amendment of an existing rule and/or regulation and notice of repeal of any rule and/or regulation shall be given to each Owner when the same becomes effective. The initial Rules and Regulations are attached hereto as Exhibit E. Failure to deliver to any Owner a copy of any rule and/or regulation, amendment of a rule and/or regulation, or notice of repeal of a rule and/or regulation shall not render such rule and/or regulation, amendment, or repeal invalid

(d) The Governing Documents apply to all Owners and occupants of property within the Project, as well as to their respective tenants, guests, and invitees. Any lease on a Lot shall provide that the tenant and all occupants of the leased Lot are bound by and obligated to comply with the Governing Documents.

Section 1.6 Severability.

If any court or government commission, board, or agency having jurisdiction should determine by final judgment, order, or degree that any provision of this Declaration is invalid, or invalid as applied in a particular instance, such determination shall in no way affect the validity or application of other provisions of this Declaration, which shall remain in full force and effect according to their terms.

ARTICLE II: DEFINITIONS

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

Section 2.1 "Area of Common Responsibility" shall mean the Common Areas, together with such other areas, if any, for which the Association has or assumes responsibility pursuant to the terms of this Declaration, any Supplemental Declarations, and/or other applicable covenants, contracts, or agreements.

Section 2.2 "**Articles**" shall mean the Articles of Incorporation of the Association granted to or to be granted pursuant to the Hawaii Revised Statutes, as amended. A copy of the initial Articles is attached to this Declaration as **Exhibit C**.

Section 2.3 "**Association**" shall mean the Kona View Estates Association, Inc., a non-profit Hawaii corporation, and its successors and assigns.

Section 2.4 "**Association Easement**" shall mean those easements in favor of the Association that are within the Project, and that are shown on a Recorded plan including, without limitation, designated Historical Sites.

Section 2.5 "**Assessment**" shall mean assessments levied on all Lots subject to assessment under Article VII to find Common Expenses for the general benefit of all Lots, as determined in accordance with **Section 7.15**.

Section 2.6 "**Board of Directors**" or "**Board**" shall mean the Board of Directors of the Association.

Section 2.7 "**Building Envelope**" shall mean the portion of each Lot reserved for the building of a Dwelling where all related Improvements must be located. The Building Envelope shall be comprised of two areas, the Private Area and the Transition Area. The Natural Area is that portion of the Lot outside of the Building Envelope.

Section 2.8 "**By-Laws**" shall mean the Bylaws of the Association, as they maybe amended. A copy of the initial By-Laws is attached to this Declaration as **Exhibit D**.

Section 2.9 **Class "A" Member** Class "A" Members shall be all Owners except the Class "B" Member, if any.

Section 2.10 **Class "B" Member** The Class "B" Member shall be Declarant.

Section 2.11 "**Class "B" Control Period**" shall mean the time period during which the Class B Member is entitled to appoint a majority of the members of the Board as provided in the By-Laws. The Class "B" Control Period shall terminate on the first to occur of the following:

(a) when ninety percent (90%) of the total number of Lots permitted by the Master Plan for the property described in **Exhibits A** and **B** have certificates of occupancy issued thereon and have been conveyed to Class "A" Members; or

(b) December 31, 2026; or

(c) when, in its discretion, the Class "B" Member so determines.

Section 2.12 "**Common Area**" shall mean all real and personal property, including easements, which the Association owns, leases, or otherwise holds possessory or use rights in for

the common use and enjoyment of the Owners including, without limitation, the Association Easements.

Section 2.13 "Common Expenses" shall mean the actual and estimated expenses incurred, or anticipated to be incurred, by the Association for the general benefit of all Owners, including any reasonable reserve, as the Board may find necessary and appropriate pursuant to the Governing Documents.

Section 2.14 "Community-Wide Standard" shall mean the standard of conduct, maintenance, or other activity generally prevailing at the Project, or the minimum standards established pursuant to the Design Guidelines, Rules and Regulations, and Board resolutions, whichever is the highest standard. Declarant shall initially establish such standard, which may contain both objective and subjective elements. The Community-Wide Standard may evolve as development progresses and as the needs and desires within the Project change.

Section 2.15 "Covenant to Share Costs" shall mean a Recorded Declaration of Easements and Covenant to Share Costs which creates certain easements for the benefit of the Association and the present and future owners of the subject real property. It obligates the Association and such owners to share the costs of maintaining property described in the Covenant to Share Costs.

Section 2.16 "Declarant" shall mean **327 KONA, LLC, a Delaware limited liability company**, or any successor, successor-in-title, or assign who takes title to any portion of the Property for the purpose of development and/or sale and who is designated as the Declarant in a Recorded instrument executed by the immediately preceding Declarant, provided that there shall be only one "Declarant" at any one time.

Section 2.17 "Design Guidelines" shall mean the architectural, design, and construction guidelines and review procedures adopted pursuant to **Article V**, as they may be amended.

Section 2.18 "Design Review Committee" or "DRC" shall mean the KONA View Estates Design Review Committee established or to be established pursuant to **Article V** hereof to review plans and specifications for the construction and use of Improvements within the Project, and to approve or disapprove the same in accordance with Declaration and the Design Guidelines.

Section 2.19 "Dwelling" shall mean a single family dwelling located on a Lot, and may include, with a guest house.

Section 2.20 "Governing Documents" shall be a collective term referring to this Declaration and any applicable Supplemental Declaration, the Articles, the By-Laws, the Rules and Regulations, the Design Guidelines, and the Resolutions of the Board of Directors, as they may be amended.

Section 2.21 "Historical Sites" shall historical and/or archaeologically significant sites that are identified and/or existing within the Project.

Section 2.22 "Improvement" shall mean anything or device placed on a Lot within the Project that may affect the appearance or use of such Lot, including, but not limited to, any building, outbuilding, garage, shed, deck, landscaping, road, driveway, excavation, fill, grading, parking area, fence, retaining wall or other wall, tanks, reservoir, pipes, lines, meters, drainage, appurtenances, cables, conduit, utility, hedge, windbreak, pole, marker, sign, mailbox, newspaper box or other delivery receptacle, planted tree, or any other structure or improvement of any type or kind.

Section 2.23 "Lot" shall mean a portion of the Project, whether improved or unimproved, which may be independently owned and is intended for development, use, and occupancy as (i) a Dwelling or (ii) a Private Amenity. The term shall refer to the land which is part of the Lot as well as any Improvements thereon. In the case of a condominium project containing multiple Dwellings, each Dwelling shall be deemed to be a separate Lot, even if the Dwelling is "keyed off" or otherwise further divided for hotel or other rental use.

In the case of a parcel of land on which Improvements are under construction, the parcel shall be deemed to contain the number of Lots designated for residential use for such parcel on the Master Plan or Declarant's site plan, whichever is more recent.

To the extent permitted by Hawaii law, and subject to the express written consent of the Declarant, two or more contiguous Lots, maybe consolidated and treated as a single Lot for the purposes of architectural control pursuant to **Article V** and the Design Guidelines, assessments and voting rights, provided that:

- (a) the Lots to be consolidated are owned by the same Owner;
- (b) only one Dwelling has been or will be constructed on the consolidated Lots and the location of the Dwelling on the Lots may be subject to the degree to which the Building Envelope is redesignated or adjusted to provide for an alternate location for the Building Envelope on the Lots by the Declarant;
- (c) the Owner of the consolidated Lots executes all documents necessary and required;
- (d) the Owner shall pay all costs related to the consolidation of the Lots; and
- (e) if a Dwelling exists on the consolidated Lots, or construction has commenced on a Dwelling on the consolidated Lots, the Lots may not be subdivided or otherwise designated as separate Lots without the express written consent of the Declarant.

Section 2.24 "Master Plan" shall mean the land use plan for the development of the Project, as it may be amended, which includes all of the property described in **Exhibit A** and all or a portion of the property described in **Exhibit B**. Inclusion of property in the Master Plan shall

not, under any circumstances, obligate Declarant to subject such property to this Declaration, nor shall omission of property described in **Exhibit B** from the Master Plan bar its later submission to this Declaration as provided.

Section 2.25 "**Member**" shall mean a Person or Persons entitled to membership in the Association pursuant to *Section 7.3*

Section 2.26 "**Mortgage**" shall mean a mortgage, a deed of trust, a deed to secure debt, or any other form of security instrument affecting title to any Lot. The term "Mortgagee" shall refer to a beneficiary or holder of a Mortgage.

Section 2.27 "**Natural Area**" shall mean that portion of the Lot that is not within the Building Envelope which is to remain in an essentially natural condition. No building improvements of any kind may be done in this area.

Section 2.28 "**Ordinance**" shall mean all ordinances applicable to the development and operation of the Project.

Section 2.29 "**Owner**" shall mean one or more persons, including natural persons, corporations, partnerships, trustee, or any other legal entities, who hold the record title to any Lot, but excluding in all cases any party holding an interest merely as security for the performance of an obligation. If a Lot is sold under a Recorded contract of sale, and the contract specifically so provides, the purchaser (rather than the fee Owner) will be considered the Owner. If a Lot is subject to a Recorded lease with a term of twenty (20) or more years from its commencement date, the Person or Persons having the right of occupancy to such Lot, will be considered an Owner of such Lot during the term of the lease.

Section 2.30 "**Person**" shall mean a natural person, a corporation, a partnership, or any other legal entity.

Section 2.31 "**Private Area**" shall mean that portion of the Building Envelope which includes buildings and outdoor private spaces.

Section 2.32 "**Project**" The master planned community The Project is to be developed on the real property described in Exhibit A, together with such additional property as is subjected to this Declaration in accordance with Article VIII.

Section 2.33 "**Property**" shall mean all real property described in **Exhibit A** together with such additional property as is subjected to this Declaration in accordance with Article VIII.

Section 2.34 "**Record,**" "**Recording,**" "**Recorded,**" or "**Recordation**" shall mean, with respect to any document, the recordation or filing of such document in the public records of the State of Hawaii, including, but not limited to, the Bureau of Conveyances and/or the Office of the Assistant Registrar of the Land Court, or such other place as maybe designated as the official location for recording deeds, plats, and similar documents affecting title to real estate.

Section 2.35 "**Reviewer**" shall mean the entity having jurisdiction over the matters contained in *Article V* as provided in that Article.

Section 2.36 "**Rules and Regulations**" shall mean the Rules and Regulations of the Project, as they maybe adopted, amended, and repealed as provided in Section 3.2. The initial Rules and Regulations are attached hereto as **Exhibit E**.

Section 2.37 "**Special Assessment**" shall mean an assessment levied in accordance with *Section 7.17*.

Section 2.38 "**Specific Assessment**" shall mean an assessment levied in accordance with *Section 7.18*.

Section 2.39 "**Subdivision Improvements**" shall mean the Improvements constructed by Declarant within the Project, including, but not limited to, berms, swales, drainage facilities, parks, sidewalks, streets, trees, landscaping, fencing, irrigation facilities, lighting, utility lines, curbing, paving, and adjacent amenities.

Section 2.40 "**Supplemental Declaration**" shall mean an instrument Recorded pursuant to Article which subjects additional property to this Declaration and/or imposes additional restrictions and obligations on the land described in such instrument.

Section 2.41 "**Transition Area**" shall mean that portion of the Building Envelope, in which no buildings may be located, but pools, patios, spas, other landscape improvements, and low walls or planting areas are allowed.

ARTICLE III: USE AND CONDUCT

Section 3.1 "**Framework for Regulation**" shall mean the Governing Documents which establish, as part of the general plan of development for the Project, a framework of affirmative and negative covenants, easements, and restrictions which govern the Project. Within that framework, the Board and the Members must have the ability to respond to unforeseen problems and changes in circumstances, conditions, needs, desires, trends and technology. Therefore, this Article establishes procedures for modifying and expanding the initial Rules and Regulations set forth in **Exhibit E**.

Section 3.2 "**Rule Making Authority**"

(a) Subject to the terms of this Article and the Board's duty to exercise business judgment and reasonableness on behalf of the Association and its Members, the Board may modify, cancel, limit, create exceptions to, or expand the Rules and Regulations and to impose reasonable fees for the use of the facilities of the Association. The Board shall mail notice to all Owners concerning any proposed action at least five business days prior to the Board meeting at which such action is to be considered.

Such action shall become effective, subject to **Subsection (c)** below, unless Members representing more than fifty percent (50%) of the total Class "A" votes in the Association and the Class "B" Member, if any, disapprove. The Board shall have no obligation to call a meeting of the Members to consider disapproval except upon receipt of a petition of the Members as required in the By-Laws. Upon such petition of the Members prior to the effective date of any Board action under this Section, the proposed action shall not become effective until after such meeting is held, and then subject to the outcome of such meeting.

(b) Alternatively, Members, representing more than fifty percent (50%) of the total Class "A" votes at an Association meeting duly called for such purpose, may vote to adopt rules which modify, cancel, limit, create exceptions to, or expand the Rules and Regulations then in effect. Such action shall require approval of the Class "B" Member, if any.

(c) Prior to any action taken under this Section becoming effective, the Board shall send a copy of the new or changed rule to each Owner. The effective date shall be not less than thirty (30) days following distribution to Owners. The Association shall provide a copy of the Rules and Regulations then in effect to any requesting Member or Mortgagee.

(d) No action taken under this Article shall have the effect of modifying, repealing, or expanding the Design Guidelines or any provision of this Declaration other than the initial Rules and Regulations set forth in **Exhibit E**. In the event of a conflict between the Design Guidelines and the Rules and Regulations, the Design Guidelines shall control.

(e) No action taken under this Article shall have the effect of unreasonably impeding Declarant's right to develop the Project.

(f) The procedures required under this Section shall not apply to the enactment and enforcement of administrative rules and regulations governing use of the Common Area unless the Board chooses in its discretion to submit to such procedures. Examples of such administrative rules and regulations shall include, but not be limited to, hours of operation of a recreational facility, and the method of allocating or reserving use of a facility (if permitted) by particular individuals at particular times.

Section 3.3 Owners' Acknowledgment and Notice to Purchasers.

All Owners are given notice that use of their Lots and the Common Area is limited by the Rules and Regulations as amended, expanded, and otherwise modified from time to time. Each Owner, by acceptance of a deed, acknowledges and agrees that the use and enjoyment and marketability of his/her Lot can be affected by this provision and that the Rules and Regulations may change from time to time. All purchases of Lots are on notice that the Association may have adopted changes. Copies of the current Rules and Regulations may be obtained from the Association.

ARTICLE IV: COVENANTS AND RESTRICTIONS

Section 4.1 Protection of Owners and Others.

The limitations contained in this Section shall only limit rulemaking authority exercised under Section 3.2; they shall not apply to the Declaration, any amendments to the Declaration adopted in accordance with Article XVI, or the initial Rules and Regulations set forth in Exhibit E. Rules and Regulations adopted pursuant to Section 3.2 shall comply with the limitations contained in Section 3.2 and the following provisions:

- (a) Similar Treatment. Similarly situated Owners shall be treated similarly.
- (b) Displays. Owners' rights to display religious and holiday signs, symbols, and decorations inside structures on their Lots of the kinds normally displayed in dwellings located in single family residential neighborhoods shall not be abridged, except that the Association may adopt time, place, and manner restrictions with respect to displays visible from outside the Dwelling. No rules shall regulate the content of political signs; however, rules may regulate the time, place and manner of posting such signs (including design criteria).
- (c) Household Composition. No rule shall interfere with Owners' freedom to determine the composition of their households, except that the Association shall have the power to require that all occupants be members of a single housekeeping unit and to limit the total number of occupants permitted in each Lot on the basis of the size and facilities of the Lot.
- (d) Activities Within Dwellings. No rule shall interfere with the activities carried on within the confines of Dwellings, except that the Association may prohibit activities not normally associated with property restricted to residential use, and it may restrict or prohibit any activities that create monetary costs for the Association or other Owners, that create a danger to the health or safety of occupants of other Lots, that generate excessive noise or traffic, that create unsightly conditions visible outside the Dwelling, or that create a source of annoyance.
- (e) Allocation of Burdens and Benefits. No rule shall alter the allocation of financial burdens among the various Lots or rights to use the Common Area to the detriment of any Owner over that Owner's objection expressed in writing to the Association. Nothing in this provision shall prevent the Association from changing the Common Area available, from adopting generally applicable rules for use of Common Area, or from denying use privileges to those who are delinquent in paying assessments, abuse the Common Area, or violate the Governing Documents. This provision does not affect the right to increase the amount of assessments as provided in Article VII.
- (f) Alienation. No rule shall prohibit leasing or transfer of any Lot, or require consent of the Association or Board for leasing or transfer of any Lot; provided, the Association or the Board may require a minimum lease term of sixty (60) days.
- (g) Abridging Existing Rights. No rule shall require an Owner to dispose of personal property that was in or on a Lot prior to the adoption of such rule if such personal

property was in compliance with all rules previously in force. This exemption shall apply only during the period of such Owner's ownership of the Lot and shall not apply to subsequent Owners who take title to the Lot after adoption of the rule.

ARTICLE V: CONSTRUCTION AND DESIGN STANDARDS

Section 5.1 Purpose.

The purpose of the construction and design standards set forth in this Article are to (a) insure the best and most appropriate development and improvement of each Lot; (b) protect the Owners of Lots against improper use and development of any other Lot which might depreciate the value of the Project as a whole; (c) preserve as far as practicable the natural beauty of each Lot and the Project as a whole; and (d) guard against the erection of structures which are poorly designed or proportioned, or structures built of improper or unsuitable materials.

Section 5.2 General.

No structure or thing shall be placed, erected, or installed upon any Lot, and no Improvements or other work (including staking, clearing, excavation, grading and other site work, exterior alterations of existing improvements, or planting or removal of landscaping) shall take place within the Project, except in compliance with this Article and the Design Guidelines.

No approval shall be required to repaint the exterior of a structure in accordance with the originally approved color scheme or to rebuild or remodel in accordance with originally approved plans and specifications. However, modifications to porches, patios, landscaping and similar portions of a Lot visible from outside the structure shall be subject to approval.

All Dwellings constructed on any portion of the Project shall be designed by and built in accordance with the plans and specifications of a licensed architect unless Declarant or its designee otherwise approves in its sole discretion. This Article shall not apply to the activities of Declarant and/or assignees of Declarant's interest, nor to activities of the Association during the Class "B" Control Period.

Section 5.3 Design Review

(a) By Declarant.

Each Owner, by accepting a deed or other instrument conveying any interest in any portion of the Project, acknowledges that, as the developer of the Project and as an Owner of portions of the Project, Declarant has a substantial interest in ensuring that the Improvements within the Project enhance Declarant's reputation as a community developer and do not impair Declarant's ability to market, sell, or lease its property. Therefore, each Owner agrees that no activity within the scope of this Article shall be commenced on such Owner's Lot unless and until Declarant or its designee has given its prior written approval for such activity, which approval may be granted or withheld in Declarant's or its designee's sole discretion.

In reviewing and acting upon any request for approval, Declarant or its designee shall be acting solely in Declarant's interest and shall owe no duty to any other Person. Declarant's rights reserved under this Article shall continue so long as Declarant owns any portion of the Project or any real property adjacent to the Project, unless earlier terminated in a written instrument executed and Recorded by Declarant. Declarant may, in its sole discretion, designate one or more Persons from time to time to act on its behalf in reviewing applications hereunder.

Declarant may from time to time, but shall not be obligated to, delegate all or a portion of its reserved rights under this Article to (i) a Design Review Committee appointed by the Board of Directors, or (ii) a committee comprised of architects, engineers, or other persons who may or may not be Members of the Association. Any such delegation shall be in writing specifying the scope of responsibilities delegated. It shall be subject to (i) Declarant's right to revoke such delegation at any time and reassume jurisdiction over the matters previously delegated and (ii) Declarant's right to veto any decision which Declarant determines, in its sole discretion, to be inappropriate or inadvisable for any reason. So long as Declarant has any rights under this Article, the jurisdiction of the foregoing entities shall be limited to such matters as Declarant specifically delegates to it.

(b) By Design Review Committee.

Upon delegation by Declarant or upon expiration or termination of Declarant's rights under this Article, the Association, acting through the DRC, shall assume jurisdiction over architectural matters. The DRC shall consist of three members. Each member shall hold office until such time as the member resigns, has been removed, or has had a successor appointed. Members shall serve staggered two year terms. There is no limit as to the number of consecutive terms that can be served by any member. The DRC is required to have a member who is a licensed architect and a member who is a licensed landscape architect.

Upon delegation by Declarant, all members of the DRC shall initially be appointed by Declarant on behalf of the Association. Upon expiration or termination of Declarant's rights under this Article, all members of the DRC shall be appointed by the Board. Members of the DRC need not be members of the Association.

The DRC may contract and/or assign some of the DRC's administrative duties, but not authority, to any qualified design professional as needed. Unless and until such time as Declarant delegates all or a portion of its reserved rights to the DRC or Declarant's rights under this Article terminate, the Association shall have no jurisdiction over architectural matters.

(c) Review Fees; Assistance.

For purposes of this Article, the entity having jurisdiction in a particular case shall be referred to as the "Reviewer." The Reviewer may establish and charge reasonable fees for the initial review of submissions and may require such fees to be paid in full by the Owner prior to commencement of review of any submission. If the initial fees collected are insufficient to cover the actual costs incurred in the review process, the Reviewer may recover from the Owner the

actual costs incurred in having any submission reviewed by architects, landscape architects, engineers, or other professionals. Declarant and the Association may employ landscape architects, engineers, or other persons as deemed necessary to perform the review. The Board may include the compensation of such persons in the Association's annual operating budget.

Section 5.4 Guidelines and Procedures.

(a) Design Guidelines. The initial Design Guidelines are attached hereto as Exhibit F. The Design Guidelines are intended to provide guidance to Owners regarding matters of particular concern to the Reviewer in considering submissions. The Design Guidelines are not the exclusive basis for the Reviewer's decisions, and compliance with the Design Guidelines does not guarantee approval of any submission.

Declarant shall have sole and full authority to amend the Design Guidelines as long as it owns any portion of or has a right to expand the Project pursuant to **Section 8.1**, unless Declarant specifically delegates the power to amend the Design Guidelines. Upon termination or delegation of Declarant's right to amend, the DRC shall have the authority to amend the Design Guidelines with the Board's consent.

Any amendments to the Design Guidelines shall be prospective only and shall not apply to require modifications to or removal of structures previously approved once the approved construction or modification has commenced. There shall be no limitation on the scope of amendments to the Design Guidelines, and such amendments may remove requirements previously imposed or otherwise make the Design Guidelines less restrictive.

The Reviewer shall make the Design Guidelines available to Owners who seek to engage in development or construction within the Project. The Recorded version of the Design Guidelines, as it may unilaterally be amended from time to time, shall control in the event of any dispute as to which version of the Design Guidelines was in effect at any particular time.

(b) Procedures.

Except as otherwise specifically provided in the Design Guidelines, no activities shall commence on any portion of the Project until the final submission required by the Design Guidelines has been submitted to and approved by the Reviewer. In reviewing each submission, the Reviewer may consider any factors it deems relevant, including, without limitation, harmony of external design with surrounding structures and environment. The Reviewer shall have the sole discretion to make final, conclusive, and binding determinations on matters of aesthetic judgment and such determinations shall not be subject to review so long as made in good faith and in accordance with the procedures set forth herein.

The design review process shall take place in four (4) steps all of which are specifically set out in the Design Guidelines. The DRC will make a reasonable effort to comply with the design review schedule. However, the DRC shall not be liable for any delays that are caused by circumstances beyond their control.

Until expiration of Declarant's rights to amend the Design Guidelines under this Article, Declarant shall have the right to veto the approval by the DRC of any submission within the scope of matters delegated to the DRC by Declarant. The DRC shall notify Declarant in writing within three (3) business days after the DRC has approved any submission. The notice shall be accompanied by a copy of the submission and any additional information which Declarant may require. Declarant shall have fourteen (14) days after receipt of such notice to veto any such action, in its sole discretion, by written notice to the DRC. The Reviewer shall notify the applicant in writing of the final determination on any submission within five (5) days after the earlier of (i) receipt of notice of Declarant's veto or waiver thereof; or (ii) expiration of the fourteen (14) day period for exercise of Declarant's veto.

In the event that the Reviewer fails to respond in a timely manner, approval shall be deemed to have been given, subject to Declarant's right to veto pursuant to this Section. However, no approval, whether expressly granted or deemed granted, shall be inconsistent with the Design Guidelines unless a written variance has been granted pursuant to **Section 5.6**. Notice shall be deemed to have been given at the time the envelope containing the response is deposited with the U.S. Postal Service. Personal delivery of such written notice shall, however, be sufficient and shall be deemed to have been given at the time of delivery to the applicant.

If construction does not commence on the Project within one (1) year after the date of approval of the final submission required by the Design Guidelines, such approval shall be deemed withdrawn and it shall be necessary for the Owner to resubmit for approval before commencing any activities. Once construction is commenced, it shall be diligently pursued to completion. All work shall be completed within twenty-four (24) months of commencement unless otherwise specified in the notice of approval or unless the Reviewer grants an extension in writing, which it shall not be obligated to do. If approved work is not completed within the required time, it shall be considered nonconforming and shall be subject to enforcement action by the Association, Declarant, or any aggrieved Owner.

The Reviewer may, by resolution, exempt certain activities from the submission and approval requirements of this Article, provided such activities are undertaken in strict compliance with the requirements of such resolution.

Section 5.5 No Waiver of Future Approvals.

Each Owner acknowledges that the Persons reviewing submissions under this Article will change from time to time and that opinions on aesthetic matters, as well as interpretation and application of the Design Guidelines, may vary accordingly. In addition, each Owner acknowledges that it may not always be possible to identify objectionable features until work is completed, in which case it maybe unreasonable to require changes to the Improvements involved, but the Reviewer may refuse to approve similar proposals in the future. Approval of submissions or plans, or in connection with any other matter requiring approval, shall not be deemed to constitute a waiver of the right to withhold approval as to any similar submissions, plans, or other matters subsequently or additionally submitted for approval.

Section 5.6 Variances.

The Reviewer may authorize variances from compliance with any of its guidelines and procedures when circumstances such as topography, natural obstructions, hardship, or aesthetic or environmental considerations require, but only in accordance with duly adopted rules and regulations. No variance shall (a) be effective unless in writing; (b) be contrary to this Declaration; or (c) act to prevent the Reviewer from denying a variance in other circumstances. For purposes of this Section, the inability to obtain approval of any governmental agency, the issuance of any permit, or the terms of any financing shall not be considered a hardship warranting a variance.

Section 5.7 Limitation of Liability.

The standards and procedures established by this Article are intended as a mechanism for maintaining and enhancing the overall aesthetics of the Project; they do not create any duty to any Person. Review and approval of any submission pursuant to this Article is made on the basis of aesthetic considerations only, and the Reviewer shall not bear any responsibility for ensuring the structural integrity or soundness of approved construction or modifications, nor for ensuring compliance with building codes and other governmental requirements, nor for ensuring that all Dwellings are of comparable quality, value or size, of similar design, or aesthetically pleasing or otherwise acceptable to neighboring property owners.

Declarant, the Association, the Board, any committee, or member of any of the foregoing shall not be held liable for soil conditions, drainage, or other general site work, any defects in plans revised or approved hereunder, any loss or damage arising out of the action, inaction, integrity, financial condition, or quality of work of any contractor or its subcontractors, employees, or agents; or any injury, damages, or loss arising out of the manner or quality or other circumstances of approved construction on or modifications to any Lot. In all matters, the Board, the DRC, and the members of each shall be defended and indemnified by the Association as provided in **Section 7.10.**

Section 5.8 Certificate of Architectural Compliance.

Any Owner may request that the Reviewer issue a certificate of architectural compliance certifying that there are no known violations of this Article or the Design Guidelines. The Association shall either grant or deny such request within thirty (30) days after receipt of a written request and may charge a reasonable administrative fee for issuing such certificates. Issuance of such a certificate shall prevent the Association from taking enforcement action with respect to any condition as to which the Association had notice as of the date of such certificate.

Section 5.9 Notice to Comply.

When as a result of a construction observation or final inspection, the Reviewer finds (i) changes and/or alterations that have not been approved; or (ii) that construction work was done not in compliance with the approved final design documents, the Reviewer shall issue a Notice to Comply to the Lot Owner within five (5) working days of the observation/inspection.

Such Notice shall describe with reasonable particularity the nature of the non-compliance and a timetable for compliance.

Upon receipt of the Notice to Comply, the Lot Owner shall remedy the non-compliance within a minimum of thirty (30) days or such other time period set forth in the Notice to Comply. Failure to remedy the non-compliance within the time period provided in the Notice to Comply may result in enforcement action against the Lot Owner including all rights and remedies contained within this Declaration and the Design Guidelines including, but not limited to, fines and removal or modification of the Improvement with the costs for such modification or removal to be assessed against such Owner's Lot.

Section 5.10 Disruption of Historical Sites.

Historical Sites exist on various portions of the Property. Declarant has conducted a survey of the Property in a reasonable effort to identify all Historical Sites on the Property. As a result of the survey numerous Historical Sites have been identified ("Identified Sites") however some Historical Sites may exist on the Property that have not been identified ("Undiscovered Sites"). Historical Sites may be located on Lots as well as under Lots in portions of lava tubes and caves. Such Historical Sites may impact the manner in which an Owner may improve his/her Lot. Some of the Identified Sites have been designated for preservation ("Preservation Sites"). The Preservation Sites within the Project are depicted on a plan that has been, or will be, Recorded. Preservation Sites shall not be disturbed or removed. The Association shall be obligated to protect and preserve Preservation Sites as required by the State of Hawaii Department of Land and Natural Resources regulations at the time this Declaration is Recorded. Protection and preservation of Preservation Sites may include the construction of berms, walls, gates and barriers, the installation of signs, plants and other landscaping, and monitoring of Historical Sites. The cost of maintaining such protection and preservation measures may be an either an expense of the Lot owner or if set herein, or a Common Expense of the Association. Data Recovery Sites may be disturbed or disrupted after data recovery activities have been completed. In the event any Data Recovery Site is located within the Building Envelope on any Lot, Declarant shall have the obligation to undertake and complete all data recovery activities.

Prior to undertaking any Improvements on a Lot, the Owner of the Lot shall take into account any Preservation Sites on the Lot when designing and constructing Improvements on the Lot. The existence and location of any Preservation Sites on a Lot shall be considered by the Reviewer in evaluating a submission for approval. In the event that any Preservation Site exists on the Lot, the Owner shall avoid disruption of the site. Under no circumstances may any Owner or Member, or their licensees, guests, invitees, agents, employees, contractors, representatives, or any other Person deposit construction waste, refuse, or any other material on or in any Preservation Site, damage, disrupt or destroy a Preservation Site, or remove material of any kind from a Preservation Site.

In the event an Owner discovers the existence of an Undiscovered Site, the Owner shall cease construction and notify the Association immediately of the existence and location of the Undiscovered Site. The Owner shall then grant the Association, its agents, employees, and any governmental officials and inspectors access to the site to conduct any required evaluation,

testing, data recovery, preservation, and mitigation that may be required by Ordinance, SMA Permit, the State of Hawaii Department of Land and Natural Resources regulations as of the date this Declaration is Recorded, or Hawaii law. Neither the Association nor Declarant give any warranty, or make any representation, that all Historical Sites that exist within the Project have been discovered. Undiscovered Sites may affect the manner in which Lots within the Project may be developed. Neither the Association nor Declarant shall have any liability for any damages, increased construction costs, or delays caused by the existence of, or the discovery of, a Historical Site. Notwithstanding any other provision of this Declaration, this Section may not be amended or modified without the consent of the State of Hawaii Department of Land and Natural Resources.

Section 5.11 Construction of Improvements.

Declarant has a legitimate interest in assuring that all construction undertaken within the Project is of the highest quality. Construction of Improvements should be conducted expeditiously with the least possible disruption to adjacent and neighboring Lots and properties so the property values within the Project may, at all times, be protected and maintained at the highest possible levels. Construction of any and all Improvements within the Project must be undertaken only by builders who are duly licensed by the State of Hawaii as general contractors.

No Improvement built by any Owner on the Owner's Lot shall encroach upon any adjoining Lot or extend outside of Building Envelope for that Lot, provided that each Owner shall be responsible for landscaping the Natural Area on his/her Lot. Declarant shall not be responsible for any encroachment of any such Improvement upon an adjoining Lot, or outside of the Building Envelope (other than landscaping). The Reviewer may require that an Owner conduct a survey to ensure that any Improvement Lot will not encroach upon any adjoining Property or outside of the Building Envelope (other than landscaping). An Owner shall indemnify, defend, and hold Declarant, the Association, their agents and employees, harmless from and against any and all claims, losses, expenses, damages, liabilities, or injuries suffered by reason of any acts, omissions, or alleged acts or omissions arising out of an Owner's performance or nonperformance of the Owner's obligations under this Section, including, but not limited to, the encroachment of any Improvement upon any adjoining Lot, or outside of the Building Envelope (other than landscaping), including, but not limited to, any judgment, award, settlement, reasonable attorney's fees and other costs, or expenses incurred in connection with the defense of any actual or threatened action, proceeding, or claim.

Each Owner shall maintain the Owner's Lot in a neat and orderly condition before, during, and after any construction on the Lot and take all reasonable dust control measures, including watering the Lot and/or erecting dust screens, to alleviate the generation of dust. In addition, Owners shall not allow trash and debris to accumulate anywhere on the Lot. Owners shall not store any construction materials on the Lot, except during the period that construction is actually occurring on the Lot. Owners shall keep roadways, easements, and other property within the Project clear of trash and materials related to construction on the Lots.

An Owner responsible for damage to Subdivision Property shall promptly repair such damage. Each Owner agrees to indemnify and hold harmless Declarant, the Association,

their agents and employees, and other Owners of Lots in the Project from and against any and all claims, damages, expenses (including reasonable attorneys' fees and court costs), and liabilities of any nature whatsoever asserted against, or incurred by the same, in connection with any damage to or alteration of Subdivision Improvements caused by such Owner, the Owner's employees, agents, or independent contractors.

ARTICLE VI: MAINTENANCE AND REPAIR

Section 6.1 Maintenance of Lots.

Each Owner shall maintain the Owner's Lot and all landscaping and Improvements on the Lot in a manner consistent with the Governing Documents, the Community-Wide Standard and all applicable covenants, unless such maintenance responsibility is otherwise assumed by or assigned to the Association pursuant to any Supplemental Declaration or other declaration of covenants applicable to such Lot. This Section shall not be interpreted as giving the Owner the right to prune, trim, cut or remove any tree, plant or other vegetation from any Association Easement.

Section 6.2 Responsibility for Repair and Replacement.

Unless otherwise specifically provided in the Governing Documents, responsibility for maintenance shall include responsibility for repair and replacement, as necessary, to maintain the Property to a level consistent with the Community-Wide Standard. Each Owner covenants and agrees with all other Owners and with the Association to carry property insurance for the full replacement cost of all insurable improvements on the Owner's Lot, less a reasonable deductible, unless the Association carries such insurance (which they may but are not obligated to do hereunder).

Each Owner further covenants and agrees that in the event of damage to or destruction of structures on or comprising the Owner's Lot, the Owner shall proceed promptly to repair or to reconstruct in a manner consistent with the original construction or such other plans and specifications as are approved in accordance with Article V. Alternatively, the Owner shall clear the Lot and maintain it in a neat and attractive, landscaped condition consistent with the Community-Wide Standard. The Owner shall pay any costs not covered by insurance proceeds.

ARTICLE VII: THE COMMUNITY ASSOCIATION

Section 7.1. Organization.

The Association is organized under the Hawaii Revised Statutes as a Hawaii non-profit corporation without stock. The Association is charged with the duties and vested with the powers prescribed by law, subject to the limitations and provisions of the Governing Documents. Neither the Articles nor By-Laws shall, for any reason, be amended or otherwise changed so as to be inconsistent with this Declaration. If there should exist any ambiguity in any provision of the Articles or By-Laws, then such provision shall be construed, to the extent possible, so as to be consistent with the provisions of this Declaration.

Section 7.2 Function.

The Association is responsible for management, maintenance, operation, and control of the Area of Common Responsibility. The Association also is the primary entity responsible for enforcement of the Governing Documents. The Association shall perform its functions in accordance with the Governing Documents and Hawaii law.

Section 7.3 Membership.

Every Owner shall be a Member of the Association. There shall be only one membership per Lot. If a Lot is owned by more than one Person, all co-Owners shall share the privileges of such membership, subject to reasonable Board regulation and the restrictions on voting set forth in **Section 7.4(c)** and in the By-Laws, and all such co-Owners shall be jointly and severally obligated to perform the responsibilities of Owners. The membership rights of an Owner which is not a natural person may be exercised by any officer, director, partner, member, trustee, or by the individual designated from time to time by the Owner in a written instrument provided to the Secretary of the Association.

Section 7.4 Voting.

The Association shall have two classes of membership, Class "A" and Class "B."

(a) Class "A". Class "A" Members shall be all Owners except the Class "B" Member, if any. Class "A" Members shall have one equal vote for each Lot in which they hold the interest required for membership under Section 7.3 except that there shall be only one vote per Lot. No vote shall be exercised for any property which is exempt from assessment under Section 7.22. All Class "A" votes shall be cast as provided in Section 7.4(c).

(b) Class "B". The sole Class "B" Member shall be Declarant. The Class "B" Member may appoint a majority of the members of the Board of Directors during the Class "B" Control Period, as specified in the By-Laws. Additional rights of the Class "B" Member are specified in the relevant sections of the Governing Documents. After termination of the Class "B" Control Period, the Class "B" Member shall have the right to disapprove actions of the Board and committees as provided in the By-Laws.

The Class "B" membership shall terminate upon the earlier of

(i) two years after expiration of the Class "B" Control Period pursuant to the By-Laws; or

(ii) when, in its discretion, Declarant so determines and declares in a Recorded instrument.

Upon termination of the Class "B" membership, Declarant shall be a Class "A" Member entitled to Class "A" votes for each Lot it owns.

(c) Exercise of Voting Rights. Except as provided herein, during the Class "B" Control Period the vote for each Lot owned by a Class "A" Member shall be exercised by such Class "A" Member. In any situation where a Member is entitled personally to exercise the vote for the Member's Lot, and where there is more than one Owner of such Lot, the vote for such Lot shall be exercised as the co-Owners determine among themselves and advise the Secretary of the Association in writing prior to the vote being taken. Absent such advice, the Lot's vote shall be suspended if more than one Person seeks to exercise it.

(d) Additional Classes of Membership. In recognition of the different character and intended use of the Property subject to such Supplemental Declaration, Declarant may, by Supplemental Declaration, create additional classes of membership for the Owners of Lots within any Property made subject to this Declaration pursuant to Article VIII. These classes shall have such rights, privileges, and obligations as specified in such Supplemental Declaration.

Section 7.5 Acceptance and Control of Association Property.

The Association may acquire, hold, lease (as lessor or lessee), operate, and dispose of tangible and intangible personal property and real property. The Association may enter into leases, licenses, or operating agreements for portions of the Common Area, for such consideration or no consideration as the Board deems appropriate, to permit use of such portions of the Common Area by community organizations and by others, whether nonprofit or for profit, for the provision of goods or services for the general benefit or convenience of Owners, occupants, and residents of the Project.

Declarant and its designees may convey to the Association, and the Association shall accept, personal property and fee title, leasehold, or other property interests in any real property, improved or unimproved, described in Exhibits A or B. Upon Declarant's written request, the Association shall reconvey to Declarant any unimproved portions of the Common Area Declarant originally conveyed to the Association for no consideration, to the extent conveyed by Declarant in error or needed by Declarant to make minor adjustments in property lines.

The Association shall be responsible for management, operation, and control of the Common Area, subject to any covenants and restrictions set forth in the deed or other instrument transferring such property to the Association. The Board may adopt such reasonable rules regulating use of the Common Area as it deems appropriate.

Section 7.6 Maintenance of Area of Common Responsibility.

The Association shall maintain, in accordance with the Community-Wide Standard, the Area of Common Responsibility, which shall include, but need not be limited to:

- (a) all portions of and structures situated on the Common Area;

(b) Landscaping within or along public rights-of-way within or abutting the Project;

(c) such portions of any additional property included within the Area of Common Responsibility as maybe dictated by this Declaration, any Supplemental Declaration, the Covenant to Share Costs, or any contract or agreement for maintenance thereof entered into by the Association;

(d) all Historical Sites as described in **Section 5.10**, including any sites located on individual Lots unless the individual Lot Owner is required to maintain a site on his Lot ;

(e) all portions of and all structures, equipment, landscaping, trees, plants and other Improvements situated on the Association Easement with the exception of any structures, equipment, landscaping, trees, plants and other Improvements installed or constructed on the Association Easement by an Owner;

(f) any Property and facilities Declarant owns and makes available, on a temporary or permanent basis, for the primary use and enjoyment of the Association and its Members. Such Property and facilities shall be identified by written notice from Declarant to the Association and will remain part of the Area of Common Responsibility maintained by the Association until such time as Declarant revokes such privilege of use and enjoyment by written notice to the Association.

The Association may maintain other property which it does not own, including, without limitation, undeveloped Lots and property dedicated to the public, if the Board of Directors determines that such maintenance is necessary or desirable to maintain the Community-Wide Standard

The Association shall not be liable for any damage or injury occurring on or arising out of the condition of property which it does not own except to the extent that it has been grossly negligent in the performance of its maintenance responsibilities.

The Association shall maintain the facilities and equipment within the Area of Common Responsibility in continuous operation, except for any periods necessary, as determined in the Board's sole discretion, to perform required maintenance or repairs, unless Members representing seventy five percent (75%) of the Class "A" votes in the Association and the Class "B" Member, if any, agree in writing to discontinue such operation.

Except as provided above, the Area of Common Responsibility shall not be reduced without Declarant's prior written approval as long as Declarant owns any property described in Exhibits A or B of this Declaration.

The costs associated with maintenance, repair, and replacement of the Area of Common Responsibility shall be a Common Expense; provided, the Association may seek reimbursement from the owner(s) of, or Persons responsible for, certain portions of the Area of

Common Responsibility pursuant to this Declaration, the Covenant to Share Costs, other Recorded covenants, or agreements with the owner(s) thereof.

Section 7.7 Insurance.

(a) Required Coverage. Where necessary, the Association shall obtain the following types of insurance, if reasonably available, or if not reasonably available, the most nearly equivalent types of coverage as are reasonably available:

(i) If the Association acquires Common area, Blanket property insurance covering "risks of direct physical loss" on a "special form" basis (or comparable coverage by whatever name denominated) for all insurable improvements on the Common Area and within the Area of Common Responsibility to the extent that Association has assumed responsibility in the event of a casualty, regardless of ownership. If such coverage is not generally available at reasonable cost, then "broad form" coverage maybe substituted. All property insurance policies obtained by the Association shall have policy limits sufficient to cover the full replacement cost of the insured improvements under current building ordinances and codes;

(ii) If the Association acquires Common area, commercial general liability insurance on the Area of Common Responsibility, insuring the Association and its Members for damage or injury caused by the negligence of the Association or any of its Members, employees, agents, or contractors while acting on its behalf. If generally available at reasonable cost, such coverage (including primary and any umbrella coverage) shall have a limit of at least \$1,000,000.00 per occurrence with respect to bodily injury, personal injury, and property damage; provided, should additional coverage and higher limits be available at reasonable cost which a reasonably prudent person would obtain, the Association shall obtain such additional coverages or limits;

(iii) If the Association hires employees, workers compensation insurance and employers liability insurance, if and to the extent required by law;

(iv) Directors and officers liability coverage;

(v) Commercial crime insurance, including fidelity insurance covering all Persons responsible for handling Association funds in an amount determined in the Board's business judgment but not less than an amount equal to one-quarter of the annual Base Assessments on all Lots plus reserves on hand. Fidelity insurance policies shall contain a waiver of all defenses based upon the exclusion of Persons serving without compensation; and

(vi) Such additional insurance as the Board, in the exercise of its business judgment, determines advisable.

Premiums for all insurance shall be Common Expenses.

(b) Policy Requirements. The Association shall arrange for an annual review of the sufficiency of its insurance coverage by one or more qualified Persons, at least one of

whom must be familiar with insurable replacement costs in the Kailua-Kona area. All Association policies shall provide for a certificate of insurance to be furnished to the Association and, upon request, to each Member insured.

The policies may contain a reasonable deductible, and the amount thereof shall not be subtracted from the face amount of the Policy in determining whether the Policy limits satisfy the requirements of **Section 7.7(a)**. In the event of an insured loss, the deductible shall be treated as a Common Expense. However, if the Board reasonably determines, after notice and an opportunity to be heard in accordance with the By-Laws, that the loss is the result of the negligence or willful misconduct of one or more Owners, their guests, invitees, or lessees, then the Board may assess the full amount of such deductible against such Owner(s) and their Lots as a Specific Assessment.

All insurance coverage obtained by the Board shall:

(i) be written with a company authorized to do business in Hawaii which satisfies the requirements of the Federal National Mortgage Association, or such other secondary mortgage market agencies or federal agencies as the Board deems appropriate;

(ii) be written in the Association's name as trustee for the benefited parties. Policies on the Common Areas shall be for the benefit of the Association and its Members;

(iii) not be brought into contribution with insurance purchased by Owners, occupants, or their Mortgagees individually;

(iv) contain an inflation guard endorsement;

(v) include an agreed amount endorsement, if the policy contains a co-insurance clause;

(vi) provide that each Owner is an insured person under the policy with respect to liability arising out of such Owner's interest in the Common Area as a Member in the Association (provided, this provision shall not be construed as giving an Owner any interest in the Common Area other than that of a Member);

(vii) provide a waiver of subrogation under the policy against any Owner or household member of a Owner;

(viii) include an endorsement precluding cancellation, invalidation, suspension, or non-renewal by the insurer on account of any one or more individual Owners, or on account of any curable defect or violation without prior written demand to the Association to cure the defect or violation and allowance of a reasonable time to cure; and

(ix) include an endorsement precluding cancellation, invalidation, or condition to recovery under the policy on account of any act or omission of any one or more

individual Owners, unless such Owner is acting within the scope of its authority on behalf of the Association.

In addition, the Board shall use reasonable efforts to secure insurance policies which list the Owners as additional insureds and provide:

(i) a waiver of subrogation as to any claims against the Association's Board, officers, employees, and its manager, the Owners and their tenants, servants, agents, and guests;

(ii) a waiver of the insurer's rights to repair and reconstruct instead of paying cash;

(iii) an endorsement excluding Owners' individual policies from consideration under any "other insurance" clause;

(iv) an endorsement requiring at least thirty(30) days' prior written notice to the Association of any cancellation, substantial modification, or non-renewal;

(v) a cross liability provision, and

(vi) a provision vesting in the Board exclusive authority to adjust losses; provided, no Mortgagee having an interest in such losses may be prohibited from participating in the settlement negotiations, if any, related to the loss.

(c) Restoring Damaged Improvements. In the event of damage to, or destruction of, Common Area or other property which the Association is obligated to insure, the Board or its duly authorized agent shall file and adjust all insurance claims and obtain reliable and detailed estimates of the cost of repairing or restoring the property to substantially the condition in which it existed prior to the damage, allowing for changes or improvements necessitated by changes in applicable building codes.

Damaged Improvements on the Common Area shall be repaired or reconstructed unless the Members representing at least seventy five percent (75%) of the total Class "A" votes in the Association, and the Class "B" Member, if any, decide within sixty (60) days after the loss not to repair or reconstruct. If either the insurance proceeds or estimates of the loss, or both, are not available to the Association within such 60-day period, then the period shall be extended until such funds or information are available. However, such extension shall not exceed sixty (60) additional days. No Mortgagee shall have the right to participate in the determination of whether the damage or destruction to the Common Area shall be repaired or reconstructed.

If a decision is made not to restore the damaged Improvements, and no alternative improvements are authorized, the affected Property shall be cleared of all debris and ruins and thereafter shall be maintained by the Association in a neat and attractive, landscaped condition consistent with the Community-Wide Standard. Any insurance proceeds remaining after paying the costs of repair or reconstruction, or after such settlement as is necessary and appropriate,

shall be retained by the Association for the benefit of its Members and placed in a capital improvements account. This is a covenant for the benefit of Mortgagees and may be enforced by the Mortgagee of any affected Lot.

If insurance proceeds are insufficient to cover the costs of repair or reconstruction, the Board may, without a vote of the Members, levy Special Assessments to cover the shortfall against the Owners.

Section 7.8 Compliance and Enforcement.

(a) Every Owner and occupant of a Lot shall comply with the Governing Documents. The Board may impose sanctions for violation of the Governing Documents after notice and a hearing in accordance with the procedures set forth in the By-Laws. Such sanctions may include, without limitation:

(i) imposing reasonable monetary fines which shall constitute a lien upon the violator's Lot. (In the event that any occupant, guest, or invitee of a Lot violates the Governing Documents and a fine is imposed, the fine shall first be assessed against the violator, provided, if the fine is not paid by the violator within the time period set by the Board, the Owner shall pay the fine upon notice from the Board);

(ii) suspending an Owner's right to vote;

(iii) suspending any Person's right to use any recreational facilities within the Common Area; provided, nothing herein shall authorize the Board to limit ingress or egress to or from a Lot;

(iv) suspending any services provided by the Association to an Owner or the Owner's Lot if the Owner is more than thirty (30) days delinquent in paying any assessment or other charge owed to the Association;

(v) exercising self-help or taking action to abate any violation of the Governing Documents in a non-emergency situation;

(vi) requiring an Owner, at its own expense, to remove any structure or Improvement on such Owner's Lot in violation of the Governing Documents and to restore the Lot to its previous condition and, upon failure of the Owner to do so, the Board or its designee shall have the right to enter the property, remove the violation and restore the property to substantially the same condition as previously existed and any such action shall not be deemed a trespass;

(vii) without liability to any Person, precluding any contractor, subcontractor, agent, employee or other invitee of an Owner who fails to comply with the terms and provisions of Article V and the Design Guidelines from continuing or performing any further activities in the Project; and damages or both.

(viii) levying Specific Assessments to cover costs incurred by the Association to bring a Lot into compliance with the Governing Documents.

(b) In addition, the Board may take the following enforcement procedures to ensure compliance with the Governing Documents without the necessity of compliance with the procedures set forth in the By-Laws:

(i) exercising self-help in any emergency situation (specifically including, but not limited to, the towing of vehicles that are in violation of parking rules and regulations); or

(ii) bringing suit at law or inequity to enjoin any violation or to recover monetary damages or both.

In addition to any other enforcement rights, if an Owner fails properly to perform the Owner's maintenance responsibility, the Association may Record a notice of violation or perform such maintenance responsibilities and assess all costs incurred by the Association against the Lot and the Owner as a Specific Assessment. Except in an emergency situation, the Association shall provide the Owner reasonable notice and an opportunity to cure the problem within a thirty (30) day period after receipt of such notice, prior to taking such enforcement action.

All remedies set forth in the Governing Documents shall be cumulative of any remedies available at law or in equity. In any action to enforce the Governing Documents against an Owner, if the Association prevails, it shall be entitled to recover from such Owner all costs, including, without limitation, attorneys fees and court costs, reasonably incurred in such action.

(c) The decision to pursue enforcement action in any particular case shall be left to the Board's discretion, except that the Board shall not be arbitrary or capricious in taking enforcement action. Without limiting the generality of the foregoing sentence, the Board may determine that, under the circumstances of a particular case:

(i) the Association's position is not strong enough to justify taking any or further action;

(ii) the covenant, restriction or rule being enforced is, or is likely to be construed as, inconsistent with applicable law;

(iii) although a technical violation may exist or may have occurred, it is not of such a material nature as to be objectionable to a reasonable person or to justify expending the Association's resources; or

(iv) that it is not in the Association's best interests, based upon hardship, expense, or other reasonable criteria, to pursue enforcement action.

Such a decision shall not be construed a waiver of the Association's right to enforce such provision at a later time under other circumstances or preclude the Association from enforcing any other covenant, restriction or rule.

(d) The Association, by contract or other agreement, may enforce applicable County Ordinances, if applicable, and permit Hawaii County to enforce Ordinances within the Project for the benefit of the Association and its Members.

Section 7.9 Implied Rights: Board Authority.

The Association may exercise any right or privilege given to it expressly by the Governing Documents, or reasonably implied from or reasonably necessary to effectuate any such right or privilege. Except as otherwise specifically provided in the Governing Documents, or by law, all rights and powers of the Association may be exercised by the Board without a vote of the membership.

The Board may institute, defend, settle, or intervene on behalf of the Association in mediation, binding or non binding arbitration, litigation, or administrative proceedings in matters pertaining to the Area of Common Responsibility, enforcement of the Governing Documents, or any other civil claim or action. However, the Governing Documents shall not be construed as creating any independent legal duty to institute litigation on behalf of or in the name of the Association or its members.

In exercising the Association's rights and powers, making decisions on the Association's behalf, and conducting the Association's affairs, Board members shall be subject to, and their actions shall be judged in accordance with, the standards set forth in the By-Laws.

Section 7.10 Indemnification of Officers, Directors and Others.

Subject to Hawaii law, the Association shall indemnify every officer, director, and committee member against all damages and expenses, including counsel fees, reasonably incurred in connection with any action, suit, or other proceeding (including settlement of any suit or proceeding, if approved by the then Board of Directors) to which he or she may be a party by reason of being or having been an officer, director, or committee member, except that such obligation to indemnify shall be limited to those actions for which liability is limited under this Section, the Articles, and Hawaii law.

The officers, directors, and committee members shall not be liable for any mistake of judgment, negligent or otherwise, except for their own individual willful misfeasance, malfeasance, misconduct, or bad faith. The officers and directors shall have no personal liability with respect to any contractor other commitment made or action taken in good faith on behalf of the Association (except to the extent that such officers or directors may also be Members of the Association).

The Association shall indemnify and forever hold each such officer, director, and committee member harmless from any and all liability to others on account of any such contract,

commitment or action. This right to indemnification shall not be exclusive of any other rights to which any present or former officer, director, or committee member may be entitled. As a Common Expense, the Association shall maintain adequate general liability and officers' and directors' liability insurance to fund this obligation, if such insurance is reasonably available.

Section 7.11 Safety and Security.

All Owners and occupants of a Lot, and their respective guests and invitees, shall be responsible for their own personal safety and the security of their property in the Project. The Association may, but shall not be obligated to, maintain or support activities within the Project designed to enhance the level of safety which each Person provides for himself and his property. Neither the Association nor Declarant shall in any way be considered insurers or guarantors of safety or security within the Project, nor shall either be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.

Section 7.12 Provision of Services.

The Association may provide, or provide for, amenities, services and/or facilities for the Members and/or their Lots, and shall be authorized to enter into and terminate contracts or agreements with other entities, including Declarant or Persons affiliated with Declarant, to provide such services and facilities. The Board may charge use or service fees for any such amenities, services and/or facilities provided at the option of an Owner, or may include the costs thereof in the Association's budget as a Common Expense and assess it as part of the Base Assessment if provided to all Lots. By way of example, such services and facilities might include recreational amenities (located at the Project or elsewhere), landscape maintenance, pest control service, cable television service, security, caretaker, transportation, fire protection, utilities, and similar amenities, services and/or facilities.

Nothing in this Section shall be construed as a representation by Declarant or the Association as to what, if any, services shall be provided. In addition, the Board shall be permitted to modify or cancel existing contracts for services in its discretion, unless the provision of such services is otherwise required by the Governing Documents. Non-use of services provided to all Owners or Lots as a Common Expense shall not exempt any Owner from the obligation to pay assessments for such services.

Section 7.13 Relationships with Other Properties.

The Association may enter into contractual agreements or covenants to share costs with any neighboring property or the Owners of a Private Amenity to contribute funds for, among other things, shared or mutually beneficial property or services and/or a higher level of Common Area maintenance.

Section 7.14 Facilities and Services Open to the Public.

Certain facilities and areas within the Project may be open for use and enjoyment of the public. Such public areas may include, by way of example: greenbelts, trails and paths,

parks, and other neighborhood spots conducive to gathering and interaction, roads, sidewalks, and medians. Declarant may designate such facilities and areas as open to the public at the time Declarant makes such facilities and areas a part of the Area of Common Responsibility or the Board may so designate at any time thereafter.

Section 7.15 Budgeting and Allocating Common Expenses.

At least sixty (60) days before the beginning of each fiscal year, the Board shall prepare a budget of the estimated Common Expenses for the coming year, including any contributions to be made to a reserve fund pursuant to Section 7.16. The budget shall also reflect the sources and estimated amounts of funds to cover such expenses, which may include any surplus to be applied from prior years, any income expected from sources other than assessments levied against the Lots, and the amount to be generated through the levy of Assessments and Special Assessments against the Lots, as authorized in Section 7.17.

The Association is authorized to levy Assessments equally against all Lots subject to assessment to fund the Common Expenses. In determining the Assessment rate per Lot, the Board may consider any assessment income expected to be generated from any additional Lots reasonably anticipated becoming subject to assessment during the fiscal year.

Declarant, at its sole option, may reduce the Assessment by payment of a subsidy (in addition to any amounts paid by Declarant under Section 7.20(b)), which may be either a contribution, an advance against future assessments due from Declarant, or a loan, in Declarant's discretion. Any such subsidy shall be disclosed as a line item in the income portion of the budget. Payment of such subsidy in any year shall not obligate Declarant to continue payment of such subsidy in future years, unless otherwise provided in a written agreement between the Association and Declarant.

The Board shall send a copy of the final budget, together with notice of the amount of the Assessment to be levied, to each Owner at least thirty (30) days prior to the effective date of such budget. The budget shall automatically become effective unless disapproved at a meeting by Members representing at least seventy five percent (75%) of the total Class "A" votes in the Association and by the Class "B" Member, if such exists. There shall be no obligation to call a meeting for the purpose of considering the budget except on petition of the Members as provided for special meetings in the By-Laws. Any such petition must be presented to the Board within ten (10) days after delivery of the budget and notice of any assessment.

If any proposed budget is disapproved or the Board fails for any reason to determine the budget for any year, then the budget most recently in effect shall continue in effect until a new budget is determined. The Board may revise the budget and adjust the Assessment from time to time during the year, subject to the notice requirements and the right of the Members to disapprove the revised budget as set forth above.

Section 7.16 Budgeting for Reserves.

The Board shall prepare and review at least annually a reserve budget for the Area of Common Responsibility. The budget shall take into account the number and nature of replaceable assets, the expected life of each asset, and the expected repair or replacement cost. The Board shall include in the Common Expense budget adopted pursuant to Section 7.15 a capital contribution to fund the reserve budget in an amount sufficient to meet the projected need with respect both to amount and timing by annual contributions over the budget period.

Section 7.17 Special Assessments.

In addition to other authorized assessments, the Association may levy Special Assessments to cover unbudgeted expenses or expenses in excess of those budgeted. Any such Special Assessment for Common Expenses maybe levied against the entire membership. Except as otherwise specifically provided in this Declaration, any Special Assessment shall require the affirmative vote or written consent of Members representing more than fifty percent (50%) of the total votes allocated to Lots which will be subject to such Special Assessment, and the affirmative vote or written consent of the Class "B" Member, if such exists. Special Assessments shall be payable in such manner and at such times as determined by the Board, and may be payable in installments extending beyond the fiscal year in which the Special Assessment is approved.

Section 7.18 Specific Assessments.

The Association shall have the power to levy Specific Assessments against a particular Lot as follows:

(a) to cover the cost (including overhead and administrative costs) of providing any special services to an Owner at his/her request, pursuant to any menu of special services which may be offered by the Association (which might include the items identified in **Section 7.12**). Specific Assessments for special services may be levied in advance of the provision of the requested service;

(b) to cover costs of correcting deficiencies resulting from an Owner's failure to comply with the Governing Documents, or costs incurred as a consequence of any conduct by the Owner or occupants of the Lot, their agents, contractors, employees, licensees, invitees, or guests in violation of the Governing Documents; provided, the Board shall give the Lot Owner prior written notice and an opportunity for a hearing, in accordance with the By-Laws, before levying any Specific Assessment.

Section 7.19 Authority to Assess Owners: Time of Payment.

Declarant hereby establishes and the Association is hereby authorized to levy assessments as provided for in this Article and elsewhere in the Governing Documents. The obligation to pay assessments shall commence as to each Lot on the first day of the month following: (a) the month in which the Lot is made subject to this Declaration, or (b) the month in

which the Board first determines a budget and levies assessments pursuant to this Article, whichever is later. The first annual Base Assessment, if any, levied on each Lot shall be adjusted according to the number of months remaining in the fiscal year at the time assessments commence on the Lot.

Assessments shall be paid in such manner and on such dates as the Board may establish. The Board may require advance payment of assessments at closing of the transfer of title to a Lot and impose special requirements for Owners with a history of delinquent payment. If the Board elects, assessments may be paid in two or more installments. Unless the Board otherwise provides, the Base Assessment shall be due and payable in advance on the first day of each fiscal year. If any Owner is delinquent in paying any assessments or other charges levied on his Lot, the Board may require the outstanding balance on all assessments to be paid in full immediately.

Section 7.20 Obligation for Assessments.

(a) Personal Obligation Each Owner, by accepting a deed or entering into a Recorded contract of sale for any portion of the Project, is deemed to covenant and agree to pay all assessments authorized in the Governing Documents. All assessments, together with interest (computed from its due date at a rate equal to the higher of (i) the prime rate of interest announced from time to time by Citibank N.A., or its successors, plus two percent (2%), per annum, or (ii) ten percent (10%) per annum, subject to the limitations of Hawaii law), late charges as determined by Board resolution, costs, and reasonable attorneys' fees, shall be the personal obligation of each Owner and a lien upon each Lot until paid in full. Upon a transfer of title to a Lot, the grantee shall be jointly and severally liable for any assessments and other charges due at the time of conveyance.

Failure of the Board to fix assessment amounts or rates or to deliver or mail each Owner an assessment notice shall not be deemed a waiver, modification, or a release of any Owner from the obligation to pay assessments. In such event, each Owner shall continue to pay Assessments on the same basis as during the last year for which an assessment was made, if any, until a new assessment is levied, at which time the Association may retroactively assess any shortfalls in collections.

No Owner is exempt from liability for assessments by non-use of Common Area, abandonment of the Owner's Lot, or any other means. The obligation to pay assessments is a separate and independent covenant on the part of each Owner. No diminution or abatement of assessments or set-off shall be claimed or allowed for any alleged failure of the Association or Board to take some action or perform some function required of it, or for inconvenience or discomfort arising from the making of repairs or improvements, or from any other action it takes.

Upon written request, the Association shall furnish to any Owner liable for any type of assessment a certificate in writing signed by an Association officer setting forth whether such assessment has been paid. Such certificate shall be conclusive evidence of payment. The Association may require the advance payment of a reasonable processing fee for the issuance of such certificate.

(b) Declarant's Option to Fund Budget Deficits. During the Class "B" Control Period, Declarant may satisfy its obligation for assessments on Lots which it owns either by paying such assessments in the same manner as any other Owner or by paying the difference between the amount of assessments levied on all other Lots subject to assessment and the amount of actual expenditures by the Association during the fiscal year. Unless Declarant otherwise notifies the Board in writing at least sixty (60) days before the beginning of each fiscal year, Declarant shall be deemed to have elected to continue paying on the same basis as during the immediately preceding fiscal year.

Regardless of Declarant's election, Declarant's obligations hereunder may be satisfied in the form of cash or by "in kind" contributions of services or materials, or by a combination of these. After termination of the Class "B" Control Period, Declarant shall pay assessments on its unsold Lots in the same manner as any other Owner.

Section 7.21 Lien for Assessments.

The Association shall have a lien against each Lot to secure payment of delinquent assessments, as well as interest, late charges (subject to the limitations of Hawaii law), and costs of collection (including court costs and attorneys fees). Such lien shall be superior to all other liens, except (a) the liens of all taxes, bonds, assessments, and other levies which by law would be superior, and (b) the lien or charge of any Recorded first Mortgage (meaning any Recorded Mortgage with first priority over other Mortgages) made in good faith and for value. Such lien maybe enforced by suit, judgment, and judicial or nonjudicial foreclosure.

The Association may bid for the Lot at the foreclosure sale and acquire, hold, lease, mortgage, and convey the Lot. While a Lot is owned by the Association following foreclosure: (a) no right to vote shall be exercised on its behalf, (b) no assessment shall be levied on it; and (c) each other Lot shall be charged, in addition to its usual assessment, its pro rata share of the assessment that would have been charged such Lot had it not been acquired by the Association. The Association may sue for unpaid assessments and other charges authorized hereunder without foreclosing or waiving the lien securing the same.

The transfer of any Lot shall not affect the assessment lien or relieve such Lot from the lien for any subsequent assessments. However, the sale or transfer of any Lot pursuant to foreclosure of the first Mortgage shall extinguish the lien as to any installments of such assessments due prior to the Mortgagee's foreclosure. The subsequent Owner to the foreclosed Lot shall not be personally liable for assessments on such Lot due prior to such acquisition of title. Such unpaid assessments shall be deemed to be Common Expenses collectible from Owners of all Lots subject to Section 7.19, including such acquirer, its successors, and assigns.

Section 7.22 Exempt Property.

The following Property shall be exempt from payment of Assessments and Special Assessments:

(a) All Common Area and such portions of the Property owned by Declarant as are included in the Area of Common Responsibility; and

(b) Any Property dedicated to and accepted by any governmental authority or public utility.

In addition, Declarant and/or the Association shall have the right, but not the obligation, to grant exemptions to certain Persons qualifying for tax exempt status under the Internal Revenue Code.

Section 7.23 Capitalization of Association.

Upon the acquisition of record title to a Lot by the first Owner thereof other than Declarant, a contribution shall be made by or on behalf of the purchaser to the working capital of the Association in the amount of \$500.00. This amount shall be in addition to the annual Assessment and shall not be considered an advance payment of such assessment. This amount shall be deposited into the purchase and sales escrow and disbursed therefrom at closing to the Association for use in covering operating expenses and other expenses incurred by the Association pursuant to the Governing Documents. In its sole discretion, the Board of Directors may increase the amount of this fee.

Section 7.24 Community Enhancement Fee.

(a) Authority. On behalf of the Association, the Board shall have the authority to establish and collect a transfer fee from the transferring Owner upon each transfer of title to a Lot in the Project, which fee shall be payable to the Association at the closing of the transfer and shall be secured by the Association's lien for assessments under Section 7.21. Owner shall notify the Secretary of the Association of a pending title transfer at least seven (7) days prior to the transfer. Such notice shall include the name of the buyer, the date of title transfer, and other information as the Board may require.

(b) Fee Limit. The initial amount of the transfer fee shall be \$1,000.00. In its sole discretion, the Board of Directors may increase the amount of this fee.

(c) Purpose. All transfer fees which the Association collects shall be deposited into the Association's accounts and used to supplement the funds collected by assessments in such manner as the Board deems beneficial for the Project.

(d) Exempt Transfers. Notwithstanding the above, no transfer fee shall be levied upon transfer of title to a Lot:

(i) by or to Declarant;

(ii) among co-Owners of a Lot;

(iii) to the Owner's estate, surviving spouse, or child upon the death of the Owner;

(iv) to an entity wholly owned or controlled by the grantor; provided, however, that the transfer fee shall become due upon any subsequent transfer of an ownership interest in such entity; or

(v) to an institutional lender pursuant to a Mortgage or upon foreclosure of a Mortgage.

ARTICLE VIII: EXPANSION OF THE PROJECT

The Declaration reserves various rights to Declarant in order to facilitate the smooth and orderly development of the Project and to accommodate changes in the Master Plan which inevitably occur as a community the size of the Project grows and matures, including, but not limited to the following:

Section 8.1 Expansion by Declarant.

Declarant may from time to time subject to the provisions of this Declaration all or any portion of the property described in **Exhibit B** by Recording a Supplemental Declaration describing the additional property to be subjected. A Supplemental Declaration Recorded pursuant to this Section shall not require the consent of any Person except the owner of such property, if other than Declarant.

Declarant's right to expand the Project pursuant to this Section shall expire when all property described in **Exhibit B** has been subjected to this Declaration or forty (40) years after this Declaration is Recorded, whichever is earlier. Until then, Declarant may transfer or assign this right to any Person who is the developer of at least a portion of the real property described in **Exhibits A** or **B**. Any such transfer shall be memorialized in a written Recorded instrument executed by Declarant. Nothing in this Declaration shall be construed to require Declarant or any successor to subject additional property to this Declaration or to develop any of the property described in **Exhibit B** in any manner whatsoever.

Section 8.2 Expansion by the Association.

The Association may also subject additional property to the provisions of this Declaration by Recording a Supplemental Declaration describing the additional property. Any such Supplemental Declaration shall require the affirmative vote of Members representing more than fifty percent (50%) of the Class "A" votes of the Association represented at a meeting duly called for such purpose, and the consent of the owner of the property. In addition, so long as Declarant owns Property subject to this Declaration or which may become subject to this Declaration in accordance with Section 8.1, Declarant's consent shall be necessary. The Supplemental Declaration shall be signed by the President and Secretary of the Association, by the owner of the property and by Declarant, if Declarant's consent is necessary.

Section 8.3 Additional Covenants and Easements.

Declarant may subject any portion of the Project to additional covenants and easements, including covenants obligating the Association to maintain and insure such Property and easements which encumber Association property. Such additional covenants and easements may be set forth either in a Supplemental Declaration subjecting such Property to this Declaration or in a separate Supplemental Declaration referencing Property previously subjected to this Declaration. If the Property is owned by someone other than Declarant, then the consent of the Owner(s) shall be necessary and shall be evidenced by their execution of the Supplemental Declaration. Any such Supplemental Declaration may supplement, create exceptions to, or otherwise modify the terms of this Declaration as it applies to the subject Property in order to reflect the different character and intended use of such Property.

Section 8.4 Effect of Filing Supplemental Declaration.

A Supplemental Declaration shall be effective upon Recording unless otherwise specified in such Supplemental Declaration. On the effective date of the Supplemental Declaration, any additional property subjected to this Declaration shall be assigned voting rights in the Association and assessment liability in accordance with the provisions of this Declaration.

ARTICLE IX: ADDITIONAL RIGHTS RESERVED TO DECLARANT

Section 9.1 Withdrawal of Property.

Declarant reserves the right to amend this Declaration, so long as it has a right to annex additional property pursuant to **Article VIII**, for the purpose of removing any portion of the Project which has not yet been improved with structures from the coverage of this Declaration, provided such withdrawal does not reduce the total number of Lots then subject to the Declaration by more than thirty three percent (33%). Such amendment shall not require the consent of any Person other than the Owner(s) of the Property to be withdrawn, if not Declarant. If the Property is Common Area, the Association shall consent to such withdrawal.

Section 9.2 Marketing and Sales Activities.

Declarant may construct and maintain upon portions of the Common Area such facilities and activities as, in Declarant's sole opinion, may be reasonably required, convenient, or incidental to the construction or sale of Lots, including business offices, signs, model units, and sales offices. The design of such facilities shall be consistent with the Community-Wide Standard. Declarant shall have easements for access to and use of such facilities at no charge.

Section 9.3 Right to Develop.

Declarant and its employees, agents and designees shall have a right of access and use and an easement over and upon all of the Common Area for the purpose of making, constructing and installing such improvements to the Common Area as it deems appropriate in its sole discretion.

Section 9.4 Right to Approve Additional Covenants.

No Person shall Record any declaration of covenants, conditions, and restrictions, or declaration of condominium or similar instrument affecting any portion of the Project without Declarant's review and written consent. Any attempted Recordation without such consent shall result in such instrument being void and of no force and effect unless subsequently approved by written consent signed and Recorded by Declarant.

Section 9.5 Right to Approve Changes in Project Standards.

No amendment to or modification of any Rules and Regulations or Design Guidelines shall be effective without prior notice to and the written approval of Declarant so long as Declarant owns Property subject to this Declaration or which may become subject to this Declaration in accordance with Section 8.1.

Section 9.6 Right to Transfer or Assign Declarant Rights.

Any or all of Declarant's special rights and obligations set forth in this Declaration or the By-Laws may be transferred in whole or in part to other Persons; provided, the transfer shall not reduce an obligation nor enlarge a right beyond that which Declarant has under this Declaration or the By-Laws. No such transfer or assignment shall be effective unless it is in a written instrument Declarant signs and Records. The foregoing sentence shall not preclude Declarant from permitting other Persons to exercise, on a one-time or limited basis, any right reserved to Declarant in this Declaration where Declarant does not intend to transfer such right in its entirety, and in such case it shall not be necessary to Record any written assignment unless necessary to evidence Declarant's consent to such exercise.

Section 9.7 Exclusive Rights To Use Name of Development.

No Person shall use the names listed on **Exhibit G** attached hereto or any logo, depiction, or derivative of such names in any printed or promotional material without Declarant's prior written consent. However, Owners may use the name "Kona View Estates" in printed or promotional matter where such term is used solely to specify that particular property is located within the Project and the Association and other entities related to Declarant shall be entitled to use the words "Kona View Estates" in its name.

Section 9.8 Right to Notice of Design or Construction Claims.

No Person shall retain an expert for the purpose of inspecting the design or construction of any structures or Improvements within the Project in connection with or in anticipation of any potential or pending claim, demand, or litigation involving such design or construction unless Declarant has been first notified in writing and given an opportunity to meet with the Owner of the Lot to discuss the Owner's concerns and conduct its own inspection.

Section 9.9 Termination of Rights.

The rights contained in this Article shall not terminate until the earlier of (a) forty (40) years from the date this Declaration is Recorded, or (b) Recording by Declarant of a written statement that all sales activity has ceased.

ARTICLE X: EASEMENTS

Section 10.1 Easements in Common Area.

Declarant grants to each Owner a nonexclusive right and easement of use, access, and enjoyment in and to the Common Area, subject to:

- (a) The Governing Documents and any other applicable covenants;
- (b) Any restrictions or limitations contained in any deed conveying such Property to the Association;
- (c) The Board's right to:
 - (i) adopt rules regulating use and enjoyment of the Common Area, including rules limiting the number of guests who may use the Common Area,
 - (ii) suspend the right of an Owner to use recreational facilities within the Common Area (A) for any period during which any charge against such Owner's Lot remains delinquent, and (B) for a period not to exceed thirty (30) days for a single violation, or for a longer period in the case of any continuing violation, of the Governing Documents after notice and a hearing pursuant to the By-Laws;
 - (iii) dedicate or transfer all or any part of the Common Area, subject to such approval requirements as may be set forth in this Declaration;
 - (iv) impose reasonable membership requirements and charge reasonable admission or other use fees for the use of any recreational facility situated upon the Common Area;
 - (v) permit use of any recreational facilities situated on the Common Area by persons other than Owners, their families, lessees, and guests upon payment of use fees established by the Board and designate other areas and facilities within the Area of Common Responsibility as open for the use and enjoyment of the public; and
 - (vi) mortgage, pledge, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred.

Any Owner may extend the Owner's right of use and enjoyment to the members of the Owner's family, lessees, and guests, as applicable, subject to reasonable regulation by the

Board. An Owner who leases the Owner's Lot shall be deemed to have assigned all such rights to the lessee of such Lot for the period of the lease.

Section 10.2 Easements of Encroachment.

Declarant grants reciprocal appurtenant easements of encroachment, and for maintenance and use of any permitted encroachment, between each Lot and any adjacent Common Area and between adjacent Lots or any Lot and any Private Amenity due to the unintentional placement or settling or shift of the Improvements constructed, reconstructed, or altered thereon (in accordance with the terms of these restrictions) to a distance of not more than one foot, as measured from any point on the common boundary along a line perpendicular to such boundary. However, in no event shall an easement for encroachment exist if such encroachment occurred due to willful and knowing conduct on the part of, or with the knowledge and consent of, the Person claiming the benefit of such easement.

Section 10.3 Easements for Utilities, etc.

(a) Installation and Maintenance. Declarant reserves for itself, so long as Declarant owns any property described in **Exhibit A** or **B** of this Declaration, and grants to the Association and all utility providers (including, but not limited to, privately owned and operated utilities), perpetual non-exclusive easements throughout the Project (but not through a structure) to the extent reasonably necessary for the purpose of:

(i) installing utilities and infrastructure to serve the Project, cable and other systems for sending and receiving data and/or other electronic signals, security and similar systems, walkways, pathways and trails, drainage systems, street lights and signage on property which Declarant owns or within public rights-of-way or easements reserved for such purpose on Recorded plats;

(ii) inspecting, maintaining, repairing, and replacing the utilities, infrastructure, and other Improvements described in Section 10.3(a)(i); and

(iii) access to read utility meters.

(b) Specific Easements. Declarant also reserves for itself the non-exclusive right and power to grant and Record such specific easements as may be necessary, in Declarant's sole discretion, in connection with the orderly development of any property described in Exhibits A and B. The Owner of any property to be burdened by any easement granted pursuant to this subsection (b) shall be given written notice in advance of the grant. The location of the easement shall be subject to the written approval of the owner of the burdened property, which approval shall not unreasonably be withheld, delayed, or conditioned.

(c) Minimal Interference. All work associated with the exercise of the easements described in subsections (a) and (b) of this Section shall be performed in such a manner as to minimize interference with the use and enjoyment of the property burdened by the easement. Upon completion of the work, the Person exercising the easement shall restore the

property, to the extent reasonably possible, to its condition prior to the commencement of the work. Exercise of these easements shall not extend to permitting entry into the structures on any Lot, nor shall it unreasonably interfere with the use of any Lot and, except in an emergency, entry onto any Lot shall be made only after reasonable notice to the Owner or occupant.

Section 10.4 Easements to Serve Additional Property.

Declarant hereby reserves for itself and its duly authorized agents, successors, assigns, and mortgagees, an easement over the Common Area for the purposes of enjoyment, use, access, and development of the property described in **Exhibit B**, whether or not such property is made subject to this Declaration. This easement includes, but is not limited to, a right of ingress and egress over the Common Area for construction of roads and for connecting and installing utilities on such property.

Declarant agrees that it and its successors or assigns shall be responsible for any damage caused to the Common Area as a result of its respective actions in connection with development of such property. Declarant further agrees that if the easement is exercised for permanent access to such property and such property or any portion thereof benefitting from such easement is not made subject to this Declaration, Declarant, its successors, or assigns shall enter into a reasonable agreement with the Association to share the cost of any maintenance which the Association provides to or along any roadway providing access to such property.

Section 10.5 Easements for Maintenance, Emergency and Enforcement.

Declarant grants to the Association easements over the Project as necessary to enable the Association to fulfill its maintenance responsibilities under **Section 7.6**. The Association shall also have the right, but not the obligation, to enter upon any Lot for emergency, security, and safety reasons, to perform maintenance and to inspect for the purpose of ensuring compliance with and enforce the Governing Documents. Such right may be exercised by any member of the Board and its duly authorized agents and assignees, and all emergency personnel in the performance of their duties. Except in an emergency situation, entry shall only be during reasonable hours and after notice to the Owner.

Section 10.6 Easements for Flood Water.

Declarant further reserves for itself, the Association, and their successors, assigns, and designees, a perpetual, nonexclusive right and easement of access and encroachment over the Common Area and Lots (but not the Dwellings thereon) adjacent to or within 100 feet of bodies of a water course within the Project, in order to (a) flood temporarily, back water upon, and maintain water over such portions of the Project; (b) alter in any manner and generally maintain the any water course within the Area of Common Responsibility; and (c) maintain and landscape the slopes and banks pertaining to such areas. All persons entitled to exercise these easements shall use reasonable care in, and repair any damage resulting from, the intentional exercise of such easements. Nothing herein shall be construed to make Declarant or any other Person liable for damage resulting from flooding due to hurricanes, heavy rainfall, or other natural occurrences.

Section 10.7 Easement to Inspect and Right to Correct.

Declarant reserves for itself and others it may designate the right to inspect, monitor, test, redesign, and correct any structure, Improvement, or condition which may exist on any portion of the Property within the Project, including Lots, and a perpetual, nonexclusive easement of access throughout the Project to the extent reasonably necessary to exercise such right. Except in an emergency, entry onto a Lot shall be only after reasonable notice to the Owner and no entry into a Dwelling shall be permitted without the Owner's consent.

Section 10.8 Easements for Historical Sites.

Declarant reserves for itself and the Association a nonexclusive, perpetual easement over the Common Areas and Lots to (a) travel to and from the Historical Sites, and (b) inspect, evaluate, perform data recovery, maintain and preserve the Historical Sites identified on the Property from time to time. Such easement shall affect only such portions of the Common Area and Lots as Declarant or the Association, as the case may be, deems reasonably necessary for such purposes. Declarant further reserves for itself and the Association the right to grant nonexclusive easements over the Common Areas and Lots to (a) travel to and from such Historical Sites, (b) inspect, evaluate, perform data recovery, maintain and preserve such Historical Sites, and/or (c) perform traditional, cultural and/or religious practices at such Historical Sites, to any Person who is or may be entitled under Hawaii law to exercise any such rights. Such easements shall affect only such portions of the Common Areas and Lots as Declarant or the Association, as the case may be, deems reasonable for such purposes and may be subject to such reasonable terms, conditions and restrictions that Declarant or the Association may impose consistent with Hawaii law. Some Historical Sites have been identified; however, others may exist that have yet to be discovered. The Historical Sites that have yet to be discovered may be located on Lots or in lava tubes or caves beneath Lots. The Declarant reserves for itself and the Association the right to grant additional easements or modify existing easements under this Section for additional Historical Sites that are discovered and to comply with Hawaii law, or the requirements of any governmental or quasi governmental entity that has jurisdiction over matters involving such Historical Sites.

Due to the sensitive nature of this type of easement, the potential exists for conflict between Persons using easements pursuant to this Section and Owners. In order to avoid or eliminate any potential conflicts that may arise, an environment of mutual respect between Persons using the easements and Owners must prevail. Owners should exercise caution to avoid disruption of Historical Sites and should take no action to prevent or hinder access to Historical Sites. Persons utilizing easements pursuant to this Section should do so in a careful, considerate and conscientious manner and take reasonable steps to avoid disturbing Owners. Neither the Association nor Declarant shall have any liability for any damages, increased construction costs, or delays caused by the existence of, or the discovery of, a Historical Site or the designation or use of an easement related to such Historical Site.

Section 10.9 Easement for Maintenance of Lots.

Declarant reserves for itself and the Association, an easement of ingress and egress over such portions of Lots necessary for the purpose of removing, replacing, installing, and maintaining trees, plants, and other vegetation on such Lots. Declarant and the Association shall have the right to exercise this easement over the entire area of a Lot, including the Building Envelope until the Owner of such Lot completes construction of a Dwelling on the Lot.

The activities undertaken pursuant to this Section may include, but not be limited to, grading of Lots and the removal, replacement, installation, and maintenance of trees, plants and other vegetation. Any costs incurred by the Association under this Section shall be a Common Expense. No tree, plant, or other vegetation installed pursuant to this Section, including but not limited to, trees, plants, and other vegetation, shall be modified, pruned, cut, or removed without the approval of the Declarant.

Except as otherwise provided by the Governing Documents, after an Owner has completed construction of a Dwelling, his/her rights to exercise this easement shall be limited to the Association Easements. The Declarant and the Association shall have the right, but not the obligation, to undertake any, or all, of the activities described in this Section.

Section 10.10 Easement for Drainage.

The Property is burdened with a perpetual and nonexclusive easement over, through, and across the Property as necessary to accommodate drainage from or across Property adjacent to the Lot in its currently existing and natural pattern and flow. Each Owner assumes all liability for damage to persons or Property caused by interference with the natural flow of drainage from, over, through, or across the Lot in connection with Owner's activities on all or any part of the Lot, and agrees to indemnify, defend, and hold harmless Declarant and the Association from and against any liability, claim, demand, action, or suit arising out of, or in connection with, any such interference with drainage.

Section 10.11 Association Easement.

Declarant reserves for itself, so long as Declarant owns any property described in **Exhibit A** or **B** of this Declaration, and grants to the Association and its successors, assigns, and designees, the nonexclusive right and easement to the portion of each Lot that is designated as Association Easement for the purposes of installing, maintaining and repairing utilities, installing structures and Improvements, installing and maintaining landscaping, and any other reasonable purpose as may be determined in the discretion of the Declarant or the Association as the case may be.

No Owner may remove, damage, or destroy any Improvement, structure, landscaping, plants, or trees that are within the Association Easement unless given express, written consent by the Board of Directors. Any Owner that constructs any Improvement or installs any landscaping on a portion of his/her Lot that is designated as Association Easement shall be required, upon notice from the Board, to remove such Improvement or landscaping at

his/her expense and restore the Association Easement to substantially the same condition as it existed prior to the construction or installation of such Improvement or landscaping. In the event an Owner fails to take such action as required by the Board, the Association shall have the right to remove such landscaping or Improvement and restore the Association Easement. The costs for such action may be levied against such Owner's Lot as a Specific Assessment.

**ARTICLE XI:
PARTY WALLS AND OTHER SHARED STRUCTURES**

Section 11.1 General Rules of Law to Apply.

Each wall, fence, driveway, or similar structure built as a part of the original construction on the Lots which serves and/or separates any two adjoining Lots shall constitute a party structure. To the extent not inconsistent with the provisions of this Section, the general rules of law regarding party walls and liability for property damage due to negligence or willful acts or omissions shall apply thereto. Any dispute arising concerning a party structure shall be handled in accordance with the provisions of **Article XII**.

Section 11.2 Maintenance: Damage and Destruction.

The cost of reasonable repair and maintenance of a party structure shall be shared equally by the Owners who make use of the party structure. If a party structure is destroyed or damaged by fire or other casualty, then to the extent that such damage is not covered by insurance and repaired out of the proceeds of insurance, any Owner who used the structure may restore it. If other Owners thereafter use the structure, they shall contribute to the restoration cost in equal proportions. However, such contribution will not prejudice the right to call for a larger contribution from the other users under any rule of law regarding liability for negligent or willful acts or omissions. The right of any Owner to contribution from any other Owner under this Section shall be appurtenant to the land and shall pass to such Owner's successors-in-title.

**ARTICLE XII:
DISPUTE RESOLUTION AND LIMITATION ON LITIGATION**

Section 12.1 Agreement to Encourage Resolution of Disputes Without Litigation.

(a) Declarant, the Association and its officers, directors, and committee members; 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 that it is in the best interest of all concerned to encourage the amicable resolution of disputes involving the Community without the emotional and financial costs of litigation. Accordingly, each Bound Party agrees not to file suit in any court with respect to a Claim described in subsection (b), unless and until it has first submitted such Claim to the alternative dispute resolution procedures set forth in Section 12.2 in a good faith effort to resolve such Claim.

(b) As used in this Article, the term "Claim" shall refer to any claim, grievance, or dispute arising out of or relating to:

(i) the interpretation, application, or enforcement of the Governing Documents;

(ii) the rights, obligations, and duties of any Bound Party under the Governing Documents; or

(iii) the design or construction of Improvements within the Community, other than matters of aesthetic judgment under **Article V**, which shall not be subject to review;

The following shall not be considered "Claims" unless all parties to the matter otherwise agree to submit the matter to the procedures set forth in Section 12.2:

(i) any suit by the Association to collect assessments or other amounts due from any Owner;

(ii) any suit by the Association to obtain a temporary restraining order (or emergency equitable relief) and such ancillary relief as a court of competent jurisdiction may deem necessary in order to maintain the status quo and preserve the Association's ability to enforce the provisions of this Declaration;

(iii) any suit between Owners, which does not include Declarant or the Association as a party, if such suit asserts a Claim which would constitute a cause of action independent of the Governing Documents;

(iv) any suit in which any indispensable party is not a Bound Party; or

(v) any suit as to which any applicable statute of limitations would expire within one hundred eighty (180) days of giving the Notice required by Section 12.2(a) unless the party or parties against whom the Claim is made agree to toll the statute of limitations as to such Claim for such period as may reasonably be necessary to comply with this Article.

Section 12.2 Dispute Resolution Procedures.

(a) Notice. The Bound Party asserting a Claim ("Claimant") against another Bound Party ("Respondent") shall give written notice to each Respondent and to the Board stating plainly and concisely:

(i) the nature of the Claim, including the Persons involved and the Respondent's role in the Claim;

(ii) the legal basis of the Claim (i.e., the specific authority out of which the Claim arises);

(iii) the Claimant's proposed resolution or remedy; and

(iv) the Claimant's desire to meet with the Respondent to discuss in good faith ways to resolve the Claim.

(b) Negotiation. The Claimant and Respondent shall make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good faith negotiation. If requested in writing, accompanied by a copy of the Notice, the Board may appoint a representative to assist the parties in negotiating a resolution of the Claim.

(c) Mediation. If the parties have not resolved the Claim through negotiation within thirty (30) days of the date of the notice described in **Section 12.2(a)** (or within such other period as the parties may agree upon), the Claimant shall have thirty (30) additional days to submit the Claim to mediation with an entity designated by the Association (if the Association is not a party to the Claim) or to an independent agency providing dispute resolution services in the Kailua-Kona area.

If the Claimant does not submit the Claim to mediation within such time, or does not appear for the mediation when scheduled, the Claimant shall be deemed to have waived the Claim, and the Respondent shall be relieved of any and all liability to the Claimant (but not third parties) on account of such Claim. If the Parties do not settle the Claim within thirty (30) days after submission of the matter to mediation, or within such time as determined reasonable by the mediator, the mediator shall issue a notice of termination of the mediation proceedings indicating that the parties are at an impasse and the date that mediation was terminated. The Claimant shall thereafter be entitled to file suit or to initiate administrative proceedings on the Claim, as appropriate.

Each Party shall bear its own costs of the mediation, including attorneys' fees, and each Party shall share equally all fees charged by the mediator.

(d) Settlement. Any settlement of the Claim through negotiation or mediation shall be documented in writing and signed by the parties. If any party thereafter fails to abide by the terms of such agreement, then any other party may file suit or initiate administrative proceedings to enforce such agreement without the need to again comply with the procedures set forth in this Section. In such event, the party taking action to enforce the agreement or award shall, upon prevailing, be entitled to recover from the non-complying party (or if more than one non-complying party, from all such parties in equal proportions) all costs incurred in enforcing such agreement or award, including, without limitation, attorneys' fees and court costs.

(e) Mandatory Arbitration. Any parties that have failed to reach the settlement of a Claim through negotiation and mediation as provided by this Article may submit the Claim to arbitration. The party, or parties, that desire to submit a Claim to arbitration shall promptly so notify the other party' in writing. Any Claim submitted for arbitration shall be submitted to arbitration to Dispute Prevention and Resolution, Inc. ("DPRP") or such other dispute resolution agency as the parties to the dispute may mutually select. Claims involving \$25,000 or less shall

be heard by a single arbitrator. Claims involving more than \$25,000 or non-monetary issues shall be heard by a panel of three arbitrators. The arbitrator(s) shall be selected and the arbitration conducted in accordance with the commercial arbitration rules then in effect for DPRI unless otherwise agreed by the parties. The decision of the arbitrator, if the Claim is heard by a single arbitrator, or a majority of the arbitrators, if the Claim is heard by a three arbitrator panel, shall be final, conclusive and binding on the parties to the arbitration. All proper costs and expenses of the arbitration including, without limitation, witness fees, attorney's fees, and the fees of the arbitrator(s) shall be allocated among the parties in such amounts as the arbitrator, if the Claim is heard before a single arbitrator, or a majority of the arbitrators, if the Claim is heard before a three arbitrator panel, shall determine at the time of the award. In the event of the failure, inability, or refusal of any arbitrator to act, a new arbitrator shall be appointed in such arbitrator's stead by DPRI. The arbitration award shall be binding in all aspects and shall be subject to the provisions of Chapter 658, Hawaii Revised Statutes, as the same be amended from time to time. In the resolution of any dispute or controversy as set forth in this Section, each party hereby irrevocably waives the right to a jury trial and any right and claim to exemplary or punitive damages in any jurisdiction. Any documents of assignment, lease, or conveyance of any Lot or other interest in the Project shall be deemed to incorporate the provisions for arbitration of disputes set forth in this Section, as if the same were fully set forth in any such document. Any person who is injured by reason of the fact that a dispute, subject to the terms of this arbitration provision, is resolved other than by arbitration, may recover as damages the cost and expense incurred by reason of the fact that the dispute was not submitted to arbitration for resolution. Any arbitration proceedings under this Section will be submitted to arbitration in Honolulu, Hawaii.

Section 12.3 Initiation of Litigation by Association.

In addition to compliance with the foregoing alternative dispute resolution procedures, if applicable, the Association shall not initiate any judicial or administrative proceeding unless, prior to initiation of the proceedings, seventy five percent (75%) of the total Class "A" votes in the Association are cast in favor of commencing such proceeding. Notwithstanding the foregoing, no such approval shall be required for actions or proceedings:

- (a) initiated during the Class "B" Control Period;
- (b) initiated to enforce the provisions of this Declaration, including collection of assessments and foreclosure of liens;
- (c) initiated to challenge ad valorem taxation or condemnation proceedings;
- (d) initiated against any contractor, vendor, or supplier of goods or services arising out of a contract for services or supplies; or
- (e) to defend claims filed against the Association or to assert counterclaims in proceedings instituted against it.

This Section shall not be amended unless seventy five percent (75%) of the total Class "A" votes in the Association are cast in favor of such amendment.

ARTICLE XIII: MORTGAGE PROVISIONS

The following provisions are for the benefit of holders, insurers, and guarantors of first Mortgages on lots in the Project.

Section 13.1 Notices of Action.

An institutional holder, insurer, or guarantor of a first Mortgage which provides a written request to the Association (such request to state the name and address of such holder, insurer, or guarantor and the street address of the Lot to which its Mortgage relates, thereby becoming an "Eligible Holder"), will be entitled to timely written notice of any:

(a) Condemnation loss or any casualty loss which affects a material portion of the Project or which affects any Lot on which there is a first Mortgage held, insured, or guaranteed by such Eligible Holder;

(b) Delinquency in the payment of assessments or charges owed by a Lot subject to the Mortgage of such Eligible Holder, where such delinquency has continued for a period of sixty (60) days, or any other violation of the Governing Documents relating to such Lot or the Owner or Occupant which is not cured within sixty (60) days;

(c) Lapse, cancellation, or material modification of any insurance policy maintained by the Association; and

(d) Proposed action which would require the consent of a specified percentage of Eligible Holders.

Section 13.2 Other Provisions for First Lien Holders

To the extent not inconsistent with Hawaii law:

(a) Any restoration or repair of the Project after a partial condemnation or damage due to an insurable hazard shall be performed substantially in accordance with this Declaration and the original plans and specifications unless the approval is obtained of the Eligible Holders of first Mortgages on Lots to which more than fifty percent (50%) of the votes of Lots subject to Mortgages held by such Eligible Holders are allocated.

(b) Any election to terminate the Association after substantial destruction or a substantial taking in condemnation shall require the approval of the Eligible Holders of first Mortgages on Lots to which more than fifty percent (50%) of the votes of Lots subject to Mortgages held by such Eligible Holders are allocated, to such election to terminate.

Section 13.3 No Priority.

No provision of this Declaration or the By-Laws gives or shall be construed as giving any Owner or other party priority over any rights of the first Mortgagee of any Lot in the

case of distribution to such Owner of insurance proceeds or condemnation awards for losses to or a taking of the Common Area.

Section 13.4 Notice to Association.

Upon request, each Owner shall be obligated to furnish to the Association the name and address of the holder of any Mortgage encumbering such Owner's Lot.

ARTICLE XIV: CHANGES IN THE COMMUNITY

Communities such as the Project are dynamic and constantly evolving as circumstances, technology, needs and desires, and laws change; as the residents age and change over time; and as the surrounding community changes. The Project and its Governing Documents must be able to adapt to these changes while protecting the things that make the Project unique.

Section 14.1 Changes in Ownership of Lots.

Any Owner desiring to sell or otherwise transfer title to the Owner's Lot shall give the Board at least seven (7) days' prior written notice of the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board may reasonably require. The transferor shall continue to be jointly and severally responsible with the transferee for all obligations of the Owner of the Lot, including assessment obligations, until the date upon which such notice is received by the Board, notwithstanding the transfer of title.

Section 14.2 Changes in Common Area.

(a) Condemnation. If any part of the Common Area shall be taken (or conveyed in lieu of and under threat of condemnation by the Board acting on the written direction of Members representing at least sixty seven percent (67%) of the total Class "A" votes in the Association and of Declarant, as long as Declarant owns any Property subject to the Declaration or which may be made subject to the Declaration in accordance with Section 8.1) by any authority having the power of condemnation or eminent domain, each Owner shall be entitled to written notice of such taking or conveyance prior to disbursement of any condemnation award or proceeds from such conveyance. Such award or proceeds shall be payable to the Association to be disbursed as follows:

(i) If the taking or conveyance involves a portion of the Common Area on which Improvements have been constructed, the Association shall restore or replace such Improvements on the remaining land included in the Common Area to the extent available, unless within sixty (60) days after such taking Declarant, so long as Declarant owns any Property subject to the Declaration or which may be made subject to the Declaration in accordance with Section 8.1, and Members representing at least seventy five percent (75%) of the total Class "A" vote of the Association shall otherwise agree. Any such construction shall be in accordance with plans approved by the Board. The provisions of Section 7.7(c) regarding funds for restoring Improvements shall apply; or

(ii) If the taking or conveyance does not involve any Improvements on the Common Area, or if a decision is made not to repair or restore, or if net funds remain after any such restoration or replacement is complete, then such award or net funds shall be disbursed to the Association and used for such purposes as the Board shall determine.

(b) Partition.

Except as permitted in this Declaration, the Common Area shall remain undivided, and no Person shall bring any action partition of any portion of the Common Area without the written consent of all Owners and Mortgagees. This Section shall not prohibit the Board from acquiring and disposing of tangible personal property nor from acquiring and disposing of real property which may or may not be subject to this Declaration.

(c) Transfer or Dedication of Common Area.

The Association may dedicate portions of the Common Area to Hawaii County, Hawaii, or to any other governmental or quasi-governmental entity.

ARTICLE XV: DISCLOSURES

Section 15.1 Phased Development.

Declarant is developing and marketing the Project in several phases. Declarant, however, does not represent, promise, or warrant that any particular phase or additional Lots will be developed.

Section 15.2 Ongoing Construction and Sales Activities.

Construction activity by Declarant or other Lot Owners may continue within the Project, as well as on properties, adjacent to and in the vicinity of the Project. Such construction activity may result in the transmission, discharge, or emission of surface water runoff, smoke, noise, dust, odors, noxious vapors, chemicals, vibrations, and other annoyances, as well as pose certain risks of injury to an Owner and the Owner's guests and visitors, and may limit the Owner's access to portions of the Project. Additionally, Declarant's sales activities, including the use of signs and sales displays and activities will continue in the Project until the sale of the last lot in the Project. All sales display and activities will be consistent with the community-wide standard.

Declarant shall have an easement over and upon each Owner's Lot and over the Project for the transmission, discharge, or emission of surface water runoff, smoke, noise, dust, noxious vapors, odors, chemicals, vibrations, or other substances or nuisances over the Project which are created by or result from such construction activities. Declarant may do such things as may be reasonably required in connection with such construction activities, including, but not limited to, grading; excavation, depositing fill material; installing drainage systems; and installing sewer, water, electrical, gas, telephone, and/or television cable lines.

Section 15.3 Expansion and/or Modification.

Declarant is considering the development of additional properties in addition to the Property. Declarant does not represent, promise, or warrant that any other property will be developed. Declarant has the right, pursuant to this Declaration, to add, modify, or eliminate Lots and Common Areas (and, if any, facilities thereon) to, on, or from the Property generally, and no representation, warranty, or assurance has been made (a) that any such Lots or Common Areas or facilities will or will not be added, modified, or eliminated, or (b) as to the financial or other impact on the Association which may assess charges against the Owners in the Project.

Section 15.4 Hazardous Materials.

Each Owner assumes all risks of Hazardous Materials (as used herein, the term "Hazardous Materials" means all substances identified, listed, or defined as a "hazardous substance" under any federal, state or local environmental laws or otherwise regulated as a dangerous, hazardous, toxic, or carcinogenic substance) existing on, about, around, under, over, or within the Owner's Lot, including all risks of (a) any and all enforcement, clean up, or other governmental or regulatory actions instituted or threatened pursuant to any Hazardous Materials Law affecting the Lot; (b) all claims made or threatened by any third party against an Owner or Declarant relating to damage, contribution, compensation, loss, or injury resulting from any Hazardous Materials, and (c) having sole responsibility for, and defending, indemnifying, and holding harmless Declarant and its partners, officers, directors, employees, agents, successors, and assigns (each of said parties herein called an "Indemnitee"), from and against 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 the use, generation, manufacture, treatment, handling, refining, production, storage release, discharge, disposal, or presence of any Hazardous Materials on, about, around, over, or within the Lot or the Project. This indemnification shall not apply to claims, demands, actions, losses, damages, liabilities, costs, and expenses caused by any Indemnitee's proven gross negligence, willful misconduct, or violation of applicable laws, established by a final, nonappealable judgment of a court of competent jurisdiction. This provision shall not apply to any institutional lender, investor, or federal housing agency (including any successors or assigns) who holds a Mortgage covering the Lot or who takes title to the Lot upon foreclosure or by way of deed in lieu of foreclosure or otherwise.

Section 15.5 Impacts on Lot.

Each Lot, and the Improvements thereon, maybe affected periodically by various hazards and by noise, dust, smoke, earthshock, soot, ash, odor, noxious vapors, transmission of pollutants or other hazardous materials, surface water runoff, or other adverse environmental conditions created by or attributable to surrounding construction, development, pasture, golf course, and other non-residential uses and activities, including, but not limited to:

- (a) fertilization and pest and weed control;

(b) cattle and other livestock grazing;

(c) real estate development and other changes in use (due to zoning changes or other governmental authorization or otherwise), construction, grading, improvement and maintenance of adjacent and surrounding properties, including roadways;

(d) irrigation of any and all surrounding lands with reclaimed water, treated effluent, or other non potable water sources.

Section 15.6 View Impairment.

The activities conducted on the Property pursuant to Article V, Article VIII, and Article X may diminish or impair views within the Property. Therefore, views within the Project are not protected, and any negative impact to any Owner's view caused by such activities shall not provide a basis for any claim or right of action. Neither Declarant, the Association, nor the owner(s) of any Private Amenities shall have any obligation to prune or thin landscaping, or trees and shall have the right, in their sole and absolute discretion, to add Improvements, landscaping, and trees from time to time. In addition, Declarant, the Association, and/or the owner(s) of any Private Amenities may, in their sole discretion, change the location, configuration, size and elevation of Improvements, trees, and landscaping from time to time. Any such additions or changes may diminish or obstruct views from the Lots. Any express or implied easements for view purposes or for the passage of light and air are hereby expressly disclaimed. However, the Declarant will use its reasonable efforts to insure that any development on adjoining Lots will be done in such a manner so as to minimize (as determined by Declarant in its sole discretion) the impact that the development will have on the view planes of Improvements already constructed (or approved for construction) on adjoining Lots.

Section 15.7 Roadways.

Roadways and related Improvements within Kona View Estates Phase I (the "Phase I Roadways") are dedicated to Hawaii County, and Hawaii County accepts such dedication. Future roadways in subsequent development phases may or may not be dedicated to Hawaii County. In order for Hawaii County to accept dedication of the Roadways, the Roadways must be in a condition that meets the standards of Hawaii County for such dedications. This Section shall not be interpreted to require the Declarant or Association to dedicate the Roadways to Hawaii County, nor shall it be interpreted to require either the Association or Declarant to construct and maintain the Roadways in a condition that meets the standards of Hawaii County for such dedications.

Section 15.8 Wells and Irrigation Systems.

No Owner or Member may construct, drill, install, or maintain any sprinkler or irrigation systems or wells of any type which draw upon water from lakes, creeks, streams, rivers, ponds, wetlands, canals, or other ground or surface waters within the Project, except that Declarant, the Association, and the Company shall have the right to draw water from such sources.

Section 15.9 Timeshare.

Pursuant to Hawaii Revised Statutes, Declarant and its assigns reserve the right to operate a timesharing, fraction-sharing, or similar program within the Project whereby the right to exclusive use of the property subject thereto rotates among participants in the program on a fixed or floating time schedule over a period of years.

ARTICLE XVI: AMENDMENT OF DECLARATION

Any restrictions, covenants, conditions, and provisions of this Declaration may, from time to time, be amended or modified by the Declarant or by the Members, as set forth below. The amendment shall be Recorded, and a copy of the recorded amendment shall be distributed to all Members of the Association.

Section 16.1 By Declarant.

In addition to specific amendment rights granted elsewhere in this Declaration, until termination of the Class "B" membership, Declarant may, unless otherwise prohibited by Hawaii law, unilaterally amend this Declaration for any purpose. Thereafter, so long as Declarant owns any property described in **Exhibit A** or **B**, Declarant may unilaterally amend this Declaration if such amendment is necessary (a) to bring any provision into compliance with any applicable governmental statute, rule, regulation, or judicial determination; (b) to enable any reputable title insurance company to issue title insurance coverage on the Lots; (c) to enable any institutional or governmental lender, purchaser, insurer or guarantor of mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to make, purchase, insure, or guarantee mortgage loans on the Lots; or (d) to satisfy the requirements of any local, state, or federal governmental agency.

Section 16.2 By Members.

Except as otherwise specifically provided in this Declaration, this Declaration may be amended only by the affirmative vote or written consent, or any combination thereof, of Members representing seventy five percent (75%) of the total Class "A" votes in the Association, including seventy five percent (75%) of the Class "A" votes held by Members other than Declarant, and Declarant's consent, so long as Declarant owns any property subject to this Declaration or which may become subject to this Declaration.

Notwithstanding the above, the percentage of votes necessary to amend a specific clause shall not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause. No amendment to any provisions of this Declaration benefitting any Private Amenity, may be made without the written approval of the Owner of the Private Amenity. However, the foregoing shall not apply to amendments made by Declarant.

Section 16.3 Validity and Effective Date.

No amendment may remove, revoke, or modify any right or privilege of Declarant or the Class "B" Member without written consent of Declarant or the Class "B" Member, respectively (or the assignee of such right or privilege).

Section 16.4 Limitations on Amendments.

If an Owner consents to any amendment to this Declaration or the By-Laws, it will be conclusively presumed that such Owner has the authority to so consent, and no contrary provision in any Mortgage or contract between the Owner and a third party will affect the validity of such amendment.

Any amendment shall become effective upon Recording, unless a later effective date is specified in the amendment. Any procedural challenge to an amendment must be made within six months of its Recordation or such amendment shall be presumed to have been validly adopted. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration.

ARTICLE XVII: MISCELLANEOUS

Section 17.1 Laws of Hawaii; Non-Waiver. The provisions hereof shall be construed and enforced under the laws of the State of Hawaii. Failure to enforce any provision hereof shall not constitute a waiver of the right to enforce said provision or any other provision hereof. No acceptance of any assessment paid by any Owner shall be deemed to be a waiver of any breach by such Owner of any provision of this Declaration or a waiver of any rights of any person entitled to enforce this Declaration.

Section 17.2 Joint and Several Liability. If an Owner consists of more than one Person, all of the obligations of the Owner under this Declaration shall constitute the joint and several obligations of all such Persons.

Section 17.3 Interpretation. The provisions of this Declaration shall be liberally construed to effectuate their purpose of creating a uniform plan for the development of the Project. The headings of paragraphs and articles are inserted only for ease of reference and shall not define or limit the scope or intent of any provision of this Declaration.

Section 17.4 Captions. The captions and headings in this instrument are for convenience only and shall not be considered in construing any provisions of this Declaration.

Section 17.5 Word Usage. The use of the masculine gender herein shall be deemed to include the feminine and neuter genders and the use of the singular shall be deemed to include the plural, whenever the text so requires.

Section 17.6 Notice, Information or Material. Any notice, information, or material required to be given hereunder shall be deemed furnished or delivered to a party at the time a

copy thereof is deposited in the mail, postage or charges prepaid, addressed to the party, and in any event, when such party actually receives such notice, information, or material.

Any notice, information, or material delivered or furnished to the name and address of a Member as last shown on the books of the Association shall be deemed to be the proper delivery or furnishing of such notice, information, or material. If notice of a meeting is given as provided for above, non-receipt of actual notice by any Member shall in no way invalidate the meeting or any proceedings taken or any business done at the meeting. Any Member may waive notice of any meeting either prior to or at or after the meeting, with the same effect as though notice of the meeting had been given to the Member. The presence of any Member at a meeting shall be the equivalent of a waiver by that Member of notice of the meeting.

Notices, information, and material required to be given hereunder to Declarant shall be addressed to the Declarant at 4054 McKinney Avenue, Suite 310, Dallas, Texas 75204. Notices, information, and material required to be given hereunder to the Association or the Board shall be addressed to such entity in care of the Association at the office of the Association.

Section 17.7 Limited Liability. Neither Declarant, the Association, the Board, nor any member, agent, officer, or employee of any of the same, shall be liable to any party for any action or for any failure to act with respect to any matter if the action taken or failure to act.

Section 17.8 Exhibits. Exhibits A, B, C, D, E, F, and G attached to this Declaration are incorporated by this reference, and amendment of such exhibits shall be governed by this Article. Any other exhibits are for informational purposes and may be amended as provided therein or in the provisions of this Declaration which refer to such exhibits.

DECLARANT: 327 KONA, LLC,
a Delaware limited liability company

By: _____
Name: Thomas M. Smith
Title: Manager

STATE OF HAWAII)
) ss.
COUNTY OF HAWAII)

On this day of _____ day of _____ 2006, before me _____, Notary Public, appeared **THOMAS M. SMITH**, to me personally known, who being by me duly sworn, did say that he is a Manager of 327 KONA, LLC, a Delaware limited liability company, and that the instrument was signed and sealed on behalf of the partnership by authority of its board of directors, and said **THOMAS M. SMITH** acknowledged said instrument to be the free act and deed of the company.

Name: _____
Notary Public
State of Hawaii

My commission expires: _____