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A&B-PROPERTIES, INC.
822 Bishop Street
Honolulu, Hawaii 96813
Attention: Suzanne K. McGuigan

Document contains _ pages

TYPE OF DOCUMENT:

Declaration of Covenants, Conditions and Restrictions

PARTIES TO DOCUMENT:

Declarant: A&B PROPERTIES, INC.
822 Bishop Street
Honolulu, Hawaii 96813

TAX MAP KEY FOR PROPERTY:

(2)2-5-5-57

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS
(KU'AU BAYVIEW AT PAIA)

THIS DECLARATION, made this _____ day of _____, 1996, by **A&B PROPERTIES, INC.**, a Hawaii corporation, whose place of business and post office address is 822 Bishop Street, Honolulu, Hawaii 96813 (hereinafter referred to as "Declarant"),

W I T N E S S E T H :

WHEREAS, Declarant is the fee owner of certain property at Pa'ia, County of Maui, State of Hawaii, which is more particularly described in Exhibit "A" attached hereto and made a part hereof (hereinafter called the "Subdivision"); and

WHEREAS, Declarant intends to subdivide the Subdivision into approximately 92 single-family residential lots (hereinafter called "Lots" or "Lot") and other lots for use for other purposes; and

WHEREAS, Declarant intends to organize a Hawaii nonprofit corporation to be known as "Ku'au Bayview at Paia Homeowners' Association" (hereinafter called the "Association"), to operate, manage, administer, maintain, repair, replace, landscape and improve Common Areas and Improvements and Facilities (as those terms are hereinafter defined) for the use and benefit of some or all of the owners and occupants of the Lots, to control the exterior design of other improvements within the subdivision, to perform and provide for services necessary or desirable for the benefit of the Subdivision and the owners and occupants of the Lots, and to perform all of the obligations of the Association described in this Declaration;

NOW, THEREFORE, Declarant, in order to establish a plan for the operation, use and maintenance of the Subdivision, the Common Areas and the Improvements and Facilities, as provided herein, hereby declares that the Subdivision, each and every lot thereof, and each and every interest therein, shall hereafter be held, leased, mortgaged, conveyed, used, occupied and improved subject to and with the benefit and protection of the following terms, restrictions, covenants, conditions and provisions, which terms, restrictions, covenants, conditions and provisions shall be deemed covenants running with the land:

1. DEFINITIONS.

(a) **"Association"**: The Ku'au Bayview at Paia Homeowners Association, a Hawaii nonprofit corporation, and its successors and assigns.

(b) **"Board" or "Board of Directors"**: The Board of Directors of the Association.

(c) **"Bylaws"**: The Bylaws of the Association, as the same may be from time to time duly amended.

(d) **"Articles"**: The Articles of Incorporation of the Association, as the same may be from time to time duly amended.

(e) **"Committee"**: The Design Committee established under paragraph 12.

(f) **"Common Areas"**: The Common Areas described in paragraph 3(a).

(g) **"Declarant"**: A&B Properties, Inc., a Hawaii corporation ("A&B"), and its successors and assigns, and such other persons to whom A&B, or its successors or assigns, may assign its rights as Declarant. (For purposes of this definition of "Declarant", A&B's "successors and assigns" shall not include any person to whom A&B conveys or leases a Lot, unless the rights of "Declarant" expressly have been assigned to such person.)

(h) **"Enforcing Persons"**: The Enforcing Persons described in paragraph 11(a).

(i) **"HRS"**: Hawaii Revised Statutes, as amended.

(j) **"HUD"**: The U.S. Department of Housing and Urban Development.

(k) **"Improvements and Facilities"**: The Improvements and Facilities described in paragraph 3(b).

(l) **"Lot"**: Each single-family residential lot in the Subdivision.

(m) **"Lot in the Subdivision"**: Each lot in the Subdivision, including all single-family residential lots, roadway lots, access lots, utility lots and all other lots.

(n) **"Owner"**: The record owner of fee simple title to each Lot.

(o) **"Paramount Liens"**: The Paramount Liens described in paragraph 8(i).

(p) **"Person"**: Any person, individual or entity (including, without limitation, any trustee, mortgagee, personal representative, profit or nonprofit corporation, general or limited partnership, unincorporated association, joint venture or trust).

(q) **"Plot Plan"**: The individual plot plan given to the initial purchaser of each Lot. Each Lot has its own Plot Plan.

(r) **"Structure"**: All buildings, fences, walls and improvements of every description, whether above, on or below ground.

(s) **"Subdivision"**: The property described in Exhibit "A" attached hereto, to be known as the "Ku'au Bayview at Paia Subdivision."

2. PROPERTY SUBJECT TO DECLARATION.

(a) **Property Subject to Declaration.** The property subject to this Declaration shall be all of the property described in Exhibit "A" attached hereto and made a part hereof (and all subdivided portions thereof), together with improvements now or hereafter located thereon.

(b) **No Other Property Subject to this Declaration.** Nothing herein or in any amendment hereto shall be deemed to be a representation, warranty or commitment that Declarant will commit or subject to this Declaration any property it may now own or hereafter acquire other than that property described in Exhibit "A".

(c) **Withdrawal of Property.** Real property may be withdrawn by the Declarant from the real property subject to this Declaration thereby releasing such real property from all covenants, conditions, limitations and restrictions contained in this Declaration. The Declarant may make such withdrawals without the consent of the Owners provided that the Declarant is the sole owner of the property to be withdrawn. Such withdrawal of real property from the Declaration shall be effective upon the execution and recordation of a document which describes the property withdrawn and declares that such property is released from the provisions of this Declaration.

3. ADMINISTRATION OF COMMON AREAS AND IMPROVEMENTS.

(a) **Common Areas.** "Common Areas" shall mean all property, real and personal, in which the Association owns or holds an interest or which the Association is obligated to maintain or elects to maintain for the use and/or enjoyment of all or some of the owners or occupants of the Lots and others so entitled, and may include, without limitation, estates in fee, estates for a term of years, easements, leases, licenses and permits. Every Owner shall have a right and easement for enjoyment in and to the Common Areas, which easement shall be appurtenant to and shall pass with the title to each Lot. The Association shall be obligated to accept any property or interest therein (including, without limitation, leases, easements, rights-of-way and licenses) which is conveyed or transferred to it, whether as a Common Area or otherwise, by Declarant, and the Association may, at its election, accept any property or interest therein which is conveyed or transferred to it by any other Person. Common Areas which are real property and which have been conveyed or transferred to the Association by Declarant shall not be consolidated, subdivided or rezoned, except with the written consent of Declarant. Common Areas and any interest therein shall not be conveyed, assigned, dedicated or in any way transferred by the Association except as provided herein.

No part of the Common Area shall be mortgaged or conveyed without the prior consent of at least two-thirds (2/3) of the Owners (excluding the Declarant).

Unless approved by both the Board and Declarant, residences or other structures for habitation shall not be constructed or placed upon any Common Area nor shall the Common Areas be used by the Association for commercial or business purposes.

The Association shall at all times operate and maintain, irrigate, fertilize, landscape, plant and replant the Common Areas and maintain all improvements in the Common Areas (including, but not limited to, roads, utility systems, irrigation systems and right-of-way areas between the boundary line of all Lots and the curb of all public or private roadways adjacent to such Lots to the extent not dedicated to and maintained by governmental entities or public utility companies or required by law or agreement to be maintained by individual Lot owners), and do all things as are reasonably necessary to insure the fullest possible use and/or enjoyment of the Common Areas by the owners and occupants of the Lots and others so entitled and, except as otherwise provided herein, shall be solely responsible for the care, maintenance and preservation of the Common Areas. Without limiting the generality of the foregoing, the Association shall periodically pump and clean the retention basin located at the intersection of Lae Street and Hana Highway to prevent overflows, remove silt therefrom, inspect and maintain the basin and keep it free of debris. The Association shall have an easement for access purposes over and across each Lot to the extent necessary to enable the Association to perform its maintenance, repair and other Common Area obligations. The Association shall at all times maintain, irrigate, fertilize, landscape, plant and replant the Common Areas at a superior level and standard of maintenance and appearance which is consistent with that of a first-class residential development. However, no Owner shall be or be deemed to be absolutely liable for damage to the Common Areas or any Lot in the Subdivision.

Nothing contained in this Declaration conflicts with or shall be deemed to conflict with HUD's requirement that the Common Areas must be conveyed to the Association free and clear of all encumbrances before HUD insures the first mortgage in the Subdivision.

(b) **Improvements and Facilities.** The Association shall at all times maintain, repair and replace, in good order, condition and appearance, all Improvements and Facilities which are transferred to or owned by the Association, or which are located within the Common Areas or which are located within easements across, over or upon lots within the Subdivision and which run in favor of the Association. "Improvements and Facilities" shall include, without limitation, all roadways, pavement, curbs, gutters, sidewalks, sewer systems, storm drain systems, drainage systems, trash enclosures, walls, fences, signs, equipment, street lighting systems (other than those owned by a utility company), landscape irrigation systems (including the cost of electricity and water to operate the landscape irrigation systems) and other similar systems, facilities and improvements. "Improvements and Facilities" shall not include improvements or systems which have been dedicated to or are owned by the County of Maui (or any department thereof) or a private or public utility such as Maui Electric Company, Hawaiian Telephone Company or a private cablevision company; provided, however, the Association shall maintain, irrigate, fertilize, plant and replant all grass, plants and landscaping in the areas in which such improvements or systems are located, at a superior level and standard of maintenance and appearance consistent with that of a well maintained residential development.

In the event an Owner of a Lot has placed any driveway or other improvement within or over any Common Area, any removal, repair or replacement of such improvements shall be at the cost of and be the responsibility of the Owner and not the Association.

(c) **Wall and Fence Easement.** Without limiting the foregoing provision, the Association shall be granted the following easements: (i) along the boundary of

each Lot in the Subdivision fronting Hana Highway, for the purpose of maintaining, repairing and replacing the wall and fence to be constructed along Hana Highway by Declarant, and (ii) along the northern boundary of the Subdivision, for the purpose of maintaining, repairing and replacing the fence to be constructed along such boundary by Declarant. Subject to the obligation of the Lot Owner to maintain the interior surface of such wall or fence, the grant of easements shall obligate the Association to maintain, repair and replace the wall and fence in good order and condition, and to maintain the landscaping located between the wall and Hana Highway.

(d) **Easements.** The Association shall be required to grant and convey to any third parties easements, licenses, rights-of-way or other rights, benefits or interests in, on, over or under any Common Areas and Improvements and Facilities (without payment to the Association) whenever required by Declarant; provided, however, that such easements, licenses, rights-of-way or interests must be exercised in such manner as not materially to interfere with the use to which the Association has devoted such Common Areas and Improvements and Facilities.

(e) **Insurance.** To the extent available and obtainable at a reasonable cost, the Association shall maintain the following insurance upon all Common Areas and Improvements and Facilities:

- (i) Fire and hazard insurance covering the full replacement cost (with a reasonable deductible) of all Improvements and Facilities;
- (ii) Liability insurance with combined single limit coverage of not less than \$1,000,000 per occurrence for bodily injury or death to one or more persons and for property damage, naming the Association and Declarant as insureds, subject to increase from time to time as required by Declarant in its reasonable business judgment; and
- (iii) Fidelity insurance with respect to the acts or omissions of the directors and officers of the Association.

The Association shall also maintain such other insurance as may be from time to time determined by the Board of Directors.

(f) **Rules and Regulations.** The Board shall have the right to adopt, amend, modify or revoke such rules and regulations as it deems necessary or desirable for the proper maintenance and operation of the Common Areas and Improvements and Facilities, including without limitation suitable regulations for and restrictions on the use of Common Areas and Improvements and Facilities, and penalties for the violation thereof; provided, however, there shall be no rule or regulation which may in any manner adversely affect or limit Declarant's use and enjoyment of the Common Areas and Improvements and Facilities, or Declarant's rights, privileges, powers and interests with regard to the Common Areas and Improvements and Facilities, as such rights may have been reserved to Declarant in any deed, declaration or other document relating to the Common Areas and Improvements and Facilities.

The Association, through the Board, may enforce such rules and regulations by any lawful means.

(g) **No Delegation of Duties.** The obligations of the Association set forth in this Declaration shall not be assigned, delegated or transferred by the Association either in whole or in part; however, the Board may enter into contracts or other similar arrangements with any Person for the performance of duties to be undertaken by the Association pursuant hereto.

4. POWERS OF THE ASSOCIATION. The Association (acting by and through the Board) and the Board shall have all the powers set forth in the Articles and the Bylaws, together with all legal general powers permitted a nonprofit corporation, and the power to do any and all things which may be authorized, required or permitted to be done by the Association or the Board under or by virtue of this Declaration, including the power to levy and collect assessments as hereinafter provided. Without in any way limiting the generality of the foregoing, the Association (acting through the Board) and the Board shall have the following powers:

(a) **Powers of Enforcement.** The Association shall have the power and authority, from time to time in its own name, on its own behalf, or in the name and behalf of any Owner or Owners who consent thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration, or to enforce by mandatory injunction, declaratory judgment or otherwise any provision of this Declaration, or to recover damages or obtain any other relief available at law or in equity as a result of any breach of this Declaration.

(b) **Powers of Administration and Management.** In fulfilling any of its duties under this Declaration, including its duties for administering and managing the Association, and for the maintenance, repair, operation or administration of the Common Areas and Improvements and Facilities, the Association shall have the following powers and authority:

- (i) To obtain, maintain and pay for such insurance policies or bonds as are required by this Declaration to be obtained by the Association or as the Association may deem to be appropriate for the protection or benefit of the Association, Declarant, the members of the Board or the Owners;
- (ii) To contract for and pay for, or otherwise provide for, such utility and other services including, without limitation, water, sewer, trash, electrical, telephone and gas services as the Association may from time to time deem desirable;
- (iii) To contract for and pay for, or otherwise provide for, the services of architects, engineers, attorneys and certified public accountants or such other professional or non-professional services as the Association may deem desirable;

- (iv) To contract for and pay for, or otherwise provide for, fire, police, security, sanitary, communications, transportation and such other services as the Association deems desirable; and
- (v) To contract for and pay for, or otherwise provide for, such materials, supplies, furniture, equipment, services and labor as and to the extent the Association deems desirable, and to pay and discharge any and all liens placed upon any Common Areas or Improvements and Facilities on account of any work performed by the Association.

(c) **Employment of Manager.** The Association may, from time to time, employ the services of a manager to manage the affairs of the Association and employees and agents; provided, however, the Association cannot delegate to such manager the power to execute any contract binding on the Association for a sum in excess of Ten Thousand Dollars (\$10,000.00) for any one job or service; nor for the performance of any work or services which cannot be completed within sixty (60) days; nor the power to sell, convey, transfer, mortgage or encumber any Common Areas or Improvements and Facilities. The Declarant shall have the right to appoint the initial manager, which may be the Declarant or a company affiliated with Declarant, provided that the term of such initial management contract shall expire upon the earlier to occur of five (5) years from the date of this Declaration or recordation of the conveyance of all Lots by Declarant to individual Owners unrelated to the Declarant.

(d) **Taxes and Assessments.** The Association shall have the right to pay, compromise or contest any or all taxes and assessments levied against all or any part of the Common Areas and Improvements and Facilities.

5. **LIMITATION OF LIABILITY.** No member of the Board or officer of the Association shall be personally liable to any Owner or any other Person for any act, error or omission of such Board member or Association officer, or for any act, error or omission of the Association or the Board, or their representatives, employees, agents and contractors, the Committee or the manager; provided that such member or officer has not acted in bad faith.

6. **ASSOCIATION MEMBERSHIP.**

(a) **Members of Association.** Membership in the Association shall always consist of and be limited to the record Owners of the fee simple title to each Lot; provided, however, that an Owner may, to the extent provided for in any recorded agreement of sale, assign such Owner's membership rights (including voting rights) to the vendee under the agreement of sale, but in no event shall such assignment serve to (i) release the Owner of any of the Owner's obligations and liabilities under this Declaration (including the Owner's personal liability for the payment of all assessments levied by the Association), (ii) diminish or impair any liens created by this Declaration upon the Owner's fee simple title to the Owner's Lot or the priority of such liens, or (iii) diminish or impair any of the Association's rights under this Declaration (including the right to foreclose its lien upon the Owner's fee simple title to the Lot).

Any such assignment shall not become effective unless and until a true and correct copy of the recorded agreement of sale has been delivered to the Board.

(b) **Corporate or Partnership Members.** For purposes of voting, directorships, officerships and the exercise of membership privileges, a corporate or partnership Owner may act through or be represented by an officer, director, partner, employee or other designated representative.

(c) **No Avoidance of Obligations.** No Owner may avoid the obligations of membership by nonuse of the Common Areas or Improvements and Facilities, renunciation or abandonment of the Owner's Lot, or any other act of abandonment or renunciation.

(d) **Termination of Membership.** No membership shall be terminated, forfeited or transferred and no member shall be expelled, except upon transfer of the Owner's entire interest in the Owner's Lot.

(e) **Articles and Bylaws.** The membership status, rights, duties, privileges and obligations of an Owner as a member of the Association shall be as set forth in this Declaration and the Articles and Bylaws. Each Owner of a Lot shall at all times comply with and observe all of the provisions of the Articles and Bylaws.

(f) **Suspension of Voting Rights.** The voting rights of any Owner may be suspended by action of the Board of Directors during the period when the Owner shall be in default in (i) the payment of any assessment owed under this Declaration, or (ii) the observance of any provision of this Declaration; provided, however, that (A) upon the curing of such default, such Owner's voting rights automatically shall be restored, and (B) prior to suspending such Owner's voting rights, the Board shall give the Owner not less than fifteen (15) days written notice of the Board's proposed action and the reasons therefor, and an opportunity to be heard by the Board, orally or in writing, not less than five (5) days before the effective date of the suspension.

7. **LIMITATIONS AND RESERVATIONS.** Declarant specifically reserves unto itself, its successors and assigns, the right at any time and from time to time, in its sole determination and discretion:

(a) **Easements, Licenses, Etc.** To designate and grant to any Person, and/or reserve unto Declarant, easements, licenses, permits and rights-of-way for public or private access and/or utility purposes, sewer, drainage, gas distribution systems, pedestrian walkways, roadways, electrical, telephone and television-cables and other or similar purposes and uses in, over, across, through and under any Common Areas and Improvements and Facilities as Declarant deems appropriate or necessary. In connection with the foregoing reservations, each Owner irrevocably appoints Declarant as such Owner's attorney-in-fact to file maps designating such easements and to grant such easements and rights and to do all things necessary or convenient in connection therewith, and upon Declarant's request, each Owner, promptly and for no additional consideration, shall execute all documents which may be

requested by Declarant to designate such easements on any map and to grant such easements and rights.

(b) **Entry and Use.** To enter on and use any Common Areas and Improvements and Facilities for the purpose of selling Lots, or of constructing any improvements or changes in or appurtenant to the Common Areas and Improvements and Facilities as it may deem appropriate or necessary, provided that the work is performed in a good and workmanlike manner and free and clear of all liens.

(c) **Assignment of Rights.** To assign and transfer, in whole or in part, all or any of its rights, privileges, powers, reservations, interests and obligations hereunder to any other Person, including without limitation, to any successor designated by Declarant or to the Association.

(d) **Approval of Amendments.** To approve or disapprove any proposed amendment to this Declaration.

(e) **Approval of Changes to Common Areas, Etc.** To approve or disapprove any change in use of the Common Areas and the Improvements and Facilities, and further to approve or disapprove any and all improvements, alterations and other work performed to, in, on, over, under and across the Common Areas and the Improvements and Facilities.

(f) **Transfer to Association of Common Areas, Etc.** To transfer from time to time to the Association ownership, possession and the obligation to maintain, landscape, repair and replace Common Areas and Improvements and Facilities and other real and personal property and interests (including, without limitation, leases, easements, rights-of-way and licenses).

8. **ASSESSMENTS.**

(a) **Responsibility.** Each Owner of a Lot, by acceptance of fee simple title to such Lot, whether or not it shall be expressed in any deed to such Lot or any other conveyance instrument, shall be deemed to covenant and agree to pay such Owner's, proportionate share of assessments in accordance with the provisions of this Declaration. No mortgagee of a Lot shall be required to collect assessments.

(b) **General Assessments.** At least thirty (30) days prior to the date set for each annual meeting of the Association, the Board shall prepare or cause to be prepared a budget for the upcoming fiscal year of the Association; provided, however, that in the case of the initial budget of the Association, the Board shall have the right (but not the obligation) to adopt such budget at any time (in the Board's sole discretion) after the recordation of this Declaration. Such budget shall cover all of the then applicable estimated costs of all operations, activities and obligations of the Association, including the cost of operating and maintaining the Common Areas and Improvements and Facilities, as provided herein, the payment of any taxes, insurance and other expenses of the Association, the cost of performing all of the Association's obligations under this Declaration, amounts for capital expenditures and reserves (if any), and the cost of performing all necessary or desired services. Assessments based on such budget shall be allocated equally among each of the Lots (regardless of such factors as the size, value or location

of the Lots or, except as expressly set forth in Section 8(d), the degree to which a particular Lot may or may not be benefiting from the services performed by the Association). The initial assessments shall commence as of a date determined by the Board in its sole discretion, and no delay in the commencement of such assessments shall in any manner affect, impair or waive the right of the Board to commence later such assessments. Similarly, the failure to include any particular item or expense within such assessment shall not preclude the inclusion of such item or expense in any later assessment. A copy of the Board's budget and the amount of assessments to be paid by the Owners shall be sent to each Owner at least twenty (20) days before the commencement of the fiscal year (or other period of time) for which such budget applies, or as soon as practicable thereafter; provided, however, that a copy of the initial budget need not be distributed by the Board to the Owners until such budget has been adopted by the Board. If for any reason the Board should fail to adopt a budget for the upcoming fiscal year, then the assessments to be paid by the Owners automatically shall continue on the basis of the last budget in effect; provided, however, that the Board shall have the right to levy supplemental assessments as provided below. Each Owner shall pay the assessments to the Association, in advance, in monthly, quarterly or semi-annual installments or in such other reasonable manner and installments as the Board shall designate.

(c) **Supplemental Assessments.** In the event that the general assessments payable under subparagraph (b) above prove inadequate for any reason, including nonpayment of any Owner's share thereof or unanticipated damage to any Common Areas or Improvements and Facilities (such as by Acts of God or by Owners or nonowners), the Board may prepare or cause to be prepared a supplemental budget and levy further assessments in the amount of such actual or estimated inadequacy, allocating such supplemental assessments equally among the Owners of each Lot. Such assessments shall be due and payable by the Owners within twenty (20) days after the date of levy, or on such installment basis as may be determined by the Board.

(d) **Special Assessments.** In addition to the assessments authorized above, the Board may also levy an assessment against any Owner or limited group of Owners for monies expended by the Association in performing any act, function or duty (i) directly or indirectly caused by such Owner's or limited group's act, or failure or refusal to act, or failure to comply with this Declaration, the Articles, the Bylaws or the rules and regulations of the Association or (ii) which benefits only such Owner or group and which provide no benefit to other members of the Association as determined by the Board. Such assessment shall be in the amount so expended plus an amount to cover the Association's overhead equal to ten percent (10%) of the amount so expended (or such other amount for overhead as may be determined by the Board), and shall be due and payable to the Association within ten (10) days after the date of levy. Monies so expended shall include, without limitation, reasonable engineers', architects', attorneys' and accountants' fees incurred by the Association.

(e) **Interest and Late Charges.** All sums not paid when due from an Owner shall bear interest from the due date until paid in full at the rate of one percent (1%) per month, or at such other interest rate as may be set from time to time by the Board. In addition, each Owner shall be subject to a late charge of five percent (5%) of the unpaid amount if not paid within fifteen (15) days of its due date, or such other late charge as may be set from time to time by the Board. The failure by the Association to collect such interest or late charge shall not

constitute a waiver of the right to do so at any time thereafter. An Owner's failure to pay assessments when due shall not constitute a default under a HUD-insured mortgage.

(f) **Lien and Default.** Each assessment (whether regular, supplemental or special) and all other sums owed by an Owner under this Declaration shall be a separate, distinct and personal debt and obligation of such Owner. Each assessment or any installment thereof when due, all other sums owed under this Declaration, together with all costs and expenses of collection, including all reasonable attorneys' fees, shall also be and are a continuing and perpetual lien and charge upon the fee simple title to such Owner's Lot and upon the Owner's interest in such Lot. Upon an Owner's failure to pay any such assessment (or installment thereof) or other sums due under this Declaration, the Association may, but need not, record a Notice of Default and Lien in the Bureau of Conveyances of the State of Hawaii. The Association's lien shall be subject and subordinate to the lien of the Paramount Liens as more particularly set out in subparagraph (i) below, but shall be prior to all other liens, encumbrances and interests upon or in the Lot or the Owner's interest in the Lot, including any leases and agreements of sale. The Association's lien may be foreclosed through suit in like manner as a mortgage on real property (including by foreclosure pursuant to Chapter 667, HRS), and the Association shall have the power to bid on the Lot at foreclosure sale and to acquire and hold, lease, mortgage or convey the same. A suit to recover a money judgment for damages or for unpaid assessments and other sums shall also be maintainable without foreclosing or waiving the lien securing the same. The foregoing remedies shall be in addition to any other remedies provided by law or in equity for the enforcement of each Owner's obligations.

(g) **Voluntary Conveyances; Co-Owners.** In a voluntary conveyance of any Lot, the transferee of the Lot shall be jointly and severally liable with the transferor for all unpaid assessments and other sums, interest, late charges and costs of collection, without prejudice to the transferee's right to recover from the transferor the amounts paid therefor by the transferee. If more than one Person owns a Lot or interest therein, all such Persons shall be jointly and severally liable for the payment of all assessments, sums, interest, late charges and costs of collection.

(h) **Estoppel Certificate.** When requested by an Owner or the holder of a first or second mortgage in favor of any institutional lender on such Owner's Lot, the Association shall execute a certificate stating the amount of any delinquent or unpaid assessment owed by the Owner. Such certificate shall, except as to the amount of any unpaid assessments which such certificate failed to reflect due to any checks which, within thirty (30) days before or after the date of the certificate, have been or are dishonored or not otherwise paid, be conclusive upon the Association in favor of all Persons who may in good faith rely thereon, as to the amount of such delinquency as of the date of the certificate. The Association shall be entitled to a reasonable servicing charge as a condition to issuing the certificate. No such certificate, however, shall constitute any representation or agreement by the Association that the Owner is in compliance with any other provision of this Declaration.

(i) **Paramount Liens.** Notwithstanding all other provisions of this Section:

- (i) A lien created hereunder upon any Lot shall be subject and subordinate to the following liens and indebtedness secured by such liens (such liens being herein called "Paramount Liens"): the lien of any recorded first or second mortgage in favor of any institutional lender (meaning a mortgage having first or second priority over other mortgages) upon the fee simple interest in the Lot made in good faith and for value. If a Lot should be conveyed pursuant to a foreclosure of a Paramount Lien encumbering such Lot, the purchaser at such foreclosure sale shall not be liable for any assessments or other sums payable under this Declaration and accruing prior to the date of recordation of the conveyance instrument, but shall be liable for all assessments and other sums accruing thereafter. No such conveyance shall relieve the prior Owner of personal liability for the payment of all such assessments and sums accruing prior to such conveyance.
- (ii) No amendment to this subparagraph (i) shall affect the rights of the holder of any Paramount Lien who does not join in the execution thereof.
- (iii) By written subordination agreement authorized by the Board, the benefits of (i) and (ii) above may be extended by the Board to mortgages and other liens not otherwise entitled thereto.

9. INDEMNITY. The Association and all Owners and occupants of Lots shall defend, indemnify and hold harmless Declarant from and against all claims and demands for loss or damage, including property damage, personal injury or wrongful death, arising out of or in connection with the exercise by them or their agents, contractors, servants, guests or invitees of any easements and rights hereby created, and shall use and permit the use of the Common Areas and the Improvements and Facilities at their sole risk without any obligation or responsibility whatsoever of Declarant for the condition, control or other use thereof, and shall jointly and severally reimburse Declarant for any and all costs and expenses, including reasonable attorneys' fees, incurred in connection with the defense of any such claim or demands, or incurred in connection with any act or failure to act by the Association, or in case Declarant, without any fault on its part, shall be made a party to any litigation commenced by or against the Association.

10. USE OF OWNER'S LOT; COMPLIANCE WITH LAWS. Each Owner and occupant of a lot in the Subdivision shall at all times comply with all applicable laws. In addition, each Owner and occupant shall at all times comply with and observe each of the following provisions; provided, however, that in the event of any conflict between or among the provisions set forth below and applicable laws, the most restrictive provision or law shall control:

(a) **Use and Site Development Restrictions and Requirements.**

- (i) **Land Use and Building Type.** Each Lot shall be used only for single-family residential purposes, regardless of whether applicable zoning or other laws permit a more intensive or different use. No Lot or residence or other building constructed on any Lot may be sold, transferred, conveyed, leased, occupied, rented or used for or in connection with any time-sharing purpose or under any time-sharing plan, arrangement or program, including without limitation any so called "vacation license," "travel club membership" or "time-interval ownership" arrangement. The term "time-sharing" as used herein shall be deemed to include, but is not limited to, any plan, program or arrangement under which the right to use, occupy, own or possess a Lot or residence or other building upon the Lot rotates among various persons on a periodically recurring basis according to a fixed or floating interval or period of time, whether by way of deed, lease, association or club membership, license, rental or use agreement, co-tenancy agreement, partnership or otherwise. No building shall be placed, altered or permitted to remain on any Lot other than one single-family dwelling and a private garage without the written consent of the Board of Directors of the Association. Any exterior alteration of the Lot or dwelling must first be approved by the Board of Directors of the Association.
- (ii) **Further Rezoning Subdivision or Consolidation.** No Lot shall be rezoned or subdivided or consolidated with another Lot without Declarant's consent.
- (iii) **Utilities.** Except for propane gas and trash collection, utility services will be provided to the boundary of each Lot in a completely underground distribution and/or collection system. Propane gas must be kept underground or within an enclosure approved by the Committee. Trash receptacles shall be screened from view of adjacent properties and roadways.
- (iv) **Individual Lot Plot Plans.** Plot Plans for individual Lots will be furnished to the Owners. Such Plot Plans shall be limited to only a general and graphical representation of utility locations and contours. All grades and contours indicated thereon are approximate and subject to verification by the Owner. It shall be the Owner's responsibility to examine the Plot Plans.

- (v) **Easements.** Easements for the installation and maintenance of utilities and drainage facilities are as set forth in or are as shown on (a) subdivision map entitled "Makana Subdivision," (b) the deed conveying the Lot to the Owner, and/or (c) the Plot Plan for each Lot. No improvements roof eaves or overhangs, or major plantings shall be placed on, below or above these easements (except by Declarant) without the prior consent of the Committee and any applicable governmental authority.
- (vi) **Grading.** The Owner shall accept the condition of the Lot in "as is" condition, as of the date of completion of all contracts for the grading, roadway and utility improvements for the Subdivision. All subsequent site work performed by the Owner shall be in strict accordance with plans as approved by the Committee.
- (vii) **Lot Drainage.** The flow of surface and/or subsurface drainage onto, across or from each Lot shall not be obstructed. Such run-off shall be dispersed or channeled by surface swales or other facilities in such a manner as to prevent erosion and damage to adjacent or nearby properties. No alteration may increase the flow of water into an adjoining Lot. Any changes to the design for Lot drainage facilities proposed by the Owner shall be subject to the prior approval of the Committee. Designs which, in the Committee's opinion, are impractical or do not adequately consider the possible adverse effects on adjoining property, will be disapproved.

The Owner shall be responsible for any changes in the design of all drainage facilities for the Owner's Lot and will be liable for all claims for damages resulting therefrom. The Committee shall not review the drainage plan for adequacy of engineering technical data or computation, and shall not be responsible for damages to nearby or adjacent properties resulting from inadequate or improper drainage and grading. Drainage design shall require an architect's or engineer's recommendation.

- (viii) **Temporary Structures and Surplus Materials.** Temporary structures, trailers and construction materials shall be placed on a Lot only at the commencement of initial construction of a dwelling on a Lot and are to be completely removed from the Lot no later than thirty (30) days from the "date of completion," as that term is defined in Section 507-43, HRS. Upon the request of the

Committee a refuse disposal bin shall be placed on site and shall be serviced on a weekly basis.

(b) **Construction and Architectural Standards.**

- (i) **Prior Notice to Committee.** The Owner shall give the Committee two (2) weeks advance written notice of the Owner's intent to commence any construction, alteration or site improvements whatsoever. Prior to commencement of any construction, alteration or site improvement, the Owner will deposit a copy of the County building permit with the Committee. For additional items, see subparagraph (e) below.
- (ii) **Materials and Quality.** All lumber shall be treated against termite infestation and shall be guaranteed in writing for a period of three (3) years.
- (iii) **Minimum Dwelling Size.** Each dwelling constructed upon a Lot, exclusive of garages and attached or detached lanai(s), shall have a minimum of 1,000 square feet of enclosed living area and shall contain a minimum of two (2) bedrooms and one (1) bath.
- (iv) **Building Height.** No structure shall be constructed on any Lot in excess of two (2) stories in height. In no event shall any structure exceed 38 feet in height measured from the highest point of the roof (but exclusive of chimney).
- (v) **Lot Coverage.** The maximum lot coverage shall be 50% of the Lot area. The term "lot coverage" shall mean the sum of the gross horizontal areas included within the exterior walls of all structures (including garages) on the Lot, plus any area within the exterior posts supporting a trellis or solid overhead roof or covering.
- (vi) **Garage.** A garage for at least two (2) cars containing not less than 400 square feet of parking area under roof, shall be attached to each dwelling; provided, however, that such garage may be detached in cases where an attached garage is not practically feasible in the opinion of the Committee, which opinion must be in writing. All garages shall be fully enclosed with roll-up doors or covered doors. Carports shall not be permitted.

(vii) **Ground Termite Treatment.**

(A) Soil under all concrete slabs on the ground and under all building floors, whether on ground or over air space, and under all footings and masonry foundation walls, shall be treated against subterranean termites by a reliable, established and duly licensed termite control company.

(B) Treatment shall be guaranteed in writing by said company against termite infestation for a period of three (3) years. The guarantee shall include annual inspection and retreatment of infested areas. A copy of this guarantee shall be delivered to the Committee.

(C) Chemicals used outside of the buildings or in accessible spaces under the buildings, shall be nonpoisonous to humans, plants and pets.

(viii) **Foundations.** Ground settlement of the filled areas is possible. The Owner and Owner's architect, engineer and contractor shall give due consideration to the design of the foundation systems of all structures (home, walls, swimming pools, etc.). It is the Owner's responsibility to conduct an independent investigation of all soil on the Owner's Lot.

(ix) **Finished Floor Elevations.** To avoid massive retaining walls on street elevations and to control the height of improvements, grading and cutting shall be limited as follows:

(A) Grading shall be limited as shown on the individual Plot Plans for each Lot. Cuts of greater than 3'-0" or fills of greater than 2'-0" shall require a plan by a civil engineer duly registered as such by the State of Hawaii.

(B) Cutting and filling shall be kept to a minimum. Grading shall be contoured, with no cut or fill banks greater than thirty percent (30%), unless specifically approved by the Committee to meet unusual site conditions. Pads for homes shall utilize stepped foundations to avoid massive cuts or fills. Cut or fill greater than 1,000 cubic yards shall require special Committee approval, and will not be permitted except under unusual circumstances.

(x) **Antennas.** No visible antennas are allowed.

- (xi) **Driveways.** Alterations to driveways and drop curbs shall be constructed by the Owner following County standards prior to any other work being done, and shall be used during construction to prevent damage to existing concrete gutters, curbs, sidewalks, common area sprinkler systems and any underground utility lines. Any damage caused by the Owner or the Owner's contractors, employees or agents shall be the responsibility of the Owner, and shall be immediately and completely repaired to the original condition.
- (xii) **Mailboxes.** All mailboxes shall be recessed into a designed structure with location and height of box as per postal regulations. House number and name signs shall be of attractive and superior quality design and installed flush with wall surfaces where possible, and shall in no event exceed an aggregate of one square foot in size.
- (xiii) **Exterior Lighting.** There shall be no exterior lighting of any type, either installed or maintained, the light source of which is visible from neighboring property, except as permitted by the Committee. Colored lights (non-white), fluorescent or high intensity discharge exterior lights are not permitted.
- (xiv) **Exterior Sound Devices/Noise.** The level of noise or sound pressure emanating from any Lot shall not exceed the maximum level permitted for single-family residential districts under applicable County ordinances, or if no such ordinance exists, then the maximum level permitted under the ordinances of the City and County of Honolulu. Should undue noise result from the operation of the Owner's air conditioning and/or swimming pool filtering pump unit or units, the Owner shall without delay or upon request of the Committee, design additional soundproofing methods, and shall upon prior approval of these methods by the Committee, proceed expeditiously with necessary adjustments. Noise in excess of permitted limits shall be terminated immediately.
- (xv) **Swimming-Pools, Spas and Ponds.** Swimming pools and ponds shall be kept operable in accordance with the rules and regulations of the State Department of Health. If abandoned or if a pool or pond becomes a nuisance, the owner shall demolish, remove the pool or pond, and, insofar as is practicable, restore the land to a condition approximating that which existed prior to the construction

of the pool or pond, and properly landscape and maintain the restored area. The method of demolishing the pool or pond shall be subject to prior Committee approval. Pool equipment rooms shall be sound treated to prevent noise nuisance.

- (xvi) **Solar Energy and Heat Pumps.** Solar energy installations shall be, as much as practicable, hidden from view by recessing them into the roof or incorporating them into a flat roof section, and shall be installed at the same angle of slope and plane as the roof. The intent is to create an architecturally pleasing integration of the solar panels into the roofline. Roof mounted composite solar collector and water storage tanks systems are not allowed.
- (xvii) **Vehicles, Trailers and Watercraft.** Cars, vehicles, trailers and watercraft shall not be parked continuously or regularly on roadway lots within the Subdivision. Without limiting the foregoing, any vehicle, trailer or watercraft parked on a roadway lot for more than 24 consecutive hours shall be in violation of this provision. Only occasional parking by guests or by vehicles servicing a Lot shall be permitted on such roadway lots.
- (xviii) **Vehicle Repair.** No automobile or other vehicle, watercraft or other equipment, may be dismantled, repaired or serviced on any Lot so as to be visible from adjoining or neighboring Lots or from any roadway.
- (xix) **Abandoned Construction or Alteration.** If construction or alteration of a dwelling is at any time abandoned, the Lot Owner shall cause the Lot to be cleared and landscaped (in the case of initial construction) or evidence of alteration removed so as to present a neat appearance, and shall thereafter so maintain the Lot until the recommencement of construction or alteration.
- (xx) **Roof Materials, Pitch and Overhang.** Built up tar and gravel roofing is discouraged, and in any case will be permitted only for flat roof construction. Only flat roofs of exceptional design and quality will be considered for approval. Pitch roofs shall use shake, shingle or tile material. The following roof materials are not permitted: rolled roofing, fiberglass or plastic. A tile sample shall be submitted for Committee approval as to color, style and texture. Roof overhangs, as measured horizontally, shall not exceed six (6) feet. Corrugated metal, steel or

aluminum and other roof materials may be approved on a case-by-case basis in the discretion of the Committee. Color should be consistent with the surrounding neighborhood. White, reflective and bright primary colors will be discouraged.

(xxi) **Exterior Walls/other Materials/Colors.** No garish, reflective or stark white colors shall be allowed. Color chips must be submitted to the Committee for review and prior approval.

(xxii) **Fences, Walls, Hedges and Trees.** Retaining walls and foundations of more than three (3) feet in height or where placed upon embankments or filled areas, shall be designed by a duly registered architect or civil/structural engineer. All fences, walls and incidental garden structures except those constructed by Developer shall be approved by the Committee and designed so as to be attractive from all viewable sides with a height limit of six (6) feet as measured from finished grade level. If a wall is located at the street frontage, the area between the wall and the property line shall be adequately landscaped. Property line fences shall be developed in common with adjacent property Owners to eliminate double fencing. No tree shall exceed a height of thirty (30) feet. The provisions of this subparagraph (xxii) shall not apply to any walls constructed by Declarant.

(c) **Construction Requirements.**

(i) **Blasting.** No blasting shall be permitted except by Declarant.

(ii) **Construction Signs.** No construction signs (i.e., signs identifying the name of the contractor, architect, construction lender, etc.) are permitted on any Lot except with the Committee's prior approval.

(iii) **Dumpsters.** No dumpsters or construction materials and debris may be left in the streets, Common Areas or adjacent property without the prior approval of the Committee.

(iv) **Contractor's Acknowledgment.** Each Owner shall be required to have his or her contractor contact the Committee prior to commencing any construction, alteration or other work upon the Owner's Lot if the cost of such work exceeds \$10,000. The contractor shall be

provided with a copy of the applicable design and construction requirements and shall be required, prior to commencing any construction, alteration or other work, to acknowledge in writing the contractor's receipt of, and agreement to comply with, such requirements.

(d) **Landscaping Standards.**

- (i) **Required Landscaping.** The Lot shall be landscaped and maintained in a manner consistent with that of a first-class residential development. Landscaping shall be commenced on or before ninety (90) days after initial occupancy of the dwelling and shall be completed on or before one (1) year after initial occupancy of the dwelling.
- (ii) **Top Soil.** Top or fill soil material brought to the site by the Owner shall be free of clay, termites and/or other deleterious matter.

(e) **Lot Maintenance.** Each Owner of a Lot in the Subdivision shall at all times keep and maintain the Lot in an attractive manner, free of tall grass or weeds, trash, litter and debris and shall not store or keep upon the Lot any vehicle(s), watercraft(s) or unsightly material. Without limiting other rights of enforcement provided in this Declaration, if an Owner fails or neglects to comply with the requirements of this subparagraph, the Association, after fifteen (15) days written notice to the Owner(s), may, directly or by way of contract(s) with others, do all acts and things necessary or convenient to bring such Lot into compliance with this subparagraph including but not limited to the cutting of grass and weeds and the removal of the litter, trash, debris or other unsightly material. The Association may charge the cost and expense of bringing the Lot into compliance to the Owner(s) of such Lot as provided herein.

(f) **Approvals, Procedures and Requirements.**

- (i) **Architectural Controls.** No structure shall be erected, placed or altered on any Lot until construction plans and specifications referred to in subparagraph (iii) below, prepared under the immediate and direct supervision and stamped by an architect with a current license to practice in the State of Hawaii, have been submitted to and approved by the Committee, and the Owner submits to the Committee a written acknowledgment (the form of which shall be prepared or approved by the Committee) from both the Owner and the Owner's general contractor, that they have received a copy of, and agree to abide by, this Declaration. Committee approval shall also be required of landscaping plans before any landscaping or planting is permitted. It is recommended that the approvals described above be obtained before any materials are ordered or

purchased for such structure or the Lot. In the event the proposed improvement or alteration is for repainting (decorating the exterior of any structure in a manner affecting only the exterior color thereof), it shall only be necessary to obtain Committee approval of the color scheme prior to the commencement of such work. The approval of the Committee may be withheld, without limitation, upon any of the following grounds:

(A) The work of construction or alteration shown on the plans and specifications and other materials submitted, fails to comply with the conditions, covenants and restrictions set forth herein or in any other applicable document which is administered by the Committee.

(B) The improvements shown on the plans and specifications and other materials submitted, are deemed unsatisfactory in location, design, exterior design or color, or would not be in harmony with the other improvements located within the Subdivision.

Approval of any plans and specifications shall not be deemed to waive the right of the Committee to object to the same or similar plans or specifications or any feature or element embodied therein, if and when the same or similar plans, specifications, features or elements are submitted for approval for use on other Lots in the Subdivision.

(ii) **Procedures for Submitting Plans.** For any construction or alteration the cost of which exceeds \$20,000.00 each Owner shall be required to have the Owner's architect submit to the Committee not less than the following items for the Committee's review and approval prior to commencing any such construction, alteration or other work upon the Owner's Lot:

(A) **Preliminary Plans.** Preliminary plans must include but are not limited to the following:

- 1) One-1/4" scale floor plan.
- 2) Four-1/8" scale exterior elevations with materials indicated.
- 3) Two-1/8" scale site/building cross sections elevations and roof height elevations noted.

- 4) One-1/8" scale site plan showing building placement, roof overhangs, building square footage, access, percentage of allowable buildable area covered, finish floor elevations with adjacent exterior corner grade elevations, drainage design, preliminary grades, conceptual landscape plan, compass, tradewind and solar orientations, drive-way, retaining walls, fences, lanais, deck, patios, easements and building setbacks, existing street tree locations, utility hookups, all site dimensions and lot number.

(B) **Final Plans**. Final plans must include but are not limited to the following:

- 1) 1) Final working drawings.
- 2) 2) Landscape and irrigation plans.
- 3) 3) Specifications.
- 4) 4) 100% performance bond and 100% labor and materials payment bond.

Upon securing the Committee's approval for all of the above, the Owner shall submit a copy of the building permit prior to the commencement of construction.

(iii) **Applicable Laws**. The Owners or their respective architects, engineers or other professionals, shall be responsible for all submissions to the appropriate state and county agencies and for complying with all applicable laws, regulations, ordinances and codes, and shall acquire all permits and approvals necessary before commencement of any construction or alteration.

(g) **Reservations and Limitations**.

(i) **Variances and Amendments**. The Committee reserves the right at any time in its sole discretion to amend, modify, waive, grant variances to or not enforce any requirements herein specified with respect to any Lot or Lots without any liability whatsoever to the Owners or occupants of any

other Lots or to any other Person and without impairing or otherwise affecting such requirements with respect to all other Lots.

- (ii) **Delegation of Authority.** The Committee shall have the right to delegate the administration (including the right to approve or reject designs, colors, plans and specifications) and/or enforcement of part of all of those standards and restrictions to any other Person, including Declarant. The written decision or disposition of any such delegates shall be binding upon the Committee.
- (iii) **Nonliability.** Neither Declarant nor the Committee nor any director, officer, employee, agent or member of Declarant or the Committee, shall be liable to the Association, or to any Owner, or to any other Person, for any damage, loss or prejudice suffered or claimed on account of (i) the approval or rejection of, or the failure to approve or reject, any plans, drawings and specifications, or other request submitted by an Owner pursuant to this Declaration, whether or not defective, (ii) the construction of any improvement or performance of any work, whether or not such construction or performance complies with this Declaration, or the terms of any approval of the Committee, (iii) the development or manner of development of any property within the Subdivision, (iv) the erroneous execution of an estoppel certificate, (v) the failure of any plans, drawings, specification or other item approved by the Committee to comply with any or all applicable laws, regulations, ordinances or codes, or (vi) any other matter, decision, act or omission; provided that such director, officer, employee, agent or member shall not have acted in bad faith.
- (iv) **Consents.** No consents or approval of the Committee shall be deemed given unless given in writing.
- (v) **Costs and Expenses.** All costs and expenses incurred by the Association in connection with approvals and review required under this Declaration shall be paid by the Person requesting such approval or review.

11. **ENFORCEMENT OF THIS DECLARATION.**

(a) **Enforcing Persons.** The following Persons (the "Enforcing Persons") shall have the right to exercise any remedy in law or in equity for the enforcement of this Declaration:

- (i) The Association (acting through the Board or the Association's Managing Agent).
- (ii) Any Owner of a Lot.
- (iii) Declarant.

(b) **Remedies.** If any Owner or other person subject to this Declaration shall breach or fail to comply with any provision of this Declaration, and such breach or noncompliance shall not be fully remedied within fifteen (15) days after notice of the breach or noncompliance is sent to or received by the Owner or, if such breach or noncompliance cannot reasonably be remedied within said 15-day period, such Owner shall have failed to begin to remedy such noncompliance within said 15-day period and shall have failed to exercise good faith and due diligence to remedy such breach or noncompliance as soon as reasonably possible, then each Enforcing Person shall have the following rights and remedies:

- (i) Without liability to the Owner or any other Person for trespass, damage or otherwise, and upon not less than five (5) days prior written notice to the Owner, to enter upon the Lot and any improvements upon the Lot, and to perform, or require the Owner to perform immediately, in either case at the Owner's cost and expense, all work (including the planting, watering, fertilizing, cutting and trimming of trees, shrubbery and other vegetation) necessary or desirable to remedy such breach or noncompliance, and/or to summarily abate and remove all improvements or anything else or any condition which is not in compliance, and/or
- (ii) To commence and maintain actions and suits to require the Owner to remedy such breach or noncompliance or for specific performance, or to enforce by mandatory injunction or otherwise all of the provisions of this Declaration, or to restrain or enjoin any breach or threatened breach of this Declaration, or to recover damages, and/or;
- (iii) To pursue all other rights and remedies available at law or in equity.

In any action for the enforcement of the provisions of this Declaration or for damages or any other form of relief, the prevailing party in such action shall be entitled to recover from the losing party all of the prevailing party's costs, expenses and reasonable attorneys' fees.

No remedy herein reserved is intended to be exclusive of any other remedy, but each remedy shall be cumulative and in addition to any remedy given hereunder or now or

hereafter existing at law or in equity. The Enforcing Person shall have the right to hire contractors and agents in performing any work to be performed by the Enforcing Person.

No Enforcing Person nor any other Person shall have any duty or obligation whatsoever to enforce the provisions of this Declaration and no Enforcing Person nor any other Person shall have any liability whatsoever if any Enforcing Person elects not to enforce such provisions or if any Enforcing Person undertakes such enforcement and terminates enforcement activities or does not succeed in such enforcement activities. Without limiting the foregoing, Declarant, for itself and its affiliated companies, expressly disclaims any obligations to undertake any enforcement of this Declaration.

12. **DESIGN COMMITTEE.**

(a) **Organization; Members.** There shall be a Design Committee (the "Committee") consisting of either three members or five members. In addition, one or more alternates may be appointed, from time to time, as members of the Committee. Such alternates shall have the power to act as voting members of the Committee in the event the members for whom they are alternates are unavailable to act as members of the Committee. Each member shall hold office until such time as such member has resigned, has been removed, or a successor has been appointed.

(b) **Appointment of Members.** Declarant shall have the right to appoint a majority of the members of the Committee (and their alternates), and the Board shall have the right to appoint the remaining members (and their alternates), until the date twenty-five percent (25%) of the Lots have been developed with a residential dwelling and conveyed to Persons other than Declarant or any entity owned or controlled by Declarant. Thereafter, the Board shall have the right to appoint a majority of the members of the Committee (and their alternates), and Declarant shall have the right (but not the obligation) to appoint the remaining members (and their alternates) until the date one hundred percent (100%) of the Lots have been developed with a residential dwelling and conveyed to Persons other than Declarant or any entity owned or controlled by Declarant. Thereafter, the Board shall have the right to appoint all of the members of the Committee. Declarant may at any earlier date send a written notice to the Board that after a specified date the Board may appoint and remove such greater number of members of the Committee as may be specified in such notice. (Declarant shall have the right to remove at any time any of its appointees and to appoint a successor to such removed member.)

(c) **Need Not be Owners.** Members appointed to the Committee need not be Owners of Lots.

(d) **Committee Duties.** It shall be the duty of the Committee to consider and act upon such proposals or plans from time to time submitted to it pursuant to this Declaration, to adopt, if deemed necessary or appropriate, Design Committee Rules, and to perform such other related duties from time to time delegated to it by this Declaration or by the Board. The Committee shall have the right to appoint one or more sub-committees with such responsibilities and decision-making authority (including the authority to review and approve plans, specifications and other items submitted by Owners for Committee approval under this Declaration), as may be delegated to such sub-committees by the Committee, and shall have the

right to retain professionals and other consultants upon such terms and conditions as may be determined by the Committee; provided, however, that any compensation payable to such professionals or consultants shall be subject to the approval of the Board.

(e) **Meetings; Action; Compensation; Expenses.** The members of the Committee shall meet or communicate with each other from time to time as necessary to perform the duties of the Committee. Any act approved by a majority of the members shall constitute the act of the Committee. The Committee shall keep and maintain a record of all final action taken by it at such meetings or otherwise. The members of the Committee shall receive such reasonable compensation and reimbursement of expenses from the Association as may be approved by the Board.

If for any reason the Committee is unable to meet or function on a particular matter by the time for action or decision required under this Declaration, the President of the Association or, in his or her absence, the Board, shall be empowered to perform the functions of the Committee or to appoint an alternate Committee for so long as the Committee is unable to meet or function.

(f) **Committee Rules.** The Committee shall by majority vote have the exclusive power to adopt, amend and repeal rules and regulations, to be known as "Design Committee Rules," which interpret or implement the provisions of this Declaration insofar as they relate to matters within the jurisdiction of the Committee. A copy of the Design Committee Rules, as they from time to time may be amended, shall be maintained with the records of the Association and shall be available for inspection by any Owner.

(g) **No Representations by the Committee; Nonliability.** No review or approval by the Committee of any item submitted to the Committee pursuant to this Declaration shall in any manner constitute the Committee's (or any Committee member's), Declarant's, the Board's or the Association's representation, warranty or agreement that such item (1) has been prepared free of defects or is of good workmanship or design, or will result in improvements which are readily marketable or free of design or construction defects, or (2) complies with any or all applicable laws (including building code requirements), or (3) will result in any governmental agency's or any other Person's approval of the same. Neither the Committee (or any member thereof) nor Declarant nor the Association nor the Board (or any member thereof) shall be liable to any Owner or any other Person for any damage, loss or prejudice suffered or claimed on account of (a) the Committee's (or any Committee member's) mistake in judgment or negligence, (b) the approval or rejection of, or the failure to approve or reject, any plans, drawings and specifications, or other request or item, whether or not defective, (c) the construction of any improvement or performance of any work, whether or not such construction or performance complies with this Declaration, the Design Committee Rules or the terms of any approval of the Committee, (d) the manner, appearance, style or quality to or in which any Lot or the Subdivision is developed, improved, landscaped, maintained or operated, (e) the erroneous execution of an estoppel certificate, (f) the failure of any plan, drawing, specification or other item approved by the Committee to comply with any or all applicable laws (including building code requirements), or (g) any other matter, decision, act or omission; provided that such member(s) shall not have acted in bad faith.

(h) **Review Fee.** The Committee shall have the right to charge the Owner a reasonable processing fee for its review of any item submitted to it, in accordance with such fee schedule as from time to time may be established by the Committee.

(i) **Expiration of Approval.** All approvals of the Committee may be revoked by the Committee if the Owner has not commenced the construction of the improvement or work covered by the Committee's approval within twelve (12) months from the date of the Committee's approval, and if so revoked, the Owner shall be required to comply with such further requirements as may be imposed by the Committee (including the submission of revised plans, drawings and specifications), and the Committee shall not be bound by any approval previously given by the Committee. The Owner shall be deemed to have "commenced the construction of the improvement" for purposes of this paragraph when the "visible commencement of operations" (as that term is defined in Section 507-41, HRS) for the construction of the improvements shall have occurred on the Owner's Lot.

(j) **Variances and Amendments.** The Committee shall have the right at any time in its sole discretion to amend, modify, waive, grant variances to or not enforce any requirements or restrictions imposed by this Declaration or the Design Committee Rules with respect to any Lot or Lots (or any improvements thereon) without any liability whatsoever to the Owners or occupants of any other Lots or to any other Person and without impairing or otherwise affecting such requirements and restrictions with respect to all other Lots.

(k) **Consents.** No consent or approval of the Committee shall be deemed given unless given in writing.

13. SPECIAL PROVISIONS REGARDING OWNERSHIP OF LOTS IN THE SUBDIVISION.

(a) **Agricultural Activities.** The Subdivision is adjacent to, nearby or in the vicinity of lands being, or which in the future may be, actively used for the growing, harvesting and processing of sugar cane and other agricultural products, and storage of mill waste water (such growing, harvesting, processing and storage activities being herein collectively called the "Agricultural Activities"), which activities may from time to time bring upon each Lot or result in smoke, dust, odors, noise, heat, agricultural chemicals, particulates and similar substances and nuisances (collectively, the "Agricultural By-Products"). Each Owner, by acquiring any interest in a Lot, automatically:

- (i) Assumes complete risk of and forever releases Declarant from all claims for damages (including, but not limited to, consequential, special exemplary and punitive damages) and nuisances occurring on the Lot or in the Subdivision and arising out of any Agricultural Activities or Agricultural By- Products;
- (ii) Forever waives any right to require Declarant, and releases Declarant from any obligation, to take any action to correct, modify, alter, eliminate or abate any Agricultural Activities

or Agricultural By-Products, and waives any right to file any suit or claim against Declarant for injunction or abatement of nuisances or damages;

- (iii) Agrees to and shall indemnify, defend and hold harmless Declarant from and against all claims, demands, actions, losses, damages, liabilities, costs and expenses, including, without limitation, attorneys' fees, asserted against or incurred by Declarant, which arise out of any injury, death or damage to person, property or business that occurs on the Owner's Lot and is the result of any Agricultural Activities or Agricultural By-Products, irrespective of the theory of liability asserted against Declarant; and
- (iv) Agrees that any Agricultural Activities or Agricultural By-Products, and any claim, demand, action, loss, damage, liability, cost or expense arising therefrom, shall not constitute a breach of any covenant or warranty of Declarant or be the basis for a suit or other claim for injunction or abatement of nuisances or damages, and forever waives any right to file any such suit or claim.

Each Owner acknowledges that the Hawaii Right-to-Farm Act, Chapter 165, HRS, limits the circumstances under which pre-existing farming activities may be deemed a nuisance.

As used in this paragraph 13, all references to "Declarant" shall mean and include Declarant and all subsidiary, sister and affiliated companies of Declarant (including but not limited to Hawaiian Commercial & Sugar Company), in their respective capacities as the Declarant under this Declaration and the developer of the Subdivision and the initial seller of the Lots, the current owner of the lands on which the Agricultural Activities are conducted, and the Person conducting the Agricultural Activities, and all successors and assigns of Declarant and its subsidiary, sister and affiliated companies.

(b) Pest Nuisances. Without limiting subparagraph (a) above, the Agricultural Activities or other characteristics of the Subdivision may result in insects (including but not limited to mosquitoes), rodents or other pests or vermin (collectively called "Pest Nuisances") coming onto the Lot or the Subdivision. Each Owner, by acquiring an interest in a Lot, automatically:

- (i) Assumes complete risk of all claims for damages (including but not limited to, consequential, special exemplary and punitive damages) and arising out of any Pest Nuisances;
- (ii) Forever waives any right to require Declarant, and releases Declarant from any obligation, to take any action to eliminate or abate any Pest Nuisances, and waives any right

to file any suit or claim against Declarant for injunction or abatement of nuisances or damages;

- (iii) Agrees to and shall indemnify, defend and hold harmless Declarant from and against all claims, demands, actions, liens, damages, liabilities, costs and expenses, including, without limitation, attorneys' fees, asserted against or incurred by Declarant, which arise out of any injury, death or damage to person, property or business that occurs on the Owner's Lot and is the result of any Pest Nuisances, irrespective of the theory of liability asserted against Declarant; and
- (iv) Agrees that any Pest Nuisances, and any claim, demand, action, loss, damage, liability, cost or expense arising therefrom, shall not constitute a breach of any covenant or warranty of Declarant or be the basis for a suit or other claim for injunction or abatement of nuisances or damages, and forever waives any right to file any such suit or claim.

(c) **Utility and Other Nuisances.** The Subdivision has located within it or adjacent thereto, electrical lines, retention basins, sewer lines, cable, utility poles and other utilities which may cause odors, interference with views, television and radio reception and which may have adverse health effects (collectively called "Utility and Other Nuisances"). Each Owner, by acquiring an interest in a Lot, automatically:

- (i) Assumes complete risk of all claims for damages (including but not limited to, consequential, special exemplary and punitive damages) and arising out of any Utility and Other Nuisances;
- (ii) Forever waives any right to require Declarant, and releases Declarant from any obligation, to take any action to eliminate or abate any Utility and Other Nuisances, and waives any right to file any suit or claim against Declarant for injunction or abatement of nuisances or damages;
- (iii) Agrees to and shall indemnify, defend and hold harmless Declarant from and against all claims, demands, actions, liens, damages, liabilities, costs and expenses, including, without limitation, attorneys' fees, asserted against or incurred by Declarant, which arise out of any injury, death or damage to person, property or business that occurs on the Owner's Lot and is the result of any Utility and Other Nuisances, irrespective of the theory of liability asserted against Declarant; and

- (iv) Agrees that any Utility and Other Nuisances, and any claim, demand, action, loss, damage, liability, cost or expense arising therefrom, shall not constitute a breach of any covenant or warranty of Declarant or be the basis for a suit or other claim for injunction or abatement of nuisances or damages, and forever waives any right to file any such suit or claim.

(d) **Development and Sales Activities.** Declarant reserves the right to develop Lots, construct homes on the Lots and to sell the Lots and homes. Such development and sales activity will result in dust, noise, increased traffic, obstruction of views or ventilation and other nuisances (collectively called "Development and Sales Activities"). Each Owner, by acquiring an interest in a Lot, automatically:

- (i) Assumes complete risk of all claims for damages (including but not limited to, consequential, special exemplary and punitive damages) and arising out of any Development and Sales Activities;
- (ii) Forever waives any right to require Declarant, and releases Declarant from any obligation, to take any action to eliminate or abate any Development and Sales Activities, and waives any right to file any suit or claim against Declarant for injunction or abatement of nuisances or damages;
- (iii) Agrees to and shall indemnify, defend and hold harmless Declarant from and against all claims, demands, actions, liens, damages, liabilities, costs and expenses, including, without limitation, attorneys' fees, asserted against or incurred by Declarant, which arise out of any injury, death or damage to person, property or business that occurs on the Owner's Lot and is the result of any Development and Sales Activities, irrespective of the theory of liability asserted against Declarant; and
- (iv) Agrees that any Development and Sales Activities, and any claim, demand, action, loss, damage, liability, cost or expense arising therefrom, shall not constitute a breach of any covenant or warranty of Declarant or be the basis for a suit or other claim for injunction or abatement of nuisances or damages, and forever waives any right to file any such suit or claim.

(e) **Park Risks and Nuisances.** The Subdivision is or may be adjacent to a public or private park or other recreational facilities (collectively called "park"). It is possible that users of any such park may, from time to time, use the roadways of the

Subdivision for access to such park and in parking of vehicles while using such park. Each Owner, by acquiring any interest in a Lot, automatically assumes complete risk of all injuries, deaths, losses, damages (including, but not limited to consequential, special, exemplary and punitive damages) and nuisances occurring on the Owner's Lot or in the Subdivision and arising out of any play upon, maintenance of or use of such park, including, without limitation, the use of Subdivision roadways and the spraying of herbicides and insecticides. Each Owner, by acquiring any interest in a Lot, automatically:

- (i) Agrees to and shall indemnify, defend and hold harmless Declarant and the County of Maui from and against all claims, demands, actions, losses, damages, liabilities, cost and expenses, including, without limitation, attorneys' fees, filed against or incurred by Declarant or the County of Maui, which arises out of any injury, death or damage to person, property or business that occurs on the Owner's Lot and is the result of any play upon, maintenance of or use of such park, including, without limitation, the spraying of herbicides and insecticides; and
- (ii) Agrees that any such play upon or maintenance of or use of the park, or use of Subdivision roadways for access or parking and any claim, demand, action, loss, damage, liability, cost or expense arising therefrom, shall not constitute a breach of any covenant or warranty of Declarant or be the basis for a suit or other claim for injunction, abatement of nuisances or damages, and forever waives any right to file any such suit or claim against Declarant, the County of Maui or otherwise.

(f) **Hana Highway**. Each Lot which adjoins the Hana Highway, shall be subject to the following provisions:

- (i) Each such Lot shall be subject to an easement (approximately 11 feet wide along the entire boundary which adjoins the Hana Highway, except for Lot 49 which shall be subject to a 5-foot wide easement, and the retention basin, which shall be subject to a 15-foot wide easement) in favor of the Association for purposes of maintaining, repairing, replacing the wall and fence constructed or to be constructed by Declarant, for the operation, maintenance, repair and replacement of electrical transmission facilities within the easement area, and for landscaping along the Hana Highway. The Owner of each such Lot shall accept the wall and fence in "as is" condition, it being understood that Declarant shall be under no obligation, and each Owner forever releases Declarant of any obligation, to repair, maintain or replace the wall and fence. The Owner

of each such Lot shall not commit any act or omission which may damage the wall, the fence or the landscaping, and shall be responsible for the cost of repairing any such damage.

- (ii) Each such Lot shall be subject to an 11-foot building setback along the Hana Highway, except for Lot 49 which shall be subject to a 5-foot building setback. Except for the wall and fence constructed by Declarant, no improvements may be constructed or placed by the Owner of such Lot within such setback, other than landscaping.

(g) **Noise Nuisances.** The Subdivision is subject to noise emanating from the Hana Highway and Kahului Airport. Each Owner, by acquiring any interest in a Lot, automatically;

- (i) Assumes all risks and nuisances arising from such noise; and
- (ii) Agrees that any such noise, and any claim, demand, action, loss, damage, liability, cost or expense arising therefrom, shall not constitute a breach of any covenant or warranty of Declarant or be the basis for a suit or other claim for injunction, abatement of nuisances or damages, and hereby forever waives any right to file any such suit or claim.

(h) **Irrigation Ditch.** Lots 49 through 60, inclusive, are adjacent to an irrigation ditch which is sometimes dry and at other times contains running or standing water which may cause unpleasant odors or other nuisances and pose a safety risk to children and other persons. By accepting any interest in any of Lots 49 through 60, inclusive, the Owner thereof automatically;

- (i) Assumes all risks, nuisances and potential hazards arising from the design, location or operation of such irrigation ditch; and
- (ii) Agrees to and shall indemnify, defend and hold harmless Declarant from and against all claims, demands, actions, liens, damages, liabilities, costs and expenses, including, without limitation, attorneys' fees, asserted against or incurred by Declarant, which arise out of any injury, death or damage to person, property or business that occurs on the Owner's Lot and is the result of any nuisances, health or safety risks or hazards connected in any way with the location or operation of the irrigation ditch adjacent to such Owner's Lot, irrespective of the theory of liability asserted against Declarant.

14. BINDING EFFECT. All restrictions, covenants, conditions and provisions hereof shall constitute covenants and servitudes running with the land and the Lots in the Subdivision, and shall be binding on and inure to the benefit of each Owner of a Lot and such Owner's heirs, personal representatives, successors and assigns. Each Owner of a Lot will be responsible for ensuring that the provisions of this Declaration are complied with by each occupant of the Owner's Lot (including without limitation any tenant, lessee or vendee of the Owner's Lot), and the Owner shall be personally liable for any noncompliance by such occupant.

15. AMENDMENT.

(a) **Amendments Generally.** Except as otherwise provided herein, any provision of this Declaration may, from time to time, be amended by filing in the Bureau of Conveyances of the State of Hawaii, an amendment duly executed by both (a) two (2) officers of the Association, and (b) if the amendment has a material effect upon Declarant, Declarant; provided that such amendment shall have been previously approved by the vote or written consent of both the Owners of at least two-thirds (2/3) of the total Lots, and (ii) Declarant.

(b) **Special Approvals Required.** Notwithstanding the foregoing, for so long as the Association or a class of membership of the Association (if any) is under the control of the Declarant, the following actions will require the prior approval of the U. S. Federal Housing Authority ("FHA") or the U. S. Veterans Administration ("VA"): the annexation of additional properties, the dedication of any Common Area, and any amendment to this Declaration.

(c) **Reserved Amendment Rights.** Notwithstanding anything herein to the contrary, the Declarant may from time to time amend this Declaration unilaterally without the consent of any Owner or mortgagee of any Lot, with the exception of HUD, FHA or VA where such consent is required, for any of the following purposes:

- (i) To correct any drafting or typographical error;
- (ii) To comply with any applicable law, rule or regulation of the State of Hawaii or the County of Maui, or any requirement or condition of any governmental agency with jurisdiction over the Subdivision, or as necessary to obtain any governmental approval, permit or order affecting the Subdivision;
- (iii) To comply with any requirement of the State of Hawaii or HUD in connection with the registration and sale of any Lots or to obtain any exemption from registration requirements; or
- (iv) To qualify some or all of the Lots for financing or financing assistance from HUD (FHA), VA, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association or any other state or federal agency

or authority which provides financing assistance for development projects similar to the Subdivision.

The Declarant's rights under this section shall expire upon the first to occur of (a) the completion of sales of all Lots to third parties unrelated to the Declarant, or (b) the expiration of ten (10) years from the date of recordation of this Declaration, or (c) Declarant's voluntary relinquishment of such rights by written release recorded in the Bureau of Conveyances of the State of Hawaii.

16. SEVERABILITY. The invalidation of any restriction, covenant, condition or other provision hereof by final judgment, order or decree of any court or governmental commission, board or agency having jurisdiction thereof shall in no way affect the other restrictions, covenants, conditions and provisions hereof, which shall remain in full force and effect according to their terms.

17. DURATION. The provisions of this Declaration shall be valid and shall run with and bind the land for a term of fifty-five (55) years from the date this Declaration is recorded. After such 55-year period, they shall automatically be extended for successive periods of ten (10) years each unless an instrument agreeing to terminate them, signed by the Owners of not less than eighty-five percent (85%) of the total Lots, shall be filed in the Bureau of Conveyances of the State of Hawaii; provided, however, that in the event the application of this paragraph would, as to any provision of this Declaration, violate the rule against perpetuities or any other limitation on duration imposed by law, then such provision shall be deemed to remain in effect only for the maximum duration permitted by law.

18. ESTOPPEL CERTIFICATE. Upon request of an Owner and the payment of such reasonable fee as the Association may set, the Association shall issue an estoppel certificate stating whether or not such Owner and/or the improvements on such Owner's Lot are in compliance with or are in default of the Articles, the Bylaws, this Declaration or any rules and regulations of the Association. If such Owner or the improvements are not in such compliance, the certificate shall specify the areas of noncompliance or default.

19. DEDICATION. If any Lot in the Subdivision should be dedicated in fee simple to any government body or agency ("Government Entity"), the Government Entity need not comply with the provisions of this Declaration; provided, however, that should such Government Entity thereafter convey, license, lease, assign or transfer its interest or rights in such Lot to any Person who is not a Government Entity, such Lot and conveyance, license, lease, assignment or transfer automatically shall be subject to and governed by this Declaration and the grantee, licensee, lessee, assignee or transferee automatically shall be bound by and required to comply with all of the provisions of this Declaration, whether or not such conveyance, license, lease, assignment or transfer expressly refers to or is made subject to this Declaration.

20. NOTICES. Whenever any notices are sent to an Owner such notices shall be sent to the address of the Owner's Lot (or to such other address as shall have previously been given in writing by the Owner to the Association and sent by registered or certified mail), and shall be deemed to be received by the Owner on the earlier of actual date of delivery or three business days after postmark (whether or not actually received by the Owner). If a Lot is owned

by more than one Person, notice to any one Person shall be deemed to be notice to all such Persons. Each Owner, upon conveying fee simple ownership of a Lot to a new Owner, shall immediately deliver or cause the new Owner to deliver a true and correct copy of the recorded conveyance instrument to the Association at the Association's principal office (or to such other address as the Association shall have previously given in writing to the Owners and sent by registered or certified mail). Until such conveyance instrument is received by the Association, any notice identifying the previous Owner as addressee shall be deemed notice to the new Owner.

21. 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 obligation of all such Persons. The obligations of more than one Owner under this Declaration shall constitute the joint and several obligation of all such Owners. Each Owner shall be liable for all acts and omissions of such Owner's guests, invitees, agents, employees, customers and contractors, and their failure to comply with the provisions of this Declaration.

22. INSPECTION. The Board and its authorized agents shall have the right at all reasonable times and without notice to or consent of any Owner, to enter upon the Owner's Lot for purposes of inspecting the same and determining whether the same is in compliance with this Declaration, without liability for trespass or damages. Notwithstanding the foregoing, the Board and its authorized agents shall have the right (but not the duty) to enter upon the Lot at any time and without any notice or consent in the event of an emergency. Each Owner shall promptly produce all documents which the Board may reasonably request to evaluate whether such Owner is in compliance with the provisions of this Declaration.

23. INTERPRETATION; NO WAIVER. The provisions hereof shall be construed and enforced under the laws of the State of Hawaii and be liberally construed to effectuate their purpose of creating a uniform plan for the development and operation of the Subdivision. The headings of paragraphs and sections herein are inserted only for ease of reference and shall not define or limit the scope or intent of any provision of this Declaration. Failure to enforce any provision hereof shall not constitute a waiver of the right to enforce thereafter said provision or to enforce 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 Enforcing Person or any other Person under this Declaration, or be construed as any agreement or representation by any Enforcing Person that such Owner is in compliance with the provisions of this Declaration.

24. AUDIT. Any Owner may, at any reasonable time and at such Owner's own expense, cause an audit or inspection to be made of the books and records of the Association. The Association shall furnish to each Owner a report on the financial status of the Association within one hundred twenty (120) days after the end of each fiscal year of the Association.

25. NO RIGHTS IN PROPERTY OF DECLARANT. Except as may be expressly provided in a separate writing duly executed by Declarant, no Person shall have any right, title of interest in or to or any right to use or enjoy any lot or other property owned or controlled by Declarant or any parent, subsidiary, sister corporation or affiliate of Declarant,

regardless of whether such lot or property is undeveloped or developed, and regardless of whether or not such lot or property is in the Subdivision.

26. CONDEMNATION OF COMMON AREAS. If at any time all or any portion of the Common Areas or any interest therein is taken by the right of eminent domain or by purchase in lieu of eminent domain, the entire award and compensation shall be paid to the Association. No Owner shall be entitled to any portion of such award, and no Owner shall be entitled to participate as a party in any proceedings relating to such condemnation, such right of participation being reserved exclusively to the Association, which shall in its name alone represent the interest of all Owners.

27. PERSONS WITH DISABILITIES. The Association shall, to the extent required by the federal Fair Housing Amendments Act or Chapter 515, HRS, as amended, or other applicable laws, make reasonable accommodations in its policies, practices, procedures and services, including without limitation the provisions of this Declaration, when such accommodations may be necessary to afford persons with disabilities equal opportunity to use and enjoy the dwellings within the Subdivision, including public or common areas of the Subdivision, or may otherwise be required by law.

28. PROJECT NAME. Declarant reserves the right to use the name "Ku'au Bayview at Paia" and any name which is a variation thereof.

29. SUBORDINATION. The provisions of the Articles and the Bylaws are subordinate and subject to all provisions of this Declaration and any amendments hereto, and in the case of any conflict, this Declaration shall control.

IN WITNESS WHEREOF, Declarant has executed these presents as of the day and year first above written.

A&B PROPERTIES, INC.

By _____
Its

By _____
Its

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

On this ____ day of _____, 1996, before me personally appeared _____ and _____, to me personally known, who, being by me duly sworn or affirmed, did say that they are the _____ and _____ respectively, of **A&B PROPERTIES, INC.**, a Hawaii corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors; and said Officers acknowledged said instrument to be the free act and deed of said corporation.

Notary Public, State of Hawaii

My commission expires: _____

DESCRIPTION

LAND SITUATE AT PAIA, HAMAKUAPOKO, Island and County of Maui, State of Hawaii, being portions of Lots 9, 10,11, 14 and 26 of Section 2; and portion of Section 3 of the Second Partition of Hamakuapoko Hui Lands, and more particularly described as follows:

BEGINNING at a pipe at the northwesterly corner of this tract of land, on the southerly side of Hana Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station ‘PUUNENE 2’ being 7342.44 feet North and 6273.41 feet East, and running azimuths measured clockwise from true South:

1. 230° 41’ 227.38 feet along the southerly side of Hana Highway to a ½ inch pipe;
2. 232° 48’ 132.18 feet along same to a ½ inch pipe;
3. 231° 48’ 236.15 feet along same to a ½ inch pipe;
4. 233° 00’ 294.39 feet along same to a ½ inch pipe;
5. 302° 00’ 548.22 feet along the remaining portion of Section 3 of the Second Partition of Hamakuapoko Hui Lands, to a ½ inch pipe;
6. 297° 15’ 128.15 feet along same to a ½ inch pipe;
7. 306° 00’ 236.53 feet along same to a ½ inch pipe;
8. 49° 31’ 1683.00 feet along same and along the remaining portions of Lots 9, 10, 11 and 26, Section 2 of the Second Partition of Hamakuapoko Hui Lands, to a ½ inch pipe;
9. Thence along the remaining portions of Lots 26 and 14, Section 2 of the Section Partition of Hamakuapoko Hui Lands, along a curve to the right with a radius of 2900.00 feet, the chord azimuth and distance being: 54° 01’ 455.06 feet to a ½ inch pipe;
10. 100° 00’ 99.66 feet along the remaining portion of lot 14, Section 2 of the Second Partition of Hamakuapoko Hui Lands, to a ½ inch pipe;

11. Thence along Lots 47 to 51, inclusive of File Plan 1250 along a curve to the left with a radius of 2231.83 feet, the chord azimuth and distance being: 232° 10' 49" 204.84 feet to a ½ inch pipe;
12. 229° 33' 824.87 feet along Lots 51 to 63, inclusive of File Plan 1250 to a 1/2 inch pipe;
13. 140° 26' 808.39 feet along Lots 64 to 71, inclusive to File Plan 1250 to the point of beginning and containing an area of 23.401 acres.

RESERVING THEREFROM, a drainage easement in favor of Alexander & Baldwin, Inc., the center line of said easement being more particularly described as follows:

BEGINNING at the southerly end of this easement on the southeasterly boundary of Lot 1, the coordinates of said point of beginning referred to Government Survey Triangulation Station 'PUUNENE 2' being 6,863.52 feet North and 7115.34 feet East, and running azimuths measured clockwise from true South:

1. 114° 30' 27.74 feet through Lot 1;
2. 139° 00' 450.00 feet through Lot 1;
3. 145° 40' 426.00 feet through Lot 1 to a point on its northwesterly boundary, the coordinates of said terminal point referred to Government Survey Triangulation Station "LUKE" being 7566.42 feet North and 6554.60 feet East.

ALSO RESERVING and excepting from the above described land (i) all roadway lots within said land upon dedication and conveyance to the County of Maui or other governmental authority and (ii) Lot 25 of the Makana Subdivision which is more particularly described in Exhibit "1" attached hereto.

DESCRIPTION

**LOT 25
MAKANA SUBDIVISION
(FILE PLAN-NUMBER PENDING)**

All of that certain parcel of land, being a portion of the land described in the deed from the Board of Education to the Trustees of Oahu College dated January 30, 1860, being also a portion of Lot 11 of Section 2 of the Second Partition of the Hamakuapoko Hui Lands situated at Paia, Hamakuapoko, Island an County of Maui, State of Hawaii.

Beginning at a ½-inch pipe at the northeasterly corner of this lot, on the southeasterly side of Hana Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station “PUUNENE 2” being 7,342.44 feet North and 6,273.41 feet East and running by azimuths measured clockwise from True South:

1. 230° 41’ 40.00 feet along the southeasterly side of Hana Highway to a ½-inch pipe;
2. 320° 26’ 10.00 feet along same [being along rod widening Lot 103 of the Makana Subdivision (File Plan – Number Pending)] to a ½-inch pipe;
3. 230° 41’ 30.50 feet along same to a ½-inch pipe;
4. 320° 26’ 358.78 feet along Lots 96 and 26 of the Makana Subdivision (File Plan – Number Pending) to a ½-inch pipe;
5. 258° 40’ 51.06 feet along Lot 26 of the Makana Subdivision (File Plan – Number Pending) to a ½-inch pipe;
6. Thence along the southwesterly side of Hoe Place on a curve to the left with a radius of 43.00 feet, the chord azimuth and distance being: 344° 40’ 54” 10.02 feet to a ½-inch pipe
7. 78° 40’ 68.43 feet along Lot 24 of the Makana Subdivision (File Plan – Number Pending) to a ½-inch pipe;
8. 49° 31’ 51.08 feet along same to a ½-inch pipe;

9. 140° 26' 370.82 feet along Lot 70 and 71 of the Paia Halelani Subdivision (File Plan 1250) to the point of beginning and containing an Area of 26,374 Square Feet.

SUBJECT, HOWEVER, to Easement 21, being an easement for electrical purposes affecting the above described Lot 25 and being more particularly described as follows:

Beginning at a ½-inch pipe at the northeasterly corner of this easement, said pipe being the northwesterly corner of Lot 96 of the Makana Subdivision (File Plan – Number Pending), the coordinates of said point of beginning referred to Government Survey Triangulation Station “PUUNENE 2” being 7,379.40 feet North and 6,334.32 feet East and running by azimuths measured clockwise from True South:

1. 320° 26' 26.07 feet along Lot 96 of the Makana Subdivision (File Plan – Number Pending) to a point;
2. 50° 26' 5.00 feet over and across Lot 25 of the Makana Subdivision (File Plan – Number Pending) to a point;
3. 140° 26' 15.32 feet over and across same to a point;
4. 59° 06' 66.26 feet over and across same to a point;
5. 140° 26' 11.07 feet along Lot 71 of the Paia Halelani Subdivision (File Plan 1250) to a ½-inch pipe;
6. 230° 41' 40.00 feet along the southeasterly side of Hana Highway to a ½-inch pipe;
7. 320° 26' 10.00 feet along same (being along road widening Lot 103 of the Makana Subdivision (File Plan – Number Pending) to a ½-inch pipe;
8. 230° 41' 30.50 feet along same to the point of beginning and containing an Area of 918 Square Feet.

SUBJECT, ALSO, to an existing easement for sewer pump station purposes in favor of the County of Maui as recorded in the Bureau of Conveyances in Liber 21849, Page 11.

Prepared by A&B Properties, Inc.
Kahului, Maui, Hawaii

January 12, 1996

This work was prepared by me or under my supervision.

Registered Professional Land Surveyor No. LS-7633

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IMANHONO:171151.1