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**MAUI LANI VILLAGE CENTER**

**DECLARATION**

**OF**

**COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS**

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MAUI LANI VILLAGE CENTER  
DECLARATION OF  
COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS

This MAUI LANI VILLAGE CENTER DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS (this "**Declaration**") is made as of October 1, 2009, by MAUI LANI VILLAGE CENTER, INC., a Hawaii corporation ("**Declarant**"), the address of which is 1100 Alakea Street, Suite 2200, Honolulu, Hawaii 96813, and by MAUI LANI 100, LLC, a Hawaii limited liability company ("**ML100**"), the address of which is 1100 Alakea Street, Suite 2200, Honolulu, Hawaii 96813.

Declarant is the owner of those certain parcels of land situated at Wailuku, County of Maui, State of Hawaii, described in **Exhibit "A"** (the "**VMX/C-R Land**") and in **Exhibit "B"** ("**Lot B-3**" or "**Lot 77**"). ML100 is the owner of those certain parcels of land situated at Wailuku, County of Maui, State of Hawaii, described in **Exhibit "C"** ("**Lot C-1**" or "**Lot 79**") and **Exhibit "D"** ("**Lot C-2**" or "**Lot 78**"). Declarant, on its own and with the consent of ML100, desires to develop the Property (as hereinafter defined) as an integrated and planned development, and intends by this Declaration to impose upon the Property certain covenants, conditions, restrictions and easements under a general plan of development in order to provide a flexible and reasonable procedure for the incremental and overall development of the Property. Declarant further intends by this Declaration to provide a procedure and government for the use and interrelationships of the various components of the development and to establish a method for the administration, maintenance, preservation, use, regulation and enjoyment of the Property.

**ARTICLE 1**  
**DEFINITIONS**

Defined terms appear throughout this Declaration with the initial letter of each such term capitalized. Unless the context clearly requires otherwise, the following terms used in this Declaration are defined as follows (it being understood that other terms are defined internally (e.g., not in this Article 1)):

Section 1.1 **Affordable Housing Agreement** means that certain Maui Lani 100 LLC Affordable Housing Agreement between Maui Lani 100, LLC and the County, Recorded in the Bureau on January 5, 2007 as Document No. 2007-002482, as it may be amended from time to time.

Section 1.2 **Archaeological Features** means any burial site(s) and any other items or areas of archaeological significance and preservation status (including, without limitation, remains of ancient (or otherwise pre-modern) Hawaiian habitats, persons, burials or other archaeological features), if any, affecting or which may affect portions of the Property, as shown either on a subdivision map for all or any portion of the Property or by professional archaeological survey of the Property, or portions thereof.

Section 1.3 **Articles** means the Articles of Incorporation of Maui Lani Village Center Owners Association, as filed or to be filed with the Director of the Department of Commerce and Consumer Affairs of the State of Hawaii, as such Articles may be amended from time to time, or any successor thereto.

Section 1.4 **Assessment Lien** means the lien created and imposed by Section 8.1.

Section 1.5 **Assessments** include (a) Benefited Assessments, (b) General Assessments, (c) Special Assessments, (d) Subdistrict Assessments, and (e) Capital Improvement Assessments, all as defined in Article 8.

Section 1.6 **Association** means the Maui Lani Village Center Owners Association, a Hawaii non-profit corporation, its successors and assigns.

Section 1.7 **Association Land** means such part or parts of the Property, and such Improvements thereon, and other real property in which the Association at any time and from time to time owns an interest, including, without limitation, estates in fee, leaseholds, licenses and easements.



Section 1.8 **Association Property** means the Association Land and any personal or intangible property or rights in which the Association at any time owns or holds an interest.

Section 1.9 **Association Rules** means the rules and regulations adopted by Declarant or the Board pursuant to Section 6.6.

Section 1.10 **Board of Directors or Board** means the Board of Directors of the Association, being the body responsible for the administration of the Association.

Section 1.11 **Boundary Walls** refers to the wall or walls between adjoining Duplex Units.

Section 1.12 **Bureau** means the Bureau of Conveyances of the State of Hawaii.

Section 1.13 **Bylaws** means the Bylaws of the Association adopted or to be adopted in accordance with the Articles, as amended from time to time.

Section 1.14 **Commercial Use Unit** means and refers to (a) any Condominium Unit designed and intended for commercial use and occupancy as described in applicable Condominium Documents, or (b) any Lot the improvements on which are designed and intended for commercial use and occupancy, or (c) the commercial use portion of any Condominium Unit designed and intended for mixed residential and commercial use and occupancy, as described in applicable Condominium Documents, or (d) the commercial use portion of any Lot the improvements on which are designed and intended for mixed residential and commercial use and occupancy.

Section 1.15 **Common Area** means all real property, together with the Improvements or amenities thereon, and all personal property in which the Association now or hereafter holds any interest or for which the Association is responsible for maintaining and/or operating pursuant to this Declaration or pursuant to a separate agreement, which real or personal property is held, maintained or operated for the common use and enjoyment of all or any group of Owners, including, but not limited to, the real and personal property described in Section 12.1 of this Declaration.

Section 1.16 **Common Expenses** shall have the meaning set forth in Section 12.2.

Section 1.17 **Community-Wide Standard** means the standard of conduct, construction, maintenance, repair or other activity generally prevailing throughout the Project. Such standard may be more specifically determined and set forth by the Board and the Design Review Committee.

Section 1.18 **Condominium Documents** shall mean and include the Recorded declaration of condominium property regime, condominium map, bylaws and related documents, effectively creating a condominium property regime upon and within any portion of the Property, pursuant to and in accordance with the laws of the State of Hawaii.

Section 1.19 **Condominium Project** means each condominium project created and developed within the Property pursuant to Hawaii Revised Statutes Chapter 514B (or successor statute) (as amended from time to time) and, therefore, governed by this Declaration. Each Condominium Project shall constitute a separate Subdistrict.

Section 1.20 **Condominium Unit** means a condominium unit, together with its appurtenant interest in the common elements, that is created by Condominium Documents.

Section 1.21 **County** means the County of Maui.

Section 1.22 **Declarant** means Maui Lani Village Center, Inc. and its successors or assigns. A Person shall be deemed a successor and/or assign of Declarant only if specifically so designated in a duly Recorded written instrument as a successor or assign of Declarant under this Declaration and/or

under any Supplemental Declaration and shall be deemed a successor and assign of Declarant only as to the particular rights or interests of Declarant under this Declaration or under such Supplemental Declarations that are specifically designated in the Recorded written instrument. Declarant shall have the right to assign less than all of its rights hereunder and to impose such conditions and limitations thereon as Declarant may impose in its sole and absolute discretion.

Section 1.23 **Declarant Control Period** shall have the meaning set forth in Section 6.4.

Section 1.24 **Declarant-Related Entities** refers to, collectively and severally, Maui Lani Partners, Maui Lani Village Center, Inc., Maui Lani 100, LLC, and their respective parents, partners, members, managers, stockholders, subsidiaries and affiliates, and any officer, director, member, manager, representative, employee and/or agent thereof.

Section 1.25 **Declaration** means this instrument as it may be amended or supplemented from time to time in accordance with the terms hereof.

Section 1.26 **Design Guidelines** means the Maui Lani Village Mixed Use Design Guidelines, as amended from time to time.

Section 1.27 **Design Review Committee** or **DRC** refers to the committee or committees created pursuant to Section 9.1.

Section 1.28 **Duplex Building** shall mean a building constructed over and across a common boundary line between two Lots and/or Subdistrict Units which contains two Duplex Units sharing a common integrated roof, with "Boundary Walls" separating the two Duplex Units.

Section 1.29 **Duplex Unit** shall mean one of the two Dwelling Units and/or Commercial Use Units constituting a Duplex Building.

Section 1.30 **Dwelling Unit** means any building or portion of a building situated upon a Lot or Subdistrict Unit, designed and intended for use and occupancy as a separate dwelling unit or residential lodging facility for a Single-Family and containing only one kitchen, and shall include (by way of illustration and not limitation) a residential Condominium Unit, each dwelling unit within an apartment building, cluster development or other multi-family development, and a detached house on a Lot or Subdistrict Unit. For purposes of this Declaration, each Lot or Subdistrict Unit shall be deemed to contain the number of Dwelling Units designated for residential use on a site plan approved by Declarant (during the Declarant Control Period) or the Board or DRC (after the Declarant Control Period), until such time as Improvements thereon are ready for occupancy in accordance with applicable law, at which time each Dwelling Unit so constructed shall constitute a separate Dwelling Unit as to the portion of the Lot or Subdistrict Unit affected thereby, and the number of Dwelling Units on the remaining portion, if any, of the Lot or Subdistrict Unit shall be determined in accordance with this Section.

Section 1.31 **Exempt Property** means the following parts of the Property:

(a) All land and improvements owned by or dedicated to and accepted by the United States, the State of Hawaii, or the County, for as long as any such entity or political subdivision is the owner thereof or for so long as such dedication remains effective;

(b) All Association Land that is owned in fee simple by the Association;

(c) Any Road; and

(d) All land and improvements owned by Declarant or ML100, except that Declarant or ML100 may declare by written instrument that certain land or improvements owned by Declarant or ML100 shall not be Exempt Property, including, for example, property leased to a third party.

Section 1.32 **Hazardous Materials** means any and all radioactive materials, asbestos, polychlorinated biphenyl ("PCB's"), chemicals that cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, toxic substances, and other hazardous substances designated as such under 40 CFR Part 302, as amended from time to time.

Section 1.33 **Improvement** means any building, structure, parking area, fence, wall, hedge, shrub, tree, landscaping feature, planting, pole, antenna, driveway, deck, sign, change in any exterior color or shape, grading and all other site work, including, without limitation, excavation, embankment, road construction, utility improvements, removal of trees or plantings and so forth, and any new exterior construction or exterior improvement that may not be included in the foregoing. "Improvement" does include both original improvements and all later changes and improvements.

Section 1.34 **Kihei Gardens Grant of Easement** means that certain Grant of Easement, Recorded in the Bureau on July 30, 2008 as Document No. 2008-121846, as it may be amended from time to time.

Section 1.35 **Land Use Commission Decision** means that certain Findings of Fact, Conclusions of Law, and Decision and Order for a State Land Use District Boundary Amendment, issued by the Land Use Commission of the State of Hawaii on September 15, 2005 for Docket No. A04-754, as it may be amended from time to time.

Section 1.36 **Land Use Matrix** means the VMX/C-R and VMX/R Land Use Matrix that is attached to and made a part of the Design Guidelines.

Section 1.37 **Landfill, Landfill Buffer Area and Landfill Easement** are all defined in Section 5.3.

Section 1.38 **Landfill Right of Entry** means that certain Right of Entry Agreement, dated November 26, 2008, between the County and Declarant, as it may be amended from time to time, which concerns rights and obligations relating to the Landfill.

Section 1.39 **Landscape Easement Area(s)** means and refers to any land area (together with any landscaping thereon) designated in this Declaration or in a Supplemental Declaration as a landscape easement benefiting the Association.

Section 1.40 **Limited Common Area** means such portion of the Common Area that is intended for the exclusive use and benefit of less than all of the Lots, as provided in Section 3.2. "Limited Common Area" includes, without limitation, the common elements described in Condominium Documents that are intended for the exclusive benefit and/or responsibility of the Owners or Occupants in the Condominium Project, and such other common areas, amenities and facilities, if any, within a Condominium Project intended for the exclusive benefit and/or responsibility of the Owners or Occupants in the Condominium Project.

Section 1.41 **Lot** means any area of the Property, whether developed or undeveloped, that is designated as a separately subdivided lot on the most current County-approved final subdivision map or Recorded file plan (approved by Declarant, ML100 or the Board, as appropriate), and classified or intended for residential and/or commercial use, and including all Improvements thereon. Roads are not Lots, although there may be Roads within larger Lots.

Section 1.42 **Majority** means those votes (which includes votes by ballots and authorizations, approvals, assents or concurrence given by written consents) by Voting Delegates, Owners, Class "A" Members (defined in Section 7.1 below) or other group (including the Board and Mortgagees), as the context may indicate, totaling more than fifty percent (50%) of the total eligible number of votes, with votes by Voting Delegates, Owners and Class "A" Members being based on applicable Voting/Assessment Ratios.

Section 1.43 **Manager or Managing Agent** means the manager or agent engaged by the Board of Directors or Declarant pursuant to Section 6.12 of this Declaration.

Section 1.44 **Member** means every Person who is entitled to Membership in the Association, as provided in Section 7.1.

Section 1.45 **Membership** means a membership in the Association.

Section 1.46 **Mortgage** means any real property security instrument that is Recorded, that is not a fraudulent conveyance under Hawaii law, and that is given in good faith and for valuable consideration as security for the performance of an obligation, including, without limitation, an agreement of sale, but shall not include any instrument creating or evidencing solely a security interest arising under the Hawaii Uniform Commercial Code (Hawaii Revised Statutes Chapter 490, as amended). **First Mortgage** means a Mortgage that is the first and most senior of all Mortgages upon the same property. **Mortgagee** means the holder of a note or interest secured by a Mortgage. **First Mortgagee** means the holder of a First Mortgage. **Mortgagor** means the party executing a Mortgage as obligor.

Section 1.47 **Occupant** means any Person, other than an Owner, in rightful use or possession of any portion of the Property, whether as a guest, tenant or otherwise.

Section 1.48 **Owner** means the Record owner, whether one or more Persons, including Declarant and ML100, of fee simple title (whether or not subject to any Mortgage) to any Lot or Subdistrict Unit, but excluding those Persons having such interest merely as security for the performance of an obligation; provided that to such extent and for such purposes, including, possibly, the exercise of voting rights, as may be provided by Recorded lease, a lessee of a Lot or Subdistrict Unit may be deemed to be an Owner. If a Lot or Subdistrict Unit is sold under a Recorded agreement of sale, then the purchaser (rather than the fee owner) may be considered the Owner if so designated in the agreement of sale. For purposes of this Declaration, if a Recorded lease or agreement of sale so provides, then such Recorded document shall be considered a conveyance of an interest in a Lot or Subdistrict Unit and, via such conveyance, the Owner shall be considered to be taking title to the Lot or Subdistrict Unit. A lease or agreement of sale, whether or not Recorded, may provide that the lessor/seller retains the right to vote the interests of the Lot or Subdistrict Unit, while the lessee/buyer must pay the Assessments for the Lot or Subdistrict Unit. In such case, the lessor/seller would still be considered the "Owner" of the Lot or Subdistrict Unit.

Section 1.49 **Parking Ordinance** means Ordinance No. 3525 of Bill No. 7 (2008) of the Maui County Code, as it may be amended from time to time.

Section 1.50 **Permitted Use** means, with respect to the Lots and Subdistrict Units in the Project, a use that is permitted under the VMX Ordinance and this Declaration and that is not a Prohibited Use. A Permitted Use within the Project may be narrower than a use that is authorized under the VMX Ordinance. **Exhibit "F"** includes a list of uses that are permitted under this Declaration.

Section 1.51 **Person** means a natural person, a corporation, a partnership, a limited liability entity, a trustee or other entity capable of holding title to real property, and such holder's respective heirs, personal representatives, successors and assigns.

Section 1.52 **President** means the duly elected or appointed president of the Association.

Section 1.53 **Prohibited Use** means, with respect to the Lots and Subdistrict Units in the Project, a use that (a) is either prohibited by or not permitted under applicable laws, rules or regulations, including laws, rules or regulations of the County of Maui, such as the VMX Ordinance, or (b) is prohibited by this Declaration or by any applicable Supplemental Declaration; provided, however, that this Section is subject to rights and exceptions reserved to Declarant and/or ML100 herein. **Exhibit "F"** includes a list of uses that are prohibited by this Declaration.

Section 1.54 **Project** means the Maui Lani Village Center planned development created by and subject to this Declaration consisting of the Property and all of the Improvements now or hereafter located thereon as described in this Declaration and any Supplemental Declaration.

Section 1.55 **Project Documents** means this Declaration, the Articles, the Bylaws, the Association Rules, the Design Guidelines, and any Supplemental Declaration, as each may be amended and/or supplemented from time to time in accordance with the provisions thereof.

Section 1.56 **Property** means the real property described in **Exhibit "A"** attached hereto (being the VMX/C-R Land), and the real property described in **Exhibit "B"** attached hereto (being Lot B-3 or Lot 77), and the real property described in **Exhibit "C"** attached hereto (being Lot C-1 or Lot 79), and the real property described in **Exhibit "D"** attached hereto (being Lot C-2 or Lot 78), as such real property may hereafter be subdivided and/or consolidated (subject to this Declaration and any applicable Supplemental Declaration), together with all Improvements now or hereafter located thereon, and all easements, rights, appurtenances and privileges belonging or in any way pertaining thereto.

Section 1.57 **Record, Recorded, Recording, Recordation, Recordable** or like reference means an instrument of record in, or the act of recording or filing or having recorded or filed an instrument with, or being in form suitable for recording or filing in the Bureau and/or the Department of Commerce and Consumer Affairs of the State of Hawaii, as appropriate.

Section 1.58 **Road or Roadway** means any vehicular right-of-way that is both (a) constructed within or upon any portion of the Property for the purpose of providing vehicular access to Lots or Subdistrict Units and (b) owned by Declarant, ML100, the Association or the County. Vehicular rights-of-way that are constructed within a Lot and are owned by a Person other than Declarant, ML100, the Association or the County are not Roads or Roadways for purposes of this Declaration.

Section 1.59 **Roadway Landscape Easement Area** refers to the land area, if any, together with the landscaping thereon, of the street-side boundary of all of those Lots or Subdistrict Units in respect of which a landscape easement has been designated noting the Association, the Maui Lani Community Association and/or another owners association as the benefited party or that is designated as such in a Supplemental Declaration.

Section 1.60 **Sign Monument** means an entry feature, a sign monument and/or a wall on which the entry feature or sign monument or both is secured that is owned or controlled by Declarant, ML100 or the Association.

Section 1.61 **Single-Family** means (a) a group of one or more persons each related to the other by blood, marriage or legal adoption, living in a Dwelling Unit together as a single, non-profit housekeeping unit; and/or (b) unrelated persons living in a Dwelling Unit as a single, non-profit housekeeping unit; provided that the number and status of such persons living in a Dwelling Unit shall not exceed applicable standards, requirements and limitations of County ordinance or State law.

Section 1.62 **Subdistrict** means each separately developed project governed by this Declaration, including Condominium Projects, whether or not governed by a separate owners association, in which owners may have common interests other than those common to all other Class "A" Members in the Association, such as a common theme, roads, entry feature, development name, common governance, and/or common areas and facilities, which are not available for use by all Class "A" Members in the Association. For example, and by way of illustration and not limitation, a Condominium Project developed on one or more of the Lots within the VMX/C-R Land would be a Subdistrict, and Condominium Projects developed on Lot B-3, Lot C-1 or Lot C-2 would be Subdistricts.

Section 1.63 **Subdistrict Assessment** means the amount that is levied and assessed against the Lots or Subdistrict Units in a particular Subdistrict to fund Subdistrict Expenses that are owed and payable to the Association, as provided in Section 8.5.

Section 1.64 **Subdistrict Association** means an association established or to be established by a Subdistrict in the Project, as evidenced by Recorded Condominium Documents or other instruments subjecting all Lots or Subdistrict Units within the Subdistrict to common governance by such Subdistrict Association. Each Owner of a Subdistrict Unit subject to the jurisdiction of a Subdistrict Association shall be a member of such Subdistrict Association, subject to such terms and conditions as are set forth in the Recorded Condominium Documents or other instruments subjecting such Subdistrict Unit to the Subdistrict Association.

Section 1.65 **Subdistrict Expenses** means and includes the actual and estimated expenses incurred or anticipated to be incurred by the Association for the benefit of Owners of Lots or Subdistrict Units within a particular Subdistrict, which may include a reasonable reserve for capital repairs and replacements, all as may be specifically authorized from time to time by the Board of Directors and as more particularly authorized herein.

Section 1.66 **Subdistrict Unit** means each separate Lot or portion of a Lot, whether improved or unimproved, that is subject to the jurisdiction of a Subdistrict Association and that is intended for independent ownership, use and occupancy as an attached or detached living and/or commercial unit, vacant land intended for development for separate residential and/or commercial use and occupancy, as shown on any subdivision map of the Lot approved by the County, or as described in a declaration of condominium property regime as a Condominium Unit to be used for residential (whether permanent or transient) or other living purposes and/or for commercial purposes. This term does not include the common elements of any Subdistrict that is part of a Condominium Project, the property owned by any Subdistrict Association or property dedicated to the public. This term does include (by way of illustration and not limitation) each residential or commercial Condominium Unit, zero-lot line home, single-family detached dwelling and/or commercial building and each platted lot intended for the construction of a residential dwelling and/or commercial building that is subject to the jurisdiction of a Subdistrict Association.

Section 1.67 **Super-Majority** means those votes (which includes votes by ballots and authorizations, assents or concurrence given by written consents) by Voting Delegates, Owners, Class "A" Members or other group (including the Board), as the context may indicate, totaling seventy-five percent (75%) or more of the total eligible number of votes, with votes by Voting Delegates, Owners and Class "A" Members being based on applicable Voting/Assessment Ratios. In the event the Board of Directors consists of three or less directors, a "**Super-Majority**" vote of the Board of Directors means a vote of more than fifty percent (50%) of the directors comprising the Board.

Section 1.68 **Supplemental Declaration** means a declaration containing covenants, conditions, restrictions, assessments, charges, servitudes, liens, reservations and/or easements, or similar instrument supplementing or amending this Declaration as it relates to all or any portion of the Property, which is Recorded from time to time in accordance with this Declaration. Any Supplemental Declaration creating a Subdistrict or establishing additional covenants, conditions, restrictions and/or easements for a Subdistrict may be described merely as a declaration affecting the named Subdistrict and for all purposes such document shall constitute a Supplemental Declaration of this Declaration. For example, and by way of illustration and not limitation, a condominium declaration for a project on Lot C-1 would constitute a Supplemental Declaration.

Section 1.69 **VMX Ordinance** means Section 19.78.051 of Ordinance No. 3364, Bill No. 11 (2006) of the Maui County Code, as such section may be amended from time to time.

Section 1.70 **Voting Delegate** means the representative appointed or elected as provided in Section 2.8 of the Bylaws, who is responsible for casting the votes attributable to the Member or Members that he or she represents for purposes of electing the Board, amending this Declaration or the Bylaws, and such other matters as provided in this Declaration, any Supplemental Declaration and in the Bylaws. Except as otherwise provided in this Declaration, each Voting Delegate shall be entitled to cast all votes attributable to the Members he or she represents. The term "**Voting Delegate**" shall include an "**Alternate Voting Delegate**" acting in the absence of a Voting Delegate.

Section 1.71 **Voting/Assessment Ratio** means the ratio or percentage assigned to each Lot, as set forth in or otherwise described in **Exhibit "E"** attached hereto. Except as otherwise provided in this Declaration or the Bylaws, the Voting/Assessment Ratio shall be used to determine the rate of General Assessments that will be assessed against the Lot and to determine the number or percentage of votes that will be allocated to the Lot. The Voting/Assessment Ratio of each Lot may be revised (likely increased) if a portion of the Property is withdrawn from the effect of this Declaration pursuant to Section 10.9. Voting/Assessment Ratios for Lots that are subject to a Subdistrict Association shall be allocated among the Subdistrict Units subject to such Subdistrict Association in the manner set forth in the Recorded Condominium Documents or other instruments establishing such Subdistrict Association.

## **ARTICLE 2 STATEMENT OF PURPOSE AND IMPOSITION OF COVENANTS**

Declarant intends to develop the VMX/C-R Land by subdivision and otherwise into various Lots, Roads and Common Areas, and to develop and/or sell and convey the Lots as portions of the VMX/C-R Land are developed. Declarant may, with respect to any portion of the VMX/C-R Land, choose to Record one or more Supplemental Declarations and may establish additional covenants, conditions, restrictions and easements (including for Condominium Projects) as may be appropriate for that property. Declarant hereby declares that all of the real property comprising or constituting the VMX/C-R Land is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part, subject to this Declaration.

Declarant intends to develop (by subdivision or otherwise) and/or sell and convey Lot B-3 (or portions thereof) as part of the Project. Declarant may, with respect to any portion of Lot B-3, choose to Record one or more Supplemental Declarations and may establish additional covenants, conditions, restrictions and easements (including for Condominium Projects) as may be appropriate for that property. Declarant hereby declares that all of the real property comprising or constituting Lot B-3 is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part, subject to this Declaration.

ML100 intends to develop (by subdivision or otherwise) and/or sell and convey Lot C-1 and Lot C-2 (or portions of each) as part of the Project. ML100 may, with respect to any portion of Lot C-1 and/or Lot C-2, choose to Record one or more Supplemental Declarations and may establish additional covenants, conditions, restrictions and easements (including for Condominium Projects) as may be appropriate for that property. ML100 hereby declares that all of the real property comprising or constituting Lot C-1 and Lot C-2 is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part, subject to this Declaration.

All of this Declaration shall run with the Property and every part thereof for all purposes and, as and to the extent provided in this Declaration, shall be binding upon and inure to the benefit of, as applicable, Declarant, ML100, the Association, all Owners and Occupants, and all other Persons having any right, title or interest in the Property or any part thereof, and their respective heirs, personal and legal representatives, successors in interest and assigns, subject to the terms and provisions hereof. Anything to the contrary contained in this Declaration notwithstanding, any portion of the Property that is dedicated to the public or a governmental entity for public purposes shall not be subject to this Declaration while owned by the public or the governmental entity, although restrictions imposed in this Declaration upon the Owners and Occupants concerning the use and maintenance of such public areas shall at all times apply to the Owners and Occupants.

This Declaration and any Supplemental Declaration Recorded by or on behalf of Declarant and/or ML100 are declared and agreed to be in furtherance of a general plan for the subdivision, condominium development, improvement, sale, use and enjoyment of the Property and are established for the purpose of enhancing and perfecting the usefulness, value, desirability, nature and attractiveness of the Property and every part thereof. Further, the covenants, conditions, restrictions and easements herein contained and encumbering the Property shall benefit specifically, as a dominant tenement, all adjacent or nearby

land owned by Declarant or ML100. Nothing in this Declaration shall be construed to prevent Declarant or ML100 from modifying their respective plans, either in whole or in part, as they relate to property owned by Declarant or ML100, as provided in this Declaration, or from developing, dedicating or conveying portions of the Property, including streets or roadways, for other uses.

The subdivision map(s) covering the Property, the file plan(s), if any, covering the Property and any and all general plan or subdivision maps or development plans, plot plans or depictions of proposed improvements to the Property and to areas surrounding the Property and the Project are intended to show only the approximate and general layout, location, and dimensions of the Lots and are not intended to be and do not constitute any other representation or warranty by Declarant or ML100. No warranty or representation whatsoever is being made that any depictions, maps or any other plans presently envisioned or considered for the development of the properties adjacent to, surrounding, or in the vicinity of the Project can or will be carried out, or that any land now owned or hereafter acquired by Declarant or ML100 is or will be subjected to this Declaration, or that any such land (whether or not it has been subjected to this Declaration) is or will be committed to or developed for a particular (or any) use or developed in accordance with any particular phasing plan or timetable or that if such land is once used for a particular use, such use will continue in effect.

By its signature on this Declaration, ML100 hereby grants to Declarant the right to act as "Declarant" under this Declaration and to all of the rights, privileges and appurtenances that are granted to and reserved for Declarant hereunder.

### **ARTICLE 3 PROPERTY RIGHTS**

#### **Section 3.1 Owners' Right of Enjoyment.**

(a) Every Owner and Occupant shall have a nonexclusive easement for use and enjoyment in and to the Common Areas, subject to all of the easements, covenants, conditions, restrictions, limitations and other provisions contained in this Declaration or in other applicable Recorded documents. Such easement for use and enjoyment shall also be subject to the following provisions and rights of the Association (acting through Declarant or the Board), among others:

(1) to limit the number of guests of Owners and Occupants and to limit the use of the Common Area by Persons who are not Owners, and to charge such Persons use, admission, membership and other fees for the use of any facility situated upon the Common Area;

(2) to permit non-Member use of any facility situated upon the Common Area, upon such terms and conditions as may be established by the Board;

(3) to establish reasonable rules and regulations pertaining to or restricting the use of the Common Area by Owners, Occupants or other Persons;

(4) to suspend the right of an Owner to use the Common Area or any designated portion thereof during any time in which any Assessment respecting such Owner or such Owner's Lot or Subdistrict Unit remains unpaid and delinquent;

(5) to dedicate or transfer all or any part of the Common Area to any public or private entity, agency, Subdistrict Association, authority, or utility for such purposes and subject to such conditions or agreements as may be agreed to by the Association, including the condition that the parts of the Common Area that are dedicated or transferred will continue to be maintained to the Community-Wide Standard;

(6) to retain the benefits of the restrictions or limitations, if any, contained in any deed or amendment to this Declaration conveying to the Association or subjecting to this Declaration the Common Area or any portion thereof; and



(7) to designate certain portions of the Common Area as Limited Common Area, and offer certain Owners and Occupants exclusive use of such Limited Common Area.

(b) Nothing herein shall be deemed or interpreted to grant to the Association, or to any Owner or Member, any ownership interest in any portion of the Property, including the Association Property or Common Area, unless specifically conveyed to the Association, or to an Owner or Member, in this Declaration, any Supplemental Declaration, or by separate agreement.

### **Section 3.2 Limited Common Area.**

(a) Certain portions of the Common Area may be designated as "**Limited Common Area**" and be reserved for the exclusive use, benefit or responsibility of the Owners and Occupants of certain Lots, Subdistrict Units or portions thereof, which may be part of one or more Subdistricts. All costs associated with the operation, maintenance, repair, replacement, taxes and insurance of Limited Common Area shall be assessed against the particular Lots or Subdistrict Units to which the Limited Common Area is assigned (e.g., the costs shall be Subdistrict Expenses if the Limited Common Area is reserved for all Subdistrict Units within a Subdistrict). Limited Common Area may include, without limitation, private roads.

(b) Any exclusive rights created and conveyed as provided herein are subject to the blanket utility easement, maintenance and architectural and landscape control, and other provisions contained in this Declaration and to such reasonable rules and regulations with respect to possession, control, use and maintenance as Declarant, ML100 or the Association may from time to time adopt. Easements are hereby created in favor of and running with each Lot or Subdistrict Unit having such an area for the exclusive control, use and/or maintenance of each such area. Each Owner, by accepting title to a Lot or Subdistrict Unit, shall be deemed to have further ratified the easements and exclusive rights created by this Section.

**Section 3.3 Delegation of Use.** No Owner may delegate that Owner's right of use and enjoyment of the Common Area to any Person, except to the members of that Owner's immediate family, to Occupants of the Owner's Lot or Subdistrict Unit, or to that Owner's guests, in each case as permitted by this Declaration, any Supplemental Declaration and the Association Rules, subject to reasonable regulation by the Board and in accordance with such procedures as the Board may adopt. An Owner shall be deemed to have made such delegation to the tenant of any leased Lot or Subdistrict Unit.

**Section 3.4 Waiver of Use.** No Owner shall be exempt from personal liability for Assessments, nor shall any Lot or Subdistrict Unit owned by such Owner be released from the liens, charges and other provisions of this Declaration, the Articles, Bylaws, Association Rules or Design Guidelines, by waiver or renunciation of, or suspension or restriction of, such Owner's right to the use and enjoyment of the Common Area, or the abandonment of such Owner's Lot or Subdistrict Unit.

**Section 3.5 Indemnification for Use of Common Area.** To the fullest extent permitted by law, the Association, and each Owner, Member and Occupant, shall indemnify and hold harmless Declarant and ML100 from any liability, claims or expenses, including attorneys' fees, arising from or relating to property damage or personal injury resulting in any manner from the use and/or enjoyment by the Association or by such Owner, Member or Occupant, and their respective employees, agents, contractors, invitees and guests, of any and all portions of the Common Area.

## **ARTICLE 4 AFFORDABLE HOUSING REQUIREMENTS**

**Section 4.1 Definitions.** The capitalized terms used in this Article that are placed in quotations are not defined in this Declaration, but shall have the definitions given to them in the Affordable Housing Agreement.

**Section 4.2 County Requirements.** The Affordable Housing Agreement requires that a minimum of fifty-one percent (51%) of the "Total Residential Units" for sale or rent in the "Maui Lani Village Mixed Use Development" be "Affordable Housing Units" in accordance with the Affordable Housing Agreement.

**Section 4.3 Project Requirements.** For each parcel of land comprising an original Lot within the VMX/C-R Land (as shown on the final subdivision map and/or file plan creating the Lots within the VMX/C-R Land) and for Lot B-3, Lot C-1 and Lot C-2 (as shown on the final subdivision map creating Lot B-3, Lot C-1 and Lot C-2), the first Dwelling Unit developed on the Lot can be market priced (i.e., it need not be an "Affordable Housing Unit"). With respect to any Dwelling Units developed on the Lot after that first Dwelling Unit, a minimum of fifty-one percent (51%) of the Dwelling Units for sale or rent on the Lot must be "Affordable Housing Units" according to the following schedule:

(a) the second Dwelling Unit shall be an "Affordable Housing Unit" that is affordable to the "120% to 140% Group";

(b) the fourth Dwelling Unit shall be an "Affordable Housing Unit" that is affordable to the "100% to 120% Group";

(c) the sixth Dwelling Unit shall be an "Affordable Housing Unit" that is affordable to the "80% to 100% Group"; and

(d) the eighth Dwelling Unit shall be an "Affordable Housing Unit" that is affordable to the "Below 80% Group".

This pattern shall then repeat itself with any additional Dwelling Units sold or rented on the Lot. So, for example, if 16 Dwelling Units are developed on a Lot, then eight of them can be market-priced units and eight of them must be "Affordable Housing Units" that meet the requirements of the Affordable Housing Agreement, with each of the four "Income Groups" represented twice among the eight "Affordable Housing Units".

**Section 4.4 Compliance.** Each Owner of Lot B-3 (or a portion thereof), each Owner of Lot C-1 (or a portion thereof), each Owner of Lot C-2 (or a portion thereof) and each Owner of a Lot (or a portion thereof) within the VMX/C-R Land that sells or rents Dwelling Units on the Lot must comply with all of the applicable requirements and obligations of the Affordable Housing Agreement relating to the sale and rental of "Affordable Housing Units." For example, the sales prices and rental rates of the "Affordable Housing Units" to be offered for sale or rent must be approved by the County's Department of Housing and Human Concerns (or successor agency) (the "DHHC"). Further, a marketing and advertising plan must be approved by the DHHC, and the documentation requirements of Article II, Section F of the Affordable Housing Agreement must be met.

**Section 4.5 Credits.** Declarant (or Declarant's designee) shall be entitled to and shall receive any and all affordable housing credits and other benefits issued by the County (or other governmental entity) as a result of the "Affordable Housing Units" developed, sold or rented within the Project. No other Lot Owner or any other Person with an interest in a Lot or the Project shall be entitled to any such credits or benefits.

**Section 4.6 Enforcement.** The requirements of this Article can be enforced by the County, by Declarant (during the Declarant Control Period) and/or by the Board. To ensure that the requirements of the Affordable Housing Agreement (including the "Developer's" obligations thereunder) are satisfied with respect to Dwelling Units developed, sold or rented on an Owner's Lot, Declarant, by and on behalf of itself, its designee or the Board, shall have the right to withhold any approvals or consents from the Lot Owner, to assess Special Assessments against the Owner and the Owner's Lot, to require that certain actions by the Lot Owner be discontinued and/or to require that certain actions be taken by the Lot Owner.

## ARTICLE 5 USE RESTRICTIONS

The Property shall be used in accordance with the covenants, conditions, restrictions and easements set forth in this Declaration, any Supplemental Declaration, the Association Rules and the Design Guidelines. Nothing herein shall restrict or limit any Supplemental Declaration, the Association Rules or the Design Guidelines from imposing stricter or further standards than those contained in this Declaration upon any one or more Subdistricts or Subdistrict Associations.

**Section 5.1 Activities of Declarant or ML100.** This Article 5 shall not apply to: (a) any activity conducted by or on behalf of Declarant or ML100 in connection with development or sale of the Project or development, construction, promotion, marketing, sale or leasing of any Lot, Subdistrict Unit, Dwelling Unit or any other portion of the Property; or (b) any activity conducted by or on behalf of the Association in connection with its ownership of the Association Property, or any interest therein, or its operation, use and/or maintenance of the Common Area in accordance with this Declaration.

**Section 5.2 Hazardous Materials.** Each Owner and Occupant shall comply with all federal, state and local statutes, regulations, ordinances, and other rules intended to protect the public health and welfare as related to land, water, groundwater, air or other aspects of the natural environment (the "**Environmental Laws**"). The Environmental Laws shall include, but are not limited to, those laws regulating the use, generation, storage or disposal of Hazardous Materials. No Owner shall knowingly use, generate, manufacture, store, release, dispose of or knowingly permit to exist in, on, under or about any Lot or Subdistrict Unit, any Common Area or any portion of the Property, or transport to or from any portion of the Property any Hazardous Materials except in compliance with the Environmental Laws.

**Section 5.3 Precautions Relating to Proximity of Closed Waikapu Landfill.** Pursuant to the requirements of the Land Use Commission Decision with regard to that part of the Project that is adjacent to the County's closed Waikapu landfill (the "**Landfill**"):

(a) There is hereby designated a residential buffer of 300 feet from the boundary of the Landfill (the "**Landfill Buffer Area**"). Within the Landfill Buffer Area, residential use is not permitted. As such, notwithstanding anything to the contrary contained in this Declaration, no portion of Lots 11, 12, 13, 14, 15, or 16 that falls within the Landfill Buffer Area shall be used for residential purposes; provided, however, that those portions of Lots 11, 12, 13, 14, 15 or 16 that do not fall within the Landfill Buffer Area can be used for residential purposes. (It is anticipated that the portion of the Landfill Buffer Area that affects those Lots is or will be shown on their respective Plot Plans (defined below).) As an example, subject to applicable requirements and restrictions, a Dwelling Unit may be able to be constructed on the portion of those Lots that is not within the Landfill Buffer Area, while a commercial building may be able to be constructed on the portion of those Lots that is within the Landfill Buffer Area.

(b) To mitigate the potential of combustible gas migration to the Project, Declarant has installed, or will install, gas monitoring wells along the property line of the Project adjacent to the Landfill. The Association will be required to conduct periodic inspections of the area and the findings of those inspections shall be reported to the appropriate County agency and to the State Department of Health (the "**DOH**"). The frequency of the Association's inspections shall be as directed by the appropriate County agency and the DOH.

(c) A 30-foot wide easement (the "**Landfill Easement**") has been designated and is hereby reserved within the southern boundary of the Project (where it abuts the Landfill). The easement has been granted to the County to ensure that the County may appropriately monitor the northern boundary of the Landfill for settlement, runoff, maintenance, and other purposes related to health and safety. Such access is meant to permit the movement of emergency or other vehicles by the County as the need may arise and may also serve to accept and appropriately contain any runoff from the Landfill. Development of Lots and Subdistrict Units that are affected by the Landfill Easement must allow for such access and runoff.

(d) By taking title to a Lot or Subdistrict Unit, each Owner is deemed to have agreed to, and the Association shall, immediately report to the State of Hawaii Land Use Commission, the DOH and the County any instances where the integrity of the boundary between the Project and the Landfill has been compromised.

(e) By taking title to a Lot or Subdistrict Unit, each Owner is deemed to have agreed that (1) the adjacent property is a closed landfill, and (2) any construction or activity within the Project that would compromise the integrity of the Landfill's cap or permit air or water to access the Landfill is prohibited.

(f) The Association shall be responsible for meeting certain requirements relating to the Landfill, including fulfilling Declarant's obligations under the Landfill Right of Entry.

**Section 5.4 Archaeological Features.** Each Lot affected by any Archaeological Features shall be owned, occupied and used subject to any and all rights and restrictions duly relating or appertaining to such Archaeological Features, including such maintenance and preservation as may be applicable, and the reserved rights of Declarant, ML100 and Maui Lani Partners relating thereto. Such reserved rights include the right to negotiate with the County, the State and other appropriate entities to designate easements for access, use, and maintenance relating to the Archaeological Features, and to convey such easements to the County, the State or the Association. Owners of Lots subject to Archaeological Features shall be responsible for compliance with restrictions and requirements, and fulfilling obligations, relating to the Archaeological Features, including any archaeological treatment plan required by the State or the County.

**Section 5.5 Vehicles, Parking and Traffic.** Vehicular and pedestrian traffic within the Project and parking on the Roads or otherwise within the Project shall be subject in all respects to (and all Owners and Occupants must abide by) the applicable terms and provisions of this Declaration, the Parking Ordinance and the Association Rules (which shall include any separate or additional parking and traffic rules and regulations), including the following:

(a) Declarant (during the Declarant Control Period) and the Association (via the Board) shall each have the right to enact, adopt, promulgate, administer, enforce and amend rules and regulations governing parking and vehicular and pedestrian traffic within the Project, provided the same are not in conflict with the Parking Ordinance. Among other things, such rules and regulations may include reasonable use restrictions, safety measures and speed limits on the Roads.

(b) Parking and traffic rules and regulations may be promulgated in writing and made available to Owners or they may be promulgated through the erection of signage along the Roads and elsewhere within the Project. The parking and traffic rules and regulations may be changed at any time and from time to time without prior notice.

(c) The Board or the Manager may remove, or cause to be removed, at the expense of the Owner thereof, any vehicle that is parked or otherwise used in violation of this Declaration, the Parking Ordinance, the Association Rules, any applicable law or any permit issued for such vehicle.

(d) Parking within the Roadways and such other parts of the Project (other than Lots and Subdistrict Units not owned by Declarant, ML100 or the Association) shall be on a first-come-first-served basis and is only allowed within parking stalls that have been marked and/or identified by or on behalf of Declarant or the Board.

(e) Subject to the parking restrictions set forth in this Declaration, the Parking Ordinance, the Association Rules or any applicable law, and subject to the Board's right to regulate, restrict and/or prohibit long-term or overnight parking in certain areas, in certain parking stalls and at certain dates or times, a vehicle shall be allowed to remain in a particular parking stall for no longer than 72 consecutive hours (i.e., three full days).

(f) Only one vehicle is allowed to park in a parking stall at a time.

(g) Each vehicle must be parked entirely within the marked parking stall. If a vehicle does not fit entirely within a parking stall, then it is not allowed to park on the Roadway and it must be parked entirely within the Lot or Subdistrict Unit that its operator is occupying, visiting or otherwise using.

(h) In special, limited circumstances, the Board and the Manager shall each have the right, at their discretion, to issue permits that allow for temporary variances from the parking rules and regulations set forth in this Declaration and/or the Association Rules. A variance may, for example, allow an operator of a large delivery truck that does not fit entirely within a marked parking stall to temporarily park the truck within two adjacent marked parking stalls.

(i) Before a vehicle that is used in connection with the construction of Improvements on a Lot or Subdistrict Unit can park within the Roadways (even within a marked parking stall), the operator of the vehicle must obtain a parking permit from Declarant, the Board or the Manager. The parking permit shall set out the terms and conditions for parking the vehicle within the Roadways and shall be displayed on the driver-side dashboard of the vehicle at all times.

(j) Vehicles that are used in connection with the construction of Improvements on a Lot or Subdistrict Unit shall not be allowed in areas of the Project that will or might result in a nuisance to Owners and Occupants. The Board and the Manager shall each have the discretion to determine whether a vehicle is or will be a nuisance to Owners and Occupants.

(k) No boats, trailers, commercial buses, motor homes, campers or other recreational vehicles shall be parked or stored in or upon any of the Roadways.

**Section 5.6 Restriction on Further Subdivision, Consolidation.** Except as otherwise specifically permitted by this Declaration, no Lot, Subdistrict Unit or Dwelling Unit shall be further subdivided or separated into smaller lots or dwelling units by any Owner, and no portion less than all of any such Lot, Subdistrict Unit or Dwelling Unit, nor any easement or other interest therein, shall be conveyed or transferred by any Owner, without the prior written consent of the Board, which consent must be evidenced on the map, plan or other instrument creating the subdivision, easement or other interest. Lots or Subdistrict Units that are contiguous to one another may be combined by all Owners of such Lots or Subdistrict Units into a single Lot or Subdistrict Unit, but only with the prior written consent of the County and Declarant (during the Declarant Control Period) or the Board (after the Declarant Control Period); provided, however, that any such combination of Lots or Subdistrict Units shall not reduce or alter the voting rights obtained by ownership of each Lot or Subdistrict Unit nor shall it reduce or otherwise alter the amount that would have been assessed against the Owner of such Lots or Subdistrict Units pursuant to the terms hereof in the absence of combination. The Owner of such Lots or Subdistrict Units will be entitled to the rights of Membership in the Association for each such Lot or Subdistrict Unit, in accordance with the provisions of Section 7.1. The Assessments attributable to each of the former separate Lots or Subdistrict Units shall be attributable to the entire combination of Lots or Subdistrict Units and the entire combination shall be subject to the Assessment Lien.

**Section 5.7 Property Restrictions.** Except as otherwise specifically permitted by this Declaration, no covenants, conditions, restrictions, easements, Condominium Documents, or similar instruments (each an "**Additional Restriction**") shall be Recorded by any Owner or other Person (except Declarant or ML100) against any Lot or Subdistrict Unit without the prior written consent (or deemed consent) of Declarant (during the Declarant Control Period) or the Board (after the Declarant Control Period), which consent may be withheld, granted or conditioned in the sole and absolute discretion of Declarant or the Board, as applicable. Any such Additional Restriction Recorded without Declarant's or the Board's (as applicable) consent (or deemed consent) being referenced thereon shall be null and void. If Declarant or the Board (as applicable) does not send a written response (in the form of either a consent, a consent with conditions, or a rejection) to an Owner's written request for consent of the Additional Restriction within 20 days after Declarant or the Board (as applicable) receives the Owner's written request, then Declarant or the Board (as applicable) shall be deemed to have consented to the

Additional Restriction. By consenting to the Additional Restriction, neither Declarant, the Board, nor the Association, nor any member, officer, or director thereof, assumes or shall have any liability or responsibility therefor. In making its decision on a request for consent to an Additional Restriction, Declarant or the Board (as applicable) shall have the right to consider, among other things, how the Additional Restriction will or may affect the allocation of voting rights and Assessment obligations, including whether the Voting/Assessment Ratio for the Lot or Subdistrict Unit, as impacted by the Additional Restriction, can be properly determined pursuant to **Exhibit "E"** or whether the Voting/Assessment Ratio for the Lot or Subdistrict Unit must be re-determined to account for the Voting/Assessment Ratio.

**Section 5.8 No Application to Declarant or ML100.** Unless Declarant or ML100 specifically elect otherwise in writing, the provisions of Section 5.5 shall not apply to Declarant or ML100. Unless Declarant or ML100 specifically elect otherwise in writing, the provisions of Sections 5.6 and 5.7 shall not apply to Lots or Subdistrict Units owned by Declarant or ML100, nor shall they in any way prohibit, restrict or otherwise limit Declarant or ML100 from subdividing, separating, consolidating or resubdividing any Lot or Subdistrict Unit or any other property at any time owned by Declarant or ML100, or from Recording Condominium Documents thereon, or from otherwise acting pursuant to rights reserved to Declarant or ML100 in the Project Documents.

**Section 5.9 Rezoning.** No applications for general plan changes, rezoning, variances, special permits, use permits or the like affecting any Lot or Subdistrict Unit shall be filed with any governmental authority unless (a) the proposed use of the Lot or Subdistrict Unit has first been approved by a Super-Majority of the Board, a Super-Majority of the Class "A" Members and, until expiration of the Declarant Control Period, Declarant, and (b) the proposed use otherwise complies with this Declaration and any applicable Supplemental Declaration. This provision shall not in any way prohibit, restrict or otherwise limit the right of Declarant or ML100 to apply for, prosecute and receive general plan changes, rezoning and/or reclassification of any portion of the Property then owned by Declarant or ML100, or to apply for, prosecute and receive variances, special permits or use permits relating to such property.

**Section 5.10 Uses Generally.**

(a) **Permitted Uses.** Subject to subsection (b) below and restrictions set forth in the VMX Ordinance, each Lot and Subdistrict Unit shall at all times be occupied and used only for one or more of the Permitted Uses set forth in **Exhibit "F"**.

(b) **Prohibited Uses.** Notwithstanding anything to the contrary contained in this Declaration (except subsection (c) below), any applicable Supplemental Declaration, the VMX Ordinance, or any other land use ordinance, no Lot or Subdistrict Unit shall be occupied or used for any of the Prohibited Uses set forth in **Exhibit "F"**. If there is a conflict between the uses permitted under the VMX Ordinance or **Exhibit "F"** and the uses prohibited under **Exhibit "F"**, then the prohibitions under **Exhibit "F"** shall control.

(c) **Other Permitted Uses.** Notwithstanding subsection (b) above, upon obtaining the vote and/or written consent of a Super-Majority of the Board, a Super-Majority of the Class "A" Members and, until expiration of the Declarant Control Period, Declarant, a specific Lot or Subdistrict Unit can be occupied and used for a use that is permitted under the VMX Ordinance but is otherwise prohibited under **Exhibit "F"**, subject, however, to any and all restrictions that may be placed on such occupation and use by Declarant, the Board and/or the Class "A" Members. All such other uses must comply with applicable land use ordinances and other governmental laws and regulations.

(d) **Other Prohibited Uses.** Notwithstanding anything to the contrary contained in this Section or elsewhere in this Declaration, upon obtaining the vote and/or written consent of a Super-Majority of the Board and, until expiration of the Declarant Control Period, Declarant, the Board and, if applicable, Declarant shall have the right to amend **Exhibit "F"** to add additional Prohibited Uses to the Project; provided, however, that such amendment shall not take effect until 30 days after a general notice of such additional Prohibited Use has been sent to the Owners; and provided further, however, that such

additional Prohibited Use shall not apply to the Lot or Subdistrict Unit of a then-existing Owner who has, prior to the effective date of the amendment, given notice to the Board and, until expiration of the Declarant Control Period, Declarant that such Owner intends that such Owner's Lot or Subdistrict Unit shall be used for the additional Prohibited Use, which, but for the amendment to **Exhibit "F"**, would have been a Permitted Use.

**Section 5.11 Notice of Use and of Change in Use.** Before any part of a Lot or Subdistrict Unit is used for a commercial purpose, the Owner or Occupant of the Lot or Subdistrict Unit must notify Declarant (during the Declarant Control Period) and either the Board or the Managing Agent in writing of the type of business that the Owner or the Occupant intends to operate on the Lot or Subdistrict Unit. At least 30 days before a change takes place in the type of business that will be operated on a Lot or Subdistrict Unit, the Owner or Occupant of the Lot or Subdistrict Unit must notify Declarant (during the Declarant Control Period) and either the Board or the Managing Agent in writing of the change and inform such parties of the type of business that the Owner or the Occupant intends to operate on the Lot or Subdistrict Unit.

**Section 5.12 Covenants, Conditions, Restrictions and Easements Applicable to Lots and Subdistrict Units.** Subject to Declarant's rights as outlined in this Declaration, including but not limited to Sections 5.1, 5.9, 9.13, and Articles 10 and 11, the following covenants, conditions, restrictions and reservations of easements and rights shall apply to all Lots and Subdistrict Units, the Owners thereof, and all Occupants, except those Lots and Subdistrict Units owned by Declarant or ML100, and except to the extent the provisions of a Supplemental Declaration may be more restrictive, in which event the Supplemental Declaration shall control as to the portion of the Property covered by the Supplemental Declaration:

(a) **Single-Family Use.** Each Dwelling Unit shall be constructed and occupied for, and devoted exclusively to, Single-Family residential use. Notwithstanding the foregoing, upon prior written approval from the Board, a gainful occupation, profession, trade or other non-residential use may be conducted in a Dwelling Unit, provided such use is consistent with applicable State of Hawaii and/or County laws and regulations. The Board, in its sole discretion, shall have the right to determine whether the practice of such occupation, profession, trade or other non-residential use constitutes, or will constitute, an unreasonable annoyance or nuisance that would prevent such use.

(b) **Roadway Landscape Easement Area.** No Owner or Occupant of a Lot or Subdistrict Unit for which the Roadway Landscape Easement Area is maintained by the Association pursuant to this Declaration shall landscape or plant in the Roadway Landscape Easement Area or otherwise interfere with the landscaping and maintenance of such landscaping as performed by the Association. No such Owner or Occupant shall interfere in any manner with the proper and effective operation of the irrigation facilities, if any, located in or on the Roadway Landscape Easement Area, including any automatic or electric timer system(s) associated with such facilities.

(c) **Garages.** No garage shall be used for other than the parking of trailers, transportation vehicles or recreational vehicles, provided, however, that a garage may be used for laundry, storage purposes or minor repairs not otherwise prohibited, so long as such use is not visible from any sidewalk or Road. No garage shall be used for living, cooking or sleeping purposes. In Commercial Use Units, garages may be used for commercial purposes as permitted by Supplemental Declaration or as approved in writing by the Board.

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

(e) **Signs.** No sign of any kind shall be displayed to the public view or from any Lot or Subdistrict Unit unless it complies and has been approved in accordance with the Design Guidelines. This restriction shall not apply to: (1) such signs as may be used by Declarant or ML100 in connection

with the development and sale or leasing of Lots, Subdistrict Units or other property in the Project; (2) such signs as may be required by legal proceedings, or the prohibition of which is precluded by law; and (3) such signs, as may be approved by Declarant or the Board, as may be required for traffic and parking control and regulation of Roadways or Common Area. Notwithstanding the above, Declarant and ML100 may post any and all signs that each, in its sole discretion, deems necessary. Such activities of Declarant and ML100 shall not be considered a nuisance or otherwise prohibited by this Declaration.

(f) **Animals.** No animals, including, without limitation, horses or other domestic farm animals, pigeons, or poultry of any kind, may be kept, bred or maintained in or on any Dwelling Unit or Common Area, except that a reasonable number of commonly accepted household pets may be kept in a Dwelling Unit in accordance with the Association Rules. In no event shall any pet or other animal be allowed to run free away from its owner's Lot or Subdistrict Unit without a leash, or conduct itself so as to create an unreasonable annoyance. The Board may require the removal of any animal that is permitted to roam free, or any animal that the Board, in its sole discretion, determines endangers the health, makes objectionable noises or odors, or otherwise constitutes a nuisance to the Project. Animal owners are responsible for the immediate and proper removal and disposal of all fecal matter of animals and are responsible for any damage to Common Area caused by their animals. This provision shall not prevent Lots or Subdistrict Units that are used for commercial purposes and that are not Dwelling Units from being used for Permitted Uses that involve the keeping of animals.

(g) **Nuisances; Construction Activities.** No Owner shall permit or suffer anything to be done or kept about or within such Owner's Lot or Subdistrict Unit, or on or about the Property, that will obstruct or interfere with the rights and enjoyment of other Owners or Occupants, or annoy them by unreasonable noises, sights, smells or otherwise, nor shall an Owner commit or permit any nuisance or commit or suffer any illegal act to be committed therein or thereabout. Each Owner shall comply with, and shall ensure its Lot's or Subdistrict Unit's compliance with, this Declaration, the Association Rules and the requirements of all health authorities and other governmental authorities having jurisdiction over the Property. The activities of Declarant and ML100 shall not be considered a nuisance or otherwise prohibited by this Declaration. Additionally, normal construction activities in connection with the building of Improvements on a Lot or Subdistrict Unit shall not be considered a nuisance or otherwise prohibited by this Declaration, but all Lots and Subdistrict Units shall be kept in a neat and tidy condition during construction periods, trash and debris shall not be permitted to accumulate. In addition, any construction equipment and building materials stored or kept on or in any Lot or Subdistrict Unit during construction of Improvements may be kept only in areas approved by the Design Review Committee, which also may require screening of the storage areas. Subject to the allowances set forth in this Declaration, the Board, in its sole discretion, shall have the right to determine the existence of any unreasonable annoyance or nuisance. Parking for construction vehicles shall be subject to the restrictions on parking described in Section 5.5 of this Declaration.

(h) **Offensive Activity.** No Lot or Subdistrict Unit shall be used, in whole or in part, for the storage of any property or thing that will cause such Lot or Subdistrict Unit to appear to be in an unclean, untidy or unsightly condition. No substance, thing, or material shall be kept upon or within any Lot or Subdistrict Unit that will emit foul or obnoxious odors or that will cause any noise or other condition that will or might disturb the peace, quiet, safety, or comfort of the occupants of surrounding property. No noxious or offensive activity shall be conducted upon or within any Lot or Subdistrict Unit, nor shall anything be done thereon tending to cause embarrassment, discomfort, annoyance, or nuisance to any Person using any property adjacent to or in the vicinity of the Lot or Subdistrict Unit. Subject to the allowances set forth in this Declaration, the Board, in its sole discretion, shall have the right to determine the existence of any unreasonable annoyance or nuisance.

(i) **Unsafe, Unsightly or Unkempt Conditions.** Each Lot and Subdistrict Unit shall be kept and maintained at all times in a safe, neat, sanitary and sound condition. It shall be the responsibility of each Owner to prevent the development of any unsafe, unclean, unhealthy, unsightly, or unkempt condition on such Owner's Lot or Subdistrict Unit. The pursuit of hobbies or other activities, including, without limitation, the assembly and disassembly of motor vehicles and other mechanical devices, which tend to cause disorderly, unsightly, or unkempt conditions, shall not be pursued or



undertaken on any part of a Lot or Subdistrict Unit that is visible from outside of such Lot or Subdistrict Unit. The disassembly and assembly of motor vehicles to perform repair work shall be permitted provided such activities are either conducted entirely within an enclosed garage or are otherwise not visible from outside of the Lot or Subdistrict Unit. No Owner or Occupant shall dump grass clippings, leaves or other debris on any portion of the Property, including, but not limited to, any drainage ditch, storm sewer, stream, or pond within the Project (but such limitation shall not bar Owners or Occupants from leaving properly bagged or bundled cut vegetation or bulky items for scheduled pick up by governmental or other agencies, in accordance with applicable regulations or standards, or from placing clippings on their own Lot or Subdistrict Unit as mulch).

(j) **Repair of Improvements.**

(1) No Improvement on any Lot or Subdistrict Unit shall be permitted to fall into disrepair and each Improvement shall at all times be kept in good condition and repair and adequately painted or otherwise finished.

(2) If a building or other Improvement on a Lot or Subdistrict Unit is partially damaged or destroyed, resulting in less than total destruction of such building or Improvement, then the Owner shall proceed promptly to repair or to reconstruct the damaged Improvements in accordance and consistent with the provisions and requirements of this Declaration. Pending such repair or reconstruction of the Improvement, the Lot or Subdistrict Unit upon which such Improvement was located shall be restored to a presentable and safe condition, with landscaping, grass or other acceptable ground cover. Subject to the requirements and approvals set forth in the Project Documents, damaged Improvements shall be repaired within a reasonable period of time.

(3) If a building or Improvement is totally destroyed and the Owner determines to rebuild or reconstruct, then such rebuilding and reconstruction shall take place within a reasonable period of time, subject to the requirements and approvals set forth in the Project Documents. Pending such rebuilding or reconstruction, the Lot or Subdistrict Unit upon which such Improvement was located shall be restored to a presentable and safe condition, with landscaping, grass or other acceptable ground cover.

(4) If a building or Improvement is totally destroyed and the Owner determines not to rebuild or to reconstruct, then the affected Lot or Subdistrict Unit shall be immediately cleared of all debris and restored to a presentable and safe condition, with landscaping, grass or other acceptable ground cover.

(5) The Board or the DRC may impose more stringent requirements regarding the standards for rebuilding or reconstructing Improvements on a Lot or Subdistrict Unit and regarding the standards for restoring the Lot or Subdistrict Unit to a presentable and safe condition. Additional Recorded covenants applicable to any Subdistrict may also impose more stringent requirements with respect to Lots or Subdistrict Units within the Subdistrict.

(k) **Lights.** The use of lights or lighting that can be seen or otherwise detected from outside of a Lot or Subdistrict Unit shall be subject to the terms and conditions of the Design Guidelines.

(l) **Garbage.** No garbage or trash shall be kept, maintained or contained in any Lot or Subdistrict Unit so as to create a strong or offensive odor or be visible from another Lot or Subdistrict Unit or the Roads, except temporarily and in containers approved by the Board for pickup. No incinerators shall be kept or maintained in any Lot or Subdistrict Unit. No refuse pile, garbage or unsightly objects shall be allowed to be placed, accumulated or suffered to remain anywhere on a Lot or Subdistrict Unit, provided that non-commercial, non-odoriferous, contained and reasonably concealed composting and mulching shall be permitted.

(m) **Drilling/Mining.** No Lot or Subdistrict Unit shall be used in any manner to explore for or remove any water, oil or other hydrocarbons or minerals of any kind or earth substance of

any kind. Nothing herein shall prohibit or restrict Declarant or ML100 or any other owner or operator of a water system serving the Property with Declarant's approval from exploring and drilling for, pumping and removing water from the Property, or the installation and operation of water wells by Declarant or ML100.

(n) **Fires.** Other than barbecues in properly constructed barbecue pits or grills, and fire pits in compliance with the Association Rules and the Design Guidelines, or as otherwise expressly permitted in the Association Rules or by the Board, no open fires shall be permitted on Lots or Subdistrict Units.

(o) **Drainage.** No Owner shall erect, construct, maintain, permit or allow any fence or other Improvement or other obstruction that would interrupt the existing drainage of the land. For the purpose hereof, "existing" drainage is defined as the drainage that exists at the time the Lot or Subdistrict Unit is conveyed to an Owner by Declarant or ML100, or later grading changes that are shown on plans approved by the Design Review Committee. The existing drainage may include drainage from Common Area or other property across any Lot or Subdistrict Unit. Each Owner shall maintain the drainage system, if any, constructed or otherwise in place with the Lot or Subdistrict Unit upon its conveyance to an Owner by Declarant or ML100. Each Owner shall be solely responsible for all surface water escaping the Owner's Lot or Subdistrict Unit and any and all damages resulting therefrom. This Section shall not be deemed to restrict or otherwise affect rights reserved to Declarant or ML100 to alter or change drainage patterns within or upon the Property.

(p) **Rental of Lots or Subdistrict Units.** An Owner who leases or otherwise grants occupancy rights to such Owner's Lot or Subdistrict Unit to other Persons shall be responsible for assuring compliance by the Occupant and other Persons with all of the provisions of the Project Documents, as they may be amended and supplemented from time to time, and shall be jointly and severally responsible for any violations by such Occupants and other Persons.

(q) **Temporary Occupancy and Temporary Buildings.** No trailer, basement of any incomplete building, tent, shack, or garage, and no temporary buildings or structures of any kind, shall be used at any time for a residence, either temporary or permanent. Temporary buildings or structures used during the construction of Improvements on any property shall be removed immediately after the completion of construction.

(r) **Landscaping and Maintenance.** Except as otherwise provided in this Declaration with respect to both the Roadway Landscape Easement Area and the area of the Drainage Easements, as defined in Section 12.1, which are to be maintained by the Association, each Owner shall install and keep all appropriate areas of the Lot or Subdistrict Unit (including front yards, side yards, sidewalks, gutters and setback areas) landscaped, shall keep all shrubs, trees, hedges, grass and plantings of every kind located on such Owner's Lot or Subdistrict Unit (including front yards, side yards and setback areas) neatly trimmed, shall keep all such areas properly cultivated and free of trash, weeds and other unsightly material and shall maintain all paved and concrete areas, including driveways and parking areas, in good condition and repair. No trees planted by Declarant shall be removed, replaced or relocated without the prior written consent of Declarant or the Board. Each Owner shall be responsible for the proper maintenance and care of any trees planted on such Owner's Lot or Subdistrict Unit.

(s) **Diseases and Insects.** No Owner shall permit any thing or condition to exist upon any Lot or Subdistrict Unit that would or might induce, breed or harbor infectious plant diseases or noxious insects, rodents or other pests.

(t) **Clotheslines, Tanks, Etc.** All clotheslines, dumpsters, above-ground tanks, and other similar items shall be located or screened so as to be concealed from view from any other Lot, Subdistrict Unit or adjacent Roadway.

(u) **Guns, Projectiles and Fireworks.** The discharge of firearms, including blanks, other projectiles, and fireworks within the Property is prohibited. The term "firearms" includes, but is not limited to, "B-B" guns, pellet guns, and other firearms of all types, regardless of size. The term

"projectiles" includes, but is not limited to, sling shots, arrows, and aerial fireworks, regardless of size. The use of even non-aerial fireworks is prohibited within the Property.

(v) **Advertising.** No Owner or Occupant shall employ an aural advertising medium that can be heard outside of the Lot or Subdistrict Unit, including, without limiting the generality of the foregoing, loudspeakers, phonographs, compact disc players, radios, or television. No Owner or Occupant shall distribute, or cause to be distributed, any handbills, flyers, informational material or other advertising device in the Common Area or other parts of the Property, including parked vehicles, or on any sidewalks, walkways or streets within or adjacent to the Project, unless approved by the Board.

(w) **Energy Conservation Equipment.** No solar energy collector panels, photovoltaic panels or attendant hardware or other energy conservation equipment visible from outside the Lot or Subdistrict Unit shall be constructed or installed unless it is installed by Declarant or ML100 or unless it is approved by the Design Review Committee.

(x) **Excavation.** No excavation shall be made except in connection with Improvements approved as provided in this Declaration. For purposes of this Section, "excavation" shall mean any disturbance of the surface of the land (except to the extent reasonably necessary for approved landscape planting) that results in a disturbance of earth, rock, or other substance by removal or fill of more than 12 inches below or above, respectively, the natural surface of the land.

(y) **Continuity of Construction.** All Improvements commenced on any Lot or Subdistrict Unit shall be prosecuted diligently to completion, pursuant to the applicable Design Guidelines.

(z) **Effect on Use of Commercial Use Units.** Anything in this Section or in this Declaration to the contrary notwithstanding, nothing shall limit or otherwise affect the right and ability of the Owners and Occupants of a Commercial Use Unit from using the Commercial Use Unit for a Permitted Use. For example purposes only, even though this Declaration prohibits a use or activity that is offensive, if the Board determines that the noise emanating from and associated with a music store operated in a Commercial Use Unit is offensive, the Board shall, nevertheless, not have the right to prohibit the operation of that music store in the Commercial Use Unit if such use is a Permitted Use, provided that the Board or the DRC shall have the right to require reasonable and appropriate measures to mitigate the negative effects of a Permitted Use of a Lot or Subdistrict Unit.

(aa) **Setbacks.** The minimum building setbacks set forth in the VMX Ordinance and other applicable laws shall be adhered to.

**Section 5.13 Implementation and Variances.** The Board may implement and enforce the covenants, conditions and restrictions set forth in this Article 5 or otherwise restrict and regulate the use and occupancy of the Property and Lots and Subdistrict Units by reasonable rules and regulations of general or specific application adopted by the Board from time to time, which shall be incorporated into the Association Rules. The Board or the DRC may, at its option and in extenuating circumstances, grant variances from the restrictions set forth in this Article 5 or in any Supplemental Declaration if the Board determines, in its discretion, (a) either (1) that a restriction would create a substantial hardship or burden on an Owner or Occupant, or (2) that a change of circumstances since the Recordation of this Declaration has rendered such restriction obsolete, and (b) that the activity permitted under the variance, in the reasonable opinion of the Board, will not have any substantial adverse effect on the Owners and Occupants of the Project and is consistent with the quality of life intended for Owners and Occupants in the Project.

**Section 5.14 Amendment of Article.** Prior to expiration of the Declarant Control Period, no part of this Article 5 may be amended without Declarant's written consent and joinder.

## **ARTICLE 6 THE ASSOCIATION**

**Section 6.1 Purpose of the Association.** The Association has been, or will be, established and/or incorporated as a non-profit corporation, a limited liability company or an unincorporated association, to serve as the governing body for the Project for the protection, improvement, alteration, maintenance, repair, replacement, administration and operation of the Property, the assessment of expenses, payment of losses, disposition of casualty insurance proceeds, and other matters as provided in the Project Documents. The Association shall not be deemed to be conducting a business of any kind, and all funds received by the Association shall be held and applied by it for the benefit of the Owners in accordance with the provisions of the Project Documents.

**Section 6.2 Duties, Powers and Authority of the Association.** The Association shall have all of the duties and powers set forth in the Project Documents, together with those powers of a non-profit corporation granted under the laws of the State of Hawaii, subject, however, to such limitations upon the exercise of such powers as are expressly set forth in this Declaration, the Articles, or the Bylaws. The Association shall have the power to do any and all lawful things that may be authorized, required or permitted to be done under and by virtue of the Project Documents and applicable law, and to do and perform any and all acts that are not inconsistent with the provisions of this Declaration and are necessary, desirable or convenient in furtherance of the purposes set forth or contemplated in or by the Project Documents. The Association may also exercise any other right or privilege reasonably implied from the existence of any right or privilege given to it or reasonably necessary to effectuate any such right or privilege. Without in any way limiting the foregoing, the Association and the Board shall have the specific duties, powers and authority set forth in this Article 6.

**Section 6.3 Articles and Bylaws.** The Association and its directors, officers, employees, agents and Members shall have such rights and powers as are set forth in the Articles and/or Bylaws that are not inconsistent with law or this Declaration. After incorporation or establishment of the Association, a copy of the Articles and Bylaws shall be available for inspection at the office of the Association during reasonable business hours.

**Section 6.4 Declarant's Control of the Association.**

(a) Notwithstanding anything in this Declaration to the contrary, at all times during the Declarant Control Period, Declarant shall have and maintain absolute control over the Association, including, without limitation, the right to: adopt and/or amend the Articles; adopt and/or amend the Bylaws; adopt and/or amend the Association Rules; adopt and/or amend the Design Guidelines; appoint or elect all or certain members of the Board; and appoint or elect all or certain members of the Design Review Committee, without the consent or joinder of the Association or any Member. Except as otherwise provided in the Bylaws or agreed to by Declarant, during the Declarant Control Period, only Declarant will be entitled to cast any vote with respect to the appointment, election or removal of directors or members of the DRC.

(b) The "**Declarant Control Period**" commenced upon the Recording of this Declaration and shall expire upon the first to occur of the following: (1) when one hundred percent (100%) of the Property in the Project has been conveyed to Persons other than Declarant, ML100 or developers holding title solely for the purpose of development and sale; (2) such date as Declarant, in its sole discretion, declares in a Recorded instrument that the Declarant Control Period will terminate and that the Class "A" Members shall assume control of the Association; or (3) December 31, 2035.

(c) Notwithstanding the foregoing, prior to the end of the Declarant Control Period, Declarant may, by declaration in a Recorded Supplemental Declaration, relinquish to or share with Class "A" Members, the Association, the Board or others all or portions of Declarant's rights to control the Association without otherwise accelerating the expiration of the Declarant Control Period. In such case, all rights under this Declaration reserved to Declarant during the Declarant Control Period shall continue in full force and effect, except as is specifically and exclusively granted to the Class "A" Members, the

Association, the Board or others in such Supplemental Declaration. In the event Declarant relinquishes or shares partial or complete control of the Association pursuant to this Section, Declarant shall, except to the extent expressly waived by Declarant in writing, automatically and without further action, reserve the right of prior written approval of certain actions by the Board including, without limitation, the following: (1) any action that increases Assessments on property owned by Declarant or ML100 or imposes a Special Assessment on property owned by Declarant or ML100; and (2) any action that, in Declarant's opinion, impairs or restricts (A) Declarant's or ML100's ability to develop and market property within the Project or the Maui Lani community, (B) the operation of any part of the Project or other projects developed by Declarant or any of the Declarant-Related Entities, or in which any of them have an interest, or (C) any rights or reservations of Declarant or ML100 under the Project Documents. Declarant may reserve such further rights as Declarant, in its sole discretion, may specify in the instrument of partial or complete relinquishment or sharing, including, without limitation, (X) the right of prior written approval of proposed amendments to the Project Documents; and (Y) the right to determine the size of the Board and the right to appoint one or more directors; and (Z) the right to rescind any partial or complete relinquishment or sharing of control during the Declarant Control Period.

**Section 6.5 Board of Directors and Officers.** The affairs of the Association shall be conducted by the Board and such officers as the Board may elect or appoint in accordance with the Articles and/or the Bylaws, as the same may be amended from time to time. Subject to the provisions of Section 6.4, the number, term, election and qualifications of the Board shall be as set forth in the Bylaws. The Board may, by resolution, delegate portions of its authority to an executive committee or to other committees, to officers of the Association, to the Manager or to other agents and employees of the Association, but such delegation of authority shall not relieve the Board of the ultimate responsibility for management of the affairs of the Association. Action by or on behalf of the Association may be taken by the Board or any duly authorized executive committee, officer, agent or employee without a vote of the Class "A" Members, except as may be otherwise specifically provided in this Declaration.

**Section 6.6 Association Rules.** Declarant, on behalf of the Board, and the Board shall have the power and authority to adopt, amend or repeal such rules and regulations as it deems reasonable and appropriate (the "**Association Rules**"), effective upon adoption or at such later time as may be specified therein, and binding upon all Persons subject to this Declaration. The Association Rules may include the establishment of a system of fines and penalties adopted by the Board on behalf of the Association, which may be enforceable as Special Assessments. The Association Rules shall govern such matters in furtherance of the purposes of the Association, including, without limitation, the use and/or occupancy of the Common Area and any other part of the Property, including Lots and Subdistrict Units therein; provided, however, that the Association Rules may not discriminate among Owners except as expressly provided or permitted herein, and shall not be inconsistent with this Declaration, the Articles, Bylaws or the Design Guidelines. The Association Rules shall have the same force and effect as if they were set forth in and were part of this Declaration and shall be binding on the Owners and Occupants, and all other Persons having any interest in, or making any use of, the Property. The Association Rules shall be available at the principal office of the Association to each Owner or other Person reasonably entitled thereto, upon request. In the event of any conflict between any provision of the Association Rules and any provisions of this Declaration, or the Articles, Bylaws or Design Guidelines, the provisions of the Association Rules shall be deemed to be superseded by the provisions of this Declaration, the Articles, Bylaws or Design Guidelines to the extent of any such conflict.

**Section 6.7 Indemnification.** Every director and officer of the Association, every member of the Design Review Committee, Declarant (to the extent a claim may be brought against Declarant by reason of its appointment, removal or control over members of the Board or the Design Review Committee), and every other Person serving as an employee or direct agent of the Association, or on behalf of the Association as a member of a committee or otherwise, shall be indemnified by the Association to the fullest extent permitted by law, and, unless specifically limited in the Bylaws, against all expenses and liabilities. Such indemnity shall include, without limitation, attorneys' fees, reasonably incurred by or imposed upon such Person in connection with any proceeding to which such Person may be a party, or become involved, by reason of such Person being or having served in such capacity on behalf of the Association (or in the case of Declarant by reason of having appointed, removed or

controlled or failed to control members of the Board or the Design Review Committee), or any settlement thereof, whether or not such Person is a director, officer or member of the Design Review Committee or serving in such other specified capacity at the time such expenses are incurred. If required by law, the Articles or Bylaws, before any such indemnification, the Board shall determine, in good faith, whether such officer, director, member of the Design Review Committee or other Person, or Declarant is entitled to indemnification. The rights of indemnification shall be in addition to and not exclusive of all other rights to which such Persons may be entitled at law or otherwise. Without limiting the foregoing, the Association shall have the powers and duties of indemnification set forth in Hawaii Revised Statutes, Sections 414D-160 through 414D-165, as such statutes may be amended from time to time.

**Section 6.8 Non-Liability of Officials.** To the fullest extent permitted by law and unless specifically limited in the Bylaws, neither Declarant, ML100, the President, the Board, the Design Review Committee or any other committees of the Association or any member thereof, nor any directors or officers of the Association, shall be liable to any Member, Owner, Occupant, the Association or any other Person for any damage, loss or prejudice suffered or claimed on account of any decision, course of action, act, inaction, omission, error, negligence or the like made in good faith and which Declarant, ML100, the President, the Board, or such committees or Persons reasonably believed to be within the scope of their respective duties or authority.

**Section 6.9 Easements.** In addition and without limitation to the easements reserved or granted in Article 11 and elsewhere in this Declaration, the Association (via the Board) is authorized and empowered to grant over, upon, across or under real property owned or controlled by the Association such limited term or perpetual permits, licenses, easements and rights-of-way for sewer lines, drainage channels, water lines, underground conduits, storm drains, television cable and other similar public or private utility purposes, security lines, roadways or other purposes as may be reasonably necessary and appropriate for the orderly maintenance, preservation and enjoyment of the Common Area or for the preservation of the health, safety, convenience and welfare of the Owners and Occupants. For example, mailboxes, utility boxes, transformers, utility lines, manholes and other utility features (such as structural transformers and switching vaults) are placed throughout the Property and the authority and power described in this Section shall apply thereto. Additionally, a number of Lots and Subdistrict Units may be affected by landscaping or Sign Monument easements benefiting the Association and the authority and power described in this Section shall apply thereto.

**Section 6.10 Accounting.** The Association, at all times, shall keep, or cause to be kept, true and correct records of account in accordance with generally accepted accounting principles, which shall specify in reasonable detail all expenses incurred and funds accumulated from Assessments or otherwise.

**Section 6.11 Records.** The Association shall, upon reasonable written request and during reasonable business hours, make available for inspection by each Owner, Member and Mortgagee the books, records and financial statements of the Association, together with current copies, as amended from time to time, of this Declaration and the Articles, Bylaws, Association Rules and Design Guidelines. Except as required by applicable laws or regulations, Declarant and ML100 shall be under no obligation to make their own books and records available for inspection by any Owner, Member, Mortgagee or other Person. The books and records of the Association may be audited or unaudited as the Board from time to time may determine.

**Section 6.12 Manager or Managing Agent.** All or any of the powers, duties and rights of the Association or the Board, as provided by law, herein or the Bylaws, may be delegated to a Manager or Managing Agent hired by the Board or by Declarant. Any agreement for management, or any other contract providing for management or other such services to the Association, shall not exceed a term of three years, but the term may be renewed by agreement of the parties. Neither the Board nor Declarant shall be liable for any omission or improper exercise by a Manager of any power, duty or right delegated to the Manager by written instrument executed by or on behalf of the Association or the Board.

**Section 6.13 Powers of Association With Respect to Subdistricts.** The Association shall have the power, without obligation, to enforce any provisions benefiting the Association or the Members contained herein or in any Supplemental Declaration and to act as the arbiter of any dispute between two or more Subdistricts or Subdistrict Associations. If the Association elects to arbitrate any such dispute, such arbitration shall be mandatory and the decision of the Association, acting as arbiter, shall be final and binding on all parties.

(a) **Cooperation with Subdistrict Associations.** The Board shall assist any Subdistrict Association in the performance of its duties and obligations under their respective Supplemental Declarations and cooperate with each Subdistrict Association so that the Association and each Subdistrict Association can most efficiently and economically provide their respective services to Owners. It is contemplated that from time to time either the Association or a Subdistrict Association may use the services of the other in the furtherance of its obligations and they may contract with each other to better provide for such cooperation. The payment for such contract services or a variance in services provided may be reflected in an increased Assessment by the Association for the particular Subdistrict or by an item in the Subdistrict Association's budget that shall be collected through Subdistrict Assessments and remitted to the Association. If a Subdistrict Association fails, neglects or is unable to perform a duty or obligation required by its respective Supplemental Declaration or by this Declaration, then the Association, may, after reasonable notice and an opportunity to cure given to the Subdistrict Association, perform such duties or obligations until such time as the Subdistrict Association is able to resume such functions, and charge the Subdistrict Association the costs of performing such duties or functions plus a reasonable fee.

(b) **Delegation of Administration to Subdistrict Associations.** Notwithstanding anything to the contrary contained in this Declaration, the Board may delegate all or portions of the duties, rights, and responsibilities of the Design Review Committee to the Board of Directors of a Subdistrict Association (or its designee). Upon such delegation, the Board of the Subdistrict Association shall have the duties and responsibilities set out in the instruments of delegation.

**Section 6.14 Rights of Enforcement.** The Association (via the Board) and Declarant shall have the right to enforce the provisions of this Declaration and/or any and all covenants, restrictions, reservations, charges, servitudes, assessments, conditions, liens or easements provided for in any contract, deed, declaration, Supplemental Declaration or other instrument that: (a) has been executed pursuant to, or subject to, the provisions of this Declaration; or (b) indicates that the provisions of such instrument were intended to be enforced by the Association or by Declarant. Declarant may provide by a Supplemental Declaration that if the Association shall fail or refuse to enforce this Declaration or any provision hereof for an unreasonable period of time after written request to do so, then an Owner may enforce such provisions on behalf of the Association, whether at law or in equity. The Association may, by contract or other agreement, enforce state laws and County ordinances, or permit the state or County to enforce such laws or ordinances, on the Property for the benefit of the Association or the Members.

**Section 6.15 Contracts with Others for Performance of Association's Duties.** Subject to the restrictions and limitations contained herein, the Association may enter into contracts and transactions with others, including Declarant, ML100 and any affiliated Persons, for the performance of the Association's duties and other purposes consistent with this Declaration, and such contracts or transactions shall not be invalidated or in any way affected by the fact that one or more directors or officers of the Association or members of any committee may be employed by or otherwise connected with Declarant, ML100 or their affiliates or other Person, provided that the fact of such interest shall be disclosed or known to the other directors, officers or committee members acting upon such contract or transaction, and provided further that the transaction or contract is fair and reasonable. Any such director, officer or committee member may be counted in determining the existence of a quorum at any meeting of the Board or committee of which he is a member. The Board or committee shall then either authorize the contract or transaction described above or grant or deny the approval sought by Declarant, ML100 or their affiliates or other Person, and may vote there to authorize or deny any such contract, transaction or approval with like force and effect as if such director, officer or committee member were not so interested. The procedure described in the previous sentence shall not apply to contracts or

transactions entered into between the Association and Declarant, ML100 or their affiliates during the Declarant Control Period.

**Section 6.16 Duty to Accept Property Transferred by Declarant or ML100.**

(a) The Association shall accept title to any real property, including any Improvements thereon, and any personal or real property, transferred to the Association by Declarant or ML100 (which property shall be included in the Common Area, unless otherwise provided in the conveyance), together with the responsibility to perform any and all duties associated therewith, which, upon conveyance to the Association, the Association shall maintain, at its expense for the benefit of the Members as provided in this Declaration. Property interests transferred to the Association by Declarant or ML100 may include fee simple title, easements, leasehold interests and licenses to use; provided, however, that any property or interest in property transferred to the Association by Declarant or ML100 shall, except to the extent otherwise specifically approved by resolution of the Board and except as otherwise provided in this Declaration, be transferred to the Association free and clear of all liens and encumbrances, except as follows: (1) the lien for property taxes and assessments not then due and payable; (2) the terms of the Project Documents; (3) easements, rights-of-way, reservations, covenants, conditions, restrictions and equitable servitudes or other non-financial encumbrances as Declarant or ML100 in their respective discretion may deem appropriate; (4) the lessee's interest in any applicable leasehold so transferred together with the financial encumbrance thereby created, provided, however, no such leasehold transferred by Declarant or ML100 to the Association shall have a term longer than ten (10) years or provide for in rental payment upon reopening of rents exceeding 89% of the fair market improved value of the premises covered by the leasehold; and (5) such other financial encumbrances as may be reasonably accepted and assumed by the Association and specifically approved by resolution of the Board. Any property or interest in property transferred to the Association by Declarant or ML100 shall not impose any unreasonable or special burden on the Association other than the normal burdens of ownership and maintenance of property and the operation of facilities thereon; provided, however, that Declarant and ML100 reserve the right to limit the use of or otherwise place any reasonable restrictions on any such property prior to the conveyance to the Association, and the Association agrees to be bound by any such limitations on use or restrictions. Every Owner, by accepting title to any portion of the Property and becoming an Owner, is deemed to approve and accept the acquisition by the Association of Common Area as provided herein, and any Common Expenses that may relate thereto. The conveyance of any such interest by Declarant or ML100 may be by quitclaim deed and shall be "as-is," without warranty of any kind, except as described above, and without the benefit of an escrow or title insurance, provided, however, the Association may purchase such title insurance, at the Association's expense, as the Association may desire. In connection with any transfer permitted hereunder, Declarant and ML100 reserve the right to include in the transfer instrument such terms, conditions and requirements as are typical to instruments for the transfer of real or personal property, as applicable, between unrelated parties, including, without limitation, the right to require the Association to indemnify Declarant and ML100 against claims arising after such transfer from the Association's use of or exercise of rights with respect to such property.

(b) Without limiting the provisions of Section 6.16(a), Declarant and ML100 reserve the right, but not the obligation, to acquire, develop and transfer to the Association certain areas designated as Landscape Easement Areas and Roadway Landscape Easement Areas and the Association shall accept and thereafter maintain at its expense and shall operate such easement areas for the benefit of Members of the Association as Common Area.

**Section 6.17 Assist Design Review Committee.** The Association shall cooperate with and assist the Design Review Committee with the Design Review Committee's functions, and shall assist the Design Review Committee in the enforcement of the Design Guidelines and the Design Review Committee's rules, regulations and decisions.

**Section 6.18 Right of Entry.** The Board, its duly authorized employees, agents, representatives and contractors, as well as duly authorized employees of the Association, shall have the power and right, which are hereby reserved and granted, at any time and from time to time, without



liability to any Owner or Occupant for trespass, damage or otherwise, to enter upon any Lot or Subdistrict Unit to enforce any provision of the Project Documents and/or to satisfy the maintenance rights or obligations of the Association under the Project Documents.

**Section 6.19 Right to Bring Legal Action.** Subject to the provisions of Article 22, the Association shall have the power and authority, but not the obligation, in its own name and via the Board, on its own behalf or on behalf of two or more Owners who consent thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of the Project Documents and to enforce the provisions thereof.

**Section 6.20 Contracts With Others Relating to Common Area and Other Property.** The Board, on behalf of the Association, shall have the authority and right, from time to time, to enter into contracts and other agreements with the Subdistrict Associations, other community associations of property owners, and/or other Persons relating to the use, operation, maintenance and repair of all or portions of the Common Area, including the Roadways, and/or other facilities, easements and improvements, including roadways, in the vicinity of the Project, and serving all or any portion of the Project and other properties in the vicinity of the Project.

**Section 6.21 Special Use Fees.** The Board, on behalf of the Association, is authorized to impose, bill for, sue for, collect, administer and disburse fees for use of Common Areas ("Special Use Fees"), and the payment thereof shall be secured by the Assessment Lien. In establishing or adjusting the amounts of Special Use Fees from time to time, the Board, in its absolute discretion, may establish reasonable classifications as among Owners, Occupants and other Persons.

**Section 6.22 Land Use Commission Decision.** The Association shall have all of the duties and obligations of the "Project's homeowners associations" that are described in the Land Use Commission Decision. Those duties and obligations include, without limitation, (a) making periodic inspections of the Landfill and reporting the findings of those inspections to the appropriate County agency and to the State Department of Health, and (b) immediately reporting to the State of Hawaii Land Use Commission, the DOH and the County any instances where the integrity of the boundary between the Project and the Landfill has been compromised.

**Section 6.23 Kihei Gardens Grant of Easement.** The Kihei Gardens Grant of Easement requires Declarant to grade an area adjacent to the Project (the "**Graded Area**") and then gives Declarant, as "Grantee", the right (but not the obligation) to construct a retaining wall, a drainage line and/or a drainage swale within the Graded Area. If these improvements are constructed, then the "Grantee" will have the obligation to repair and maintain the improvements. Declarant will (likely before expiration of the Declarant Control Period) enter into an agreement with the Association that requires the Association (rather than individual Owners) to repair and maintain any such improvements pursuant to the Kihei Gardens Grant of Easement. The Association shall be required to enter into and accept that agreement and, upon doing so, shall be responsible for the "Grantee's" repair and maintenance obligations (and corresponding indemnity obligations) relating to the retaining wall, drainage line and/or drainage swale located within the "Graded Area", as described in the Kihei Gardens Grant of Easement.

**Section 6.24 Landfill Right of Entry.**

(a) Among other things, the Landfill Right of Entry (1) requires Declarant to regularly maintain an area adjacent to a portion of the Project that is defined in the Landfill Right of Entry as the "Right of Entry Area", and (2) gives Declarant the right to enter upon the Right of Entry Area for those limited purposes described in the Landfill Right of Entry. Declarant will (likely before expiration of the Declarant Control Period) assign or delegate its rights and obligations under the Landfill Right of Entry to the Association. The Association shall be required to accept such assignment or delegation and, upon doing so, shall be responsible for fulfilling Declarant's obligations (including its corresponding indemnity obligations) under the Landfill Right of Entry.

(b) Declarant may build a fence on Lots 11, 12, 13 and 14, near the boundary of those Lots and the Landfill. If such a fence is built and if the County does not maintain and repair the

fence, then the Association shall be responsible for maintaining and repairing the fence. Owners of those Lots shall be allowed to plant landscaping up to the Landfill Easement, but no Improvements (including landscaping) shall be allowed within the Landfill Easement.

## **ARTICLE 7 MEMBERSHIP AND VOTING**

### **Section 7.1      Membership in the Association.**

(a)      **Membership.** The Association shall have two classes of Members: Class "A" and Class "B." Qualifications, rights, duties, privileges and obligations of Members of the Association shall be as set forth in and exercised and imposed in accordance with the provisions of the Articles, this Declaration, the Bylaws and/or the Association Rules. The rights and obligations of a Member shall not be assigned, transferred, pledged, conveyed or alienated in any way except as expressly provided in this Declaration. Any attempt to make a prohibited assignment, transfer, pledge, conveyance or alienation shall be void.

(b)      **Class "A" Members.** Except as otherwise set forth in a Project Document, as used in the Project Documents, the term "Class 'A' Members" shall refer to all of the "Subdistrict Members" and all of the "Owner Members", and the term "Class 'A' Membership" shall refer to all of the "Subdistrict Memberships" and all of the "Owner Memberships."

(1)      **Subdistrict Members.** Each Subdistrict Association governed by this Declaration shall be a "**Subdistrict Member**" of the Association. In the event more than one Subdistrict Association is formed within a Lot (such as, for example, where a Lot is subdivided and separate condominium projects are developed on those subdivided parcels), then each Subdistrict Association shall be separate Subdistrict Members of the Association. In such case, the Voting/Assessment Ratio assigned to the Lot prior to creation of multiple Subdistrict Associations shall be allocated among the separate Subdistrict Associations in accordance with the square footage of the Lot or Lots, or portions thereof, made subject to each separate Subdistrict Association; provided, however, that the total Voting/Assessment Ratio for all Subdistrict Associations after the creation of multiple Subdistrict Associations shall equal the total Voting/Assessment Ratio prior to such creation. Each Subdistrict Member shall be represented in the Association by a single Voting Delegate, such Voting Delegate being determined in accordance with Section 2.8 of the Bylaws.

(2)      **Owner Members.** The Owner of each Lot that is not subject to the jurisdiction of a Subdistrict Association (including any such Lot owned by Declarant) shall be an "**Owner Member**" of the Association. Each Owner Member shall be represented in the Association by a single Voting Delegate as determined in accordance with Section 2.8 of the Bylaws. In the case of Owner Members:

(A)      Membership shall automatically cease upon conveyance of the Lot to which such Membership pertains, and the grantee of such Lot shall automatically become a Member;

(B)      Membership in the Association shall be an incident of ownership of such Lot, shall run with the land, and, except as expressly provided herein, may not be severed from the interest of an Owner in such Lot;

(C)      An Owner, by taking title to such Lot, shall be deemed to have automatically consented to becoming a Member in the Association;

(D)      No Owner, whether one or more Persons, shall have more than one Membership per Lot owned, but all of the Persons constituting the Owner shall be entitled to rights of Membership and of use and enjoyment appertaining to ownership of the Lot, subject to any limitations

relating to multiple party ownership of Lots set forth in this Declaration, any applicable Supplemental Declaration, the Bylaws or the Association Rules;

(E) An Owner Membership shall automatically convert to a Subdistrict Membership upon Recording of documents establishing and subjecting the Owner's Lot to the jurisdiction of a Subdistrict Association. Upon such conversion, the Voting/Assessment Ratio applicable to such Owner Membership shall be transferred to the Subdistrict Association; and

(F) Prior to the exercise by a lessee or agreement of sale purchaser of the rights of an Owner Member hereunder, including the exercise of any voting rights, a copy of the Recorded lease or agreement of sale assigning such rights to the lessee or purchaser shall be furnished to the secretary of the Association and, provided that such instrument is provided to the secretary not less than one week prior to the meeting at which the lessee's or purchaser's vote is entitled to be cast, the lessee or purchaser shall be considered the Owner Member.

(c) **The Class "B" Membership.** In addition to any Membership rights Declarant may have as an Owner Member or as a Subdistrict Member, and any rights Declarant may have under any Recorded documents establishing a Subdistrict Association, Declarant shall be the "**Class 'B' Member**" of the Association under this Section 7.1(c) until the expiration of the Declarant Control Period, whether or not Declarant owns a Lot in the Project. The Class "B" Member shall be represented in the Association by a single Voting Delegate as determined in accordance with Section 2.8 of the Bylaws. Declarant shall have such rights as are specified in or reserved to Declarant in the Project Documents. Declarant's Class "B" Membership established under this Section 7.1(c) may be transferred by Declarant only as provided in Section 6.4(c). Declarant's Class "B" Membership shall terminate on the expiration of the Declarant Control Period. At such time, Declarant shall call a special meeting of the Association in accordance with Section 3.4 of the Bylaws to advise all Class "A" Members of the termination of Declarant's Class "B" Membership under this Section 7.1(c). Termination of Declarant's Class "B" Membership under this Section 7.1(c) shall not be construed to terminate any Class "A" Membership held by Declarant under any Recorded documents establishing a Subdistrict Association or any Class "A" Membership held by Declarant as an Owner Member.

**Section 7.2 Voting.** Each Subdistrict Member shall be entitled to the number of votes that are proportional to the Voting/Assessment Ratio appertaining to the Lot or Lots that are subject to the jurisdiction of the Subdistrict Association as set forth in **Exhibit "E"**. Each Owner Member shall be entitled to the number of votes that are proportional to the Voting/Assessment Ratio appertaining to the Owner's Lot as set forth in **Exhibit "E"**. In addition to any votes to which Declarant might be entitled under any Recorded documents establishing a Subdistrict Association and/or as an Owner Member, Declarant shall have such voting, consent, and/or approval rights in the Association as are set forth in the Project Documents. All votes shall be cast by Voting Delegates as provided in Section 7.4 of this Declaration and Section 2.8 of the Bylaws.

**Section 7.3 Voting Delegates.** Section 2.8 of the Bylaws describes the Voting Delegates who will vote for the Class "A" Members and the Class "B" Member, how the Voting Delegates will be determined, use of proxies by Voting Delegates and other provisions relating to the Voting Delegates. Portions of Section 2.8 of the Bylaws provide as follows: (a) each Subdistrict Association shall be represented in the Association by a single "Subdistrict Voting Delegate"; (b) Subdistricts may appoint or elect "Alternate Voting Delegates", who shall have the right to exercise all of the voting rights of the Subdistrict Voting Delegate in such Subdistrict Voting Delegate's absence; (c) unless otherwise specified in this Declaration or the Bylaws, the Owner of a Lot (including Declarant) that is not subject to the jurisdiction of a Subdistrict Association shall be the Voting Delegate for such Lot; (d) if more than one Owner owns a Lot that has an Owner Membership appertaining to it, then the Voting Delegate shall be the Owner selected by and among such Owners; and (e) any Person authorized to act on behalf of Declarant pursuant to Section 10.10 of this Declaration shall be the Voting Delegate for the Class "B" Member.

Section 7.4 **Voting by Voting Delegates.** Except as otherwise provided in this Declaration or the Bylaws, each Voting Delegate shall be entitled to cast all votes attributable to the Lots and/or Subdistrict Units represented by such Voting Delegate. Each Voting Delegate shall cast the votes that the Voting Delegate represents in such manner as such Voting Delegate may, in the Voting Delegate's sole discretion, deem appropriate; provided, however, that if an Owner delivers written direction to a Voting Delegate (via the secretary of the Association) on how to vote the Owner's Voting/Assessment Ratio on an issue to be voted on by the Voting Delegate, then the vote of such Owner (according to the Voting/Assessment Ratio appertaining to the Owner's Lot or Subdistrict Unit, as set forth in **Exhibit "E"**) shall, as nearly as possible without counting fractional votes, be reflected in the Voting Delegate's vote on that issue. The written direction to the Voting Delegate must be delivered by the Owner to the secretary (a) in person while in attendance at the meeting at which such vote will be cast and prior to such vote being cast, or (b) at least 24 hours prior to the meeting at which such vote will be cast.

Section 7.5 **Pledge of Voting Rights.** Notwithstanding the foregoing provisions of this Article 7, in the event that an Owner Member has granted an irrevocable proxy or otherwise pledged the voting right appurtenant to the Membership with respect to such Owner Member's Lot to a Mortgagee as additional security, only the vote of such Mortgagee will be recognized if a copy of such proxy or other instrument pledging such vote has been delivered to the secretary of the Association at least two business days prior to the date of the meeting, and then only to the matters specified in the proxy or other instrument. If more than one such instrument has been filed on behalf of an Owner Member, then the Association shall recognize the proxy of the First Mortgagee, if applicable and if so identified, otherwise, the Association shall recognize the proxy of the first Mortgagee to file, regardless of priority.

Section 7.6 **Corporate Memberships.** The Membership rights of an Owner that is a corporation, partnership, limited liability entity, trust or other legal entity shall be exercised and exercisable only by the individuals (not to exceed five) designated no more often than once per calendar year by the Owner in a written instrument provided to the secretary of the Association.

## **ARTICLE 8 ASSESSMENTS**

### **Section 8.1 Creation of Lien and Personal Obligation.**

(a) Each Owner, by acceptance of a deed or other conveyance of an interest in a Lot or Subdistrict Unit, is deemed to covenant and agree to pay for the benefit of the Association or directly to the Association, such Owner's proportionate share of Assessments imposed hereunder, including General Assessments, Special Assessments, Subdistrict Assessments, Benefited Assessments, and any other such Assessments to be established and collected from time to time as provided in the Project Documents. The Assessments, together with interest thereon, late charges, attorneys' fees, court costs, and dispute resolution costs, and other costs of collection thereof, as hereinafter provided, shall be a continuing lien (the "**Assessment Lien**") upon the Lot or Subdistrict Unit against which the Assessments are made.

(b) Each Assessment, together with such interest and other costs, shall be the separate, distinct and personal debt and obligation, as of the date of the Assessment, of the Owner of the Lot or Subdistrict Unit against which the Assessment is made, and in the event a Lot or Subdistrict Unit is owned by more than one Person, shall be the joint and several obligations of all co-Owners. The personal obligation of delinquent payments shall not pass to an Owner's successor in title unless expressly assumed by the successor.

(c) The proportionate share of Assessments imposed hereunder on a Subdistrict Unit Owner shall be determined as set forth in the Recorded Condominium Documents or other instruments establishing the Subdistrict Association of which the Subdistrict Unit Owner is a member. In the absence of provisions in such Recorded documents for the determination of the proportionate share applicable to a Subdistrict Unit, each Subdistrict Unit Owner within such Subdistrict shall be jointly and

severally liable for the proportionate share allocated to all of the Lots subject to the jurisdiction of the Subdistrict Association.

**Section 8.2 Purpose of Assessments.** The Assessments levied by the Board on behalf of the Association shall be used for the purposes set forth in the Project Documents and such other purposes consistent therewith, as determined by the Board, in the Board's sole discretion, including, but not limited to, promoting the safety and welfare of Owners of Lots and Subdistrict Units within the Property, enhancing the quality of life within the Property, preserving the value of the Property, paying the costs of administration of the Association and all other Common Expenses, and otherwise to further the interests of the Association. If a Lot or Subdistrict has separate security, gas, electrical, sewer, or other similar services, then the cost of the same shall be the personal obligation of the Owner of such Lot or Subdistrict.

**Section 8.3 General Assessments.** Each Owner shall pay General Assessments as provided in this Section and the Bylaws. Except as otherwise specifically provided herein, payment of General Assessments shall be in such amounts and at such times as may be provided in the Bylaws or as determined by the Board. Not later than 60 days prior to the beginning of each fiscal year of the Association, the Board shall prepare a pro-forma operating statement or budget for the upcoming fiscal year, which shall, among other things, estimate the total Common Expenses to be incurred for such fiscal year; provided, however, that, with respect to the Association's initial pro-forma operating statement or budget, the Board (via Declarant) shall only be required to prepare the statement or budget 60 days prior to the date that General Assessments are first assessed against Owners. The Board shall at the time determine the amount of the General Assessment to be paid by each Owner and notify such Owner. Each Owner shall thereafter pay to the Association said General Assessment in such a manner and on such schedule as the Board may provide. Each such installment shall be due and payable on the date and in the manner specified by the Board. In the event the Board fails for any reason to determine the budget for any fiscal year, then and until such time as a budget shall have been determined as provided herein, the budget and General Assessments in effect for the then-current fiscal year shall continue for the succeeding fiscal year. If the Board determines that the total General Assessments for the current year are, or will become, inadequate to meet all Common Expenses for whatever reason, including Common Expenses in excess of the estimated Common Expenses used in preparation of the Association's budget for that year, but excluding any Common Expenses allocated as Subdistrict Expenses, Special Assessments or Benefited Expenses, then the Board shall determine the approximate amount of such inadequacy and issue a supplemental estimate of the Common Expenses and determine the revised amount of General Assessments to be paid by each Owner for the balance of the year, and the date or dates when due. If the estimated total General Assessments for the current year prove to be excessive in light of the actual Common Expenses, then the Association may, at the discretion of the Board, retain such excess as additional working capital or reserves, reduce the amount of the General Assessments for the succeeding year, or abate collection of General Assessments for such period as it deems appropriate.

**Section 8.4 Special Assessments.** Special Assessments shall be levied by the Board against an Owner and such Owner's Lot or Subdistrict Unit to reimburse the Association for: (a) costs incurred in bringing an Owner or such Owner's Lot or Subdistrict Unit into compliance with the provisions of the Project Documents; (b) any other charge designated as a Special Assessment in the Project Documents; (c) unbudgeted expenses of the Association; (d) fines levied or fixed by the Board; and (e) attorneys' fees, interest and other costs or charges provided to be paid as, or which are incurred in connection with, a Special Assessment in accordance with the Project Documents. The Board may also levy a Special Assessment against any Subdistrict to reimburse the Association for costs incurred in bringing the Subdistrict into compliance with the provisions of the Project Documents.

**Section 8.5 Subdistrict Assessments.** Subdistrict Assessments mean the amount that is levied and assessed against the Lots and/or Subdistrict Units in a particular Subdistrict to fund Subdistrict Expenses that are owed and payable to the Association. Subdistrict Assessments shall be levied by the Board in respect of the specific Subdistrict(s) for whose benefit expenses are incurred, and to fund any other Subdistrict Expenses applicable to such Subdistrict, as provided in this Declaration or in any

Supplemental Declaration. All of the Lots and Subdistrict Units within the Subdistrict(s) so assessed shall be responsible for paying the Subdistrict Assessments. Where a Subdistrict Association has been established, the Association shall have the right to allocate an entire Subdistrict Assessment to the Subdistrict Association, thereby making the Subdistrict Association responsible, as provided in Section 8.16, for the allocation to, and collection of such Association Assessments from, the Subdistrict Unit Owners within the Subdistrict.

**Section 8.6 Benefited Assessments.** The Board shall have the power and authority to specifically assess Lots and/or Subdistrict Units receiving benefits, items or services provided to less than all Lots or Subdistrict Units within the Property (the "**Benefited Assessments**"). Costs and expenses of the Association that are incurred upon the request of a Member or Owner for specific items or services relating to or benefiting a specific Owner or Owner's Lot or Subdistrict Unit, or that are incurred pursuant to the Project Documents, for specific items or services relating to or benefiting certain Lots or Subdistrict Units, shall be specifically assessed as Benefited Assessments against the Lot(s) or Subdistrict Unit(s) benefited.

**Section 8.7 Capital Improvement Assessments.** The Board may adopt in any fiscal year a "**Capital Improvement Assessment**" for the purpose of defraying, in whole or in part, the cost of any action or undertaking on behalf of the Association in connection with, or the cost of, any construction, acquisition or replacement of capital improvements, equipment and necessary appurtenances upon or relating to the Common Area. All amounts collected as Capital Improvement Assessments may only be used for capital improvements or equipment, shall be deposited by the Board in a separate account for such purposes and not commingled with other funds of the Association, and shall be deemed a contribution to the capital account of the Association by the Owners. A Capital Improvement Assessment in excess of \$5,000 per Lot or Subdistrict Unit shall not become effective unless approved by Voting Delegates representing a Majority of all eligible Class "A" Members, and, prior to the expiration of the Declarant Control Period, the Class "B" Member. No Capital Improvement Assessments adopted by the Board shall become effective prior to the expiration of the Declarant Control Period without the approval of Declarant.

**Section 8.8 Rate of Assessment.** Except with respect to Declarant and ML100 and Lots or Subdistrict Units owned by Declarant or ML100, as provided in Section 8.20, each Lot Owner and each Subdistrict Unit Owner shall be severally liable to pay the General Assessments allocable to such Owner's Lot or Subdistrict Unit in proportion to the Voting/Assessment Ratio (set forth in or as determined by **Exhibit "E"**) appertaining to such Owner's Lot or Subdistrict Unit. Each Owner, by acceptance of a deed or other conveyance of an interest in a Lot or Subdistrict Unit, is deemed to understand and agree that the Voting/Assessment Ratios set forth in **Exhibit "E"** shall be revised under certain circumstances, including upon withdrawal of Property from the Project and the effect of this Declaration and the Recordation of Condominium Documents against a Lot or Subdistrict Unit, the effect of which revision may be to either increase the ratio (and, thus, the amount) of General Assessments payable by the Owner or decrease the voting power appertaining to the Lot or Subdistrict Unit.

**Section 8.9 Date of Commencement of Assessments.** Subject to the rights of Declarant and ML100 set forth in this Declaration, the obligation to pay Assessments shall commence as to all Lots and Subdistrict Units on the first day of the month following the conveyance of the first Lot or Subdistrict Unit to an Owner other than Declarant or ML100. The foregoing notwithstanding, during the Declarant Control Period, Declarant (through the Board or otherwise) shall have the right, at its sole discretion, to delay the commencement of collection of Assessments from Owners until a date that is 30 days after Declarant delivers a general notice to the Owners that collection of Assessments will commence. Assessments shall be due and payable in a manner and on such schedule as the Board may provide.

**Section 8.10 Exempt Property.** Exempt Property shall be exempt from the Assessments created herein. Exempt Property shall also be exempt from Subdistrict Assessments to the extent permitted by law.

**Section 8.11 Time and Manner of Payment; Late Charges and Interest.** Assessments shall be due and payable by Owners in such manner and at such times as the Board shall designate. If not paid when due, but paid within ten days after its due date, each such Assessment shall have added to it a late charge equal to ten percent (10%) of the amount of Assessment or such other charge as the Board may specify from time to time. Thereafter, any such delinquent Assessment and the applicable late charge shall bear interest from the tenth day after the date the Assessment was due at the rate of twelve percent (12%) per annum until paid. The Board may, in its discretion and without waiving the imposition of a late charge or interest in any other instance, waive the late charge and/or interest in any particular instance. A delinquent Owner shall also be liable for attorneys' fees and other related costs incurred by the Association as a result of such delinquency, and if any suit, action or arbitration proceeding is brought to collect any such Assessment or charge, then there shall be added to the amount thereof costs of the suit, action or proceeding and reasonable attorneys' fees to be fixed by the court and included in any judgment or award rendered thereon.

**Section 8.12 No Offsets.** Subject to Declarant's and ML100's rights set forth in Section 8.20, and subject to the right of the Association to accept subsidies and "in kind" contributions as provided in Section 8.21, all Assessments shall be payable in the amount specified in the Assessment or notice of Assessment and no offsets against such amount shall be permitted for any reason, including, without limitation, a claim that: (a) the Association, the Board, Declarant or ML100 is not properly exercising its duties and powers as provided in this Declaration; (b) Assessments for any period exceed Common Expenses; or (c) an Owner has made, and elects to make, no use of the Common Area or any portion thereof.

**Section 8.13 Reserves.** Any reserves included in the Common Expenses that are collected as part of the General Assessments shall be deposited by the Association in a separate bank account (or similar account with a recognized financial or investment institution) to be held for the purposes for which they are collected and are to be segregated from and not commingled with any other funds of the Association, except to the extent that the Association's accountant deems it desirable to do otherwise on the basis of standard accounting principles in similar contexts, optimizing investment returns, or the laws, tax or otherwise, of the State of Hawaii or the United States relating to non-profit corporations or community associations. Such reserves shall be deemed a contribution to the capital account of the Association by the Owners. The responsibility of the Board (whether while controlled by Declarant or the Class "A" Members) shall be only to provide for such reserves, if any, as the Board in good faith deems reasonable, and neither Declarant, ML100 nor the Board nor any Member thereof shall have any liability to any Member or Owner or to the Association if reserves prove to be inadequate.

**Section 8.14 Rules Regarding Billing and Collection Procedures.** The Board shall have the right to adopt rules and regulations setting forth procedures for the purpose of making the Assessments provided herein and for the billing and collection thereof, provided that such procedures are not inconsistent with the provisions hereof. The failure of the Association to send a bill to an Owner shall not relieve any Owner of such Owner's liability for any Assessment or charge under this Declaration, but the Assessment Lien therefor shall not be foreclosed or otherwise enforced until the Owner has been given not less than 30 days' written notice prior to such foreclosure or enforcement, at the address of the Owner on the records of the Association, that the Assessment or any installment thereof is or will be due and of the amount owing. Such notice may be given at any time prior to or after delinquency of such payment. The Association shall be under no duty to refund any payments received by it even though the ownership of a Lot or Subdistrict Unit changes during an assessment period. Successor Owners of Lots or Subdistrict Units shall be given credit for prepayments made by prior Owners on a prorated basis.

**Section 8.15 Enforcement of Lien.** The Assessment Lien may be foreclosed by the Association in any manner provided or permitted for the foreclosure of mortgages in the State of Hawaii. All of the provisions of this Article 8 relating to the enforcement of the Assessment Lien provided for herein shall apply with equal force in each other instance provided for in the Project Documents wherein it is stated that payment of a particular Assessment, charge or other sum shall be secured by the Assessment Lien. Nothing herein shall be construed as requiring that the Association take any action

required hereunder in any particular instance, and the failure of the Association to take such action at any time shall not constitute a waiver of the right to take such action at a later time or in a different instance.

**Section 8.16 Collection of Assessments by Subdistrict Associations.** Where directed by Supplemental Declaration, all Association Assessments levied and assessed against Subdistrict Units shall be collected with the assessments and charges, if any, levied by the Subdistrict Association pursuant to the Supplemental Declaration relating to the Subdistrict. Where provided by Supplemental Declaration, the Association Assessments shall constitute common expenses of the Subdistrict Association and the Subdistrict Association shall have the assessment power of the Association with respect to the property within the Subdistrict.

**Section 8.17 Subordination of the Assessment Lien.**

(a) The Assessment Lien, including interest, late charges (subject to the limitations of Hawaii law), and costs (including attorneys' fees) provided for herein, shall be subordinate to the lien of any First Mortgage upon any Lot or Subdistrict Unit, except to the extent the Assessment Lien secures the amount of any unpaid Assessments that accrue from and after the date on which a First Mortgagee comes into possession of or acquires title to the Lot or Subdistrict Unit, whichever occurs first. The sale or transfer of any Lot or Subdistrict Unit shall not affect the Assessment Lien. However, the sale or transfer of any Lot or Subdistrict Unit pursuant to judicial or nonjudicial foreclosure of a First Mortgage shall extinguish the Assessment Lien as to payments that became due prior to such sale or transfer. No sale or transfer, including transfer to a receiver or trustee in bankruptcy, shall relieve such Lot or Subdistrict Unit from the Assessment Lien for any Assessments thereafter becoming due. Where the Mortgagee of a First Mortgage of Record obtains title, neither it nor its successors and assigns shall be liable for the share of the Common Expenses or Assessments by the Association chargeable to the Lot or Subdistrict Unit securing such Mortgage that became due prior to the acquisition of title to such Lot or Subdistrict Unit.

(b) If the Owner against whom the original Assessment was made (or a Person related to or otherwise affiliated with such Owner) purchases or redeems the Lot or Subdistrict Unit, then the Assessment Lien shall continue in effect and may be enforced by the Board on behalf of the Association. Further, any such unpaid Assessment shall continue to exist as the personal obligation of the defaulting Owner of the respective Lot or Subdistrict Unit to the Association, and the Board may use reasonable efforts to collect such unpaid Assessment from that Owner even after he or she is no longer the Owner of the Lot or Subdistrict Unit.

(c) Any unpaid Assessments that are extinguished pursuant to this Section may be reallocated by the Association among all Owners as part of the Common Expenses, collectible from all of the Owners including the Mortgagee, its successors and assigns. Except as provided above (and except for liens for taxes and other public charges that by applicable law are made prior and superior), the Assessment Lien shall be prior and superior to any and all charges, liens or encumbrances that hereafter in any manner may arise or be imposed on any Lot or Subdistrict Unit.

**Section 8.18 Pledge of Assessment Rights as Security.** The Association shall have the power to pledge the right to exercise its assessment powers and rights provided for in this Declaration as security; provided, however, that any such pledge occurring after expiration of the Declarant Control Period shall require the affirmative vote of a Majority of the Class "A" Members.

**Section 8.19 Waiver of Use.** No Owner shall be exempt from personal liability for Assessments, nor shall any Lot or Subdistrict Unit owned by such Owner be released from the liens, charges and other provisions of any of the Project Documents, by voluntary waiver of, or suspension or restriction of, such Owner's right to the use and enjoyment of the Common Area, or the abandonment of such Owner's Lot or Subdistrict Unit.

**Section 8.20 Declarant's and ML100's Assessment Obligation.** During the Declarant Control Period, Declarant and ML100 each may annually elect, at its sole and absolute discretion, one of



the following alternatives, or any combination thereof, as a method of contributing to Common Expenses (and fully satisfying its Assessments obligations, if any) hereunder as the Owner of Lots and/or Subdistrict Units:

- (a) pay General Assessments as the Owner of Lots and/or Subdistrict Units; or
- (b) make "in kind" contributions of services and/or materials; or
- (c) contribute to the Association (in cash and/or by "in kind" contributions of services and/or materials) the difference between the amounts received by the Association in Assessments from all Owners other than Declarant and ML100 and the amount of the actual expenditures required to operate the Association during the fiscal year. In the absence of a written election by Declarant or ML100 at least 60 days prior to the end of the fiscal year, Declarant or ML100, as applicable, shall pay on the basis set forth in this subparagraph (c).

Declarant and ML100 shall have no other or further Assessment obligations hereunder, with respect to Lots or Subdistrict Units owned, respectively, by Declarant or ML100 or otherwise. Nothing herein shall be interpreted to require Declarant or ML100 to establish with its own funds, or pay its own funds over to the Association to establish, reserves or reserve accounts for capital improvements or for maintenance of any part of the Property.

**Section 8.21 Subsidies and "In Kind" Contributions.** Without limiting Section 8.20, the Board, on behalf of the Association, is specifically authorized, at its discretion, to enter into subsidy contracts or contracts for "in kind" contribution of services or materials or a combination of services and materials with Declarant, ML100 or any other Person, with respect to Lots or Subdistrict Units owned by Declarant, ML100 or otherwise, for the payment of any portion of the Common Expenses.

## **ARTICLE 9 ARCHITECTURAL AND LANDSCAPE CONTROL**

The Board and Declarant shall have the authority and standing, on behalf of the Association, to enforce decisions of the Design Review Committee established pursuant to Section 9.1 below. The Board and Declarant shall also have the standing and authority to enforce the Design Guidelines and any design and development guidelines adopted by the Design Review Committee, and may delegate the right to enforce such decisions and guidelines to the Design Review Committee. No construction, which term shall include within its definition staking, clearing, excavation, grading, and other site work, and no plantings or removal of plants, trees, or shrubs, shall take place except in strict compliance with this Article 9, and may proceed only after (1) the approval of the proposed Improvement is obtained from the Design Review Committee, and (2) the requirements hereof and set out in the Design Guidelines have been fully met.

**Section 9.1 Design Review Committee.** A Design Review Committee ("DRC") is hereby established. Declarant, during the Declarant Control Period, and the Board, following the Declarant Control Period, shall appoint the members of the DRC, which shall consist of at least three but no more than five persons. Subject to oversight by the Board, the DRC shall have supplemental jurisdiction over all construction on any portion of the Property and over all modifications, additions or alterations made to Improvements on the Property. Declarant initially shall appoint all members of the DRC and, until expiration of the Declarant Control Period, shall have the right to determine the number of, appoint, augment or replace all members of the DRC. Declarant or its representative may serve as the DRC until expiration of the Declarant Control Period. There shall be no surrender or partial surrender of this right prior to the expiration of the Declarant Control Period, except in a Recorded instrument executed by Declarant. Declarant reserves the right to impose conditions on any such surrender for the duration of the Declarant Control Period, including, without limitation, the right of prior written approval, in Declarant's sole discretion, of any DRC action, of the appointment of any DRC member and the right, by Recorded instrument executed by Declarant, to rescind any prior surrender. Upon expiration of the Declarant

Control Period, the Board shall appoint the members of the DRC, who shall serve at the discretion of the Board.

## **Section 9.2      Design Guidelines.**

(a)      The Design Guidelines have been adopted as the design guidelines applicable to the Project. The Design Guidelines constitute the rules, regulations and guidelines controlling construction and improvements in the Project to the extent therein provided, provided that the County retains design review and approval authority over all developments in the Project. The Design Guidelines will be administered by the DRC at and under the direction of the Board. The Design Guidelines have four components to them, all of which must be followed: Site Planning Guidelines; Architectural Design Guidelines; Landscape Design Guidelines; and Signage Design Guidelines. The Design Guidelines also include the Land Use Matrix. The Board or the DRC (with approval of the Board), may (1) adopt as a part of the Design Guidelines such additional architectural and landscape standards, rules and regulations as it deems to be appropriate and as are not in conflict with this Declaration, and (2) establish and promulgate supplemental design and development guidelines and application and review procedures in addition to the Design Guidelines, which may be applicable to specific Subdistricts. Such supplemental design guidelines shall not conflict with or repeal any provision of the Design Guidelines; provided, however, the Board may adopt more restrictive limitations on Improvements within Subdistricts. The DRC shall make the Design Guidelines and its application and review procedures available to the Owners, and all Owners shall be bound in strict accordance therewith.

(b)      Declarant has adopted the initial Design Guidelines and, until the expiration of the Declarant Control Period, shall have the right to review and approve, in Declarant's sole discretion: (1) any amendment to the Design Guidelines, (2) any application and review procedures adopted by the DRC, and (3) any design review decision made by the DRC. There shall be no surrender of all or any portion of this right prior to the expiration of the Declarant Control Period, except in a Recorded instrument executed by Declarant. Declarant reserves the right to impose conditions on any such surrender for the duration of the Declarant Control Period, including, without limitation, the right, of prior written approval by Recorded instrument executed by Declarant, to rescind any prior surrender.

(c)      The Design Guidelines may include, among other things, the following restrictions and limitations:

(1)      Time limitations for the completion, within specified periods after approval, of the Improvements for which approval is required pursuant to the Design Guidelines;

(2)      Procedures for assuring conformity of completed Improvements to drawings and specifications approved by the DRC; and

(3)      Such other limitations and restrictions as the Board or the DRC (with the Board's consent) in their reasonable discretion shall adopt.

**Section 9.3      Individual Lot Plot Plans.** Declarant shall establish a "**Plot Plan**" for each Lot, which Plot Plan shall be part of the Design Guidelines. The DRC and, during the Declarant Control Period, Declarant shall each have the right to revise or amend the Plot Plans, and no Plot Plan can be revised or amended without written approval of the DRC and, during the Declarant Control Period, Declarant. A copy of each Plot Plan shall be maintained at the principal offices of the Association and the DRC, and, upon written request, shall be available for review and inspection by each Owner and other Persons who are affected by or have a reasonable interest in a Plot Plan. Each Plot Plan may establish, indicate or designate some or all of the following items applicable or relevant to construction on or relating to the Lot: (a) building area limits and building setbacks (including applicable "open areas"); (b) easement areas; (c) the Landfill Buffer Area (if applicable); (d) the Landfill Easement (if applicable); and (e) approximate location of utilities and their connection points. Without limiting any other provision of the Design Guidelines, each Lot, and development thereof, shall be subject to all items shown or referred to on its respective Plot Plan. All grades, elevations, contours, boundaries, utility locations, setbacks and

other items (if any) shown or referred to on the Plot Plans are approximate, and subject to verification by the Owner or Owners of the affected Lot. Declarant, the Association and/or the DRC make no representations or assurances, and shall have no liability, with respect to the accuracy of the information and other items shown or referred to on the Plot Plans.

**Section 9.4 Land Use Matrix.** The Land Use Matrix is attached to and made a part of the Design Guidelines. Except as otherwise allowed by Declarant or under this Declaration or by law, use and development of each Lot and each Subdistrict Unit must, at all times, comply with and adhere to the land use standards and criteria set forth in the VMX/C-R Design Criteria portion of the Land Use Matrix. Depending on which of the four land use categories (Retail/Office; Light Manufacturing; Civic; Residential) is utilized on a Lot or Subdistrict Unit, the VMX/C-R Design Criteria portion of the Land Use Matrix sets forth, among other things, the permitted uses, the maximum floor area ratio, the maximum lot coverage ratio, the maximum building height, and the maximum number of stories allowed on the Lot or in the Subdistrict.

**Section 9.5 General Provisions.** The following general provisions are without limitation to other rights of the Board, Declarant or the DRC pursuant to this Article 9:

(a) The DRC may require security deposits and assess reasonable fees to Owners in connection with its review of drawings and specifications and may adopt and promulgate appropriate fee schedules from time to time.

(b) The DRC may delegate all or any portion of its drawings and specifications review responsibilities to one or more of its members or architectural consultants retained by the DRC. The DRC may further avail itself of technical and professional advice and consultants (architectural, design, landscaping, etc.) as it deems appropriate, the cost of which shall be borne by the Owner seeking review of plans.

(c) The DRC shall approve, approve with conditions or disapprove any drawings and specifications submitted in accordance with the Design Guidelines within such period as may be specified in the Design Guidelines.

(d) The Board or the DRC (at and under the direction of the Board) may enforce the Design Guidelines, and any disapproval or conditional approval of construction or other decision of the DRC against any Owner or Occupant, and the cost incurred in connection with any such enforcement, including reasonable attorneys' fees and experts fees, shall be reimbursed by the Owner of the applicable Lot or Subdistrict Unit to the Association upon demand therefor by the Board.

(e) Without limitation of the foregoing the Board or the DRC may, when confronted with a violation (e.g., no approval was obtained or the constructed improvements do not conform to the approval given):

(1) Notify the violator to correct the violation and afford the violator an opportunity to cure by either (A) seeking appropriate approval where no approval was originally obtained, (B) modifying the improvement so that it conforms with a pre-existing approval, or (C) removing the improvement.

(2) Fine the violator pursuant to the Project Documents.

(3) Retain counsel to communicate the Board's or the DRC's demands to a violator and assess the violator for the cost incurred by the Board and/or the DRC in that effort.

(4) Retain a professional to correct the violation after (A) an appropriate finding by the Board or the DRC of the violation and (B) providing the violator an opportunity to cure.

(5) File an Assessment Lien against the violator's property for the costs incurred by the Board or the DRC, which may thereafter be foreclosed by action of the Board if not paid.

(6) File suit or otherwise bring an action to enforce the Design Guidelines.

**Section 9.6 Approval and Conformity of Drawings and Specifications.** No building, fence, wall or other structure or Improvement of whatever type shall be constructed, erected or maintained upon the Property, nor shall there be any modifications, additions or alterations to any Improvement upon a Lot or Subdistrict Unit, or to the landscaping, grading or drainage thereof, nor shall there be any change to the exterior of any residence, building or other Improvements including, without limitation, the painting (other than painting with the same color and type of paint as previously existed) of exterior walls, patio covers and fences, except in compliance with complete plans thereof and specifications therefor which have been submitted to and approved in accordance with the Design Guidelines as to design and harmony of external design and location in relation to surrounding structures and topography and finish grade elevation. No permission or approval shall be required to repaint in accordance with an originally approved color scheme or to rebuild in accordance with originally approved plans and specifications. Nothing contained herein shall be construed to limit the right of an Owner to remodel the interior or to paint the interior of such Owner's structure any color desired.

**Section 9.7 Non-Liability for Approval.** Plans and specifications shall be reviewed by the DRC as to style, exterior design, appearance and location, and are not approved for engineering design or for compliance with zoning and building ordinances, and, by approving such plans and specifications, neither the DRC, any member thereof, ML100, Declarant, the Association, the Board, nor any officer or director of the Association assumes or shall have any liability or responsibility therefor, or for any defect in any structure constructed from such drawings and specifications. Neither the DRC, any member thereof, ML100, Declarant, the Association, the Board, nor any officer or director of the Association shall be liable to any Member, Occupant, Owner, the Association or other Person for any damage, loss or prejudice suffered or claimed on account of (a) inaccuracy of items shown or referenced on the Plot Plans, (b) the approval or disapproval of any plans and specifications, whether or not defective, (c) the grant or denial of any requests for variances to the Design Guidelines, (d) the construction or performance of any work, whether or not pursuant to approved plans and specifications, (e) the development, or manner of development, of any property within the Property, (f) any change in the size, configuration or location of any Improvements or the changing of the natural or existing grade of any Lot or Subdistrict Unit, or (g) the execution and filing of an estoppel certificate pursuant to the Design Guidelines, whether or not the facts therein are correct; provided, however, that such action, with the actual knowledge possessed by the decision maker, was taken in good faith. Approval of plans and specifications by the Board or the DRC, or a change in the natural or existing grade of any Lot or Subdistrict Unit is not, and shall not be deemed to be, a representation or warranty that said plans, specifications or changes comply with applicable governmental ordinances or regulations, including, but not limited to, zoning laws and building codes.

**Section 9.8 Inspection and Recording of Approval.** Any member or authorized consultant of the DRC, or any authorized officer, director, employee or agent of the Association, may, at any reasonable time, enter, without being deemed guilty of trespass, upon any Lot or Subdistrict Unit, except the interior of any completed Dwelling Unit, after reasonable notice as provided herein to the Owner, in order to inspect Improvements constructed or being constructed on such Lot or Subdistrict Unit, or any changes in the grade thereof, to ascertain that such Improvements or changes have been or are being built or changed in compliance with the Design Guidelines and this Declaration. The DRC may also cause such an inspection to be undertaken within 30 days of a request therefor from any Owner as to the Owner's Lot or Subdistrict Unit, and if such inspection reveals that the Improvements or changes located on such Lot or Subdistrict Unit have been completed in compliance with this Declaration and the Design Guidelines, then the DRC shall provide to such Owner a notice of such approval in Recordable form, which, when Recorded, shall be conclusive evidence of compliance, as of the date of inspection, with the provisions of this Declaration and the Design Guidelines as to the Improvements or changes described in such Recorded notice, but only as to such identified Improvements or changes.

**Section 9.9 No Waiver of Future Approvals.** The approval of the DRC of any proposals or plans and specifications or drawings for any work done or proposed, or in connection with any other matter requiring the approval and consent of the DRC, shall not be deemed to constitute a waiver of any right to withhold approval or consent as to any similar proposals, plans and specifications, drawings or matters whatever subsequently or additionally submitted for approval or consent.

**Section 9.10 Variance.** The DRC may, in its discretion, authorize variances from compliance with any of the provisions of the Design Guidelines when circumstances such as topography, natural obstructions, hardship, aesthetic or environmental considerations require, but only in accordance with its duly adopted rules and regulations. Such variances may only be granted, however, when unique circumstances dictate and no variance shall: (a) be effective unless in writing; (b) be contrary to the restrictions set forth in this Declaration or any Supplemental Declaration; or (c) estop the DRC from denying a variance in other (even similar) circumstances. For purposes of this Section, the inability to obtain approval of any governmental agency or the issuance of any permit or unfavorable terms of financing shall not be considered a hardship warranting a variance.

**Section 9.11 Enforcement/Right of Removal.** Any construction, alteration, or other work done in violation of this Declaration and/or the Design Guidelines shall be deemed to be nonconforming. Upon written request from the Board, the DRC or Declarant, Owners shall, at their own cost and expense, remove such nonconforming construction, alteration, or other work and shall restore the Lot or Subdistrict Unit to substantially the same condition as existed prior to the nonconforming construction, alteration, or other work. Should an Owner fail to remove and restore as required in this Section, the Board, Declarant or the DRC or their respective designees shall have the right to enter the Lot or Subdistrict Unit, remove the violation and restore the property to substantially the same condition as existed prior to the nonconforming construction, alteration or other work. The Owner shall be liable for all costs thereof together with interest thereon at the maximum rate then allowed by law, and the Association shall have an Assessment Lien to secure the payment of such costs.

**Section 9.12 Construction by Declarant or ML100.** This Article 9 shall not apply to any Improvements proposed, made or modified by or on behalf of Declarant or ML100 in connection with development of the Project, or the development, construction, promotion, marketing, sale or leasing of any Lot or Subdistrict Unit, or any other portion of the Property by Declarant and/or ML100.

**Section 9.13 Amendments to Design Guidelines.** The Design Guidelines may be amended from time to time by Declarant (during the Declarant Control Period) or the Board (pursuant to a request by or proposal from the DRC or not), consistent with this Declaration and any applicable Supplemental Declaration. Any amendments to the Design Guidelines shall apply only to construction and modifications commenced after the effective date of such amendment and shall not apply to require modifications to or removal of Improvements previously approved by the DRC once the approved construction or modification has commenced.

## **ARTICLE 10 RIGHTS AND RESERVATIONS**

**Section 10.1 Reserved Rights.** The rights, reservations and easements of Declarant and ML100 set forth in this Declaration shall be deemed excepted and reserved in each Recorded Supplemental Declaration, in each conveyance of any interest in property by Declarant or ML100 to the Association and in each deed or other instrument of conveyance by which any portion of the Property is conveyed by Declarant, ML100 or any other Owner, whether or not specifically stated therein. The rights, reservations and easements of Declarant and ML100 set forth in this Declaration shall be prior and superior to any other provisions of this Declaration and any Supplemental Declaration and may not, without Declarant's prior written consent, be modified, amended, rescinded or affected by any amendment of this Declaration or any Supplemental Declaration. Declarant's consent to any one such amendment shall not be construed as consent to any other or subsequent amendment. The rights, reservations and easements of Declarant and ML100 set forth in this Article 10 are in addition to, and shall in no way affect or otherwise be interpreted to limit or restrict any of the rights, reservations and

easements of Declarant and ML100 contained elsewhere in this Declaration or in any Supplemental Declaration.

**Section 10.2 Declarant's Rights of Use.** Declarant and ML100 shall have and hereby reserve the right to use of the Common Area, and of services offered by the Association, in connection with the development, construction, promotion, marketing, sale, leasing and use of all or any portion of the Property. Without limiting the generality of the foregoing, Declarant and ML100 may: (a) erect and maintain on any part of the Common Area such signs, temporary buildings and other structures as Declarant may reasonably deem necessary or proper in connection with the development, construction, promotion, marketing, sale and leasing of all or any portion of the Property; (b) restrict the use of specific Common Areas by any Owner or Occupant until all Lots and Subdistrict Units have been conveyed to a Person other than Declarant and ML100; (c) use vehicles and equipment on the Common Area, including the Roads, for developmental, construction and promotional purposes; (d) permit entry on and use of all or any portion of the Property by prospective purchasers and other Persons who are not Owners; (e) make reference to the Association and to the Common Area and any services offered by the Association in connection with the development, construction, promotion, marketing, sale and leasing of all or any portion of the Property; and (f) adopt such name or names and change any names from time to time by which the Project or portions thereof, or the Association, is identified. Declarant and ML100 shall have the right to assign or delegate all or any of their rights under this Section 10.2 to any qualified Persons, and any such assignment or delegation shall not diminish Declarant's or ML100's rights hereunder.

**Section 10.3 Construction at or Adjacent to Project and Access.** Each Owner, in purchasing or otherwise taking title to any Lot or Subdistrict Unit, shall do so with the express understanding and acknowledgment that construction activity by Declarant, ML100 and other third parties or other Owners or Occupants may continue in the Project area and adjacent areas after such Owner has occupied the Lot or Subdistrict Unit and that this activity may result in noise, dust, or other annoyances to the Owner and may limit the Owner's access to portions of such Lot or Subdistrict Unit or other areas adjacent thereto, and each Owner shall thereby accept any such inconvenience or annoyance and expressly waive any rights, claims, or actions that the Owner might otherwise have against Declarant, ML100 or third parties (including various contractors who may be involved in such construction activity) as a result of such circumstances.

**Section 10.4 Rights to Change Subdivision Map.** Declarant and ML100 shall have and hereby reserve the right to further subdivide and/or consolidate all or any portions of the subdivided Lots comprising the Property, to designate, delete or relocate roads, easements and boundaries of such Lots, and to otherwise modify and/or amend any applicable subdivision map for all or any portion of the Property; provided only that such changes, modifications or amendments shall not have a direct and material adverse effect on the interests of any Owners owning Lots or Subdistrict Units at the time of such modification or amendment to the applicable subdivision map, unless each Owner directly affected consents to the subdivision, consolidation, designation, deletion, relocation, modification or amendment or the right to take such actions is expressly reserved in the deed or other instrument of conveyance from Declarant or ML100 to an Owner or is otherwise permitted under this Declaration.

**Section 10.5 Modifications to Infrastructure.** If the ongoing development of the Project, or any portion or component thereof, requires modification of an existing roadway or utility or other item of infrastructure in order to obtain necessary governmental or utility company approvals or in order to complete the development of the Project, then each affected Owner and the Association, as appropriate, shall allow and/or take all steps necessary to comply with or effect the required modifications.

**Section 10.6 Rights Incident to Easements and Reserved Rights.** With respect to and in furtherance of any and all rights and easements reserved and/or granted to Declarant and/or ML100 pursuant to this Declaration, Declarant and ML100 shall each have the right, for itself and its successors and assigns, at its sole discretion and without being required to obtain the consent or joinder of any Person, including the Association, any Owner, or any Mortgagee, lien holder, or other Person who may have an interest in the Property or any portion thereof, to file with the County and/or Record, as

applicable, any necessary documents, including maps, grants, assignments, petitions, applications and amendments to this Declaration. Each Owner consents to the filing or Recordation of such documents as may be necessary or convenient to effect the reserved rights and easements of Declarant and ML100, and agrees to execute such documents and do such other things as may be reasonably necessary to effect such rights and easements.

**Section 10.7 Transfer of Declarant's Rights.** Any or all of the rights, reservations and easements of Declarant and ML100 may be transferred to any other Person, provided that the transfer shall not enlarge a right or reservation beyond that contained herein, and provided further, no such transfer shall be effective unless it is in a written instrument signed by Declarant or ML100 (as applicable) and Recorded.

**Section 10.8 Reserved Water Rights.** Declarant and ML100 reserve the right to collect, use and appropriate all underground and percolating water, both tributary and non-tributary, within and under the Property, together with easements to construct, maintain, replace and repair drains, lines and pipes at appropriate locations for collecting and carrying underground or percolating water.

**Section 10.9 Withdrawal of Property.**

(a) **By Declarant or ML100.** Declarant and/or ML100 may, and each hereby reserves the right to, at any time and from time to time, unilaterally remove and release any portion of the Property from coverage of this Declaration and the jurisdiction of the Association, provided that: (1) Declarant or ML100 is the owner of such portion of the Property to be so removed and released, or if Declarant or ML100 is not the owner, then either such owner consents to the withdrawal or the right to withdraw such portion of the Property is expressly reserved in the deed or other instrument of conveyance of such portion of the Property from Declarant or ML100 to such owner; and (2) this Declaration is amended (A) to describe the property remaining subject to this Declaration upon completion of the withdrawal (and the amendment is executed by the owner, if the owner's consent is required as provided herein) and (B) to revise the Voting/Assessment Ratio of the Lots and/or Subdistrict Units remaining subject to this Declaration upon completion of the withdrawal.

(b) **Effect of Withdrawal.** The removal and release of any portion of the Property shall be effective upon the date of Recordation of the amendment of this Declaration or such later date as may be provided in the amendment. The amendment shall contain a legal description of the portion of the Property withdrawn and state that it is released from the terms, covenants, conditions and restrictions of this Declaration. Upon Recordation of the amendment of this Declaration, such portion of the Property shall be free and clear of, and no longer subject to: (1) any of the terms, covenants, conditions, easements and restrictions contained in this Declaration or any Supplemental Declaration; or (2) any interest of the Association, any Owner (other than the owner of the withdrawn portion of the Property), or any Mortgagee (other than a mortgagee having a Recorded interest in the withdrawn portion of the Property), the intent being that such parties' interest, if any, in the withdrawn portion of the Property would be divested upon such Recordation.

**Section 10.10 Acts of Declarant and ML100.** Anything in this Declaration or in the Bylaws to the contrary notwithstanding, in any and all matters of the Association (whether as an Owner Member or, with respect to Declarant, as the Class "B" Member), Declarant and ML100 shall have the right and authority to act through any Person who is so designated to act in a writing that is delivered (whether by hand delivery, facsimile or otherwise) to the Managing Agent or to the secretary of the Association at any time prior to the relevant act. In the absence of any such designation, any Person who is, at the time of such act, authorized to sign legal documents on behalf of Declarant or ML100 (or a Member of Declarant or ML100) shall have the right and authority to act on behalf of Declarant or ML100 in any and all matters of the Association.

## **ARTICLE 11 EASEMENTS**

The rights and easements set forth in this Article 11 are in addition and without limitation to any other rights and easements created by or set forth in this Declaration or any Supplemental Declaration.

### **Section 11.1    Reservation of Blanket Easement and Utility Construction Easements.**

(a)        There is hereby created a blanket perpetual easement in favor of Declarant and its designees (which may include, without limitation, ML100, the County, the State of Hawaii and any entity providing utility services) upon, across, over and under any part of the Property, including, without limitation, the Lots or Subdistrict Units, for ingress and egress for installing, constructing, replacing, repairing, maintaining, protecting and operating all utilities (whether public or private) or facilities of a public use or nature, including, but not limited to, water, sewer, gas, telephone, electricity, cable (including without limitation television cable), mailboxes and access thereto, landscaping, security systems, and communication lines and systems. By virtue of the easement, it shall be expressly permissible for Declarant and its contractors and/or the providing utility company to construct (above ground or underground) and maintain (including inspect, alter, repair, refurbish and the like) the necessary facilities, wires, circuits, conduits, cables, walls, pads, mailbox pads and stanchions, meters and related appurtenances, facilities and equipment on any part of the Property, and to enter upon any part of the Property to accomplish the foregoing and to take readings of any meter relating to the provision of such service.

(b)        The easement reserved by this Section may be assigned by Declarant to the Association by written instrument, and the Association shall accept the assignment upon such terms and conditions as are acceptable to Declarant, including reservations of rights in favor of Declarant. If the easement is assigned to the Association, the Board shall, upon written request, grant such limited term or perpetual easements as may be reasonably necessary for the development of the Property and/or, in the sole and absolute discretion of Declarant, for any adjacent property.

(c)        Any utility company or other entity benefiting from this blanket easement: shall use its best efforts to install and maintain the utilities in a manner that will cause the least practicable interference with the uses of and by the Owners, Occupants, the Association, Declarant and ML100, except on a temporary basis; shall proceed with its installation and maintenance activities as promptly and expeditiously as reasonably possible; and shall restore the surface of the land to its original condition as soon as possible after completion of its work. Should any utility company or other entity furnishing a service covered by the blanket easement request a specific easement by separate Recordable document, then either Declarant, ML100 or the Association shall have, and each is hereby given, the right and authority to grant such limited term or perpetual easement upon, across, over, or under any part of the Common Area or any part of any Lot or Subdistrict Unit, without the joinder of the Owner thereof or the Owner's Mortgagee.

(d)        Without limitation of the foregoing, Declarant and ML100 each reserves unto itself and its successors the right to grant, create, designate, delete, cancel, amend, relocate, realign and reserve limited terms and/or perpetual easements and rights of way over, across, under and through the Property, including the Lots and Subdistrict Units, for electrical power and communication utilities, electromagnetic and optical transmission facilities, landscaping, drainage, water, wastewater, mail delivery and other similar development or public service purposes, as Declarant or ML100 in its discretion may from time to time designate, for the benefit of the Property, other property in the vicinity of the Property or Surrounding Operations (as defined in Article 15) and the right to grant or assign any such easements to any governmental agencies, public utility or service companies or owners associations as determined by Declarant or ML100, without the joinder or consent of the Owner or the Owner's Mortgagee. Furthermore, the rights reserved to Declarant and ML100 include, specifically and without limitation, the right to utilize utility service to the Project on any portion thereof to serve adjacent and separate developments outside of the Project, provided Declarant or ML100 sub-meters such use, and



the right to use Roadways in the Project to serve adjacent developments, provided such adjacent development shares pro rata for the cost of maintenance and repair of the Roadways.

(e) By taking title to a Lot or Subdistrict Unit, each Owner consents to any such creation, designation, grant, deletion, cancellation, relocation, reassignment, conveyance, transfer, and reservation of easements and/or rights of way as provided above, without the necessity of the joinder or consent of the Owner or the Owner's Mortgagee, or those claiming by, through or under the Owner, entering into any further agreement respecting such action or document; provided, however, that such Owner and those claiming by, through or under the Owner, agrees to join in and execute such documents and instruments and do such other things as may be necessary or convenient to effect the same promptly at the request of Declarant or ML100 without payment of additional consideration.

(f) The rights reserved in this Section 11.1 shall, to the extent practical, be exercised in a manner that does not materially and adversely affect the Lot or Subdistrict Unit being impacted by the reserved right. Reserved rights that affect those portions of a Lot or Subdistrict Unit that are within the building setbacks are deemed to automatically be of no material or adverse effect on such Lot or Subdistrict Unit. Reserved rights that affect those portions of a Lot or Subdistrict Unit that are outside of the building setbacks shall not necessarily be considered material and adverse to such Lot or Subdistrict Unit, but shall be considered on a case-by-case basis, keeping in mind the impact of the reserved right on the overall development of the Lot or Subdistrict Unit.

(g) The rights reserved in this Section 11.1 shall continue until December 31, 2035.

#### **Section 11.2 Roads/Roadways.**

(a) Subject to applicable provisions of the Project Documents, each Owner shall have a non-exclusive right to enter upon and use the Roads for ingress and egress purposes. Such right of entry shall automatically terminate with respect to the Roads, or portions thereof, upon dedication, if any, of the Roads or such portions thereof to the County, the State of Hawaii or any other governmental authority for public access purposes. Each Owner assumes all risks associated with such Owner's use of the Roads.

(b) Declarant and ML100 shall have and reserve the right to negotiate and agree with the County and other appropriate entities to designate easements for access, use, maintenance and other purposes relating to the Roads, and to convey or dedicate the Roads and/or such easements to the County, the Association, and/or other appropriate Persons as may be required by the County or deemed appropriate by Declarant or ML100 in connection with the development, construction, promotion, sale, use and/or ownership of the Property and/or other properties adjacent to or in the vicinity of the Project. Declarant and ML100 may temporarily relocate, reroute or restrict entry upon portions of the Roads, provided only that a reasonable alternative route for ingress and egress purposes required by Owners for access to their respective Lots and Subdistrict Units shall be provided by Declarant or ML100. During such period(s) of construction, each Owner shall abide by all traffic modifications as directed by Declarant or ML100 and shall not interfere with the exercise of Declarant's or ML100's rights hereunder.

(c) Declarant and ML100 shall have and hereby reserve the right (1) to designate, delete, relocate, grant, convey, transfer, cancel, reserve or otherwise deal with any easements and rights of way over, across, under and through the Roadways at any time necessary or desirable for the construction, reconstruction, installation, relocation, operation, use, maintenance, repair and/or removal of: roadway and related improvements, including, without limitation, landscaping, street lights, entry and other identification features, including street signs and monuments, irrigation systems, and related appurtenances and facilities; appliances, equipment, wires, cables, conduits, pipes and facilities for electric power transmission and distribution systems; water transmission and distribution systems; sanitary sewer systems; stormwater drainage systems; television, telecommunication and communications; and similar purposes (including, without limitation, a right of entry for the aforesaid purposes), and (2) to grant, amend and cancel easements for such purposes to governmental or quasi-

governmental authorities, public or private utility or service companies, the Association or other Persons on terms customary and appropriate for such grants of easement.

**Section 11.3 Easements for Surrounding Operations.** Easements are hereby reserved over, across, under and through the Property, and each Lot and Subdistrict Unit therein, for the commencement, continuation and resulting effects of the Surrounding Operations (as defined in Article 15), and all activities related or incidental thereto.

**Section 11.4 Easement for Ongoing Construction.** Declarant, ML100 and their agents, employees, contractors, licensees, successors, mortgagees and assigns, shall have and there is hereby created an easement over, under and upon the Property, including Lots and Subdistrict Units therein, to create and cause noise, dust, odors, vibration and other nuisances or annoyances created by or resulting from any work connected with or incidental to the development, construction and/or sale of any Lot, Subdistrict Unit, Condominium Unit or Dwelling Unit or other Improvement to the Property, or any other development that Declarant, ML100, their successors or assigns, may develop on property adjacent to or in the vicinity of the Project. By taking title to a Lot or Subdistrict Unit, each and every Owner or other Person acquiring any interest in the Project waives any and all rights, claims or actions that might otherwise be asserted against Declarant, ML100, their agents, employees, licensees, successors, mortgagees and assigns, based on any such noise, dust, odors, vibration and other nuisances or annoyances.

**Section 11.5 Recorded Easements.** The Common Area and all portions thereof and each Lot and Subdistrict Unit shall be subject to all easements shown on any final, County-approved subdivision map or Recorded file plan relating to the Common Area and all portions thereof and/or such Lot or Subdistrict Unit, and to any easement of Record or of use, which shall include, without limitation, use for construction, installation and repair of utilities, maintenance, encroachment, drainage, ingress and egress.

**Section 11.6 Maintenance Easement.** Declarant and ML100 each hereby reserves to itself and the Association, and their respective officers, agents, employees, and assigns, an easement upon, across, over, in, and under all and any portion of the Property, including the Lots and Subdistrict Units, and a right to make such use of such property as may be necessary or appropriate to perform the rights, duties and functions that the Association is obligated or permitted to perform pursuant to this Declaration, any Supplemental Declaration or the Association Rules, including the right to enter upon any Lot or Subdistrict Unit for the purpose of performing maintenance to the landscaping or the exterior of Improvements to such Lot or Subdistrict Unit as required or permitted by this Declaration, any Supplemental Declaration or the Association Rules.

**Section 11.7 Flowage Easement.** Declarant and ML100 each hereby reserves to itself, the Association, and their respective officers, agents, employees, successors, and assigns, an easement to enter upon, across, over, in, and under any portion of the Property, including Lots and Subdistrict Units, for the purpose of changing, correcting, or otherwise modifying the grade or drainage channels or patterns of any portion of the Property so as to improve the drainage of water on the Property for the benefit of the Property and, at Declarant's or ML100's sole and absolute discretion, adjacent properties. Reasonable efforts shall be made to use this easement so as to disturb as little as possible the uses of the Owners, the Association, Declarant and ML100, as applicable, to prosecute such drainage work promptly and expeditiously, and to restore any areas affected by such work to a slightly and usable condition as soon as reasonably possible following such work. The rights reserved in this Section shall continue until December 31, 2035.

**Section 11.8 Easements for Encroachments.** There shall be reciprocal appurtenant easements of encroachment as between adjacent Lots due to the unintentional placement or settling or shifting of the Improvements constructed, reconstructed, or altered thereon (either initially by Declarant or ML100 or subsequently in accordance with the terms of this Declaration) to a distance of not more than one foot, as measured from any point on the common boundary between said adjacent Lots, along a line perpendicular to such boundary at such point; provided, however, in no event shall an easement for

encroachment exist if such encroachment occurred due to willful and knowing conduct on the part of an Owner, Occupant or the Association. Any such easements for encroachment shall be for the encroachment and for the maintenance thereof.

#### **Section 11.9 Easements for Sales Activities.**

(a) Declarant, ML100 and their agents, employees, contractors, licensees, successors, and assigns shall have the right to conduct extensive sales activities on and at the Property, including, without limitation, the use of any Lot or Subdistrict Unit owned by Declarant or ML100, and the Common Areas appurtenant thereto as model units, sales and management offices, and to conduct extensive sales displays and activities until the closing of the sale of the last Lot and/or or Subdistrict Unit in the Property. Without limitation of the foregoing, these reserved rights and easements include: (1) the right to enter the Common Areas for the purpose of showing prospective purchasers Lots or Subdistrict Units in the Property; (2) the right to place displays, advertising signs, billboards, flags, balloons, banners, lights and spotlights upon any portion of the Property, and to light the buildings or any portion thereof in conjunction with sales of Lots or Subdistrict Units; (3) the right of Declarant or ML100 to use any Lot or Subdistrict Unit owned or rented by Declarant or ML100 for a sales office or for sales or display purposes until all Lots and Subdistrict Units have been sold; and (4) the right of Declarant or ML100 to reserve parking areas within the Property for employees, agents and prospective buyers, even if such parking areas are designated as Common Areas.

(b) In the event that Declarant's or ML100's mortgagee or any successor to or assignee of Declarant's or ML100's mortgagee shall acquire any portion of the Property in the course of any foreclosure or other legal proceeding or by a deed in lieu of foreclosure, such mortgagee, its successors and assigns, shall be vested with the rights of Declarant or ML100 (as applicable) under this Declaration and without limitation of the foregoing shall have the same right to conduct such extensive sales activities on the Property.

(c) Each and every party acquiring an interest in the Property hereby acknowledges that the sales activities may result in noise and nuisances, and consents to such activity by Declarant and ML100, and further waives, releases and discharges any rights, claims or actions such party may acquire against Declarant, ML100, their brokers, sales agents, employees and lenders, and their respective successors and assigns as a result of any such activity or activities. The rights reserved in this Section shall continue until December 31, 2035.

**Section 11.10 Duplex Buildings.** Each Duplex Unit shall have a perpetual easement in, on, over and through its adjoining companion Duplex Unit and Lot or (if applicable) Subdistrict Unit for support, maintenance, repair and replacement of the Boundary Walls, the roof, rafters, roof frame, felt under covering, shingles, gutters and other Improvements, or any portion thereof, that extends over or into the adjoining companion Duplex Unit, Lot or Subdistrict Unit and/or is in any way connected to the companion Duplex Unit, together with a perpetual easement in, on, over and through the adjoining companion Duplex Unit, Lot or Subdistrict Unit for ingress and egress in order to perform repair, maintenance or replacement work. Except as otherwise provided in this Declaration, each Owner of a Duplex Unit shall be responsible for the repair, maintenance and replacement of Improvements located on such Owner's Lot or Subdistrict Unit, including the driveway and that portion of the Duplex Building that is located on such Owner's Lot or Subdistrict Unit, subject, however, to general liability for property damage due to negligence or willful acts or omissions. In the event any dispute concerning matters of mutual interest and concern (e.g., roof repairs, repainting, landscaping and the like) arises between the Owners of adjoining Duplex Units, such dispute shall be submitted to the dispute resolution process as provided in Article 22 below.

**Section 11.11 Landscape Maintenance Easement.** Declarant and ML100 each reserves unto itself and its successors a perpetual, non-exclusive easement for landscape maintenance purposes and rights of way over, across, under and through those certain easements affecting the Lots and/or Subdistrict Units in the Project that are designated in this Declaration or in a Supplemental Declaration, including, without limitation, the Roadway Landscape Easement Area, for the purposes of planting,

replanting, installing, re-installing, maintaining, using, and removing landscaping plants, shrubs and trees, Sign Monuments and the installation and use of general landscape structures, machinery and equipment. Likewise, the Board, and its duly authorized employees, agents and contractors, shall have and are hereby granted the right and a non-exclusive license to enter upon the Property, including any Lot or Subdistrict Unit, as reasonably necessary for the purpose of satisfying the maintenance rights or obligations of the Association, including, specifically, those set forth in Article 13 of this Declaration.

**Section 11.12 Repair Easement.** Declarant, ML100 and their agents, employees, contractors, licensees, successors, mortgagees and assigns shall have an easement over, under and upon any portion of the Project, including the Common Area and any Lot or Subdistrict Unit, as may be reasonably necessary for the completion of Improvements to and correction of defects and other "punchlist" and warranty items in the Project. The rights reserved in this Section shall continue until 10 years after the later of (a) the "date of completion" of the Improvements as evidenced by the filing of a Notice of Completion or (b) the expiration of the applicable limited warranty period for any portion or portions of the Property.

**Section 11.13 Common Area.** Notwithstanding anything provided in this Declaration to the contrary, Declarant, ML100 and their assignees shall have an easement over the Common Area, which easement may be assigned from time to time to anyone whom Declarant or ML100 wishes, including Owners and non-owners, on a permanent or temporary basis, for access over, under, across and through the Common Area. Declarant, ML100, their contractors, subcontractors, licensees, mortgagees and assigns, and their respective employees and agents, shall have the right, and an easement in favor of Declarant, ML100 and their successors and assigns is hereby granted, at any time, during the Declarant Control Period, to enter upon, use, remove, replace, add to, or otherwise alter the Improvements in the Common Areas and to do all things reasonably necessary, desirable or useful for designing, developing, constructing or completing the Project, and marketing and selling the Lots and/or Subdistrict Units; provided that the exercise of the rights granted herein shall not cause any permanent or avoidable interruption in the service of utilities to the Property, and provided further that any Person exercising such rights shall use reasonable efforts, without additional cost to Declarant or ML100 and consistent with maintaining the progress of the design, development, construction, completion and sale of the Project, to minimize interference with the Owners' use and enjoyment of the Property. Without limitation of the foregoing, Declarant and ML100 shall have the absolute right, notwithstanding the lease, sale, or conveyance of any Lot, Subdistrict Unit or Dwelling Unit, and without being required to obtain the consent or joinder of or provide notice to any Owner, Mortgagee, lien holder, or other Persons, to improve Common Areas with recreational facilities, which may include, but are not limited to, picnic tables and barbecue areas, all of which upon such construction shall be Common Area of the Project.

**Section 11.14 Assignment of Rights.** The rights of Declarant under this Article shall extend to Declarant and ML100 and, to the extent described in a Recorded instrument of succession or assignment, their successors and assigns. Without limitation of the foregoing, Declarant and/or ML100 may, by Recorded instruments or by Supplemental Declaration, assign or partially assign, while retaining equivalent rights to Declarant and ML100, to any assignee, including, without limitation, the Association, any one or more of the rights and easements reserved to Declarant and ML100 under this Article and its subparts (or otherwise reserved to Declarant and ML100 in this Declaration).

**Section 11.15 Additional Easements and Licenses.** If Declarant or ML100 in its sole and absolute discretion determines that additional roadway, utility, drainage or other similar easements or licenses, whether or not contemplated or mentioned in this Declaration, over, across, under and through portions of the Property are reasonable, necessary, and desirable to effectuate the purposes of this Declaration or to facilitate use or development of the Project or other properties adjacent to or in the vicinity of the Project, then, upon the request of Declarant or ML100, and provided the proposed additional easements and licenses will not materially and adversely interfere with the development, use, occupancy, or operation of, or access to, any affected Lot or Subdistrict Unit, Declarant or ML100 may designate easements for such purposes and the Association, each Owner and Mortgagee, as applicable, agrees, at the direction of Declarant or ML100, to grant such additional easements and licenses over,

across, under and through the affected Lot or Subdistrict Unit, without charge, subject to terms customary and appropriate for such easements and licenses.

**Section 11.16 Estoppel Certificate.** Each Owner shall have the right to request from Declarant and/or ML100 a Recorded estoppel certificate that describes the extent to which the rights and easements reserved in this Article are expected to physically affect the Owner's Lot or Subdistrict Unit. If Declarant and/or ML100 agree to issue and Record an estoppel certificate for a requesting Owner, then the extent and scope of the certificate shall be at the discretion of Declarant and/or ML100, and may, but need not necessarily, limit the location of easements to certain utility corridors within the Lot or Subdistrict Unit.

## **ARTICLE 12 COMMON AREA**

**Section 12.1** The Common Area includes, but need not be limited to:

- (a) any landscaping and other flora, structures and all other Improvements located upon and within any real property transferred to or acquired by the Association;
- (b) the Roadways and the medians and rights-of-way along or within the Roadways, including, without limitation, the Planting Strip Areas (defined in Section 13.10), any and all street lights, light bulbs, curbs, sidewalks, paving and any trees and other landscaping and/or irrigation facilities located therein or thereon;
- (c) the Roadway Landscape Easement Areas, together with all irrigation improvements therein located;
- (d) except as provided in Section 13.8 and Section 13.9, all perimeter walls of the Project designated in this Declaration or in Supplemental Declarations as Common Area, and Sign Monuments for the Project or Subdistricts;
- (e) any property that becomes the responsibility of the Association by agreement with, or imposed as a condition to a grant or permit of development of the Project by, the County;
- (f) all and each of those facilities and easement areas serving to control and direct the drainage of surface water in the Project or any part thereof, whether located within the Property or on property owned by others (collectively the "**Drainage Easements**" or "**Common Drainage Facilities**");
- (g) Cluster mailbox systems serving the Project (subject to the privacy rights of the postal addressee); provided, however, that the Board may assign responsibility for the care and maintenance of such mailbox systems to one or more Subdistrict Associations;
- (h) such additional property as may be transferred to the Association in accordance with this Declaration;
- (i) the Association Land; and
- (j) such additional property as may be designated or described as part of the Common Area in this Declaration, any Supplemental Declaration or any contract or agreement for maintenance thereof by the Association.

**Section 12.2 Common Expenses.** Except as otherwise provided in this Declaration, "**Common Expenses**" means and includes all actual and estimated costs incurred or anticipated to be incurred by or on behalf of the Association and/or its designees in connection with ownership, management, operation, maintenance, repair and replacement of the Association Property and Common

Area (or portions thereof), the administration of the Association and others acting pursuant to this Declaration, including without limitation, the following:

(a) Management, operation, maintenance, repair and replacement of all or any portion of the Common Area;

(b) Unpaid Assessments resulting from an Owner's failure to pay such Assessments; provided, however, that the Owner shall remain personally liable for such Assessments and, except as otherwise provided in this Declaration, the Owner's Lot or Subdistrict Unit shall remain subject to the Assessment Lien for such unpaid Assessments;

(c) Maintenance by the Association of areas within the right-of-way of any public or private streets or other areas within or in the vicinity of the Project as may be provided for in this Declaration or pursuant to agreements with the County, the State of Hawaii, Declarant or ML100;

(d) Management and administration of the Association, including the costs and fees of the Managing Agent;

(e) Utilities and services and related matters, including, but not limited to, water, electricity, gas, sewer, cable television, trash pick up and disposal, that are provided to the Association, the Association Property or the Common Area;

(f) Landscaping maintenance and replacement and other services that generally benefit and enhance the value and desirability of the Project and that are provided to or for the benefit of the Association;

(g) Insurance maintained by the Association as required or permitted in the Project Documents, including a reserve for any deductibles provided in insurance policies;

(h) Reasonable reserves for contingencies, replacements and other proper purposes if deemed appropriate by the Board to meet the costs and expenses of maintenance, repairs and replacement of those portions of the Common Area that must be maintained, repaired, or replaced on a periodic basis;

(i) The costs that the Board reasonably elects to incur to bond officers and directors of the Association, the Managing Agent or any other Person handling the funds of the Association;

(j) Taxes paid by or imposed upon the Association;

(k) Amounts paid by the Association for discharge of any lien or encumbrance levied against the Association Property, the Common Area or portions thereof;

(l) Costs incurred by the Design Review Committee, except and to the extent charged to and paid by an Owner pursuant to the Design Guidelines;

(m) Costs incurred by the Board and any committees established by the Board, except and to the extent charged to and paid by an Owner;

(n) The costs of any security guards and any other security systems or services, if any, installed, operated or contracted for by the Association;

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

- (p) Costs incurred by the Association to borrow money;
- (q) Costs incurred by the Association for professional services;
- (r) Costs incurred by the Association in connection with any litigation or dispute resolution proceeding costs, or in the prosecution, defense, investigation, negotiation or settlement of any claim, subject to the provisions of Article 22;
- (s) Costs incurred by the Association in connection with the performance of its rights, duties and obligations under any contract(s) with Declarant, ML100, other community associations, and/or other Persons regarding maintenance of Roadways and other facilities benefiting the Project and other properties in the vicinity of the Project;
- (t) Capital improvement costs approved by the Board;
- (u) Other expenses incurred by the Association for any reason whatsoever in connection with the Common Area, or the costs of any other item or items designated by, or to be provided or performed by, the Association pursuant to any of the Project Documents, or in furtherance of the purposes of the Association or in the discharge of any duties or powers of the Association; and
- (v) Costs incurred by the Association in connection with the performance of its rights, duties, and obligations under any archaeological treatment plan entered into with respect to the Archaeological Features.

**Section 12.3 Upgrades to or Maintenance of Public Park.** Declarant and ML100 reserve the right, but not the obligation, to contract with the County for the right to upgrade, improve or maintain public parks or other facilities in the vicinity of the Property for the benefit of the Members of the Association and, in such case, Declarant or ML100 may transfer to the Association by Supplemental Declaration, and the Association shall accept, the obligations under such contract as a Common Area.

**Section 12.4 Limited Warranties; Disclaimer; Arbitration.**

(a) **Disclaimer.** It is expressly understood and agreed by and between Declarant, ML100, each Owner and the Association that, other than the Limited Warranty (defined below) and except as otherwise expressly stated in this Declaration, NEITHER DECLARANT NOR ML100 MAKES ANY WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE COMMON AREA, THE PROJECT OR CONSUMER PRODUCTS OR OTHER THINGS THAT MAY BE INSTALLED OR THAT ARE CONTAINED IN THE COMMON AREA OR THE PROJECT, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, HABITABILITY, WORKMANLIKE CONSTRUCTION OR FITNESS FOR A PARTICULAR USE. Notwithstanding the foregoing, the Association and each Owner shall permit Declarant, ML100, or their designated representative to repair any and all items Declarant or ML100 elects to repair. The Association and its Members shall have no further rights and neither Declarant nor ML100 shall have any further obligation to the Association and/or its Members in respect of such matters repaired by Declarant, ML100, or their representative.

(b) **Common Area Warranty.** Upon the Recording of the deed(s) conveying Common Area to the Association, Declarant and/or ML100 will give to the Association a limited warranty that the construction of the Common Area that is constructed by or on behalf of Declarant or ML100 has been completed in general conformity with approved plans and specifications (the "**Limited Warranty**"), subject to appropriate or required field changes in accordance with the building standards set out in the Limited Warranty. The Limited Warranty in favor of the Association with respect to the Common Area is conditioned on appropriate regular and routine maintenance, inspection and repair of the Common Area by the Association. The exact terms of the Limited Warranty are to be set forth by Declarant and/or ML100. The Limited Warranty shall be administered by the Professional Warranty Service Corporation ("**PWC**"). During the term of the Limited Warranty, the Association shall in each and all instances permit Declarant, ML100, or their designated representatives to repair any and all items classified by Declarant

or ML100 as items covered by the Limited Warranty. The Association and its Members shall have no further rights and neither Declarant nor ML100 shall have any further obligation to the Association and/or its Members in respect of such matters repaired by Declarant, ML100 or their representative. It is expressly understood and agreed by and between Declarant, ML100, each Owner and the Association that the Limited Warranty provides for mandatory arbitration of certain claims and disputes between the Association and Declarant and/or ML100 relating to the Common Area. By virtue of its interest in the Project and this Declaration, the Association covenants and agrees to abide by the Limited Warranty.

(c) **Mandatory Arbitration.** BY VIRTUE OF TAKING TITLE TO A LOT OR SUBDISTRICT UNIT, EACH OWNER ACKNOWLEDGES AND AGREES THAT, AS PROVIDED IN THE LIMITED WARRANTY, ANY DISPUTES RELATING TO OR ARISING FROM DECLARANT'S OR ML100'S OBLIGATIONS OR PERFORMANCE UNDER THE LIMITED WARRANTY, WHETHER SUCH DISPUTE IS BASED ON CONTRACT, TORT, STATUTE, OR EQUITY, AND WHETHER SUCH DISPUTE ARISES BEFORE OR AFTER THE RECORDING OF THE DEED(S) CONVEYING THE COMMON AREA TO THE ASSOCIATION, MUST BE RESOLVED SOLELY AND EXCLUSIVELY THROUGH BINDING ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. § 1, ET SEQ.), AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") IN ACCORDANCE WITH ITS CONSTRUCTION INDUSTRY ARBITRATION RULES, AND THAT IN HEREBY AGREEING TO SUBMIT SUCH DISPUTES TO BINDING ARBITRATION, DECLARANT, ML100 AND OWNER ARE GIVING UP ANY RIGHTS THEY MAY POSSESS TO LITIGATE IN A COURT OR JURY TRIAL.

## **ARTICLE 13 MAINTENANCE**

### **Section 13.1 The Association's Responsibility.**

(a) The Association, or its duly designated representatives, shall maintain, manage and keep in good repair all Common Area.

(b) During the Declarant Control Period, the Common Area shall not be reduced by amendment of this Declaration or any other means without the prior written approval of Declarant. Dedication of any portion of the Property to the County or the State of Hawaii or other governmental or quasi-governmental agency shall not relieve the Association of its maintenance obligations, unless the terms of the dedication indicate otherwise.

(c) Except as otherwise provided in this Declaration or in any Supplemental Declaration, all costs associated with maintenance, management, operation, repair and replacement of the Common Area shall be Common Expenses, subject to any right of the Association to seek reimbursement from certain Members or other Persons responsible for certain portions of the Common Area, including Limited Common Area, pursuant to this Declaration, any Supplemental Declaration or other agreements. All Common Expenses associated with the maintenance, management, operation, repair and replacement of any Limited Common Area shall be assessed against only those Lots and Subdistrict Units to which such Limited Common Area is assigned, notwithstanding that the Association may undertake to perform such maintenance and responsibilities hereunder.

(d) The Association may, in the discretion of the Board, assume maintenance responsibilities, if any, imposed on any Subdistrict by this Declaration or any Supplemental Declaration. In such event, all costs of such maintenance shall be assessed as a Subdistrict Assessment against only those Subdistrict Unit Owners in the Subdistrict(s) to which the services are provided. This assumption of responsibility may take place either by contract or because, in the opinion of the Board, the level and quality of service then being provided is not consistent with the Community-Wide Standard.

(e) In providing for the maintenance, management and repair of the Common Area pursuant to this Article 13, the Association may, subject to any other applicable provisions of this Declaration, in the sole discretion of the Board:



(1) Construct, reconstruct, repair, replace or refinish any Improvement or portion thereof upon the Common Area;

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

(3) Do all such other and further acts that the Board deems necessary or appropriate to preserve and protect the Common Area and the attractiveness thereof, in accordance with the Community-Wide Standard and the general purpose of this Declaration. Subject to any obligations imposed on the Association pursuant to any limited warranty that may be included in a Supplemental Declaration and that is applicable to the Common Area contained in a Subdistrict, the Board shall be the sole judge as to the appropriate maintenance of the Common Area. Any cooperative action necessary or appropriate to the proper maintenance and upkeep of such properties shall be taken by the Board or by its duly delegated representatives. The Board may cause the Association to contract with others for the performance of the maintenance and other obligations of the Association under this Section.

### **Section 13.2 Owner's Responsibilities.**

(a) Except as otherwise specifically provided in this Declaration, any Supplemental Declaration, or any agreement with the Association, the performance and cost of all maintenance and repair of each Lot or Subdistrict Unit, and all structures, parking areas, landscaping and other Improvements located on or within such Lot or Subdistrict Unit shall be the sole responsibility of the Owner of the Lot or Subdistrict Unit. Each Owner shall maintain all Improvements, including landscaping upon or within such Owner's Lot or Subdistrict Unit, in a state of good condition and repair in accordance with this Declaration. No Owner or Occupant of a Lot or Subdistrict Unit shall landscape or plant in any area controlled by the Association or shall otherwise interfere with the landscaping and maintenance of such landscaping as performed by the Association. No Owner or Occupant shall interfere in any manner with the proper and effective operation of the irrigation facilities, if any, located in or on Common Areas, including any Drainage Easement, Roadway Landscape Easement Area or Planting Strip Area. Further, each Owner, by taking title to a Lot or Subdistrict Unit, acknowledges and agrees that the Owner is responsible for the control of pests (termites, insects, rodents and the like) in or around such Owner's Lot and Improvements to the Lot and/or Subdistrict Unit.

(b) Each Owner shall be required to install approved landscaping and/or grass on the unimproved portions of such Owner's Lot or Subdistrict Unit within 90 days after the improvements that are constructed on the Lot or Subdistrict Unit are first occupied; provided, however, that if construction of vertical improvements to the Lot or Subdistrict Unit does not begin within 90 days after delivery of possession of the Lot or Subdistrict Unit to the Owner, then the Owner shall be required to install approved landscaping and/or grass on the unimproved portions of the Lot or Subdistrict Unit within 120 days after delivery of possession of the Lot or Subdistrict Unit to the Owner. All such landscaping and/or grass must conform to the requirements set forth in the Design Guidelines and must be irrigated and maintained by the Owner in a neat appearance with appropriate measures taken to control dust and to stabilize the lot pad and any slope. (Once construction of improvements to the Lot or Subdistrict Unit begins, the Owner shall be required to diligently and regularly continue such construction until completed.)

(c) Unless the deadline for installing approved landscaping and/or grass is extended by written consent of Declarant, ML100, the Board or the Design Review Committee, Declarant, ML100 or the Design Review Committee each may, at its option, perform all such clearing and landscape work and the Owner shall reimburse Declarant, ML100 or the Design Review Committee for the reasonable cost thereof upon demand, together with interest thereon at the maximum rate allowed by law. Similarly, if, after 30 days written demand, an Owner fails to maintain the landscaping on the Lot or Subdistrict Unit in a neat and attractive manner, Declarant, ML100 or the Design Review Committee each may, at its option, perform the work and shall be reimbursed therefor by the Owner, together with interest thereon at the

maximum rate allowed by law. Any sums not paid by the Owner shall be a lien against the Lot or Subdistrict Unit owned by such Owner, subject to foreclosure.

(d) Owners of Lots or Subdistrict Units adjacent to any Roadway shall maintain the driveway serving their respective Lots or Subdistrict Units, whether or not the driveway lies entirely within the Lot or Subdistrict Unit boundaries.

(e) Each Owner shall maintain all Improvements, including without limitation sidewalks (that portion of a street between the curb line or the pavement of a property and the adjacent property line intended for pedestrian use, but excluding the Planting Strip Area), front yards, side yards and all other landscaping upon or within such Owner's Lot or Subdistrict Unit, in a state of good condition and repair in accordance with this Declaration; provided, however, that landscaping and maintenance of the Planting Strip Area is described in Section 13.10 below.

**Section 13.3 Contracts with Owners.** To promote uniformity and/or harmony of appearance throughout the Project, the Board may cause the Association to contract with Owners to provide maintenance services to Lots or Subdistrict Units in exchange for the payment of such fees as the Association and the Owner may agree upon. The fees for such services shall be charged to such Owners as a Benefited Assessment.

**Section 13.4 Standard of Performance.** The Property, including all Lots and Subdistrict Units, shall be maintained, managed and repaired by the Association and the Owners, as applicable, under this Declaration and any Supplemental Declaration, in a manner consistent with the Community-Wide Standard and all applicable covenants, conditions and restrictions. Unless and to the extent otherwise specifically provided in this Declaration or any Supplemental Declaration, responsibility for maintenance shall include responsibility for repair and replacement, as necessary.

**Section 13.5 Assessment of Certain Costs of Maintenance and Repair of the Common Area.** In the event that the need for maintenance or repair of any portion of the Common Area (including, without limitation, the Drainage Easements, Planting Strip Area and Roadway Landscape Easement Area maintained by the Association pursuant to this Declaration) is caused through the willful or negligent act of any Owner or Occupant or the family, guests, or invitees of such Owner or Occupant, the cost of such maintenance or repair shall be a Special Assessment against the Owner and such Owner's Lot or Subdistrict Unit, secured by the Assessment Lien.

**Section 13.6 Maintenance of Unimproved Lots or Subdistrict Units.** In order to maintain the appearance of the Project in accordance with the Community-Wide Standard, the Association may, at the discretion and by resolution of the Board, provide temporary maintenance of the landscaping and flora of any or all unimproved Lots or Subdistrict Units. Such maintenance may include (and may be limited to) the cutting or trimming of vegetation on an unimproved Lot or Subdistrict Unit and such other actions as the Board may deem necessary or appropriate from time to time. The Board shall have no obligation to provide such temporary maintenance of any unimproved Lot or Subdistrict Unit, and by performing such maintenance from time to time the Board shall not be deemed to have or assumed any continuing obligation to do so. The costs of maintenance by the Board of any unimproved Lot or Subdistrict Unit pursuant to this Section may, at the discretion of the Board, be charged as either (a) a Common Expense and included in the General Assessment, or (b) a Benefited Assessment against the Owner and such Owner's Lot or Subdistrict Unit, secured by the Assessment Lien.

**Section 13.7 Improper Maintenance and Use of Lots or Subdistrict Units.** In the event any portion of any Lot or Subdistrict Unit is so maintained as to be in violation of this Declaration or to present a public or private nuisance or an unreasonable condition (as determined by the Board) with respect to other Owners or Occupants, or as to substantially detract from the appearance or quality of the surrounding Lots, Subdistrict Units or other areas of the Property, or in the event any portion of a Lot or Subdistrict Unit is being used in a manner that violates this Declaration, any applicable Supplemental Declaration, the Association Rules or the Design Guidelines, or in the event the Owner of any Lot or Subdistrict Unit or portion thereof is failing to perform any of its obligations under this Declaration, any

applicable Supplemental Declaration or the Design Guidelines (including, but not limited to, the maintenance of the Lot or Subdistrict Unit consistent with the Community-Wide Standard), then the Board may by resolution make a finding to such effect, specifying the particular condition or conditions that exist, and, pursuant thereto, give notice to the offending Owner that, unless corrective action is taken within 10 days, the Board may cause such action to be taken at the Owner's cost. If, at the expiration of said 10-day period, the requisite corrective action has not been taken, then the Board shall be authorized and empowered to cause such action to be taken and the cost thereof shall be a Special Assessment against the offending Owner and the Owner's Lot or Subdistrict Unit, secured by the Assessment Lien.

#### **Section 13.8 Existing Fences and Walls.**

(a) Among the improvements that may be constructed by Declarant or ML100 are various wooden, vinyl, aluminum, or wrought iron fences and masonry walls located within various Lots or along Lot boundaries. The Owner of any Lot or Subdistrict Unit within which a fence or wall has been constructed or along the Lot line of which a fence or wall is located may not remove such fences or walls, and shall be responsible, at the Owner's cost, to maintain, paint as required, and repair any fence or wall so constructed or located (the **"fence maintenance obligation"**), and shall, to the extent required, have a right in the nature of an easement over the adjacent Lot and, if applicable, Subdistrict Unit to perform such fence maintenance obligation. No additions or alterations shall be made to these improvements except as permitted pursuant to this Declaration.

(b) Certain fences and walls may have been constructed on the common lot line boundary between Lots, with portions of the fence or wall located in one or the other of the Lots (such fences and walls are herein described as **"party wall(s)"** and the Lots affected by such party walls are referred to as the **"Party Wall Lots"**). The constructed placement and location of party walls within the Project, together with the encroachments resulting therefrom, are specifically authorized by this Declaration. Party walls may not be demolished or relocated by an Owner of a Party Wall Lot (or by the Owner of any Subdistrict Unit affected by such party wall, if any), except (1) in accordance with the terms of this Declaration and (2) with the written consent of the Owner of the other Party Wall Lot on which is located the party wall that is proposed to be demolished and/or relocated. Owners of Party Wall Lots that share a party wall on the Lots' common boundary have a mutual fence maintenance obligation to maintain and repair the common party wall, and the cost of such maintenance and repair, and reconstruction, as required, shall be shared equally by such Lot Owners; provided that if one of the Party Wall Lots is subject to the jurisdiction of a Subdistrict Association, then the rights and obligations of Owners of Subdistrict Units affected by party walls may be set forth in the Recorded Condominium Documents or other instruments establishing or governing such Subdistrict Association. The right of any Owner to contribution from any other Owner under this Section shall be appurtenant to the land and shall pass to such Owner's successors in title. In the event of any dispute arising concerning a party wall or fence, or under the provisions of this Section and its subparts, such dispute shall be submitted to the dispute resolution procedure set forth in Article 22 of this Declaration.

**Section 13.9 Sign Monument and Entry Features.** Located on certain Lots or Subdistrict Units may be a Sign Monument installed by or on behalf of Declarant, ML100 or the Association. Sign Monuments shall be maintained by the Association or by an applicable Subdistrict Association. The structural integrity of a Sign Monument shall not be undermined. No additions or alterations shall be made to the Sign Monument except as permitted pursuant to this Declaration or an applicable Supplemental Declaration. The Association, ML100 or Declarant, each may, at its option, have access on and over such Lot(s) or Subdistrict Unit(s) as may be necessary to perform, and may perform, all necessary and required maintenance, painting, repair and upkeep of a Sign Monument deemed appropriate by the Association, ML100 or Declarant.

**Section 13.10 Trees and Planting Strip Area.** Declarant or ML100 may plant trees in an Owner's yard or in the Common Areas, along the Roadways, including, without limitation, the planting strip between the curb and the sidewalk (the **"Planting Strip Area"**). The Planting Strip Area shall be maintained by the Association. No trees within a Planting Strip Area shall be altered, removed, changed or relocated, and no trees shall be planted in the Planting Strip Area, without the prior written consent of

the Board and, during the Declarant Control Period, Declarant. No Owner may (a) fill in the ground area of the Planting Strip Area, (b) pile building materials or equipment in the Planting Strip Area, (c) poison any landscaping in the Planting Strip Area, (d) post any signs or notices in the Planting Strip Area, or (e) damage any tree in the Planting Strip Area.

**Section 13.11 Grade of Lot or Subdistrict Unit.** Each Owner shall maintain the grade and ground cover of the Owner's Lot or Subdistrict Unit so as to prevent soil erosion, excessive water run-off onto any neighboring Lot, Subdistrict Unit or property, and the ponding of any water on the Lot or Subdistrict Unit. Such erosion and ponding may contribute to expansion or shrinking of soils underlying improvements and damage the area.

**Section 13.12 Cleaning and Maintaining Sidewalks.** The Owner of any Lot or Subdistrict Unit abutting or adjoining a street shall maintain, and keep clean, passable and free from weeds and noxious growths, the sidewalk and gutter area that abuts or adjoins their property and any area between the sidewalk and fence line within the Lot or Subdistrict Unit. This requirement shall not apply where maintenance of an abutting sidewalk and gutter may be hazardous to the Owner or if there is no reasonable access from the property to the sidewalk and gutter or if the Association is responsible for such maintenance. The term "**sidewalk**" as used herein shall mean that portion of a Road right-of-way between a curb line or the pavement of a Roadway and the adjacent property line (but excluding the Planting Strip Area) intended for the use of pedestrians, including any setback area acquired by the County for road widening purposes. The term "**gutter**" as used herein shall mean that paved portion of a Roadway immediately adjacent to the curb or that portion of a Roadway in concrete and 12 to 14 inches wide immediately adjacent to the curb.

**Section 13.13 Declarant's Uses.** Uses of the Property and activities engaged in thereon that are incident to the initial development of the Project by Declarant, ML100, or any successor in interest to Declarant or ML100 as developers of the Project, shall be Permitted Uses for those entities, notwithstanding any apparent violation of the foregoing restrictions and notwithstanding that such uses and activities may cause temporary annoyance, inconvenience or nuisance to Owners.

## **ARTICLE 14 SUBDISTRICTS AND SUPPLEMENTAL DECLARATIONS**

**Section 14.1 Subdistrict Associations.** Subdistricts shall be created by a Recorded Supplemental Declaration that contains additional covenants, conditions, restrictions and easements for the Subdistrict, which may, but need not, provide for the formation of a Subdistrict Association. Each Subdistrict containing condominium developments shall have Recorded Condominium Documents that provide for the formation of an association in accordance with Hawaii law. The Supplemental Declaration (and/or the bylaws of any Subdistrict Association if such association is formed) may provide for, among other things: (a) assessment liens and other procedures to enforce the collection of all assessments; (b) membership rights and voting rights; (c) meetings of members and directors of the Subdistrict Association and the election of officers and directors of the Subdistrict Association; (d) the right of the Association to take control (temporary or otherwise) of the Subdistrict Association in the event the Subdistrict Association is failing to levy and collect assessments in an amount sufficient to pay its obligations to the Association or otherwise failing, in the opinion of the Board or Declarant, to perform its functions and duties in a manner consistent with the Community-Wide Standard; and (e) the payment by the Subdistrict Association to the Association of all costs incurred by the Association designated in this Declaration or any Supplemental Declaration as Subdistrict Expenses, including, but not limited to, all costs and expenses relating to Limited Common Area assigned to the Subdistrict, as provided in Section 3.2. If a Subdistrict Association is created for the administration of any portion of the Property, then all of the property within the Subdistrict shall be subject to the jurisdiction of such Subdistrict Association (as well as of the Association). If a Subdistrict Association is not created for a portion of the Property, then the Subdistrict for such portion of the Property shall be governed only by the Association and assessments shall be made directly to the Owners in the Subdistrict (as opposed to being made on the Subdistrict Association).

**Section 14.2 Subdistrict Expenses.** Certain of the Common Expenses, determined at the reasonable discretion of the Board, as incurred, or to be incurred, by the Association for the benefit of, or otherwise directly attributable to, Owners or Occupants of Lots or Subdistrict Units within one or more Subdistricts, may be assigned by the Board as Subdistrict Expenses appertaining to such Subdistrict(s), and thereby subject to Subdistrict Assessments. All Common Expenses relating to or associated with Limited Common Area shall be Subdistrict Expenses assigned to the Subdistrict(s) to which such Limited Common Area appertains. The Subdistrict Expenses may include, at the discretion of the Board, reasonable reserves for capital repairs and replacements as may be specifically authorized from time to time by the Board as provided herein or in the Bylaws.

**Section 14.3 Property Management and Maintenance.** Unless otherwise provided in the applicable Supplemental Declaration, the Board, at its election, may require any Subdistrict Association to retain the Association as, or at the request of a Subdistrict Association the Association may, at the discretion of the Board, serve as, Manager for the Subdistrict Association so that the Community-Wide Standard may be achieved and/or maintained. As such Manager, the Association shall maintain the Limited Common Area in the Subdistrict.

**Section 14.4 Management Support.** Unless otherwise provided in the applicable Supplemental Declaration, the Board, at its election, may require any Subdistrict Association to use, or at the request of a Subdistrict Association the Association may, at the discretion of the Board, provide, the administrative and management services of the Association for the Subdistrict Association. At the election of the Board, the Association, through its staff of employees and contractors, may act as accountants for any Subdistrict Association, handle the collecting of assessments, if any, levied by the Subdistrict Association, and enforce such collection, assist in the preparation of budgets, administer the use of the Limited Common Area, negotiate contracts for services and enforce the governing documents of the Subdistrict Association.

**Section 14.5 Charges to Subdistrict Associations.** All costs incurred by the Association in providing any services described in this Article 14, of any other sums due the Association from the Subdistrict Association pursuant to this Declaration or any agreement between the Subdistrict Association and the Association, shall be Subdistrict Expenses charged to the applicable Subdistrict Association, and/or the Owners therein, as Subdistrict Assessments.

**Section 14.6 Additional Association Rights.** The Association (via the Board) shall have the right to take control of a Subdistrict Association for such period of time as shall be necessary to bring about collection of Assessments or otherwise to cause the Subdistrict Association to meet the applicable standards and obligations set forth in the Project Documents. Such control may be effected by the Board removing such officers and directors of the Subdistrict Association as the Board deems appropriate and substituting other individuals, including, if the Board so elects, individuals who are also officers and directors of the Association. The Association (via the Board) also shall have the right at any time, if Declarant does not control the Subdistrict Association, to add as a Special Assessment, secured by the Assessment Lien in favor of the Association against each Subdistrict Unit in the Subdistrict, any assessments against such Subdistrict Unit levied by the Subdistrict Association that are not paid in a timely manner.

**Section 14.7 Recording and Effect of Supplemental Declarations.** During the Declarant Control Period, Declarant may unilaterally (i.e., without the consent of or notice to the Board, any Owner, any Member, or any Mortgagee) Record such Supplemental Declarations, as Declarant determines are necessary or appropriate, affecting those portions of the Property that are owned by Declarant or ML100. Upon Recording, any such Supplemental Declaration shall be effective with respect to the portion or whole of the Property described in the Supplemental Declaration. In the event of a conflict between the Supplemental Declaration adopted by Declarant and this Declaration, this Declaration shall control, except under circumstances where the Supplemental Declaration specifically provides that it is intended to amend this Declaration.

**ARTICLE 15**  
**SURROUNDING OPERATIONS; CONDITIONS OF LAND**

**Section 15.1 Surrounding Operations.** Each Owner, for itself and any Person claiming through such Owner, in taking title to any Lot or Subdistrict Unit, does so with the express understanding and acknowledgment that the Project and the Owner's Lot or Subdistrict Unit and their use and enjoyment of the Lot, Subdistrict Unit and Property may be periodically affected by each and all of the following uses (collectively all the uses described in this Section are referred to herein as the "**Surrounding Operations**") and specifically approves the Surrounding Operations:

(a) the land of the Project was used previously for commercial agricultural and farming operations and, in connection therewith, fertilizer and pesticides, among other things, may have been applied to and used upon the land of the Project;

(b) the Project is located near or adjacent to properties that are or may be used for agricultural or related uses, such as, but not limited to, cane milling, burning, harvesting, tending, as well as fertilization and pest and weed control (the "**Agricultural Properties**");

(c) further development, construction and sale of residential, commercial, recreational and public projects by Declarant, ML100 and others, as well as grading, improvement and maintenance of adjacent and surrounding properties, including roadways, drainage facilities, sewage treatment facilities and the like;

(d) certain lands within the surrounding area and within the Project may be irrigated with treated effluent, reclaimed water or other sources of nonpotable water; and

(e) the Project may be adjacent to sand quarrying operations and is adjacent to or in the vicinity of the Waiale Reservoir Spillway.

The Surrounding Operations may have one or more adverse effects on the use and enjoyment of the Owner's Lot or Subdistrict Unit and the occupancy of the Property, which effects may include, but are not limited to, various hazards, noise, dust, rights of access by others, smoke, earthshock, soot, ash, odor, noxious vapors, transmission of pollutants or other Hazardous Materials, flooding, surface water runoff, those attributable to winddrift and other weather factors and other adverse environmental conditions (collectively all the effects set forth above and below in this Section are referred to herein as the "**Surrounding Operations Effects**").

**Section 15.2 Hawaii Right to Farm Act.** Owners are advised that the agricultural operations and resulting consequences may be protected under the provisions of the Hawaii Right to Farm Act (Hawaii Revised Statutes, Sections 165-1 through 165-4).

**Section 15.3 Other Environmental Issues.**

(a) Mold and mold spores are present throughout the environment and may be present within and around the Improvements and other structures within the Project. All mold is not necessarily harmful, but certain strains of mold have been shown to have adverse health effects in susceptible persons. Common effects are allergic reactions, including skin irritation, watery eyes, runny nose, coughing, sneezing, congestion, sore throat and headache. Individuals with suppressed immune systems may risk infections. By minimizing moisture, an Owner or Occupant can reduce or eliminate mold growth. Owners should take positive steps to reduce or eliminate the occurrence of mold growth and thereby minimize any possible adverse effects that may be caused by mold.

(b) Neither Declarant nor ML100 will be liable for any actual, special, incidental or consequential damages based on any legal theory whatsoever, including, but not limited to, strict liability, breach of express or implied warranty, negligence or any other legal theory with respect to the presence and/or existence of molds, mildew and/or microscopic spores unless caused solely by the gross

negligence or willful misconduct of Declarant or ML100. By taking title to a Lot or Subdistrict Unit, each Owner, on behalf of itself and its family members, tenants, invitees and licensees, releases Declarant and ML100 and their officers, directors, partners, members, managers, affiliates, subsidiaries, parents, successors and assigns from and against any and all claims, actions, damages, causes of action, liabilities and expenses (including, without limitation, attorneys' fees and costs of enforcing this release) for property damage, injury or death resulting from the exposure to microscopic spores, mold and/or mildew and from any loss of resale value due to the presence and/or existence of mold, mildew and/or microscopic spores.

**Section 15.4 Mixed Use Project.** Without in any manner limiting the foregoing, each Owner expressly understands and acknowledges that the Project includes mixed uses, and is not exclusively a residential community or exclusively a commercial community, and that the presence of the mixed uses in the Project and the Surrounding Operations described above may impact an Owner's use and enjoyment of their Lot or Subdistrict Unit.

**Section 15.5 Assumption of Risk.** By taking title to a Lot or Subdistrict Unit, each Owner covenants and agrees, on behalf of such Owner, the tenants, lessees, family, servants, guests, invitees, licensees and employees of the Owner and the Occupants of such Owner's Lot or Subdistrict Unit:

(a) to accept any nuisance, inconvenience, irritation or annoyance that the Owner or such other Person claiming through the Owner may experience as a result of the foregoing activities and conditions and agrees to suffer and permit all actions and consequences incidental to such activities and conditions;

(b) to assume and does thereby assume any and all risks associated with the Surrounding Operations and the annoyances, inconveniences, Surrounding Operations Effects and other nuisances thereby created, as well as with the ongoing construction and sales activities; and

(c) to waive and does thereby waive all rights to make any claim against Declarant, ML100 and the Declarant-Related Entities, their successors and assigns, the Association, any Subdistrict Association(s) formed pursuant to a Supplemental Declaration, the owners of the Agricultural Properties and/or any of their related entities, affiliates, successors-in-title or assigns, arising out of or in connection with the ongoing construction and sales activities, the Surrounding Operations and the annoyances, inconveniences, Surrounding Operations Effects and other nuisances thereby created, the clean-up or remediation of the same, including, but not limited to (1) any claim or right for damages attributable thereto or for the design or the placement of Improvements to the Project, including the Lots and Subdistrict Units therein and thereon, or the surrounding property, or any part thereof, or related or adjacent facilities, or (2) claims for the abatement or elimination thereof.

**Section 15.6 Views.** Views from Lots and Subdistrict Units are not assured or guaranteed in any way. There is no warranty concerning the preservation of any existing view or view plane from the Lots or Subdistrict Units.

**Section 15.7 Condition of Land.**

(a) By taking title to a Lot or Subdistrict Unit, each Owner understands and acknowledges that the Property and the Lot or Subdistrict Unit may have been graded, had soil removed and/or added to reach its finished height and form, and contains (or may contain) expansive soils, and, as a result, may be subject to subsidence, settlement or expansion. Each Owner also acknowledges that standard construction techniques and applicable designs for a structure's foundation slab may result in a degree of non-structural cracking or "spider" cracking within the slab and that certain slabs will contain contraction joints. Except as expressly set forth herein, each Owner is relying and will rely solely upon such Owner's own inspection and investigation of the land of the Project and surrounding properties, and is not relying and will not rely in any way upon any representations, statements, warranties, or other information or material furnished by Declarant or its representatives, whether oral or written, express or implied. Each Owner assumes all risks associated with the condition of the Property and the Lot or

Subdistrict Unit, the nature of the soils making up the Property and the Lot or Subdistrict Unit and any Hazardous Materials on, about, around, under, over or within the Project.

(b) To properly consider the conditions and characteristics of the soils in the Property, it is important that the advice of a consultant (such as a geotechnical engineer) be obtained during the design and construction of any Improvements to the Lot or Subdistrict Unit.

## **ARTICLE 16 SECURITY DISCLAIMER**

**Section 16.1 No Obligation.** Neither Declarant nor ML100 intend to install or operate a security system within a part of the Project. The Association, or its duly appointed representatives and agents, may, but shall have no obligation to, install, operate and maintain a security system on or related to the Project. The Board shall be the sole judge as to the appropriate level and type of security, if any, provided by the Association to any portion of the Project. The Board may cause the Association to contract with third parties for the performance of any or all of the security described in this Article 16.

**Section 16.2 General Security.** Any security system installed and operated by the Association may, but need not necessarily, include: (a) guard gates and other security points, both manned and unmanned, at entries to various portions of the Project; (b) patrol vehicles, patrolmen and security supervisors; (c) cameras, computers, televisions and/or other monitoring equipment and devices; (d) communications equipment; (e) direct line phones; and (f) such other security protection devices as may be deemed appropriate by the Association. The costs of installation, maintenance and operation of any such security system shall be Common Expenses.

**Section 16.3 Right of Entry.** Representatives and agents of the Association, including security patrol personnel, if any, shall have the right to enter upon all Lots, Subdistrict Units and Common Area when reasonably deemed necessary for the protection of Persons or property. Neither the Association nor any representative or agent of the Association shall have any liability to any Person when acting in good faith in effecting such entry.

**Section 16.4 Disclaimer; No Liability.** Neither Declarant, ML100 nor the Association shall in any way be considered an insurer or guarantor of security within the Project and neither Declarant, ML100 nor the Association shall have any liability to any Owner, Occupant or other Person for any loss, damage or theft of property or injury or death to Persons (a) by reason of a failure to provide adequate security, (b) not prevented by a security system that may be provided or (c) resulting from any failures in a security system that may be provided. Each Owner and Occupant assumes all risks for loss or damage to property and death or injury to Persons and acknowledges that Declarant, ML100, the Association, and the Board have made no, and make no, representations or warranties whatsoever, nor has any Owner or Occupant relied upon any representations or warranties, expressed or implied, including any warranty of merchantability or fitness for any particular purpose, relative to any security measures undertaken or which may be undertaken within the Project. Project security measures, if any, are not intended to substitute for security of individual Lots or Subdistrict Units, or personal property located therein or thereon, which shall be the responsibility of the Owner thereof.

## **ARTICLE 17 INSURANCE**

**Section 17.1 Authority to Purchase.** The Board shall have the power and authority to, and shall, purchase with Association funds such general liability, property damage, directors' and officers' and employment practices liability, worker's compensation and other insurance and such fidelity bonds as the Board shall deem necessary or appropriate from time to time. Such policies shall be on such terms and conditions as the Board shall direct, subject to this Article 17. All such policies and claims thereunder shall be administered by the Board. To the extent reasonably available, the Association shall maintain at least \$2,000,000 of insurance (in the aggregate) against liability incurred as a result of death or injury to Persons or damage to property on the Common Area and the actions of the Association relating thereto.



Property damage insurance shall be in an amount as near as possible to the full replacement value of all Improvements (excluding landscaping) that are owned by or that are the responsibility of the Association. The property damage insurance shall be on a "special peril" basis, including the peril of hurricane. The Board may establish commercially reasonable deductibles for all insurance policies.

**Section 17.2 Non-Liability of Association, Board and Officers.** None of Declarant, ML100, the Association, any Board member, or any officer of the Association shall be liable to any Owner, Mortgagee or other Person if any risks or hazards are not covered by insurance or if the amount of insurance is not adequate or if an insurer becomes insolvent. It shall be the responsibility of each Owner to ascertain the coverage and protection afforded by the Association's insurance and to procure and pay for such additional insurance coverage and protection as the Owner may desire.

**Section 17.3 Premiums.** Premiums for insurance policies purchased by the Association shall be paid by the Association as a Common Expense, except that the amount of increase over any annual or other premium occasioned by the use, misuse, occupancy or abandonment of a Lot, a Subdistrict Unit, or related appurtenances, or of the Common Area, by an Owner, the Occupant of the Owner's Lot or Subdistrict Unit or by the agent, employee or invitee of either, shall be assessed against that particular Owner as a Special Assessment. Premiums for insurance provided by the Association to Subdistricts may, at the discretion of the Board, be charged as Subdistrict Assessments.

**Section 17.4 Insurance Claims.** The Association, through such Persons as the Board may delegate, is hereby irrevocably appointed and authorized, subject to the provisions contained herein, to adjust all claims arising under insurance policies purchased by the Association and to execute and deliver releases upon the payment of claims, and to do all other acts reasonably necessary to accomplish any of the foregoing. The Board, at its discretion, may appoint an authorized representative, or enter into an insurance trust agreement wherein the trustee shall have authority to negotiate losses under any policy purchased by the Association.

**Section 17.5 Benefit.** Except as otherwise provided herein, all insurance policies obtained by the Board shall be for the benefit of, and any proceeds of insurance received by the Association or any insurance trustee shall be held or disposed of for, the Association and the Owners, as their interests may appear.

**Section 17.6 Provisions Common to Association Insurance.** Any insurance coverage obtained by the Association pursuant to this Article 17 shall be subject to the following provisions and limitations:

(a) The named insured under any such policies shall be the Association or its authorized representative(s), with Declarant and ML100 named as additional insureds;

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

(c) The policies shall provide that coverage shall not be prejudiced by (1) any act or neglect of the Owners when such act or neglect is not within the control of the Association, or (2) failure of the Association to comply with any warranty or condition with regard to any portion of the Project over which the Association has no control;

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

(e) All policies shall be written with a company licensed to do business in Hawaii and holding a rating of A or better in the financial strength category and a rating of VIII or better in the financial size category as established by A.M. Best Company, Inc., if reasonably available, or, if not reasonably

available, the most nearly equivalent rating; provided, however, that the Board may require or allow for such other rating as it shall reasonably determine; and

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

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

(2) Notwithstanding any provisions that give the insurer the right to elect to restore damage in lieu of making a cash settlement, such option shall not be exercisable (A) without the prior written approval of the Board or (B) when in conflict with (1) the provisions of any insurance trust agreement to which the Association may be a party or (2) any requirement of law; and

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

**Section 17.7 Annual Insurance Review.** At least annually, the Board shall review the insurance carried by or on behalf of the Association for the purpose of determining the amount of general liability, property and other insurance required. If economically feasible, the Board may obtain a current appraisal of the full replacement value of the Improvements on the Association Land, without deduction for depreciation, from a qualified independent insurance appraiser, prior to every third such annual review.

**Section 17.8 Individual Insurance.** By taking title to a Lot or Subdistrict Unit, each Owner (other than Declarant or ML100) hereby covenants and agrees with all other Owners, and with Declarant, ML100 and the Association, that such Owner shall carry or provide for blanket "special peril" property insurance on such Owner's Lot or Subdistrict Unit and Improvements thereon on such terms and with such limits as a reasonably prudent person would obtain, but in an amount that is sufficient to ensure that the Owner will meet his obligation to either restore the Lot or Subdistrict Unit and Improvements or clear and then landscape or grass the affected Lot or Subdistrict Unit. For Condominium Unit Owners, this obligation shall be undertaken by the Subdistrict Association, but only if so provided in the Recorded Condominium Documents or other instruments establishing or governing such Subdistrict Association. It is recommended that Owners of adjoining Duplex Units secure such foregoing coverage from the same carrier.

## **ARTICLE 18 RIGHTS OF MORTGAGEES**

**Section 18.1 General Provisions.** Notwithstanding any other provisions of the Project Documents, the following provisions shall apply to and benefit each First Mortgagee (and, in the case of Section 18.4 and Section 18.6, to any Mortgagee).

**Section 18.2 Subordination of Assessment Lien.** The subordination of the Assessment Lien against a Lot or Subdistrict Unit shall be as set forth in Section 8.17 of this Declaration.

**Section 18.3 Mortgagee Liability.** Except as expressly provided in this Declaration, a First Mortgagee shall not be personally liable for the payment of any Assessment or charge, nor for the observance or performance of any covenant, condition, restriction, servitude or reservation contained in the Project Documents or any management agreement, except for those matters that are enforceable by injunctive or other equitable actions not requiring the payment of money.

**Section 18.4 Enforcement After Foreclosure Sale.** An action to abate the breach of any of the covenants, conditions, restrictions, servitudes and reservations in the Project Documents may be brought against the purchaser of a Lot or Subdistrict Unit who has acquired title through foreclosure of a Mortgage or through any equivalent enforcement proceedings (excluding payment of an Assessment), and the successors in interest to said purchasers, even though the breach existed prior to the time said purchaser acquired an interest in such Lot or Subdistrict Unit.

**Section 18.5 Exercise of Owner's Rights.** During the pendency of any proceeding to foreclose a First Mortgage (including any period of redemption), the First Mortgagee, or a receiver appointed in any such action, may, but need not, exercise any or all of the rights and privileges of the Owner in default including, but not limited to, the right to vote as a Member of the Association in the place and stead of the defaulting Owner; provided, however, that such First Mortgagee shall, prior to being entitled to exercise such rights, have previously provided the Association with written notice of such foreclosure action, including a copy of the file-stamped complaint in the foreclosure action.

**Section 18.6 Subject to Project Documents.** At such time as a Mortgagee shall come into possession of or become record Owner of a Lot or Subdistrict Unit, the Mortgagee shall take title to and/or possession of such Lot or Subdistrict Unit subject to all of the terms and conditions of the Project Documents, including, but not limited to, the obligation to pay all Assessments and charges accruing thereafter, in the same manner as any other Owner.

**Section 18.7 Notices of Action.** A First Mortgagee who provides written request to the Association (such request to state the name and address of such First Mortgagee and the address of the affected Lot or Subdistrict Unit) will be entitled to timely written notice of:

- (a) any proposed termination of the Association;
- (b) any condemnation loss or any casualty loss that affects a material portion of the Association Land or that affects the Lot or Subdistrict Unit subject to the Mortgage held by such First Mortgagee;
- (c) any delinquency in the payment of Assessments or charges owed by an Owner of the Lot or Subdistrict Unit subject to the Mortgage held by such First Mortgagee, where such delinquency has continued for a period of 60 days;
- (d) any lapse, cancellation, or material modification of any insurance policy or fidelity bond maintained by the Association; and
- (e) any proposed action that would require the consent of a First Mortgagee, pursuant to this Article 18.

**Section 18.8 Other Provisions for First Mortgagees.** To the extent possible under Hawaii law, any restoration or repair of the Common Area after a partial condemnation or damage due to an insurable hazard shall be substantially in accordance with this Declaration and the original plans and specifications, unless the approval of substantial changes from the original plans and specifications is obtained from the Mortgagees holding First Mortgages on at least a majority of the Lots or Subdistrict Units upon which there are First Mortgagees.

**Section 18.9 Failure of Mortgagee to Respond.** Any Mortgagee given a written notice from the Board or Manager to respond or consent to any action shall be deemed to have approved such action if the Board or the Manager does not receive a written response from the Mortgagee within 60 days of the date of the Board's or the Manager's request, provided such request is mailed to the Mortgagee by certified mail, return receipt requested, addressed to the Mortgagee at its most current address of which the Board or the Manager has written notice.

**ARTICLE 19**  
**EXEMPTION FROM RESTRICTIONS; LIMITATION OF LIABILITY**

**Section 19.1 Exemption from Restrictions.** None of the covenants, conditions, restrictions, easements or other provisions in this Declaration shall be construed or interpreted to limit or prohibit any act of Declarant, ML100 or their employees, agents and contractors, or parties designated by them, in connection with the development, construction, completion, marketing and sale, as applicable, of any portion of the Project.

**Section 19.2 Limitation of Liability.** Each Owner, by accepting title to any portion of the Property and becoming an Owner, acknowledges and agrees that neither Declarant, ML100 nor any of the Declarant-Related Entities shall have any personal liability to the Association, or any Owner, Member or other Person, arising under, in connection with, or resulting from (including, without limitation, resulting from action or failure to act with respect to) this Declaration or the Association, except, in the case of Declarant and ML100, to the extent of their interest in the Property; and, in the event of a judgment, no execution or other action shall be sought or brought thereon against any other assets, nor shall it be a lien upon such other assets, of the judgment debtor.

**ARTICLE 20**  
**AMENDMENT**

**Section 20.1 Amendment to Declaration.** Except as otherwise expressly provided in this Declaration (including amendments made by way of a Supplemental Declaration in accordance with this Declaration), amendments to this Declaration shall be made by an instrument in writing entitled, "Amendment to Declaration" which sets forth the entire amendment. Except as otherwise specifically provided in this Declaration and subject to Section 20.3, (a) any proposed amendment must be approved by a Majority of the Board prior to submission of the proposed amendment to the Voting Delegates for adoption, (b) an amendment shall be adopted upon the vote or written consent of a Super-Majority of the Class "A" Members, (c) amendments of a material adverse nature to Mortgagees must be agreed to by Mortgagees that represent a Majority of all votes appurtenant to Lots and Subdistrict Units that are subject to Mortgages, and (d) the amendment when adopted shall (1) bear (A) the signatures of Voting Delegates comprising the required Super-Majority of votes or written consents, or (B) the signature of the President or a vice president of the Association, and (2) be attested to by the secretary or an assistant secretary of the Association, who shall state that the amendment was properly adopted. Amendments once properly adopted shall be effective upon Recording of the Amendment to Declaration, or at such later date as may be specified in the amendment.

**Section 20.2 Effect of Amendment.** Any amendment to this Declaration properly adopted will be completely effective to amend any and all provisions of this Declaration that may be affected and any or all clauses of this Declaration, unless otherwise specifically provided in the Section being amended or the amendment itself.

**Section 20.3 Declarant's Reserved Rights of Amendment.** The provisions of this Article 20 notwithstanding:

(a) **Limitations on Members' Rights to Amend.** This Declaration may not be amended by the Members pursuant to Section 20.1 or otherwise during the Declarant Control Period without the written consent of Declarant, which consent may be withheld for any reason in the sole and absolute discretion of Declarant. The following provisions of this Declaration may not be amended at any time (including after the Declarant Control Period) without the written consent of Declarant: Section 5.8 (No Application to Declarant or ML100); Section 6.16 (Duty to Accept Property Transferred by Declarant or ML100); Section 12.4 (Limited Warranties; Disclaimer; Arbitration); Section 20.3 (Declarant's Reserved Rights of Amendment); and Section 20.4 (Requested Amendment; Legislative Change); and any of the provisions contained in Article 10 (Rights and Reservations), Article 11 (Easements) and Article 22 (Dispute Resolution). This Declaration may not be amended at any time, without the written consent of

Declarant, to remove, revoke or modify any right or privilege of Declarant or ML100 under this Declaration.

(b) **Declarant's Right to Amend.** Anything in this Declaration to the contrary notwithstanding, during the Declarant Control Period, Declarant shall have and hereby reserves the right to unilaterally amend this Declaration without the approval of the Board, or any Member, Owner, Mortgagee or any other Person who might have an interest in the Project; provided, however, that after the conveyance of the first Lot or Subdistrict Unit to an Owner other than Declarant or a Declarant-Related Entity, any such amendment shall have no material adverse effect upon the rights or obligations of any Owner other than Declarant, except as expressly permitted in this Declaration. After the Declarant Control Period, this Declaration may be amended only in the manner provided in Section 20.1 and Section 20.3. Nothing contained in this Article 20 shall be deemed or construed to limit or restrict the rights of Declarant to amend this Declaration without approval of the Board, or any Member, Owner, Mortgagee or any other Person, even after the conveyance of Lots or Subdistrict Units, to the extent expressly provided in this Declaration.

(c) **Amendments to Voting/Assessment Ratios.** Anything in this Declaration to the contrary notwithstanding, Declarant (during the Declarant Control Period) and the Board (after the Declarant Control Period) shall have the right and obligation to unilaterally amend this Declaration (especially **Exhibit "E"**), without the consent or joinder of any Owner, Mortgagee or any other Person who might have an interest in the Project to reflect new or revised Voting/Assessment Ratios resulting from (1) the withdrawal of Property from the effect of this Declaration (pursuant to Section 10.9); (2) the Recordation of Condominium Documents on a Lot or Subdistrict Unit within the VMX/C-R Land, Lot B-3, Lot C-1 or Lot C-2; or (3) typographical, mathematical or other errors in one or more of the Voting/Assessment Ratios set forth in **Exhibit "E"**.

**Section 20.4 Requested Amendment; Legislative Change.** Subject to the reserved rights and limitations set forth in Section 20.3, until the conveyance of all Lots and Subdistrict Units in the Project to Persons other than Declarant or ML100, Declarant shall have and specifically reserves the right to unilaterally amend all or any part of this Declaration and/or the Bylaws, when adopted, without the approval of the Board, any Member, Owner, Mortgagee or any other Person, to such an extent and with such language as may be required by law or as may be requested by the Federal Housing Administration, the Department of Housing and Urban Development, the Veterans Administration, the Department of Commerce and Consumer Affairs, the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, and to further amend to the extent requested by any other federal, state or local governmental agency that requests such an amendment as a condition precedent to such agency's approval of this Declaration or registration of the Project, or any portion thereof, for sale in accordance with applicable law, or by any established lending institution as a condition precedent to lending funds upon the security of any Lot or Subdistrict Unit, the Project or any portion thereof. It is the desire of Declarant to retain control of the Association and its activities to the extent provided in this Declaration. If any amendment requested pursuant to the provisions of this Section, or if any federal, state or other legislation hereafter enacted, diminishes or alters such control, Declarant shall have the right to prepare, provide for and adopt, as an amendment to this Declaration, other and different control provisions to achieve such control or equivalent control.

## **ARTICLE 21 TERM; TERMINATION**

This Declaration, as amended and supplemented from time to time, shall be effective upon the date it is Recorded and shall continue in full force and effect for a term of 30 years (the "**Initial Term**"), and thereafter shall continue for successive periods of five years each, unless terminated as provided in this Article 21. This Declaration may be terminated by the vote or the written consent of a Super-Majority of the Class "A" Members and, during the Declarant Control Period, the written approval of Declarant, obtained not more than 360 days prior to a date upon which the term would be automatically extended. Anything in the foregoing to the contrary notwithstanding, a determination to terminate this Declaration shall not be effective unless and until the written consent to such termination has been obtained, within

the 360-day period, from the holders of Recorded First Mortgages on seventy-five percent (75%) of the Lots and Subdistrict Units upon which there are such Recorded First Mortgages. If the necessary votes and consents are obtained, then the Board shall cause to be Recorded a Certificate of Termination, duly signed by the President or a vice president of the Association and attested by the secretary or an assistant secretary of the Association. Thereupon, this Declaration shall terminate and have no further force and effect as of the date the next extension of the term hereof would otherwise have commenced, and the Association shall be dissolved.

## **ARTICLE 22 DISPUTE RESOLUTION**

### **Section 22.1    Negotiation, Mediation and Arbitration.**

(a)    **No Litigation.** Except as specifically permitted in this Section 22.1 or elsewhere in this Declaration, no judicial or administrative (inclusive of arbitration) proceeding shall be commenced or maintained by the Managing Agent, the Board, the Association, any Owner, individually or collectively, or Declarant or ML100, nor shall any lis pendens or notice of pendency of action be filed or Recorded.

#### **(b)    Negotiation, Mediation and Arbitration.**

(1)    Each Owner, on behalf of such Owner and the Owner's successors and assigns, and in his or her capacity as a Member of the Association and/or the Board, and Declarant and ML100 agree that there shall be no right to litigate in respect of the Covered Matters (defined below), and in the event the Board, the Association, Declarant, ML100 or any Owner or any other Person with an interest in the Project shall have any claim or cause of action arising out of or in any way related to (A) the Project Documents or the enforcement thereof, (B) the design or orientation of the Project, one or more Lots, Subdistrict Units or Improvements as they relate to adjacent or nearby properties and/or exposure to the Sun, the wind and other elements, (C) the development, construction, quality, sales, marketing, disclosures concerning, financing or delivery of the Common Area, the Project, any Lot, Subdistrict Unit or the Improvements thereto, (D) warranties, if any, (E) the reservations with respect to, or limitations on, use or purpose of the Project, the Common Area, any Lot, Subdistrict Unit or the Improvements thereto, (F) the agreements, decisions, and determinations of the Board and/or the Association or the enforcement thereof, or (G) any other aspect of or activity with respect to the Common Area, the Project, a Lot or a Subdistrict Unit, but excluding any disputes as to Declarant's or ML100's (or any Covered Party's) obligations or performance under the Limited Warranty (if applicable), which includes its own binding arbitration agreement (herein collectively the "**Covered Matters**"), against any of those Persons hereinafter defined as Covered Parties, such claim or cause of action (a "**Dispute**"), whether such Dispute is based on contract, tort, common law or statute, including, without limitation, any Dispute over (1) the disposition of any deposits, (2) breach of contract, (3) negligent or intentional misrepresentation or fraud, (4) nondisclosure, (5) breach of any alleged duty of good faith and fair dealing, (6) allegations of latent or patent construction defects, or (7) any other matter arising from or related to the interpretation of any term or provision of this Declaration, the Bylaws or the Association Rules, or any defense going to the formation or validity of this Agreement, the Declaration, the Bylaws, or the Association Rules or any provision of this Agreement, the Declaration, the Bylaws or the Association Rules, including, without limitation, allegations of unconscionability, fraud in the inducement, or fraud in the execution, whether such Dispute arises before or after the close of escrow, shall be submitted and resolved according to the process of "Negotiation", "Mediation" and "Arbitration" defined and described below.

Any such claim or cause of action shall be subject to Negotiation, Mediation and Arbitration regardless of whether the claim is against an Owner, the Association, Declarant, ML100, their real estate brokers, agents, or attorneys, the architects, engineers, or other consultants for the Project, the contractor, subcontractors, sub-subcontractors, material suppliers, the Managing Agent, or other Persons involved with the Project, and their respective officers, directors, agents, members, managers, principals, servants, employees, representatives, successors or assigns (the "**Covered Parties**"), provided that such Person(s) has entered into an agreement or otherwise agrees to negotiate, mediate and/or arbitrate such disputes; or if such Dispute is filed jointly and severally

against other parties, it shall be subject to Negotiation, Mediation and Arbitration whether or not such other parties are willing to submit to Negotiation, Mediation and Arbitration as herein provided.

Any Dispute concerning the interpretation or the enforceability of this Section, including, without limitation, its revocability or voidability for any cause, any challenges to the enforcement or the validity of this Section, and any defense relating to the enforcement of this Section, including, without limitation, waiver, estoppel, or laches, shall be decided by an arbitrator in accordance with this Section and not by a court of law. Further, in the event that a Dispute is raised between the parties after an Owner's acquisition of the Owner's Lot, Subdistrict Unit and/or Dwelling Unit, whether such Dispute is related to, or arises from, an act, omission or other event occurring prior to such acquisition, such Dispute shall be decided by an arbitrator in accordance with this Section and not by a court of law.

(2) In respect of all Covered Matters the Owner, Declarant, ML100 and any other Covered Party shall participate in a period of good faith negotiation (the "**Negotiation**"). Each Owner, the Board, the Association, ML100 and Declarant recognize that the Negotiation process must be completed before the Mediation and/or Arbitration process described in this Section can begin. As such, the claimant must first give written notice to the Covered Party describing the nature of the Dispute and a description of what the claimant believes ought to be done to resolve the Dispute. The claimant must also propose a date and time for a conference, which date must fall on a business day between 20 and 30 days after the date the claimant sends the foregoing notice to the Covered Party (the "**Conference**"), unless mutually extended by the parties. The Conference shall be held at a mutually agreed-upon location. Within five business days of the Conference notice, the Covered Party shall provide a follow-up notice to the claimant confirming the time of the Conference and stating the name and title of the Covered Party's representative to the Conference. At least five days before the Conference is scheduled to take place, claimant will, in good faith, discuss with the Covered Party's representative and consider possible resolutions of the claim. At the Conference, the claimant (and the claimant's representatives, if any) and the Covered Party's representatives shall confer together to resolve the Dispute for a maximum period of two hours, although the parties may extend or adjourn the meeting by mutual agreement. If, as a result of the Conference, the Dispute or certain issues in the Dispute have been resolved, then the parties shall set forth in a single, signed, written document the issues that have been resolved and the issues, if any, that remain unresolved and will require Mediation and, if necessary, Arbitration. If the parties do not sign such a document within 15 days after the end of the Conference (or such other period as the parties may agree in writing), then the parties will be deemed to have completed the Negotiation process and those parts of the Dispute that have not been resolved, as set forth in a document signed by the parties, will be deemed unresolved and subject to Mediation and, if necessary, Arbitration.

(3) If the Negotiation process has been completed as required by this Section, but the entire Dispute has not been resolved, then, if any of the parties wishes to pursue the Dispute further, then the unresolved aspects of the Dispute shall be resolved, if possible, by confidential mediation conducted with the assistance of a single mediator in accordance with the Mediation Rules, Procedures, and Protocols of Dispute Prevention & Resolution, Inc. (or, if that entity no longer exists, such other dispute resolution service reasonably agreeable to all parties) ("**DPR**") then in effect (the "**Mediation**"). Any counterclaim a Covered Party may have against a claimant shall also be a subject of (and an attempt shall be made to resolve the same in the context of and by) Mediation. Any Mediation shall be conducted in the City and County of Honolulu, and shall be governed by the laws of the State of Hawaii. The parties shall share equally the expense of the mediator. Unless all parties agree otherwise, the Mediation hearing shall not exceed two eight-hour sessions and the mediator shall not expend more than five hours in pre-hearing preparation (including review of submissions) and five hours in post-hearing matters. In other words, unless all parties agree otherwise, the mediator's total hours shall not exceed 26. If the mediator is to render any sort of post-hearing report or decision and such report or decision is not filed with DPR within 15 days after the end of the last mediation hearing, then the Mediation process will be deemed completed and those parts of the Dispute that have not been resolved, as set forth in a document signed by the parties, will be deemed unresolved and subject to Arbitration.

(4) If the Negotiation and Mediation processes have been completed as required by this Section, but the entire Dispute has not been resolved, then, if any of the parties wishes to pursue the Dispute further, the unresolved aspects of the Dispute shall, except as provided below, be resolved by a single arbitrator by confidential arbitration in accordance with DPR's Arbitration Rules, Procedures, and Protocols ("**Arbitration Rules**") then in effect and with Chapter 658A of Hawaii Revised Statutes (the "**Arbitration**"). If the unresolved aspects of the Dispute involve a claim or cause of action with a monetary value of One Million Dollars (\$1,000,000.00) or more (as alleged by the claimant), then the Arbitration shall be conducted by a panel of three arbitrators (collectively, referred to as an "**arbitrator**") selected in accordance with DPR's Arbitration Rules, and the decision of a majority of such arbitrators shall be binding. Any counterclaim a Covered Party may have against a claimant shall also be resolved in the context of and by Arbitration. Any Arbitration shall be conducted in the City and County of Honolulu, and shall be governed by the laws of the State of Hawaii.

(5) Except as otherwise set forth in any applicable agreements or provided by law, no special, consequential, punitive, speculative or indirect damages, no damages attributable to emotional distress or a multiple of actual damages based upon any theory of law and no award of attorneys' fees shall be sought, made, or awarded in any claim against or Dispute involving any of the other Covered Parties and each Covered Party specifically waives such damages and awards. The parties agree to give up any right they may have to bring a class-action lawsuit or class arbitration, or to participate in either as a claimant. The parties agree to give up any right they may have to consolidate the arbitration of a Dispute with the arbitration(s) of others. The arbitrator may award costs, including expert witness fees and fees of the arbitrator, to the prevailing party. Additionally, the arbitrator may award equitable relief pursuant to any Arbitration instituted as a result of or to enforce this Declaration. The arbitrator shall faithfully apply the substantive law of the County and the State, or applicable federal law, in all matters and shall give due consideration to all procedural and evidentiary laws and rules. In the event that there is a conflict between any provisions in the arbitration statute(s) of the County or the State and those of the federal government, the provisions of the federal arbitration statute(s) shall control, to the extent not inconsistent with this Section.

(6) Any arbitration award shall not be considered final unless and until the arbitration award contains a decision with respect to all issues put before the arbitrator and, additionally, the arbitrator has determined all collateral issues. Furthermore, no decision of the arbitrator shall be considered final until the tenth day subsequent to the date of service of the arbitration award of the arbitrator upon the parties. Service of the arbitration award shall be made on the same date upon all parties. Unless all parties agree otherwise, the arbitration hearing shall not exceed two eight-hour sessions and each arbitrator shall not expend more than eight hours in pre-hearing preparation (including review of submissions) and ten hours in post-hearing matters (including preparation of written decisions). In other words, unless all parties agree otherwise, each arbitrator's total hours shall not exceed 34. The written decision of the arbitrator shall be filed with DPR within 20 days after the end of the last arbitration hearing. The award rendered by the arbitrator shall be final and a judgment may be entered upon it in accordance with Hawaii Revised Statutes Chapter 658A in the Circuit Court of the First Circuit, State of Hawaii.

(7) Notwithstanding the provisions of this Section 22.1 or otherwise of this Declaration, (a) disputes with an Owner regarding amount or validity of any Assessment shall be resolved in accordance with Article 8, and (b) the Association (including the Board on behalf of the Association) may proceed by litigation, with Majority Board approval, in connection with: (y) the imposition and collection of Assessments by the Association, including foreclosure actions necessitated by the failure of an Owner to pay the required Assessments; or (z) counterclaims brought by the Association in court proceedings instituted against it.

(8) Except with respect to those actions described in subsection (7) above, no actions or proceedings of any kind (including crossclaims) shall be commenced by the Association or the Board against the Covered Parties (or any of them) except upon the affirmative vote of not less than two-thirds of the Board and the affirmative vote of not less than sixty-seven percent (67%) of the Class "A" Members.



Any documents of assignment, lease or conveyance of any Lot, Subdistrict Unit or other interest in the Project shall be deemed to incorporate the provisions of this Section 22.1, as if the same were fully set forth in any such document.

#### **Section 22.2    Miscellaneous.**

(a)    Issues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration. Each party shall bear its own attorneys' fees associated with Negotiation, Mediation, and Arbitration, and, unless otherwise set forth herein, other costs and expenses shall be borne as provided by the rules of (or used by) DPR.

(b)    If court proceedings to stay litigation or compel arbitration are necessary, the party who unsuccessfully opposed such proceedings shall pay all associated costs, expenses, and attorneys' fees that are reasonably incurred by the other party.

(c)    The arbitrator may order the parties to exchange copies of nonrebuttable exhibits and copies of witness lists in advance of the arbitration hearing. However, the arbitrator shall have no other power to order discovery or depositions unless and then only to the extent that all parties otherwise agree in writing.

(d)    No party, witness, or arbitrator may disclose the facts of the underlying dispute or the contents or results of any negotiation, mediation, or arbitration hereunder without prior written consent of all parties, unless and then only to the extent required to enforce or challenge the negotiated agreement or the arbitration award, as required by law, or as necessary for financial and tax reports and audits.

(e)    Unless such a limitation is otherwise specifically prohibited by law, no party may bring a claim or action, regardless of form, arising out of or related to this Declaration or other claims relating to the Project, including any claim of fraud, misrepresentation, or fraudulent inducement, more than one year after the cause of action accrues, unless the injured party cannot reasonably have discovered the basic facts supporting the claim within one year, in which event the claim or action cannot be brought more than one year after the injured party should reasonably have discovered the basic facts supporting the claim.

### **ARTICLE 23 GENERAL PROVISIONS**

**Section 23.1    Notice.** All notices permitted, required or otherwise described in this Declaration and the other Project Documents shall be in writing.

(a)    **Notices to Association, Board and Manager.** Notices to the Association, the Board or the Manager (or any committees thereof) provided for in the Project Documents shall be in writing and shall be addressed to the Association, the Board or the Manager at the address specified in the Bylaws or Articles (if any) or at a Hawaii business address of the Manager. The Association, the Board and the Manager may from time to time designate a different address or addresses for notice by giving written general notice of such change of address to all Owners. A notice shall be considered delivered and effective upon personal delivery, or three days after posting, when sent by prepaid certified mail, to the address of such recipient set forth in the records of the Association at the time of such mailing; provided that a notice of a change of address shall be considered delivered and effective upon personal delivery, or three days after posting, when sent by first class, postage-paid mail to the address of the recipient.

(b)    **Notices to Owners.** If notice of any action or proposed action by Declarant, the Association, the Board or any committee or of any meeting is required by applicable law, any of the Project Documents or resolution of the Board to be given to any Owner or Occupant, then, unless otherwise specified herein or in the resolution of the Board, such notice shall be considered delivered and

effective upon personal delivery, or three days after posting, when sent by prepaid certified mail, to the address of such Owner on file in the records of the Association at the time of such mailing. For purposes of the Project Documents, notice to one Owner of a Lot or Subdistrict Unit shall constitute notice to all Owners of such Lot or Subdistrict Unit. This Section shall not be construed to require that any notice be given if not otherwise required and shall not prohibit satisfaction of any notice requirement in any other manner. General notices to all Owners or to any classification thereof may be sent by prepaid, regular, first class mail or, if the sender so chooses, by personal delivery or prepaid certified mail. Such general notices shall be considered delivered and effective upon personal delivery, or three days after posting, when sent by prepaid, first class mail or when sent by prepaid certified mail, to the address of such Owner on file in the records of the Association at the time of such mailing.

(c) **Notices to Declarant or ML100.** Notices to Declarant or ML100 provided for in the Project Documents shall be addressed to Declarant or ML100 (as applicable) as follows: Maui Lani Village Center, Inc. or Maui Lani 100, LLC (as applicable), 1100 Alakea Street, Suite 2200, Honolulu, Hawaii 96813. Declarant and ML100 may from time to time designate a different address or addresses for notice by giving written general notice of such change of address to all Owners.

**Section 23.2 Captions; Construction.** Captions given to various Articles and Sections and the Table of Contents for this Declaration are for convenience only and are not intended to modify or affect the meaning of any of the substantive provisions of this Declaration. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development and operation of the Property as set forth herein.

**Section 23.3 Severability.** If any provision of a Project Document, including any section, clause, sentence, phrase or word, or the application thereof in any circumstance, is declared invalid or contrary to law, then such provision shall be null and void and shall be deemed separable from the remaining provisions of the Project Document, and shall in no way affect the enforceability of any other provision, and the validity of the remainder of such Project Document, and the application of any such provision in any other circumstances, shall not be affected and the remainder of the affected Project Document shall be construed as if such invalid part were never included therein.

**Section 23.4 Rule Against Perpetuities.** If any of the options, privileges, covenants or rights created by this Declaration shall be unlawful, void or voidable for violation of the rule against perpetuities, then such provision shall continue until the later to occur of (a) twenty-one years after the death of the last survivor of the now living descendants of George H.W. Bush, former president of the United States, or (b) the latest date that such provision may continue to exist without violating any applicable rule of perpetuities.

**Section 23.5 Mortgage of Lots or Subdistrict Units.** Each Owner shall have the right, subject to the provisions of this Declaration, to make separate Mortgages for such Owner's Lot or Subdistrict Unit and appurtenant easements and rights. No Owner shall have the right or authority to make or create or cause to be made or created any Mortgage, or other lien or security interest, on or affecting any other part of the Property.

**Section 23.6 Power of Attorney.** Unless otherwise specifically restricted by the provisions of this Declaration, in any instance in which the Association or Declarant or other Persons are empowered to take any action or do any act, which may at any time be deemed to require the act of an Owner or Class "A" Member, the Owners and Class "A" Members and each of them hereby constitute and appoint the Association or Declarant or such other Person, as appropriate, as their attorney-in-fact with rights of substitution for the purposes of taking such action or doing such acts, including, but not limited to, executing, acknowledging and delivering any instruments or documents (including conveyance instruments, grants of easements, releases, amendments to the Project Documents, and applications to governmental agencies, and casting votes on behalf of such Persons) necessary, appropriate or helpful for such purposes. It is acknowledged that this power of attorney is irrevocable and coupled with an interest and shall not be affected by the disability of the principal, and by becoming an Owner or a Member of the Association or by the acceptance of a conveyance of a Lot or Subdistrict Unit or by signing

a contract for purchase of a Lot or Subdistrict Unit or by succeeding in any other manner to the ownership of a Lot or Subdistrict Unit, or any interest therein, or a Membership in the Association, each Owner and Class "A" Member shall be deemed and construed to have ratified and expressly granted the above power of attorney.

Section 23.7 **Gender.** Masculine, feminine and neuter references herein each shall include the others as the context requires.

Section 23.8 **Interpretation.** Except for construction by a court of law or arbitrator, the Association, by its Board, shall have the exclusive right to construe and interpret the provisions of this Declaration. In the absence of any adjudication to the contrary by a court of competent jurisdiction or arbitrator, the Association's construction or interpretation of the provisions hereof shall be final, conclusive and binding as to all Persons and property benefited or bound by the provisions hereof.

Section 23.9 **References to Declaration in Deeds.** Deeds to and other instruments of conveyance affecting any Lot or Subdistrict Unit or any other part of the Property may incorporate by reference the provisions of this Declaration; but regardless of whether any such reference is made in any deed or instrument, all of the provisions of this Declaration shall be binding upon each successor Owner or other Person claiming through any instrument and such Person's heirs, executors, administrators, successors and assigns as though set forth in full in such instrument.

Section 23.10 **Incorporation of Exhibits.** Exhibits "A", "B", "C", "D", "E" and "F," as they may be amended from time to time in accordance with this Declaration, are incorporated into this Declaration by this reference.

## **ARTICLE 24 COMPLIANCE WITH PROJECT DOCUMENTS; SCOPE OF ENFORCEMENT; COOPERATION**

Section 24.1 **Compliance Required.** The Association, all Owners, Occupants, Mortgagees, families, agents, employees, servants, contractors and guests, and any other Persons who may in any manner use the Project, shall be bound by and comply strictly with the provisions, conditions and restrictions of the Project Documents, and all agreements, decisions and determinations of Declarant, ML100, the Board and the Association as lawfully made or amended from time to time. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages (to the extent permitted under Article 22 of this Declaration) or injunctive relief or both, under the dispute resolution proceedings of Article 22 of this Declaration, maintainable by Declarant, ML100, the Board (on behalf of the Association), or, in a proper case, by any aggrieved Owner.

Section 24.2 **Enforcement.** Except as otherwise set forth in this Declaration, the Bylaws or the Association Rules, Declarant and the Board (on behalf of the Association) shall have the right, but not the obligation, to enforce the provisions of the Project Documents and all agreements, decisions and determinations of the Board and the Association as lawfully made or amended from time to time. The Association (via the Board) shall have the exclusive right to the enforcement of the Assessment Lien. Failure by the Board to enforce any provision of the Project Documents shall in no event be deemed a waiver of the right to do so thereafter. Except as otherwise set forth in this Declaration, the Bylaws or the Association Rules, each Owner shall have standing to initiate the dispute resolution proceedings under Article 22 on their own behalf (and at their own expense) to enforce the terms and conditions of the Project Documents and all agreements, decisions and determinations of the Board and the Association as lawfully made or amended from time to time. No Owner may bring an action or proceeding on behalf of the Association or on behalf of another Owner. Any judgment, award or other recovery on behalf of the Association shall be payable only to the Association as a realization of the Association. Each remedy provided for in this Declaration shall be cumulative and not exclusive. The result of or condition caused by any violation of any of the provisions of the Project Documents is and shall be deemed a nuisance.

**Section 24.3 Recovery of Costs.** All costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the Association for: (a) collecting delinquent Assessments against any Owner; (b) foreclosing a lien on any Owner's Lot or Subdistrict Unit; and (c) subject to the applicable provisions of Article 22 of this Declaration, enforcing provisions of the Project Documents against any Owner, shall be promptly paid on demand to the Association by the Owner and if not so paid shall be assessed as a Special Assessment that can be foreclosed upon; provided that the Association shall promptly pay on demand to the Owner those costs and expenses, including reasonable attorneys' fees, incurred by the Unit Owner as a result of claims made by the Association that are not substantiated.

**Section 24.4 Obligation of Good Faith and Mutual Cooperation.** Each Owner, by acquiring a Lot or Subdistrict Unit in the Project, acknowledges and agrees that such Owner shall have an obligation to act in good faith and mutual cooperation with respect to the Project, the Association and the other Owners. In that respect, if something needs to be done that is reasonable and necessary, but the Project Documents do not address (i.e., are silent on) the act that needs to be done, then, provided the act will not have a material and adverse effect on the Owner, the Owner's Lot or Subdistrict Unit or the use of or obligations with respect to the Owner's Lot or Subdistrict Unit and provided the Owner is not required to incur any unreimbursed costs related thereto, the Owner agrees to cooperate, in good faith, in the performance of the desired act. If, despite such good faith mutual cooperation, an agreement cannot be reached with respect to the act that needs to be done, then the matter shall be submitted to the dispute resolution process set forth in Article 22 of this Declaration.

[THE SIGNATURE PAGE FOLLOWS]

Declarant and ML100 have duly executed this Declaration as of the date first referenced above.

MAUI LANI VILLAGE CENTER, INC.,  
a Hawaii corporation

By Stacey Takaba  
Name: Stacey Takaba  
Title: President

Declarant

MAUI LANI 100, LLC,  
a Hawaii limited liability company

By Stacey Takaba  
Name: Stacey Takaba  
Title: President

ML100

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

On October 1, 2009, before me personally appeared STACEY TAKABA, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable in the capacities shown, having been duly authorized to execute such instrument in such capacities.

**Further, I certify, as of this date, as follows:**


**Date of Document: October 1, 2009**

**Number of Pages: 90**

Document Description: Maui Lani Village Center Declaration of Conditions, Restrictions and Easements

**Jurisdiction/Judicial Circuit Where Signed:** First



  
Type or print name: Stephanie Yamane Biehl  
Date: October 1, 2009  
Notary Public, State of Hawaii  
My commission expires: October 19, 2011

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

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Restrictions and Easements

Jurisdiction/Judicial Circuit Where Signed: First



  
Type or print name: Stephanie Yamane Biehl  
Date: October 1, 2009  
Notary Public, State of Hawaii  
My commission expires: October 19, 2011

**EXHIBIT "A"**

**Description of the VMX/C-R Land  
(including Lots 77 through 81, being the five Roadway and Common Area lots)**

All of those certain parcels of land situated in the District of Wailuku, Island and County of Maui, State of Hawaii, being Lots 1 through 81, inclusive, of "MAUI LANI VMX (C-R) SUBDIVISION," as shown on File Plan Number 2470, filed in the Bureau of Conveyances of the State of Hawaii.



**EXHIBIT "B"**

**Maui Lani (Large-Lot) Subdivision No. 7  
Lot 11-D-1-A-1-B-3  
("Lot B-3" or "Lot 77")**

Land situated on the easterly side of Waiale Drive at Wailuku, Maui, Hawaii

Being a portion of Grant 3343 to Claus Spreckels

Beginning at a point at the southwesterly corner of this lot, the coordinates of said point of beginning referred to Government Survey Triangulation Station "LUKE" being 3,702.19 feet South and 1,294.90 feet West and running by azimuths measured clockwise from True South:

1.     165°    19'                    93.35     feet along the easterly side of Waiale Drive to a point;
2.     190°    43'                   198.03     feet along same to a point;
3.     Thence along Lot 11-D-1-A-1-F-1 of Maui Lani (Large-Lot) Subdivision No. 7, being also along the remainder of Grant 3343 to Claus Spreckels on a curve to the right with the point of curvature azimuth from the radial point being:  
          100° 43', and the point of tangency azimuth from the radial point being:  
          189° 00', having a radius of 40.00 feet, the chord azimuth and distance being:  
          234° 51' 30" 55.71 feet to a point;
4.     279°    00'                   255.78     feet along same to a point;
5.     9°     00'                    295.62     feet along Lot 11-D-1-A-1-B-2 of Maui Lani (Large-Lot) Subdivision No. 7, being also along the remainder of Grant 3343 to Claus Spreckels to a point;
6.     95°    58'                   118.27     feet along Lot H of Waikapu East (Large-Lot) Subdivision No. 3, being also along the remainder of Grant 3343 to Claus Spreckels to a point;
7.     91°    04'                   147.50     feet along same to the point of beginning and containing an Area of 2.070 Acres.

**EXHIBIT "C"**

**Maui Lani (Large-Lot) Subdivision No. 7  
Lot 11-D-1-A-1-C-1  
("Lot C-1" or "Lot 79")**

Land situated on the easterly side of Waiale Drive at Wailuku, Maui, Hawaii

Being a portion of Grant 3343 to Claus Spreckels

Beginning at a point on the northernmost corner of this lot, the coordinates of said point of beginning referred to Government Survey Triangulation Station "LUKE" being 3,098.02 feet South and 255.12 feet West and running by azimuths measured clockwise from True South:

- |     |  |        |   |
|-----|--|--------|---|
| 1.  | 345° 30'   | 698.41 | feet along Lot 8 of Maui Lani Subdivision, being also along the remainder of Grant 3343 to Claus Spreckels to a point;                                |
| 2.  | 330° 00'   | 68.00  | feet along same to a point;   |
| 3.  | 316° 30'   | 272.00 | feet along same to a point;   |
| 4.  | 314° 00'   | 314.00 | feet along same to a point;   |
| 5.  | 289° 30'   | 164.00 | feet along same to a point;   |
| 6.  | 272° 00'   | 149.49 | feet along same to a point;   |
| 7.  | 3° 20'   | 112.50 | feet along Lot 11-D-1-A-1-D-1 of Maui Lani (Large-Lot) Subdivision No. 7, being also along the remainder of Grant 3343 to Claus Spreckels to a point; |
| 8.  | Thence along Lot 11-D-1-A-1-F-1 of Maui Lani (Large-Lot) Subdivision No. 7, being also along the remainder of Grant 3343 to Claus Spreckels on a curve to the right with the point of curvature azimuth from the radial point being:<br>9° 41' 06", and the point of tangency azimuth from the radial point being:<br>46° 30', having a radius of 757.00 feet, the chord azimuth and distance being:<br>118° 05' 33" 478.08 feet to a point; |        |   |
| 9.  | 136° 30'   | 664.04 | feet along same to a point;   |
| 10. | Thence along same on a curve to the left with the point of curvature azimuth from the radial point being:<br>226° 30', and the point of tangency azimuth from the radial point being:<br>189° 00', having a radius of 1,243.00 feet, the chord azimuth and distance being:<br>117° 45' 799.10 feet to a point;   |        |   |
| 11. | 99° 00'  | 43.78  | feet along same to a point;   |

12.	189°	00'	134.16	feet along Lot 11-D-1-A-1-C-2 of Maui Lani (Large-Lot) Subdivision No. 7, being also along the remainder of Grant 3343 to Claus Spreckels, to a point;
13.	324°	00'	80.97	feet along Lot 1 of Kahului 3 MG Reservoir Subdivision, being also along the remainder of Grant 3343 to Claus Spreckels to a point;
14.	302°	40'	64.14	feet along same to a point;
15.	279°	00'	59.00	feet along same to a point;
16.	234°	00'	107.48	feet along same to a point;
17.	189°	00'	218.00	feet along same to a point;
18.	279°	00'	413.04	feet along Lot 2-A of Ka Hale A Ke Ola Subdivision, being also along the remainder of Grant 3343 to Claus Spreckels to the point of beginning and containing an Area of 7.537 Acres.

**EXHIBIT "D"**

**Maui Lani (Large-Lot) Subdivision No. 7  
Lot 11-D-1-A-1-C-2  
("Lot C-2" or "Lot 78")**

Land situated on the easterly side of Waiale Drive at Wailuku, Maui, Hawaii

Being a portion of Grant 3343 to Claus Spreckels

Beginning at a point on the northwesterly corner of this lot, the coordinates of said point of beginning referred to Government Survey Triangulation Station "LUKE" being 2,943.62 feet South and 1,230.01 feet West and running by azimuths measured clockwise from True South:

- |     |   |         |        |   |
|-----|---|---------|--------|---|
| 1.  | 279°  | 00'     | 78.54  | feet along Lot 2-A of Ka Hale A Ke Ola Subdivision, being also along the remainder of Grant 3343 to Claus Spreckels to a point;   |
| 2.  | 8°  | 52' 12" | 30.00  | feet along Lot 2 of Kahului 3 MG Reservoir Subdivision, being also along the remainder of Grant 3343 to Claus Spreckels to a point;   |
| 3.  | 279°  | 00'     | 40.00  | feet along same to a point;   |
| 4.  | 188°  | 52' 12" | 30.00  | feet along same to a point;   |
| 5.  | 279°  | 00'     | 204.46 | feet along Lot 2-A of Ka Hale A Ke Ola Subdivision, being also along the remainder of Grant 3343 to Claus Spreckels to a point;   |
| 6.  | 9°  | 00'     | 345.16 | feet along Lot 1 of Kahului 3 MG Reservoir Subdivision and Lot 11-D-1-A-1-C-1 of Maui Lani (Large-Lot) No. 7, being also along the remainder of Grant 3343 to Claus Spreckels to a point; |
| 7.  | 99°   | 00'     | 254.85 | feet along Lot 11-D-1-A-1-F-1 of Maui Lani (Large-Lot) Subdivision No. 7, being also along the remainder of Grant 3343 to Claus Spreckels to a point;                                     |
| 8.  | Thence along same on a curve to the right with the point of curvature azimuth from the radial point being:<br>9° 00', and the point of tangency azimuth from the radial point being:<br>100° 43', having a radius of 40.00 feet, the chord azimuth and distance being:<br>144° 51' 30" 57.41 feet to a point; |         |        |   |
| 9.  | 190°  | 43'     | 65.80  | feet along the easterly side of Waiale Drive to a point;  |
| 10. | 167°  | 23'     | 81.80  | feet along same to a point;   |
| 11. | 189°  | 00'     | 162.14 | feet along same to the point of beginning and containing an Area of 2.427 Acres.  |

**EXHIBIT "E"**

**VOTING/ASSESSMENT RATIOS**

**A. Owner Members**

<b>Lot Number</b>	<b>Lot Area (s.f.)*</b>	<b>Voting/Assessment Ratio</b>
1	20,670	0.96%
2	18,913	0.88%
3	17,626	0.82%
4	9,919	0.46%
5	10,151	0.47%
6	7,564	0.35%
7	12,245	0.57%
8	7,545	0.35%
9	7,688	0.36%
10	13,591	0.63%
11	62,291	2.89%
12	50,537	2.35%
13	40,359	1.88%
14	39,887	1.85%
15	61,565	2.86%
16	79,300	3.68%
17	19,776	0.92%
18	17,449	0.81%
19	19,630	0.91%
20	19,489	0.91%
21	18,684	0.87%
22	18,146	0.84%
23	18,876	0.88%
24	16,518	0.77%
25	17,636	0.82%
26	17,964	0.83%
27	24,225	1.13%
28	15,701	0.73%
29	25,234	1.17%
30	13,514	0.63%
31	16,132	0.75%
32	29,254	1.36%
33	26,918	1.25%
34	20,287	0.94%
35	26,512	1.23%
36	24,688	1.15%
37	16,463	0.77%
38	12,356	0.57%
39	13,962	0.65%
40	14,634	0.68%
41	15,093	0.70%
42	10,487	0.49%
43	9,950	0.46%

<b>Lot Number</b>	<b>Lot Area (s.f.)*</b>	<b>Voting/Assessment Ratio</b>
44	10,021	0.47%
45	8,569	0.40%
46	14,136	0.66%
47	13,538	0.63%
48	13,006	0.60%
49	11,583	0.54%
50	13,064	0.61%
51	16,989	0.79%
52	16,908	0.79%
53	12,866	0.60%
54	10,549	0.49%
55	9,533	0.44%
56	9,267	0.43%
57	9,512	0.44%
58	9,322	0.43%
59	9,543	0.44%
60	10,831	0.50%
61	10,057	0.47%
62	10,170	0.47%
63	10,721	0.50%
64	11,808	0.55%
65	10,692	0.50%
66	10,934	0.51%
67	11,917	0.55%
68	10,895	0.51%
69	12,192	0.57%
70	12,284	0.57%
71	22,013	1.02%
72	14,669	0.68%
73	14,421	0.67%
74	13,990	0.65%
75	196,185	9.12%
76	96,170	4.47%
Subtotal of just the 76 Lots comprising the VMX/C-R Land	1,627,784	75.65%
11-D-1-A-1-B-3 (aka "Lot 77")	90,169	4.19%
11-D-1-A-1-C-2 (aka "Lot 78")	105,720	4.91%
11-D-1-A-1-C-1 (aka "Lot 79")	328,312	15.25%
<b>Total</b>	<b>2,151,985</b>	<b>100.00%</b>

\*The Lot sizes shown include the areas of any easements that may affect the respective Lots.

**B. Subdistrict Members**

There shall be no Subdistrict Members unless and until a Lot is made subject to the jurisdiction of a Subdistrict Association. When and if a Lot is made subject to the jurisdiction of a Subdistrict Association by the Recording of Condominium Documents or other instruments, the Membership for that Lot shall be converted from an Owner Membership to a Subdistrict Membership and this Declaration shall be amended to revise this Exhibit "E" to reflect the change in category of the affected Memberships. The total Voting/Assessment Ratio shown above for a Lot after a Lot is made subject to a Subdistrict Association shall be the same as the Voting/Assessment Ratio for such Lot prior to becoming subject to the jurisdiction of a Subdistrict Association. The Voting/Assessment Ratio allocable to each new Subdistrict Unit (e.g., Condominium Unit) shall be determined as provided in the Recorded Condominium Documents or other instruments subjecting such Lot to the jurisdiction of the Subdistrict Association.

If an owner of contiguous Lots submits the Lots to the jurisdiction of a single Subdistrict Association (e.g., a condominium property regime), then the Voting/Assessment Ratio allocable to the Subdistrict Association after the Recording of the Condominium Documents or other instruments subjecting such Lots to the Subdistrict Association, shall be the aggregated total of the Voting/Assessment Ratios of the contiguous Lots (regardless of whether or not the Lots are consolidated into a single parcel of land) prior to being made subject to such Subdistrict Association, and this Declaration shall be amended to revise this Exhibit "E" to reflect the change in category of the Membership of each of the affected Lots and re-allocation of the Voting/Assessment Ratio.

**NOTE:** The Voting/Assessment Ratio for the Lots may change (increase or decrease) in connection with: (i) a withdrawal of a portion of the Property from the effect of this Declaration; or (ii) the Recordation of Condominium Documents on the title to a Lot.

**NOTE:** Due to the rounding necessary to make the Totals equal 100%, the Voting/Assessment Ratios of the Lots may not be exactly based on the sizes of the Lots.

## **EXHIBIT "F"**

### **PERMITTED AND PROHIBITED USES**

A. Permitted Uses. The following uses shall be permitted within the Project:

1. Principal uses and structures:

- a. Single-family dwelling
- b. Two-family or duplex dwelling
- c. Multi-family dwelling
- d. Living quarters
- e. Lodging house
- f. Animal boarding facility
- g. Animal hospital
- h. Day care facility
- i. Eating and drinking establishments
- j. Education, general
- k. Education, specialized
- l. Eleemosynary organizations
- m. Food and beverage, retail
- n. Garage, storage
- o. General merchandising
- p. General office
- q. Group shelters
- r. Light manufacturing, and processing
- s. Medical center, minor
- t. Park
- u. Parking area, public
- v. Personal and business services
- w. Public facility or public use
- x. Quasi-public use of quasi-public facility
- y. Recreation, active
- z. Recreation, indoor
- aa. Recreation, open land
- bb. Recreation, passive
- cc. Self-Storage, provided it is within an enclosed building
- dd. Utility facilities, minor

2. Accessory uses and structures. The following uses shall be clearly incidental to and customarily found in connection with the principal uses:

- a. Energy systems, small-scale
- b. Garage, private
- c. Home occupation
- d. Outdoor storage yards that are ancillary to a permitted principal use, provided the storage yards are appropriately screened from the public right-of-way
- e. Parking areas, covered or uncovered
- f. Park equipment, including but not limited to, play equipment, backstops, dugouts, scoreboards, and bleachers
- g. Recreation buildings and pools
- h. Restrooms
- i. Walls not to exceed 5 ft. in height, and fences



3. Special uses. The following uses shall be permitted, subject to the approval of the appropriate County planning commission:

- a. Medical center, major
- b. Utility facilities, major
- c. Uses and structures that are similar to, and compatible with, the principal uses and structures of the Project and that conform to the intent of the Design Guidelines may be approved by the appropriate County agency

B. Prohibited Uses. Except as otherwise provided in the Declaration, the following uses are prohibited within or as part of the Project:

- a. Flea market
- b. Off-track betting parlor
- c. Any business that requires a cabaret license to operate legally
- d. Promotion or sale (including rental) of paraphernalia for use with illegal or illicit drugs
- e. Promotion or sale (including rental) of pornography
- f. Any distillation or refinery facility
- g. Any indecent or pornographic uses
- h. Massage parlor
- i. "Adult" bookstore (e.g., pornographic or X-rated)
- j. Peepshow store
- k. Any use or operation not allowed under applicable laws, rules or regulations, including applicable laws, rules or regulations of the County of Maui
- l. Any use or operation not allowed under this Declaration, the Design Guidelines or the Association Rules

If there is a conflict between a Permitted Use and a Prohibited Use, then the Prohibited Use shall control.