

LAND COURT

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TITLE OF DOCUMENT:

**DECLARATION OF COVENANTS, CONDITIONS
AND RESTRICTIONS FOR PAPAANUI, LLC SUBDIVISION**

PARTIES TO DOCUMENT:

DECLARANT: PAPAANUI, LLC
2073 Wells Street, Suite 101
Wailuku, Hawaii 96793

TAX MAP KEY(S): (2) 2-1-007:009, 2-1-007:060,
2-1-008:100(por.)

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**DECLARATION OF COVENANTS, CONDITIONS
AND RESTRICTIONS FOR PAPAANUI, LLC SUBDIVISION**

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR PAPAANUI, LLC SUBDIVISION (“CC&R’s”), is made as of _____, 20____, by PAPAANUI, LLC, a Hawaii limited liability company, whose principal place of business and mailing address is 2073 Wells Street, Suite 101, Wailuku, Maui, Hawaii 96793, hereinafter referred to as the “Declarant”,

W I T N E S S E T H:

WHEREAS, Declarant is the fee simple owner of certain real property in Makena, County of Maui, State of Hawaii, (hereinafter called “the Property”); and

WHEREAS, the Property consists of seven (7) residential lots (Lots #1 through #7) and two (2) roadway lots (Lots #8 and #9) (called “Papaanui, LLC Subdivision”), and two (2) additional roadway lots designated by Tax Map Key Nos. (2) 2-1-007:060 and 2-1-008:100 (por.), more particularly described in Exhibit “A” attached hereto and made a part hereof (collectively herein referred to as “Papaanui”); and

WHEREAS, Declarant intends to organize a Hawaii non-profit corporation to be known as the Papaanui Homeowners Association (hereinafter called the “Association”), to own, maintain, operate and/or improve certain “Common Areas” (as hereinafter defined), for the use and benefit of the owners and occupants of lots located in Papaanui and others entitled thereto; to repair, maintain and replace improvements owned or maintained by the Association; to perform and provide for services necessary and required for the benefit of Papaanui and the owners and occupants of the lots thereof and others; and to supervise and enforce the compliance by the owners and occupants of the lots in Papaanui with all applicable provisions, covenants, conditions and restrictions; and

WHEREAS, Declarant reserves the right to annex additional real property to expand Papaanui; and

WHEREAS, Declarant intends to establish standards for construction and use of Papaanui to minimize environmental impacts, require cohesive landscaping, and control noise, lighting, and nuisance to minimize negative impacts on Papaanui; and

WHEREAS, Declarant is desirous of adopting, and establishing certain restrictive covenants and conditions relative to the use of Papaanui for these purposes;

NOW, THEREFORE, Declarant hereby declares that all of the real property described in Exhibit “A” included in Papaanui and all other real property hereafter included in Papaanui through the process of annexation as provided in these CC&R’s shall, at all times, be owned, held, used, sold, leased, occupied and conveyed subject to the covenants, conditions and restrictions herein contained all of which are established and declared for the purpose of

preserving the economic value, desirability and attractiveness of Papaanui. These CC&R's shall run with said real property and shall be binding upon all persons acquiring any right, title or interest in and to Papaanui, or any part thereof and their respective heirs, personal representatives, successors and assigns.

ARTICLE I. DEFINITIONS

The following words when used in these CC&R's, unless the context otherwise specifies or requires, shall have the following meanings:

1.1 Amending Declaration. "Amending Declaration" means any written instrument prepared and Recorded whose purpose is to amend the terms of these CC&R's.

1.2 Annexing Declaration. "Annexing Declaration" means any written instrument prepared and Recorded pursuant to Section 11.3 below whose purpose is to annex additional real property to Papaanui.

1.3 Architect. "Architect" means a Person licensed to practice architecture in the State of Hawaii.

1.4 Articles. "Articles" means the Articles of Incorporation of the Association.

1.5 Association. "Association" means Papaanui Homeowners Association, a Hawaii non-profit corporation, and its successors and assigns, or the unincorporated association of Owners, prior to the formation of the Hawaii non-profit corporation.

1.6 Association Property. "Association Property" means all real and personal property owned by, leased or subleased to the Association.

1.7 Board. "Board" means the Board of Directors of the Association.

1.8 By-Laws. "By-Laws" means the By-Laws of the Association.

1.9 CC&R's. "CC&R's" means this Declaration of Covenants, Conditions and Restrictions, as the same may from time to time be amended.

1.10 Common Area. "Common Area" means (i) all roadways, including walls along Makena Road, Uwelo Place, and the roadway lots designated by Tax Map Key No. (2) 2-1-007:060, and appurtenant landscaping within Papaanui which are not included within the area of any Property (defined below), if and so long as such roads shall not have been dedicated to and accepted by the County of Maui; (ii) waterlines, if any, which are not owned by the Board of Water Supply and which serve more than one lot or Papaanui as a whole; (iii) the Shared Drainage Basin, and other drainage improvements, (iv) the Makena Access and Utility Easements, (v) all other areas within one or more Lots designated or to be designated by Declarant and comprising landscaping easements, drainage easements or utility easements for the

benefit of one or more other Lots, the common areas or Papaanui as a whole or as may be required by governmental authorities; and (vi) such other assets, properties, facilities, and property rights, if any, which may in the future be designated as Common Area by Declarant or transferred to or acquired by the Association (defined below).

1.11 Declarant. “Declarant” means Papaanui LLC, a Hawaii limited liability company, its successors and assigns, including such other Person or Persons whom said Papaanui LLC may, by a Recorded document, designate as having the powers and functions of Declarant, or some of such powers and functions.

1.12 Declaration. “Declaration” means this Papaanui, LLC Declaration of Covenants, Conditions and Restrictions as it may be amended from time to time.

1.13 Dedicated Area. “Dedicated Area” means any Lot or easement, or portion thereof that may be designated, established, or created for a specific use or purpose, such as a roadway, access easement, waterline easement, drainage easement, sewer easement, utility easement, or landscaping easement, in the Plan, a subdivision map or plan, or by the Declarant, in Declarant’s sole and sound discretion. A Dedicated Area may also be a Common Area, and vice versa. Owners may be required to maintain a Dedicated Area if it is located within the Owner’s Lot (for example, a landscape buffer area).

1.14 Architectural Review Committee. “Architectural Review Committee” means a committee established by the Association to design, evaluate, and/or review buildings, structures, access to Common Areas, and other facilities within Papaanui pursuant to the Design Review Standards attached hereto as Exhibit “B”, and other requirements, including, but not limited to, the aerobic individual wastewater systems referenced in Section 7.13 hereinbelow.

1.15 Plan. “Plan” means the final plat entitled “PAPAANUI, LLC SUBDIVISION”, Subdivision File No. 2.2937.

1.16 Landscape Architect. “Landscape Architect” means a person licensed to practice landscape architecture in the State of Hawaii.

1.17 Lot. “Lot” or “Lots” means any legally subdivided Lot or Lots in Papaanui.

1.18 Makena Access and Utility Easements. “Makena Access and Utility Easements” means those easements more particularly identified and described in Doc. No. 2005-202333, attached hereto as Exhibit “C”, and incorporated herein by reference.

1.19 Member. “Member” means any Person who is a member of the Association pursuant to Article III below.

1.20 Owner. “Owner” means any one or more Persons as the case may be (including Declarant) who is or are the Record owner or owners of a fee simple interest in a Lot PROVIDED, HOWEVER, that to such an extent and for such purpose, including voting, as shall be provided in a lease or agreement of sale covering all of the Owner’s interest in any Lot which has been Recorded and a copy filed with the Association, the lessee under such lease or vendee

under such agreement of sale shall be deemed the Owner thereby while the same is in effect. However, in the event of a dispute or conflict between the fee owner and such lessee or vendee as to who shall be the Owner for purposes of these CC&R's, then the fee owner shall be the Owner until such dispute or conflict is resolved. Any Person who holds any interest in a Lot merely as security for the performance of any obligation shall not be deemed an Owner. Declarant reserves the right to determine the Owner under any leases or agreements of sale of such Lot(s) owned by the Declarant.

1.21 **Person.** "Person" means a natural individual, corporation, partnership or any other legal entity.

1.22 **Record.** "Record," "Recorded" or "Recordation" means, with respect to any document, the recordation or filing of such document in the Bureau of Conveyances and/or in the Office of the Assistant Registrar of the Land Court of the State of Hawaii, as appropriate.

1.23 **Shared Drainage Basin.** "Shared Drainage Basin" means the basin more particularly identified and described in Doc. No. 2005-202331, attached hereto as Exhibit "D", and incorporated herein by reference.

1.24 **Structural Engineer.** "Structural Engineer" means a Person who performs consultation, investigation, evaluation, planning and/or design services in connection with the structural integrity of buildings and other structures and is licensed as a professional engineer in the State of Hawaii.

1.25 **Subdivision.** "Subdivision" means a parcel of real property legally divided or separated into lots as shown on a subdivision plan in accordance with all applicable laws, including the Subdivision Ordinance of the County of Maui.

1.26 **Utility.** "Utility" includes electricity, telephone, cable television, water, sewer and any other existing or future use normally considered a utility.

ARTICLE II. LIMITATIONS ON USE

2.1 **Residential Uses.** All Lots shall be used only for single-family residential purposes, in accordance with the provisions of the Maui County Code, as may be amended from time to time. Transient vacation rentals and bed and breakfast homes, as defined by the Maui County Code, shall be prohibited. No Property shall be subdivided in order to create additional lots or be the subject of a condominium property regime.

2.2 **No Commercial Use.** No Property shall be used for any commercial, professional or business use, except the following:

- (a) Reasonable sales activities on any Property for the purpose of selling such Property, including but not limited to reasonable placement of signs and advertising of the Property for sale; and

- (b) Declarant's activities in connection with the sale of any Properties in the Neighborhood.

2.3 Approval by Board of Directors. These CC&R's shall govern the rights of an Owner to construct, reconstruct, refinish, alter or maintain any improvements upon, under, within or above Papaanui, to make any change in the natural or existing contour or drainage, to install any utility lines or conduits within Papaanui or to allow the production, creation, release or discharge of any Emissions on any Lot. No new buildings, landscaping or improvements, or material alterations to existing buildings, landscaping or improvements shall be constructed, reconstructed or placed on any Lot, and no excavation, fill or grading shall be permitted on any Lot, except in accordance with plans, specifications, and other materials approved by the Board of Directors, and in accordance with any design standards adopted by said Board of Directors. For purposes of this Section 2.3, "material alteration" shall mean any alteration or change (i) in the shape or size of any existing building or improvement which costs \$25,000.00 or more, or (ii) which would affect the control of Emissions on any Lot. The Board of Directors shall not approve any work, grading, fill, excavation, landscaping, or improvements which are inconsistent with the provisions of these CC&R's. The Board of Directors may establish an Architectural Review Committee to review and approve plans, drawings and related matters for the development of a Lot as set forth in this Section 2.3.

2.4 Removal of Nonconforming Improvements. The Declarant, and/or the Association, upon the request of the Board of Directors, and after reasonable notice to the offender and the Owner, may remove any improvements constructed, reconstructed, refinished, altered or maintained on any Lot in violation of these CC&R's, and/or may restore a Lot to its state existing prior to any grading, excavation, fill, alteration, construction or other work on such Lot in violation of these CC&R's, and the Owner of such Lot shall immediately reimburse the Declarant, or Association, as appropriate, for all expenses incurred in connection with such removal and/or restoration. All such expenses incurred by the Association which are not so immediately reimbursed shall be specially assessed against the Owner of such Lot, and such Special Assessment shall be secured by the lien created under Section 5.8 below. If such Special Assessment becomes delinquent, the Association may take any of the actions described in Section 5.9 below, including, without limitation, the filing of a Notice of Delinquency and Statement of Lien, and foreclosing on such lien, as provided in Section 5.10.

2.5 Construction of Subdivision Improvements. Notwithstanding any provisions contained herein to the contrary, any work performed by Declarant, its representatives, agents, employees or contractors in or about Papaanui and any land annexed or to be annexed, including, but not limited to construction of subdivision improvements required by the County of Maui and any roadways or any electrical, communication, water, sewer, or other utilities, and drainage facilities shall be permitted without the prior written approval of the Board of Directors. Declarant, its representatives, agents, employees or contractors shall be exempt from these CC&R's, and may proceed with such work without complying with the provisions of these CC&R's.

2.6 Reservation of Right to Consolidate: Resubdivide, Etc. Declarant reserves the right to consolidate and resubdivide two or more adjoining Lots within Papaanui and to designate

Dedicated Areas, whether or not shown on any Final Plat or subdivision map, including the right to create, expand, or alter new or existing roadway lots and easements, without the prior written approval of the Board of Directors. Declarant and/or the Association also reserves the right to review and approve of any Owner's proposal to consolidate and/or subdivide Lots within Papaanui. Consolidation of one or more lots shall maintain voting rights and assessments, and all other rights and obligations of the original number of lots.

ARTICLE III. THE ASSOCIATION

3.1 General Purposes and Powers. Papaanui Homeowners Association has been or will be incorporated to be and constitute the Association to which reference is made in these CC&R's. Upon dissolution of the Association, the assets of the Association shall be disposed of as set forth in the Articles. Prior to the incorporation of said Association, the Association shall comprise the Owners of the Lots as defined in Section 1.20 above and the Declarant shall be empowered to exercise on behalf of the Association and its Board of Directors all powers granted to the Association under this Declaration.

3.2 Declarant's Control of Association. Notwithstanding anything in the CC&R's to the contrary, until the Final Transition Date, Declarant shall maintain control over the Association, including without limitation: amendment of the articles of the Association (through control of the Board); appointment of all or a majority of members of the Board (as provided in the Bylaws); and appointment of the President. Until the Final Transition Date, only Declarant will be entitled to cast any vote with respect to the appointment of such directors as specified in the Bylaws or removal of such directors. The Final Transition Date shall be the first to occur of the following: (a) such date as Declarant, in its sole discretion, requires the Members to assume control of the Association; or (b) December 31, 2015.

3.3 Membership. Each Person who is an Owner of a Lot shall be a Member of the Association and no person other than such an Owner may be a Member of the Association. In the event that additional Lots are annexed to Papaanui pursuant to Article XI, membership in the Association shall commence with respect to such Lots on the first day of the first calendar month following such annexation.

3.4 Voting Rights. Each Member, including the Declarant, shall have one vote for each Lot. In the event of multiple Owners of the same Lot, the multiple Owners shall, prior to each meeting of Owners, provide the Board with a written statement signed by each such multiple Owner, designating one Person who shall have the right to cast the votes assigned to the Lot owned by such multiple Owners. In the event that such multiple Owners fail to provide the Board with such written statement, the votes for such Lot may be exercised by any one of them present at any meeting in the absence of protest by the other Owner(s). In case of any protest by any other Owner, the voting rights for such Lot may not be exercised until such multiple Owners provide the Board with such a written statement designating the one Person who shall have the right to cast the votes. Voting by proxy shall be permitted. The right of each Owner to vote may not be severed or separated from any Lot, and any sale, transfer or conveyance of the estate of an

Owner in his Lot shall operate to transfer the appurtenant voting rights without the requirement of any express reference thereto. The right of each Owner to vote shall be subject to suspension as provided in Sections 4.10 and 5.9 below.

3.5 Board of Directors. The affairs of the Association shall be managed by a Board of Directors which may, by resolution, delegate any portion of its authority to an Executive Committee composed of not fewer than three (3) Directors. The number and qualifications of Directors shall be as provided in the Articles and By-Laws of the Association. Prior to the incorporation of said Association, the Board of Directors shall be one or more Persons determined by a majority of the Owner votes.

3.6 Quorums. The presence of fifty percent (50%) of the voting power of the Association, in person or by proxy, at a meeting to consider a matter shall constitute a quorum for consideration of that matter. Except as a greater percentage of votes is required by law, under a specific provision of these CC&R's, or of the Articles or By-Laws, a majority of the votes cast on the matter or, in the case of elections in which there are more than two candidates, a plurality of votes cast shall decide the matter.

3.7 Articles and By-Laws. The purposes and powers of the Association and the rights and obligations with respect to Members of the Association set forth in these CC&R's may be amplified by provisions of the Articles and By-Laws of the Association, including any reasonable provisions with respect to corporate matters, but in the event that any such provisions may be, at any time, in direct conflict with any provision of these CC&R's, the provisions of these CC&R's shall prevail.

3.8 Notification of Association. Each Owner shall, within ten (10) days of any sale, transfer or conveyance of any interest in the Owner's Lot, notify the Association in writing of such sale, transfer or conveyance and provide the Association with a copy of such sale, transfer or conveyance document.

ARTICLE IV. CERTAIN RIGHTS AND OBLIGATIONS OF THE ASSOCIATION

4.1 Association Rights in Lots. The Association and the Board of Directors shall have the right, upon not less that 72 hours prior written notice, to enter upon any Lot for inspection purposes and/or to enforce these CC&R's.

4.2 Maintenance of Association Property. The Association shall be obligated to provide for the care, operation, management, maintenance, repair and replacement of Association Property, including picnic tables and other related improvements within the Park Area referenced in Section 4.3, and the parabolic mirror referenced in the Unilateral Maintenance Agreement, attached hereto as Exhibit "E". Without limiting the generality of the foregoing, said obligations shall include keeping Association Property in good, clean, attractive and sanitary condition, order and repair, repairing wind and other damage caused by the elements on the Association Property; and making necessary or desirable alterations, additions, betterments or improvements to or on Association Property.

4.3 Right to Trim Trees. Pursuant to that certain Reciprocal Grant of Easement (Sight Distance and View Plane), Doc. No. 2005-202332, attached hereto as Exhibit "F", the Association shall have the right to require Makena 'Aina Corp., the fee simple owner of Tax Map Key No. (2) 2-1-007:094 or the owner of the Park Area as shown on Exhibit "D" attached to said Reciprocal Grant of Easement, to trim any trees or other landscaping within said Park Area if such trees or other landscaping exceed forty (40) feet in height above mean sea level.

4.4 Association Obligations With Respect to the Dedicated Area. Declarant may convey any Dedicated Area, or any portion thereof, to the Association, including easements for roadway and landscaping purposes; provided that in the event that the Dedicated Area or any portion thereof is dedicated and conveyed to the State of Hawaii, County of Maui or any other governmental authority, such easements shall immediately terminate. Unless otherwise designated by Declarant, all roadway lots and rights-of-way within Papaanui shall be designated as Dedicated Areas. The Association shall assume all obligations of the Declarant to upkeep, maintain, operate and repair the roadway, sewer, landscaping and irrigation improvements within the Dedicated Areas and Papaanui, and shall comply with any maintenance standards set forth in these CC&R's.

The Association's responsibilities with respect to the upkeep, maintenance, operation and repair of the landscaping and irrigation improvements within the Dedicated Areas and Papaanui may continue notwithstanding any such dedication and conveyance of the Dedicated Areas to the County. Until such time that the Dedicated Area is conveyed and dedicated to and accepted by the County of Maui or other governmental authority, the Association shall also be responsible for the upkeep, maintenance and repair of the roadway improvements within the Dedicated Area. Any extraordinary costs of upkeep, maintenance or repair incurred as a result of excessive or extraordinary use by Owner of any Lot shall be specially assessed against such Owner, and such Special Assessment shall be secured by the lien created under Section 5.8 below; and if such Special Assessment becomes delinquent, the Association may take any of the actions described in Section 5.9 below; including, without limitation, the filing of a Notice of Delinquency and Statement of Lien, and foreclosing on such lien as provided in Section 5.10.

4.5 Labor and Services. The Association may obtain and pay for the services of any Person to manage its affairs, or any part thereof; to the extent it deems advisable, as well as the services of such other personnel, including independent contractors, as the Association shall determine to be necessary or desirable for the proper operation of the Association, whether such personnel are furnished or employed directly by the Association or by any Person with whom or which it contracts, including but not limited to, the centralized drainage system, landscaping, private roadway lots, and the maintenance of walls along Makena Road and Uweloia Place. The Association may grant such Person the authority to use some Association Property for the benefit of all, some or any of its Members.

4.6 Association Functions. The Association may undertake or contract for any lawful activity, function or service for the benefit of its Members. The Association shall obtain from any governmental authority any licenses necessary or appropriate to carry out its functions hereunder. The activities, functions or services undertaken or contracted for by the Association may include, without limitation, the preparation of noise and air quality studies, the providing of

legal and accounting services necessary or desirable in connection with the enforcement of these CC&R's; the granting or conveying of easements or rights of way over, across, along or under any real property of the Association; the enforcement of all rights granted to the Association in any lease, sublease, easement, license, or other instrument; the enforcement of these CC&R's, the Rules and Regulations, the Articles and the By-Laws; and the promotion of Papanui to benefit the Owners.

4.7 Personal Property of Association. The Association may acquire and hold tangible and intangible personal property and may dispose of the same by sale or otherwise.

4.8 Property of Association. The Association shall accept fee simple title to, or a leasehold or subleasehold interest in, or grants of easement, licenses or other rights in all real property from time to time conveyed, leased or granted to it by Declarant or at the direction of Declarant, provided that the Association need not accept any such real property subject to a lien upon such real property securing or evidencing an obligation to pay money except a lien for nondelinquent real property taxes and assessments.

4.9 Rules and Regulations. Subject to the provisions of these CC&R's, the Association may make, amend, repeal and enforce reasonable and uniformly applied rules and regulations ("Rules and Regulations") governing use, maintenance and activities within Papanui, including, and without limitation, the following:

- (a) the use of Association Property;
- (b) Catch Basins, Underground Drainage System, and Retention Basin Operation and Maintenance Plan, a current copy of which is attached hereto as Exhibit "G";
- (c) the enforcement of any restrictions on use of Lots pursuant to these CC&R's;
- (d) parking restrictions and limitations;
- (e) the establishment of maintenance standards for Lots;
- (f) a schedule of fines for the violation of the Rules and Regulations, the Articles, By-Laws and these CC&R's; and
- (g) Design Review Standards, a current copy of which is attached hereto as Exhibit "B".

The Association shall furnish each Member with a written copy of the Rules and Regulations adopted pursuant to this Section 4.9; provided however, that failure to furnish said copy shall not be deemed to invalidate said Rules and Regulations to any extent.

4.10 Fines and Penalties. The Association, through the Board of Directors, shall have the right to enforce any of the Rules and Regulations, and the obligations of any Owner under

these CC&R's or any provision of the Articles or By-Laws by imposing fines in accordance with the Rules and Regulations, by suspending the right of such owner to use Association Property and/or suspending the right of such Owner to vote at meetings of the Association; provided that such use and/or voting suspension may not be imposed for a period longer than thirty (30) days per violation; and provided further that if any such violation continues for a period of ten (10) days after notice of such violation has been given to such Owner, such continuing violation shall be deemed to be a new violation and shall be subject to the imposition of new fines and penalties. The Board shall not impose a fine, or a use and/or voting suspension for a violation other than the failure to pay an Assessment when due, until the Owner accused of any such violation has been afforded the right to have a hearing before the Board or a committee designated by the Board to conduct such hearing, or has, in writing, waived such right. Each such Owner shall have the right to be heard in person, by submission of a written statement, or through a spokesperson at any such hearing. In addition to the rights provided in this Section 4.9, the Association and the Board may also take judicial action against any Owner to enforce compliance with these CC&R's, the Rules and Regulations or any other obligations of Owners hereunder or to obtain damages for noncompliance, all to the extent permitted by law.

4.11 Association Right to Charge Fees. The Association may charge reasonable fees for the use of Association Property as the Board shall determine.

4.12 Dedication of Land. The Association may dedicate, grant easements in or transfer any part of the Common Area to any public agency, authority or utility. Further, the Association shall, upon demand by the County of Maui, dedicate the four (4) roadway lots of Papaanui (Lots #8 and #9), and Tax Map Key Nos. (2) 2-1-007:060 and 2-1-008:100 (por.), as required by the Agreement to Dedicate Upon Demand, Document No. 2008-102224, attached hereto as Exhibit "H".

4.13 Grant of Easements. Upon the request of the Declarant or due to, among other things, changes in construction plans for improvements or accommodation of easements for utilities, the Association shall grant or consent to the grant of easements in the Common Areas, the Dedicated Area, or any part thereof, including on any Lot (provided that such easement does not materially reduce the value of said Lot), for access, utilities and other such purposes, to the Declarant or to such other parties as the Declarant shall designate. The Association's grant or consent also includes, upon the request of the Declarant, the processing of documents to removing inapplicable encumbrances on title for Papaanui.

4.14 Real Property Taxes. The Association shall pay all property taxes, assessments, rates and charges levied on or against any portion of Association Property. The Association may contest, by appropriate legal proceedings commenced before the same become delinquent, and conduct in good faith and with due diligence, the amount, validity or application of any taxes, assessments, rates or charges. The Association shall not be required to pay the contested amount until final determination of such contest; provided, however, that the Association shall pay all such taxes, assessments, rates and charges, together with all connection therewith, forthwith upon the commencement of proceedings to foreclose any lien which attached to such property or any part thereof as security therefor, or within such foreclosure proceedings.

4.15 Implied Rights. The Association shall have and may exercise any right or privilege given to it expressly by these CC&R's, or reasonably to be implied from the provisions of these CC&R's, or given or implied by law, duties, obligations, rights or privileges.

ARTICLE V. ASSESSMENTS

5.1 Assessments. Each Owner, or, in the event of multiple Owners of the same Lot, such multiple Owners jointly and severally, shall be obligated to, and shall pay to the Association amounts hereinafter provided, including fees and assessments for operation, management, repair, and replacement of Association improvements, and all other expenses relating to the Common Areas, which amounts are herein called "Assessments." Assessments shall include "Regular", "Supplementary" and "Special" Assessments. Subject to the provisions hereof, the Board shall have the power and authority to determine all matters in connection with Assessments, including, without limitation, power and authority to determine where, when and how Assessments should be paid to the Association, and each Owner and Member shall comply with all such determinations. Notwithstanding anything to the contrary contained herein, no Assessments in excess of \$50,000.00 for any purpose other than the upkeep, maintenance and repair of Association Property, Common Area or Dedicated Area, and promotion of Papaanui shall be made in any fiscal year of the Association without the consent of seventy-five percent (75%) of the voting power of the Association.

5.2 Determination of Budgets and Assessments. The fiscal year of the Association shall be the calendar year. Within sixty (60) days prior to the commencement of each fiscal year or partial fiscal year, the Board shall determine the total amount to be raised by Regular Assessments during such fiscal year or partial fiscal year. The amount to be raised by Regular Assessments for any fiscal year or partial fiscal year shall be determined in the following manner: The Board shall prepare or cause to be prepared and approve a budget for the fiscal year or partial fiscal year showing, in reasonable detail, the estimated operating costs and expenses which will be payable in that fiscal year or partial fiscal year to fulfill the regular operating functions and obligations of the Association in that fiscal year or partial fiscal year, including amounts necessary to cover obligations made in connection with, or contemplated under, any previously approved budgets, plus an amount sufficient to provide a reasonable carry over reserve for the next fiscal year (the "Operating Budget"). The Operating Budget shall include, without limitation (a) amounts that are required to operate the Board of Directors and enable it to carry out its functions, (b) amounts required for the upkeep, maintenance and repair of Association Property, the Common Area, the Dedicated Area, and the share of the maintenance and/or insurance costs, and (c) reserve funds for maintenance and repair of roadways and walls along Makena Road, other Dedicated Areas, and trees in the Park. The Board shall subtract from the Operating Budget the amount equal to the anticipated surplus attributable to Assessments collected but not disbursed in the fiscal year or partial fiscal year immediately preceding the fiscal year or partial fiscal year for which the Operating Budget has been prepared. Alternatively, the Association may elect to refund a portion of said anticipated surplus to the Members and to subtract the balance of said anticipated surplus from the Operating Budget. However, the portion refunded to Members may not exceed the portion (if any) of said

collected but undisbursed Assessments that, if not refunded to the Members would constitute "exempt function income" under and for purposes of Section 528 of the Internal Revenue Code of 1986, as amended. The Board shall furnish a copy of the Operating Budget to each Member.

If the Board fails to determine or cause to be determined the total amount to be raised by Regular Assessments in any fiscal year or partial fiscal year, and/or fails to notify the Members of the amount of such Regular Assessments for any fiscal year or partial fiscal year, then the amounts of Regular Assessments shall be deemed to be the amount assessed in the previous fiscal year or partial fiscal year.

5.3 First Assessments. At the time of the closing of sale for each Lot, Declarant shall collect two (2) months worth of Assessments from the purchaser, which will be Declarant's estimate of the costs and expenses to be incurred by the Association until the commencement of the first full fiscal year of the Association. The Association shall thereafter be responsible for collecting Assessments from the date of notice of substantial completion of construction of subdivision improvements or such other date as Declarant may determine. Declarant shall be responsible for the Assessments on Lots which it owns and/or has not sold.

5.4 Supplementary Assessments. In addition to Regular Assessments, the Association may levy Supplementary Assessments, payable over such period as the Association may determine: (i) for the purpose of defraying any expense incurred or to be incurred as provided in these CC&R's, including the acquisition of Association Property; or (ii) to cover the deficiency, in the event that, for whatever reason, the amount received by the Association from Regular Assessments is less than the amount determined and assessed by the Association.

5.5 Apportionment of Regular and Supplementary Assessments. The amount of the Regular or Supplementary Assessment for any fiscal period payable by an Owner for each Lot owned by such Owner shall be computed by dividing the total amount to be raised by such Assessments by all Lots within Papanui. In the event that additional Lots are annexed to Papanui pursuant to Article X, Assessments shall commence with respect to such Lots on the first day of the first calendar month following such annexation. Consolidation of one or more lots shall maintain voting rights and assessments, and all other rights and obligations of the original number of Lots.

5.6 Special Assessments. In addition to Regular Assessments and Supplementary Assessments, the Association may levy Special Assessments, payable by such Owners and over such period as the Association may determine, for (a) expenses which are incurred or to be incurred by the Association as provided in these CC&R's for the benefit of fewer than all of the Owners, (b) monetary fines assessed against an Owner pursuant to these CC&R's, or the Rules and Regulations and not paid when due, (c) expenses which are incurred or to be incurred by the Association which are necessitated by the negligence, misuse or neglect of any Owner, or by the extraordinary or excessive use of any Association Property, Common Area, Dedicated Area, or the Roadway Improvements, by any Owner or (d) expenses which are incurred or to be incurred by the Association as a result of any Owner's act or failure or refusal to act or otherwise comply with the provisions of these CC&R's, the Rules and Regulations, or any other rules and/or regulations promulgated pursuant to these CC&R's.

5.7 Time for Payments. The amount of any Assessment, charge or other amount payable with respect to any Owner or such Owner's Lot, shall become due and payable as specified by the Board and, in any event, within thirty (30) days after any notice of the amount due as to such Assessment, charge, or other amount shall have been given by the Association to such 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.

5.8 Lien for Assessments and Other Amounts. The Declarant, for each Lot it owns within Papaanui, and each Owner of a Lot, by acceptance of a deed or other conveyance of such Lot, whether or not it shall be so expressed in such deed or conveyance, covenants and agrees to pay to the Association the Regular Assessments, Supplementary Assessments and Special Assessments assessed against the Owner's Lot as provided herein. All Assessments, including Regular, Supplementary and Special Assessments, together with late charges, interest, costs and reasonable attorneys' fees shall be a charge on the Lot and the Association shall have a continuing lien against the Owner's interest in such Lot to secure payment of any such Assessment, charge or other amount due and owing to the Association with respect to the Owner or with respect to such Owner's Lot, plus late charges, and interest as provided in Section 5.7, from the date due and payable until paid, plus all costs and expenses of collecting the unpaid amount, including attorneys' fees.

5.9 Effect of Nonpayment of Assessment. Remedies of Association. Any Assessment, whether Regular, Supplementary or Special, or any installment thereof, which is not paid within thirty (30) days of its due date shall be delinquent. In the event that an Assessment or installment thereof becomes delinquent, the Association, in its sole discretion, may take any or all of the following actions:

- (a) assess a late charge of at least \$150 per delinquency;
- (b) assess interest thereon as provided in Section 5.7 above;
- (c) suspend the voting rights of the Owner during any period of delinquency;
- (d) accelerate all remaining Assessment installments for the fiscal year in question so that the unpaid Assessment for the remainder of the fiscal year shall be due and payable immediately;
- (e) bring an action at law against any Owner personally obligated to pay Assessments;
- (f) file a Notice of Delinquency and Statement of Lien with respect to the Lot, and foreclose on the lien as more fully set forth in Section 5.10 below.

Any such action shall be in addition to any other remedies provided by law for the enforcement of such obligations.

5.10 Foreclosure of Lien. In the event that any Regular, Supplementary or Special Assessment is delinquent, the Association may file a Notice of Delinquency and Statement of Lien by Recording a written statement with respect to the Lot, setting forth the name(s) of the Owner(s), the legal description of the Lot, the name of the Association and the amount of delinquent Assessments then owing, which statement shall be duly signed and acknowledged by an officer or director of the Association or by a managing agent retained by the Association to perform any or all of the Association's functions hereunder. A copy of such statement shall also be mailed to the Owner(s) at the address of the Lot or at such other address as the Owner(s) has provided in writing to the Association. The Association may proceed to foreclose the lien in the manner for foreclosure of mortgages in the State of Hawaii. The foregoing remedies shall be in addition to any other remedies provided by law for the enforcement of such obligations.

5.11 Liability of Owners and Purchasers. The amount of any Assessment or charge owing to the Association by Owner under these CC&R's shall be a joint and several obligation to the Association of such Owner and such Owner's heirs, personal representatives, successors and assigns. Each such amount, together with interest thereon, may be recovered by suit for a money judgment by the Association without foreclosing or waiving any lien securing the same.

ARTICLE VI. ARCHITECTURAL CONTROLS

6.1 Purpose. The purpose of the architectural controls set forth in this Article 6 is not to regulate all details of an owner's construction and landscaping activity, but instead is to give the Declarant the means to attempt in its sole discretion to insure compliance with Design Guidelines (Exhibit "B"), and maintain a consistent look throughout the Lots that reduces adverse visual impacts on the surrounding lands. It is understood that Declarant's judgment in these matters may not be perfect or even consistent, and that some degree of taste and subjectivity will necessary be involved. However, it is hoped that all concerned will cooperate in this process with the mutual objective of protecting property values and the general appearance of the neighborhood. The power to exercise these controls is reserved to the Declarant only and may be exercised and delegated at Declarant's option only. Declarant shall have no legal obligation to exercise or delegate the architectural controls and shall have no liability to any buyer or owner if Declarant shall elect not to exercise said controls or shall fail to enforce said controls as to some or all of the Properties or if Declarant exercises said controls in whole or in part in a manner which a buyer or owner of any Property feels is inappropriate, inconsistent or otherwise objectionable.

6.2 Restriction and Scope. No structure may be constructed without the prior written approval of the Architectural Design Committee (defined below); and no such feature, once built, may be externally remodeled, or otherwise visually altered to any material extent without the prior written approval of the Architectural Design Committee. The Owners of each Property shall comply with and abide by all proposals, plans and specifications submitted to and approved by the Architectural Design Committee with respect to said Property. The term "structure" includes a building, any addition or expansion, pool, fence, wall, and any other man-made item

located on or above the surface of the ground which may be visible from any road or other Property, and also includes any pavement of a driveway, parking area, lanai or open patio.

Notwithstanding the foregoing, the following shall not be subject to prior written approval of the Architectural Design Committee under this Article 6: (a) the construction, remodeling or change of any structure by the Declarant (or any successor as developer of all or part of Papaanui) as part of the development or initial sale of Papaanui; (b) the construction, remodeling or change of any structure by the Association of any Common Area facilities and (c) the repair or reconstruction of a damaged structure in accordance with plans previously approved for the original structure or the repainting of a structure in accordance with a previously approved color and color scheme.

6.3 Composition of Architectural Design Committee. The Declarant, or any person or persons whom the Declarant in its sole discretion may designate, shall serve as the Architectural Design Committee until the date, if any, on which the Declarant (or Declarant's assignee) shall, in its sole discretion, notify the Board of Directors of the Association or the owners of all Properties that the Declarant (or said designee) assigns the Architectural Design Committee's function to the Association, after which time the Board of Directors or its assigns shall act as the Design Review Committee.

6.4 Standards and Procedures of the Architectural Design Committee. All proceedings by the Architectural Design Committee shall be conducted in an orderly manner and a reasonable record of all proceeding shall be maintained.

All applications for approval of the Architectural Design Committee shall be accompanied by plans, specifications and other supporting material which shall be detailed and complete to the point which would, in the Architectural Design Committee's reasonable judgment, enable it to adequately understand and evaluate the location and appearance of the planned work. The Architectural Design Committee may (but is not required to) engage one or more architects, engineers or other professionals to assist in its deliberations and review and process of applications and may assess to the applicant all reasonable costs and fees incurred. The Architectural Design Committee shall have the right to refuse to consider any application unless and until the application shall have been completed, and no application to said Committee shall be deemed completed until all materials shall have been received by said Committee in accordance with the Design Standards and all rules and requests of said Committee, all requests and rules of said Committee shall have been complied with, and all assessments shall have been paid.

The Architectural Design Committee may in its discretion adopt reasonable rules and regulations to govern its procedures and requirements as it may deem appropriate from time to time.

The approval of the Architectural Design Committee shall not be withheld unreasonably, provided that the following conditions are met: (a) all permissions and approvals of all governmental authorities having jurisdiction shall have been obtained; (b) the proposal complies with all terms and conditions of this Declaration; (c) the proposal conforms to the

Design Standards attached hereto as Exhibit "B" as they may be amended from time to time (or conforms to any variance granted by the Architectural Design Committee), and (d) the appearance of the proposed structure, alteration, addition or treatment is not likely to be out of harmony or out of scale with the rest of Papaanui. Any decision of the Architectural Design Committee which involves a subjective conclusion as to taste or aesthetics (such as matters referred to in clauses (c) or (d) in the preceding sentence which require an opinion or judgment) shall be final and binding on all concerned and shall not be appealable to any court or tribunal (but any such decision may be reconsidered by the Architectural Design Committee in its sole and absolute discretion).

6.5 **Responsibility.** The members of the Architectural Design Committee shall not be personally liable, and the Architectural Design Committee itself and Declarant shall not be liable, for any of their or its acts or omissions in connection with the performance of (or failure to perform) any duties hereunder so long as such actions or omissions were grounded in the belief that such actions or omissions were in the best interests of Papaanui or the Declarant.

Neither the Declarant, the Association, its Board of Directors, nor the Architectural Design Committee (nor the agents, officers, members or affiliates of any of them) shall be held liable for any injury, loss or damages arising out of or in any way connected with the integrity, quality or execution of any construction or design, or the failure of any construction or design to comply with any laws, rules or regulations, or the failure to approve or to require the approval of any structure.

6.6 **Variations.** The Architectural Design Committee in its sole discretion may grant variances from the strict requirements of the Design Standards in individual cases if said Committee determines that (a) strict compliance would result in an undue hardship or would serve no reasonable purpose, and (b) the structure, alteration or addition, or its location, as proposed, complies with the general spirit and intent of the Design Standards and this Declaration. The Architectural Design Committee's discretion to grant or withhold a variance in any particular case shall be solely within the Committee's discretion, shall be binding on all parties and shall not be appealable, and shall not bind said Committee as precedent in any other case.

6.7 **Protection of Views.** The Lots in Papaanui have a perpetual easement for sight distance and view plane purposes to the Pacific Ocean as set forth in that certain Reciprocal Grant of Easement (Sight Distance and View Plane), Doc. No. 2005-202332, attached hereto as Exhibit "F".

6.8 **Design Standards.** The Design Standards attached hereto as Exhibit "B" are hereby adopted by the Declarant as the Design Standards for Papaanui. They shall apply to all Properties except where variances are granted in individual cases as provided in Section 6.6 above. The Design Standards may be amended from time to time by the Declarant provided that no amendment shall be inconsistent with, or have the express or implied effect of superseding the body of this Declaration of Covenants, Conditions and Restrictions (as it may be amended by the Association under Section 12.3 below). Said power to amend may be exercised by any person or

entity, including the Association, to which the Declarant may, in its discretion, assign said power in the future.

No amendment to the Design Standards or this Declaration shall apply to any structure which shall have been previously approved by the Architectural Design Committee and the construction or placement of which (in accordance with said approval) has commenced or will, in the reasonable judgment of the Architectural Design Committee, be commenced by the Owner in good faith without undue delay.

ARTICLE VII. USE REQUIREMENTS AND RESTRICTIONS

7.1 Landscaping for Papaanui. All common areas shall be landscaped, irrigated and/or otherwise appropriately maintained by the Association. Such common areas of the Subdivision that may be dedicated to, and accepted by, the County of Maui in the future shall become the responsibility of the County to maintain. Also, waterline and drainage easements or such lots which become easements in a residential Lot shall be the responsibility of the owner of the Lot in which the easement is incorporated to landscape, irrigate and/or maintain, provided, however, that the actual waterline and drainage within the easement which is not owned by the County and serves more than one Lot shall be the responsibility of the Association to maintain. In addition, maintenance of the area inside of the wall along Uweloa Place shall be the responsibility of the owner of each Lot upon which said wall fronts.

7.2 Animals and Pets. All animals shall be confined to the borders of their Owner's Property at all times when out of doors and shall be controlled so as not to disturb any occupant of the neighborhood. Chickens and pigs are prohibited.

7.3 Vehicles and Parking. There shall be no parking on any street in Papaanui except for temporary parking of vehicles of guests and visitors. No vehicle of any kind which is inoperable may be kept or stored outside of an enclosed garage and any such vehicle must be removed from the Property or promptly placed within an enclosed garage within seventy-two (72) hours of becoming inoperable. Boats, trailers or recreational vehicles shall not be visible from any adjacent property or roadway.

7.4 Restricted Access. Ingress and egress to Lot 1 of Papaanui shall be restricted to and from Uweloa Place. Ingress and egress to Lots 6 and 7 of Papaanui shall be restricted to and from the Access and Utility Easement, Document No. 2005-202333, as shown on the Plan.

7.5 Archaeological. The State of Hawaii, State Historic Preservation Division ("SHPD"), has approved a monitoring plan for Papaanui that requires monitoring during excavation and construction of the subdivision. Upon the date of the notice of substantial completion of the subdivision, Declarant will submit any follow-up report to SHPD, if deemed necessary. All future excavation activities within the subdivision must be carried out in full compliance with SHPD requirements, including archaeological monitoring, as required by SHPD.

7.6 Nuisances. No noxious or offensive activity shall be carried on upon any Property, nor shall anything be done on any Property which may be or may become an annoyance or nuisance to any occupants of Papaanui, including but not limited to activities which cause unreasonable noise, dust, or odors or unreasonably violate privacy or violate any applicable laws, rules or regulations.

7.7 Maintenance of Structures, Properties and Drainage Reserves. All structures located on each Property shall be kept in attractive condition, in good order and repair, and free from visible deterioration. All grass and vegetation on each Property (whether vacant or improved with a dwelling) shall be kept neatly trimmed and hedges and other vegetation pruned. The Association shall maintain all Common Area drainage (in compliance with the Retention Basin Operation and Maintenance Plan) and landscaping easements, including the sidewalk and planted area located within the road right-of-way fronting each Property, the wall and all landscape improvements fronting Uweloa Place, and the wall and the grassed drainage swale along Makena Road, with each Owner equally sharing in the maintenance costs.

7.8 Hazardous Materials. No Owner shall use, generate, store or dump any hazardous materials on any Property or in any other portion of the Neighborhood. "Hazardous materials" means those materials and substances which are identified as hazardous, toxic or otherwise regulated under applicable federal, state or local environmental laws, rules or regulations.

7.9 Signs. Signs shall be prohibited except (a) Declarant's signs in connection with the construction, promotion and sale of Papaanui, (b) not more than one standard broker's-type "for sale" sign on a Property in connection with resale of said Property and (c) subdivision and road identification signs installed by the Declarant or the Board of Directors of the Association.

7.10 Utilities. All utilities within Papaanui and within each Property shall be underground.

7.11 Building/Landscaping Heights. As set forth in that certain Reciprocal Grant of Easement (Sight Distance and View Plane), Doc. No. 2005-202332, attached hereto as Exhibit "F", the height of any building, structure, trees or other landscaping on Lots #4, #5, #6, and #7 shall not exceed seventy-five (75) feet in height from mean sea level, and the height of any building, structure, trees or other landscaping on Lots #1, #2, and #3 shall not exceed thirty (30) feet in height from the final grade of such lot at the time of final approval of the subdivision of each lot. Owner shall comply with all other provisions set forth in said Reciprocal Grant of Easement. Each Owner shall be allowed two (2) single trunk palms to exceed these limits.

7.12 Compliance With Design Standards and Laws. All structures, shall comply with (a) the Design Standards attached hereto as Exhibit "B" as they may be amended by the Declarant from time to time and (b) all applicable laws, rules and regulations. Where requirements in this Declaration are more stringent than applicable laws, rules and regulations, the requirements in this Declaration shall govern.

7.13 Aerobic Individual Wastewater Systems. Each Owner shall be responsible for the installation of an aerobic individual wastewater system ("IWS"), defined as a facility which is

used and designed to receive and dispose of domestic wastewater, to service each Lot. The installation, approval, operation, and maintenance of the IWS shall be in accordance with the rules and regulations of the State of Hawaii, Department of Health ("DOH"), including, but not limited to, Hawaii Administrative Rules, Title 11, Chapter 62 of the DOH. No Owner shall be allowed to occupy or construct upon any Lot until such time that an IWS has been installed and is operational in accordance with DOH rules and regulations, including review and approval by the Association's Architectural Review Committee.

7.14 Clearing and Grading. The clearing and grading of any Lot shall be performed in strict accordance with plans and specifications therefor which have been approved by the Board of Directors and County of Maui, and such clearing and grading shall not alter or impede existing drainage patterns without the prior approval of the Board of Directors. All areas cleared shall be left clear of rubbish and litter, and approved ground vegetation shall be re-established. All grading operations shall exercise soil erosion and dust control measures, and the areas graded shall be replanted with grass or ground cover approved by the Board of Directors and the County of Maui immediately upon completion of grading.

7.15 Construction Period. During the course of actual construction of any structure or improvement permitted hereunder, the provisions, covenants, conditions and restrictions contained in these CC&R's shall be deemed waived only to the extent necessary to permit such construction, provided that such construction is carried out with all due diligence and that during the course of such construction, nothing is done which will result in a violation of any of said provisions, covenants, conditions and restrictions upon completion of construction. All structures and improvements permitted hereunder shall be completed within eighteen (18) months from the date of the approval of construction.

7.16 Construction Regulations. All construction activities by Owners or contractors (except the Declarant, who is exempt from these conditions) shall be conducted in compliance with the following controls and conditions, and with any such other construction rules and regulations adopted by the Board of Directors:

- (a) A 100% performance and lien payment bond must be provided by the contractor for all work undertaken prior to the commencement of such work.
- (b) Adequate temporary toilets must be provided for on-site workers.
- (c) Adequate temporary water service must be provided.
- (d) Adequate temporary on-site power must be provided.
- (e) Adequate construction debris control practices must be implemented so as to minimize wind-driven debris, and the Owner or his contractor will be responsible for picking up any debris from adjacent Lots so as to minimize the maintenance burden on Lots. The Owner or his contractor shall be responsible for cleaning up and repairing any damage to other properties.

- (f) No on-site burning of scrap will be permitted.
- (g) The Owner must provide and keep in force during construction, general liability insurance with minimum limits for bodily injury claims in the amount of \$1,000,000 for each occurrence and for property damage claims in the amount of \$ 100,000 for each occurrence.
- (h) No dumping of excess concrete and wash out of premix concrete trucks shall be permitted in any location except as may be approved by the Board of Directors.
- (i) Noise pollution standards equivalent to the standards set by the County of Maui and State of Hawaii shall be observed.
- (j) During the grading and excavation, and at other times, the Lot must be wet down sufficiently so as to minimize dust problems.
- (k) No sediment or other debris shall be allowed onto the roadways or into the drainageways.

7.17 Owner Caused Damage. If, due to the act or neglect of an Owner or such Owner's guests, employees, agents or invitees, loss or damage shall be caused to any Association Property, such Owner shall be liable and responsible for the same except to the extent that such damage or loss is covered by insurance obtained by the Association and the insurer has waived its rights of subrogation against such Owner. The amount of such loss or damage may be collected by the Association from such Owner, and such amount shall be secured by a lien on the Lot of such Owner in accordance with the provisions of Section 5.8 above.

7.18 Assignment of Rights or Obligations. An Owner may assign or delegate to another Person some or all of his rights hereunder as an Owner and may enter into any arrangement with such other Person under which such Person shall agree to assume some or all of such Owner's obligations hereunder. The Association shall recognize any such assignment or delegation of rights or arrangement for assumption of obligations, provided that, to be effective with respect to the Association, Declarant or any other Owner, the assignment or delegation of rights or arrangement for assumption of obligations shall be in writing, shall be in terms deemed satisfactorily specific by the Association, and a copy thereof shall be filed with the Association. Notwithstanding the foregoing, no Owner shall be permitted to relieve himself of the ultimate responsibility for fulfillment of all obligations hereunder of an Owner arising during the period he is an Owner.

ARTICLE VIII. EASEMENTS

8.1 Easements in Lots for Repair, Maintenance, and Emergencies. The Association and its officers, employees, agents and representatives shall have an easement upon, across, over, in and under each Lot in order to make emergency repairs thereon necessary to prevent damage

IN WITNESS WHEREOF, Declarant has executed these CC&R's as of the date and year first above written.

PAPAANUI LLC, a Hawaii limited liability company

By _____
DAVID WARD
Its Manager

12.6 Protection of Encumbrances. No violation or breach of, or failure to comply with any provision of these CC&R's and no action to enforce any such provision shall affect, defeat, render invalid or impair the lien of any mortgage or other lien on any Lot taken in good faith and for value and Recorded prior to the time of Recording of an instrument describing the Lot and listing the name or names of the Owner or Owners of the Lot and giving notice of such violation, breach or failure to comply; nor shall such violation, breach, failure to comply or action to enforce affect, defeat, render invalid or impair the title or interest of the holder of any such mortgage or other lien or title or interest acquired by any purchaser upon foreclosure of any such mortgage or result in any liability, personal or otherwise, of any such holder or purchaser. Upon foreclosure of any such mortgage or other lien, no such holder who thereby assumes title to a Lot shall be required to correct past violations hereof with respect to said Lot so long as said Lot is neither occupied nor used by any purpose by such holder but is merely held for a prompt resale, and provided that all money obligations accruing pursuant to these CC&R's subsequent to such foreclosure shall be paid by such holder. Any such purchaser on foreclosure shall, however, take subject to all provisions of these CC&R's and shall comply with all covenants, conditions, restrictions and obligations hereunder.

12.7 Construction. The provisions of these CC&R's shall be liberally construed to promote and effectuate the fundamental concepts of Papanui as set forth in these CC&R's, and no provision hereof shall be construed to excuse any Person from observing any law or regulation of any governmental body having jurisdiction over Papanui.

12.8 Assignment of Powers. Any and all of the rights and powers vested in Declarant pursuant to these CC&R's may be delegated, transferred, assigned, conveyed or released by Declarant to the Association and the Association shall accept the same effective upon the recording by Declarant of a notice of such delegation, transfer, assignment, conveyance or release.

12.9 Non-Avoidance. No Owner through non-use of the Common Area or by abandonment of his Lot may avoid the burdens or obligations imposed on him by these CC&R's.

12.10 Limited Liability. Neither Declarant, the Association, the Board, nor any member, agent, officer or employee of any of the same, shall be liable to any party for any action or for any failure to act with respect to any matter if the action taken or failure to act was in good faith and without malice.

12.11 Compliance With Laws. Each Owner shall, at Owner's sole cost and expense, comply with all applicable laws, rules, regulations and requirements (hereinafter collectively called "Laws") of all County, State, and Federal authorities now in force, or which may hereafter be in force, pertaining to the Owner's Lot or Lots, and shall faithfully observe all such Laws in the use of such Lot or Lots. In the event of a conflict or inconsistency between the Laws and these CC&R's, the more restrictive provision shall apply. In the event any provision in these CC&R's is prohibited by any Laws, the Laws shall prevail.

Compliance with these CC&R's shall not relieve an Owner from Owner's obligation to comply with any Laws.

expanded. Thus, for example, "Papaanui" shall mean the land described in Exhibit "A" and that added by an Annexing Declaration or by Annexing Declarations, and reference to these CC&R's shall mean these CC&R's as so modified.

11.5 CC&R's Operative on New Land and Improvements. Any such additional land, buildings and improvements shall be subject to all the terms and conditions of these CC&R's and of such Annexing Declaration or Declarations upon Recordation of the Annexing Declaration; provided that in the event that any provision of any such Annexing, Declaration is inconsistent with any provision of these CC&R's the terms and conditions of these CC&R's shall prevail

11.6 Scope of CC&R's. No land except that described in Exhibit "A" and land annexed hereto as provided in this Article X shall be deemed subject to these CC&R's, whether or not any such land is shown on any file plan or subdivision map filed by Declarant or is described or referred to in any document executed and/or Recorded by Declarant. No designation, on any map Recorded or filed by Declarant, of any parcel, lot or other area as a private area, common area, road, street, park or as any other type of parcel, lot or area, shall be deemed to be a dedication or commitment or representation that such parcel, lot or area is or will be used or restricted to such use except with respect to parcels, lots or areas described in said Exhibit "A" or annexed to Papaanui as herein provided and so designated by Declarant in a Recorded document. No Owner shall acquire nor shall the public nor any public body or agency nor any other Person acquire any interest or right in any land by reason of such designation or Recording or filing except as aforesaid. Nothing herein or in any amendment hereto or on any maps shall be deemed to be a representation, warranty or commitment that Declarant will commit to Papaanui or subject to these CC&R's any land it may now own or may hereafter acquire other than that described in said Exhibit "A".

ARTICLE XII. MISCELLANEOUS

12.1 Release of Dedicated Lots. Declarant shall have the right and power, without having to obtain the consent or approval of the Association, any Owner or any other Person, to grant or dedicate any Dedicated Area and any Lot owned by Declarant to the County of Maui or the State of Hawaii, or to any other appropriate governmental agency, or to any public or private utility. Notwithstanding any other provision contained in these CC&R's to the contrary, any such grant or dedication of any such Lot(s) may be made by Declarant free and clear of, and no longer subject to, any of the terms, covenants, conditions or restrictions contained in these CC&R's. Upon any such grant or dedication, the release and removal of these CC&R's (and all of the terms; covenants, conditions or restrictions contained herein) as an encumbrance upon the Lot(s) so granted or dedicated may, but need not necessarily, be made effective by Recording in the Bureau of Conveyances of Hawaii and/or filing in the Office of the Assistant Registrar of the Land Court of Hawaii, a certificate executed by Declarant certifying such grant or dedication of the Lot(s) and noting the release and removal of these CC&R's as an encumbrance upon said Lot(s) pursuant to this Section 11.1.

(a) Substantial and Partial Destruction. "Substantial Destruction" shall exist whenever damage or destruction to any improvement or facility which is part of the Common Area is valued at fifty percent (50%) or more of the total assessed value of such improvement or facility; "Partial Destruction" shall mean any other damage or destruction.

(b) Substantial and Partial Condemnation. "Substantial Condemnation" shall exist whenever an entire Lot which is part of the Common Area is taken under eminent domain or by grant or conveyance in lieu of condemnation, or whenever a taking of a portion of a Lot which is part of the Common Area, under eminent domain or by grant or conveyance in lieu of condemnation is valued at fifty percent (50%) or more of the total assessed value of such Lot and the improvements thereon. "Partial Condemnation" shall mean any other such taking by eminent domain or grant or conveyance in lieu of condemnation.

(c) Restoration. "Restoration," in the case of any damage or destruction, shall mean restoration of the improvement or facility within the Common Area to a condition the same or substantially the same as the condition in which it existed prior to the damage or destruction and in the case of condemnation, shall mean restoration of the remaining portion thereof to a state appropriate for Papaanui.

(d) Available Funds. "Available Funds" shall mean any proceeds of insurance or condemnation awards or payments in lieu of condemnation and any uncommitted income or funds of the Association including funds carried over from the previous fiscal year. Available Funds shall not include that portion of insurance proceeds legally required to be paid to any party other than the Association, including a mortgagee.

10.2 Determination by the Board. Upon the occurrence of any damage or destruction to the Common Area or any part thereof, or upon a complete or partial taking of the Common Area under eminent domain or by grant or conveyance in lieu of condemnation, the Board shall make a determination as to whether such damage or taking was substantial or partial, taking into account the Available Funds and levying of Supplementary Assessments.

10.3 Restoration of the Common Area. Restoration of the Common Area may be undertaken by the Association, at the discretion of the Board, without a vote of Members in the event of Partial Destruction or Partial Condemnation. With the exception for Substantial Destruction to an improvement or facility which is part of the Common Area that may impact health and safety, within sixty (60) days after the Board has determined that Substantial Destruction or Substantial Condemnation has occurred, the Board shall send each Member a written description of the Destruction or Condemnation and a ballot on which each Member shall indicate whether or not Restoration is to be undertaken. Restoration shall be undertaken unless Members holding seventy-five percent (75%) of the voting power of the Association vote against such Restoration. In the event the insurance proceeds actually received exceed the cost of Restoration when such Restoration is undertaken pursuant to this Section the excess shall be either used as determined by the Association, or used to reduce Assessments to be paid by Members.

- (d) **Fire Lane Easement:** Lot 3 of Papaanui shall be subject to a grant of an easement for emergency access to the County of Maui Fire Department. Such area shall be kept free and clear at all times. Any gating of such area from Uweloa Place shall be accepted by the County of Maui Fire Department.
- (e) **Access and Utility Easement:** Lot 7 of Papaanui shall be subject to a grant of access and utility easement in favor of Lot 6 of Papaanui, Maui Electric Co. Ltd., Hawaiian Telcom, and Oceanic Time Warner Cable Inc.

8.5 **Flooding and Erosion.** No Owner shall permit to be constructed on his Lot any improvements which will create a problem of flooding, erosion or interference with natural water flow or runoff damaging to his Lot or adjacent properties, nor shall any Owner fail to reasonably act so as to minimize runoff damage or interference with the natural flow of storm waters.

ARTICLE IX. INSURANCE

9.1 **Insurance Requirements Generally.** The Association shall obtain and maintain in full force and effect at all times certain fire, liability and other insurance as hereinafter provided. All such insurance shall be obtained from companies duly authorized to do insurance business in the State of Hawaii. All such insurance shall name as insureds Declarant and its designees, the Association, the Board, and all of their officers, directors, employees and agents. All such insurance shall protect each of the insureds as if each were separately insured under separate policies. To the extent reasonably practicable, such insurance shall: (i) provide for a waiver of subrogation by the insurer as to claims against the Declarant, the Association, the Board, and any of their officers, directors, employees, invitees and guests; (ii) provide that the insurance cannot be cancelled, invalidated or suspended on account of the conduct of the Declarant, the Association, the Board, or any of their officers, directors, employees or agents, or of any Member or such Member's employees, invitees and guests; (iii) provide that any "no other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by any Member or mortgagee and that the insurance policy shall not be brought into contribution with insurance maintained by any Member or mortgagee; (iv) contain a standard mortgage clause endorsement in favor of the mortgagee of any part of Association Property except a mortgagee who is covered by other and separate insurance; and (v) provide that the policy of insurance shall not be terminated, cancelled or substantially modified without at least thirty (30) days' prior written notice to the Association, the Declarant, and to each mortgagee covered by any standard mortgage clause endorsement. Any insurance policy may contain such deductible provisions as the Board deems consistent with good business practice.

The cost and expense of all insurance obtained by the Association, except insurance obtained at the request of and specifically benefiting any particular Member or group of Members, shall be an expense of the Association and paid by way of Regular Assessments by the Owners of their Lot(s) provided that if any additional insurance charge is incurred because of the activities of any Owner, that Owner shall be solely responsible for that additional charge.

- (f) No on-site burning of scrap will be permitted.
- (g) The Owner must provide and keep in force during construction, general liability insurance with minimum limits for bodily injury claims in the amount of \$1,000,000 for each occurrence and for property damage claims in the amount of \$ 100,000 for each occurrence.
- (h) No dumping of excess concrete and wash out of premix concrete trucks shall be permitted in any location except as may be approved by the Board of Directors.
- (i) Noise pollution standards equivalent to the standards set by the County of Maui and State of Hawaii shall be observed.
- (j) During the grading and excavation, and at other times, the Lot must be wet down sufficiently so as to minimize dust problems.
- (k) No sediment or other debris shall be allowed onto the roadways or into the drainageways.

7.17 Owner Caused Damage. If, due to the act or neglect of an Owner or such Owner's guests, employees, agents or invitees, loss or damage shall be caused to any Association Property, such Owner shall be liable and responsible for the same except to the extent that such damage or loss is covered by insurance obtained by the Association and the insurer has waived its rights of subrogation against such Owner. The amount of such loss or damage may be collected by the Association from such Owner, and such amount shall be secured by a lien on the Lot of such Owner in accordance with the provisions of Section 5.8 above.

7.18 Assignment of Rights or Obligations. An Owner may assign or delegate to another Person some or all of his rights hereunder as an Owner and may enter into any arrangement with such other Person under which such Person shall agree to assume some or all of such Owner's obligations hereunder. The Association shall recognize any such assignment or delegation of rights or arrangement for assumption of obligations, provided that, to be effective with respect to the Association, Declarant or any other Owner, the assignment or delegation of rights or arrangement for assumption of obligations shall be in writing, shall be in terms deemed satisfactorily specific by the Association, and a copy thereof shall be filed with the Association. Notwithstanding the foregoing, no Owner shall be permitted to relieve himself of the ultimate responsibility for fulfillment of all obligations hereunder of an Owner arising during the period he is an Owner.

ARTICLE VIII. EASEMENTS

8.1 Easements in Lots for Repair, Maintenance, and Emergencies. The Association and its officers, employees, agents and representatives shall have an easement upon, across, over, in and under each Lot in order to make emergency repairs thereon necessary to prevent damage