

that, as of the date thereof, either (a) all Improvements and other work made or done upon or within said Lot comply with the Declaration, or (b) such Improvements or work do not so comply, in which event the certificate shall also (i) identify the noncomplying Improvements or work, and (ii) set forth with particularity the cause or causes for such noncompliance. Any purchaser or lessee from the Owner or mortgagee or other encumbrancer of the property shall be entitled to rely on said certificate with respect to the matters therein set forth, such matters being conclusive as between the Association, Declarant and all Owners and such purchaser, lessee, mortgagee or other encumbrancer.

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

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

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

(3) The development or manner of development of any property within the Kealakekua Bay Estates; or

(4) The execution and filing of an estoppel certificate pursuant to Section 5.7, whether or not the facts therein are correct; or

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

Neither Design Committee nor any member thereof shall be liable in damages to anyone submitting plans to them for approval, or to any Owner or other Person by reason of mistake in judgement, negligence, or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve any plans and specifications. Each owner or other Person who submits plans to the Design Committee for approval agrees, by submission of such plans and specifications, that the Person will not bring any action or suit against the Design Committee or any member thereof to recover damages. Approval by the Design Committee or any member shall not be deemed to be a representation or warranty that the Owner's plans or specifications or the actual construction of a

dwelling or other Improvement comply with applicable governmental ordinances or regulations, including but not limited to zoning ordinances and local building codes, and it shall be the sole responsibility of the owner or other Person submitting plans to the Design Committee or performing any construction to comply therewith.

5.09 Professional Advice. The Design Committee may employ the services of any attorney, architect, landscape architect, or structural or civil engineer licensed to practice in the State of Hawaii or any other consultant to render professional advice, and may pay a reasonable compensation for such services, which compensation may be charged to any Person who has submitted plans, specifications or other materials requiring review by such attorney, architect, landscape architect, engineer or consultant. Failure to obtain professional advice shall not constitute misconduct on the part of the Design Committee.

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

ARTICLE VI

PRIVATE ROADS AND STREET LIGHTS

6.01 Association Ownership and Maintenance. All of the roads and street lights within Kealakekua Bay Estate are private and shall remain private, i.e., shall not be dedicated to the County of Hawaii or the State of Hawaii. Therefore the roads and street lights within Kealakekua Bay Estate shall be owned and maintained by the Association as Common Areas. All maintenance, replacement and/or repair of these Common Areas, like all other Common Areas, shall be paid for by the Association from the Association operating fund and assessments pursuant to Article VII and Article VIII of this Declaration.

6.02 Dedication of Roads and Street Lights. The roads and street lights within Kealakekua Bay Estates cannot be dedicated to the County of Hawaii in their present condition because, although the main fifty foot (50') roads within Kealakekua Bay Estates are constructed to current County of Hawaii standards, the secondary sixteen foot (16') and twenty foot (20') roads and all of the street lights within Kealakekua Bay Estates do not meet current County standards. Therefore, if the members of the Association elect to dedicate either the roads or the street lights within Kealakekua Bay Estates, or both, those roads and/or street lights will have to be improved to the then existing standards of the County of Hawaii at the sole expense of the Association.

ARTICLE VII

KEALAKEKUA BAY ESTATES OWNERS' ASSOCIATION

7.01 Organization.

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

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

7.02 Membership.

(a) Each owner of any Lot within the Kealakekua Bay Estates shall be a member of the Association, provided, however, that no Person other than an Owner may be a member of the Association.

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

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

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

Class B. The Declarant shall have Class B voting rights, and shall be entitled to three (3) votes for each of its Lots or a total of one hundred sixty-five (165) votes, based upon 55 Lots for the entire Kealakekua Bay Estates. The Class B voting rights shall cease and be converted to Class A voting rights when the total number Class A voting rights then existing equals the total number of Class B votes then existing, or when the Declarant in its discretion so determines, whichever occurs first.

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

7.04 Duties and Obligations of the Association. The Association shall have the rights, obligations and duties, subject to this Declaration, to do and perform each and every one of the following for the benefit of the Owners and for the maintenance and improvement of the Kealakekua Bay Estates.

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

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

(c) The Association may maintain or provide for the maintenance of all Lots which are underdeveloped by the Owners in an equitable manner and included in the Maintenance Assessments to be determined and set by the Board; provided, however, that an Owner may elect to be responsible for the maintenance on its Lot in accordance with standards established by the Board of the Association (the "Board") for all Lots.

(d) To the extent not assessed to or paid by the Owners, the Association shall pay all Real Property taxes and assessments levied upon any portion or the common areas.

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

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

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

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

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

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

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

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

7.05 Powers and Authority of Association. The Association shall have all the powers set forth in the Articles,

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

(a) The Association shall have the power and authority at any time, and from time to time and without liability to an Owner or Owners for trespass, damage or otherwise, to enter upon any private area for the purpose of maintaining and repairing any such area if for any reason whatsoever the Owner or Owners thereof fail to maintain and repair such area as required under Article III hereinabove, or for the purpose of removing any Improvement constructed, refinished, altered or maintained upon such area in violation of said Article III. The Association may maintain and repair any Roads, sidewalks, or other public areas in or adjoining the Kealakekua Bay Estates, including landscaping and planting the same and repairing Improvements thereon when public authorities, in the opinion of the Board, have failed to do so in a manner befitting the standards of the community. The Association shall also have the power and authority from time to time in its own name, on its own behalf, or in the name and behalf of any Owner or Owners who consent thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration, or to enforce by mandatory injunction or otherwise all of the provisions of this Declaration.

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

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

(2) To obtain, maintain and pay for such insurance policies or bonds, whether or not required by Section 7.04, as the Association deems appropriate for the protection or benefit of the Kealakekua Bay Estates, the Association, the members of the Board, the members of the Design Committee, or the Owners, including but without limitation, war risk insurance, builders' risk insurance, workers' compensation insurance, malicious mischief insurance, automobile, non-ownership insurance and performance and fidelity bonds;

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

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

(5) To contract and pay for, or otherwise provide for fire, police and such other protection services as the Association, from time to time, deems necessary for the benefit of the Kealakekua Bay Estates, any property located within the Kealakekua Bay Estates and the Owners; and

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

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

(d) The Association shall have the authority to exchange, to sell and convey, or to otherwise dispose of, for cash or on such terms as it shall approve, any portion or portions of the common area with or without Improvements thereon, or other property of the Association, the retention of which is no longer necessary, advantageous or beneficial for the Association or for the Owners, and to borrow money, without limit as to the amount, for any purpose with the powers and authority of the Association,

or any part thereof; provided, however, that no such exchange, sale or other disposition of any teal property in fee, and no such borrowing and mortgaging, shall be made unless the same shall have been approved by an affirmative vote of not less than two-thirds (2/3) of each class of members who may vote in Person or by proxy at a meeting of the Association duly called, the Notice for which shall describe the Real Property to be sold or otherwise disposed of, or the amount of the borrowing and the security to be mortgaged, and shall be invested by the Association in additional property acquired for the benefit of the Association and the Owners, or in improving the properties of the Association.

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

7.07 Exclusive Owners of the Association. The Association, through the Board and its duly authorized representatives, shall have the exclusive right to exercise the powers and authorities referred to in paragraphs (b) through (d) inclusive of Section 7.05.

ARTICLE VIII

FUNDS AND ASSESSMENTS

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

- (1) Maintenance Assessments;
- (2) Special assessments;
- (3) Miscellaneous fees; and
- (4) Income and profits attributable to the operating fund, and from which the Association shall make disbursements in performing the functions for which the foregoing assessments are levied.

8.02 Maintenance Assessment.

(a) Within thirty (30) days prior to the commencement of each fiscal year, the Board shall estimate the costs and expenses to be incurred by the Association during such fiscal year in performing its functions under Article VII (including a reasonable provision for contingencies, reconstruction and replacements and for alterations, modifications and Improvements to existing facilities, and in paying all expenses of

the Design Committee and its operations), and shall subtract from such estimate an amount equal to the anticipated balance (exclusive of any accrued reserves from contingencies and replacements) in the operating fund at the start of such fiscal year which is attributable to assessments.

(b) The sum or net estimate determined pursuant to this Section (a) shall be divided and assessed by the Board as a Maintenance Assessment against the Owners in proportion to the number of Lots owned by each Owner.

(c) Any increase in Maintenance Assessments in any amount which is 10% greater than the previous year's Maintenance Assessment must be approved by an affirmative vote of a majority of the Board.

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

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

8.03 Special Assessments. The Board shall levy a special assessment against any Owner who, as a direct result of whose acts or failure or refusal to act or to otherwise comply with this Declaration, or the Design Requirements, has caused monies to be expended from the operating fund by the Association in performing its functions under this Declaration. Such assessments shall be in the amount so expended and shall be due and payable to the Association when levied, together with interest thereon as provided for in Section 8.02 hereof. Monies so expended shall include, Without limitation, actual engineers', architects', attorneys' and accountants' fees where reasonably incurred by the Association.

8.04 Default in Payment of Assessments.

(a) Each assessment under this Article shall be a separate, distinct, personal debt and obligation of the Owner

against whom it is assessed, and each Owner of any Lot, by acceptance of a deed therefor or execution of an agreement of sale, lease or other instrument of conveyance, whether or not it shall be so expressed in any such deed, agreement of sale, lease or conveyance, is deemed to covenant and agree to pay the same to the Association. If the Owner does not pay such assessment or any installment thereof when due, the Owner shall be deemed in default and the amount of the assessment not paid, together with the amount of any subsequent default, plus interest as provided for in Section 8.02 hereof and actual costs, including reasonable attorneys' fees and court costs, shall be and become a lien upon the Lot or Lots of such Owner upon Recordation by the Association of a Notice of default. Such lien shall be subject and subordinate to the lien of any mortgage upon the Lot or Lots of such Owner, and the sale or transfer of any Lot in foreclosure of any such mortgage, whether by judicial proceedings or pursuant to a power of sale contained in such mortgage, or the transfer or conveyance to the mortgagee in lieu of foreclosure, shall extinguish the lien as to payments of assessments which become due prior to such sale, transfer or conveyance, but no such sale, transfer or conveyance shall relieve such Lot or the purchaser or transferee thereof with regard to assessments thereafter becoming due. The Association shall record such Notice of default within ninety (90) days following the occurrence of such default and shall commence proceedings to enforce such lien within six (6) months following such recordation. Such lien may be foreclosed by suit by the Association in like manner as a mortgage of Real Property, and the Association shall have power to bid on the Lot at foreclosure sale and to acquire and hold, lease, mortgage or convey the same. A suit to recover a money judgment for unpaid assessments shall be maintainable without foreclosing or waiving the lien securing the same. The foregoing remedies shall be in addition to any other remedies provided by law for the enforcement of such assessment obligation.

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

ARTICLE IX

MISCELLANEOUS PROVISIONS

9.01 Enforcement of Declaration. Each provision of this Declaration shall be enforceable by Declarant, by the Association, or by any Owner by a proceeding for a prohibitive or mandatory injunction or by a suit or action to recover damages. If any court proceedings are instituted in connection with the right of enforcement and remedies provided in this Declaration, the