MICHAEL P. VICTORINO
Mayor

SANDY K. BAZ
Managing Director

TYSON K. MIYAKE
Deputy Managing Director

DEPARTMENT OF MANAGEMENT
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAI'I 96793

August 19, 2019

Honorable Michael P. Victorino
Mayor, County of Maui
200 South High Street
Wailuku, Hawaii 96793

APPROVED FOR TRANSMITTAL

Michael P Victorino 8/19/19
Mayor Date

For Transmittal to:

Keani N.W. Rawlins-Fernandez, Chair
Economic Development and Budget Committee
Maui County Council
200 South High Street
Wailuku, HI 96793

Dear Ms. Rawlins-Fernandez:

SUBJECT: **LOTS AT THE FAIRWAYS AT MAUI LANI** (EDB-41)

Thank you for your letter dated August 9, 2019 requesting information "as it relates to the 51 County-owned lots, including one drainage lot, at the Fairways at Maui Lani".

1. **A list of property maintenance and property fixes completed since the Committee's meeting on July 25.**

   a) Removed fallen fence material, retaining wall blocks, and vegetation within the drainage channel;

   b) Installed a temporary orange safety fence at the top of wall within the drainage channel.

2. **A schedule of ongoing maintenance and upkeep for the lots, and related costs.**

   There is a monthly landscaping cost of $1300 per month for a landscaper to mow the subject properties.

3. **A copy of the Covenants, Conditions, & Restrictions (CC&Rs) for the Fairways at Maui Land Subdivision.**

   A specific CC&R for the Fairways at Maui Lani does not exist, however there is an existing CC&R for the Maui Lani Community Association. Attached hereto is a copy of the *Maui Lani Declaration of Covenants, Conditions, and Restrictions* recorded with the State of Hawaii Bureau of Conveyances on January 23, 1997 (Exhibit A) and a copy of the *Maui Lani Master Design Guidelines (Single Family Homes) September 2010* (Exhibit B).

   A plan outlining the possible next steps for the lots, including timelines and cost estimates.

   We are currently in the process of drafting a scope of work whereby we will engage a consultant to:

   a) Review the existing documentation of the project in order to determine the original intent of all of the engineering design, and more importantly the outcome of the work with respect to meeting the specifications;

   b) Perform site visits to determine the structural condition of the wall, oversee soil testing (if needed to determine toxicity), and to document the current condition of the built infrastructure for integrity and efficacy;

   c) Determine a pathway forward, with as many as three options for maintenance and/or new work (with corresponding estimates and schedules) to bring the property up to an acceptable level.

   We estimate that it will be at least a few months before we have a final report in hand that captures these deliverables.

4. **A copy of the minutes from the Goo v. Arakawa (2007) court case referenced in your presentation entitled "Lots in the Fairways at Maui Lani, July 25, 2019, EDB Committee Meeting."**

   Attached hereto is a copy of the *Memorandum Opinion* dated September 19, 2013 (Exhibit C) and a copy of the *Opinion of the Court by Pollack, J.* filed with the Supreme Court on February 19, 2014 (Exhibit D).

Sincerely,

Sandy Baz
Managing Director

THE ORIGINAL OF THIS DOCUMENT WAS RECORDED AS FOLLOWS
STATE OF HAWAII

BUREAU OF CONVEYANCES

DATE 11/23/97 TIME 8:02

DOCUMENT NO. 97-0170578

LAND COURT SYSTEM | REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL ( ) PICK UP ( )

DONNA Y. KANEMARU, ESQ.
Watanabe, Ing & Kawashima
999 Bishop Street, 23rd Floor
Honolulu, HI 96813

0096372.07

MAUI LANI

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

WHEREAS, Maui Lani Partners, a Hawaii general partnership (hereinafter referred to as the "Declarant"), is the owner of the real property described in Exhibit "A";

WHEREAS, Declarant recorded that certain Maui Lani Declaration of Covenants, Conditions and Restrictions dated February 13, 1996, recorded in the State of Hawaii Bureau of Conveyances as Document No. 96-020854;

WHEREAS, no portion of the real property has been conveyed to third-parties as of the date of this instrument;

NOW, THEREFORE, the Maui Lani Declaration of Covenants, Conditions and Restrictions dated February 13, 1996 and recorded as Document No. 96-020854 shall be replaced in its entirety with the revised Maui Lani Declaration of Covenants, Conditions and Restrictions attached hereto and incorporated herein by reference as Schedule "1" and said Maui Lani Declaration. Upon the recordation of this instrument said Maui Lani Declaration of Covenants, Conditions and Restrictions dated February 13, 1996 shall be removed from title of the real property described in Exhibit "A" and, if applicable, Exhibit "B".

EXHIBIT A

IN WITNESS WHEREOF, the undersigned Declarant has executed this Declaration this 22nd day of January, 1997.

MAUI LANI PARTNERS, a Hawaii general partnership

By **BILL MILLS DEVELOPMENT COMPANY**, a general partner

By: _____
BILL D. MILLS
Its President

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

On this 22nd day of January, 1997, before me appeared **BILL D. MILLS**, to me known to be the person, who, being by me duly sworn, did say that he is the President of **BILL MILLS DEVELOPMENT COMPANY**, the general partner of **MAUI LANI PARTNERS**, a Hawaii general partnership, that the foregoing instrument was signed in the name of and in behalf of said partnership, and said **BILL D. MILLS** acknowledged that he executed the same as his free act and deed and as the free act and deed of said partnership.

T.L. M.P.

Tracy A. Lane

Notary Public, State of Hawaii

My commission expires: 2.11.2000

LS

MAUI LANI

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

Watanabe, Ing & Kawashima
999 Bishop Street, 23rd Floor
Honolulu, Hawaii 96813
Phone: (808) 544-8300

SCHEDULE 1

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EXHIBITS

0096372.08

MAUI LANI
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS is made this _____ day of _____, 1996, by MAUI LANI PARTNERS, a Hawaii general partnership (hereinafter referred to as "Declarant").

Declarant is the owner of the real property described in Exhibit "A" attached hereto and incorporated herein by reference. Declarant intends by this Declaration to impose upon the Properties (as defined herein) mutually beneficial restrictions under a general plan of improvement for the benefit of all owners of real property within the Properties. Declarant desires to provide a flexible and reasonable procedure for the overall development of the Properties, and to establish a method for the administration, maintenance, preservation, use and enjoyment of such Properties as are now or hereafter subjected to this Declaration.

Declarant hereby declares that all of the property described in Exhibit "A" and any additional property which is hereafter subjected to this Declaration by Supplemental Declaration (as defined herein) shall be held, sold, and conveyed subject to the following easements, restrictions, covenants, and conditions which are for the purpose of protecting the value and desirability of and which shall run with the real property subjected to this Declaration and which shall be binding on all parties having any right, title, or interest in the described Properties or any part thereof, their heirs, successors, successors-in-title, and assigns, and shall inure to the benefit of each owner thereof.

This Declaration does not and is not intended to create a condominium within the meaning of the Condominium Property Regimes Act, Chapter 514A, Hawaii Revised Statutes.

Article I
DEFINITIONS

The terms used in this Declaration and its exhibits shall generally be given their natural, commonly accepted definitions unless otherwise specified. Capitalized terms shall be defined as set forth in this Article, unless the context otherwise requires.

Section 1. "Area of Common Responsibility" shall refer to the Common Area, together with those areas, if any, which by the terms of this Declaration, any Supplemental Declaration or other applicable covenant, or by contract or agreement with any entity, become the responsibility of the Association. The term shall

include the property to be maintained by the Association pursuant to Article VII of this Declaration.

Section 2. "Articles of Incorporation" or "Articles" shall refer to the Articles of Incorporation of Maui Lani Community Association, Inc., as filed with the Secretary of State of the State of Hawaii.

Section 3. "Association" shall refer to Maui Lani Community Association, Inc., a Hawaii nonprofit, nonstock corporation, its successors or assigns. The use of the term "association" or "associations" in lower case shall refer to any condominium association or other owners association having concurrent jurisdiction over any portion of the Properties.

Section 4. "Base Assessment" shall mean assessments levied against all Units subject to assessment under Article XI hereof to fund Common Expenses for the general benefit of all Units, as more particularly described in Article XI, Section 1.

Section 5. "Board of Directors" or "Board" shall mean the body responsible for administration of the Association, selected as provided in the Bylaws and generally serving the same role as the board of directors under Hawaii corporate law.

Section 6. "Bylaws" shall refer to the Bylaws of Maui Lani Community Association, Inc., as they may be amended from time to time.

Section 7. "Class "B" Control Period" shall mean the period of time during which the Class "B" Member is entitled to appoint a majority of the members of the Board of Directors, as provided in Article III, Section 3, of the Bylaws.

Section 8. "Common Area" shall be an inclusive term referring to all real and personal property which the Association now or hereafter owns or otherwise holds for the common use and enjoyment of all Owners.

Section 9. "Common Expenses" shall mean and include the actual and estimated expenses incurred or anticipated to be incurred by the Association for the general benefit of all Unit Owners, including any reasonable reserve, all as may be found to be necessary and appropriate by the Board pursuant to this Declaration, the Bylaws, and the Articles of Incorporation of the Association, but shall not include any expenses incurred by the Declarant for initial development, original construction or installation of infrastructure, original capital improvements, or other original construction costs unless approved by a majority of the total Class "A" vote of the Association.

Section 10. "Community-Wide Standard" shall mean the standard of conduct, maintenance, or other activity generally

prevailing throughout the Properties. Such standard may be more specifically determined by the Board of Directors.

Section 11. "Declarant" shall refer to MAUI LANI PARTNERS, a Hawaii general partnership, or its successors, successors-in-title or assigns who take title to any portion of the property described on Exhibits "A" or "B" hereof for the purpose of development and sale, and who are designated as the Declarant in a recorded instrument executed by the immediately preceding Declarant.

Section 12. "Master Land Use Plan" shall mean the general land use designation and general plan of development of the property described in Exhibits "A" and "B" attached hereto. The Master Land Use Plan may change and evolve with time as Declarant, in its sole discretion, deems appropriate. Declarant may change and modify the Master Land Use Plan without notice to or approval of any Owner.

Section 13. "Member" shall mean a Person entitled to membership in the Association, as provided herein.

Section 14. "Mortgage" shall mean a mortgage, a deed of trust, a deed to secure debt, or any other form of security deed.

Section 15. "Mortgagee" shall mean a beneficiary or holder of a Mortgage.

Section 16. "Mortgagor" shall mean any Person who gives a Mortgage.

Section 17. "Owner" shall mean and refer to one (1) or more Persons who hold the record title to any Unit, but excluding in all cases any party holding an interest merely as security for the performance of an obligation. If a Unit is sold under a recorded contract of sale, and the contract specifically so provides, then the purchaser (rather than the fee owner) will be considered the Owner.

Section 18. "Person" shall mean a natural person, a corporation, a partnership, a trustee, or any other legal entity.

Section 19. "Private Amenities" shall mean certain real property and the improvements and facilities thereon located adjacent to, in the vicinity of, or within the Properties, which are privately owned and operated by Persons other than the Association for recreational and related purposes, on a club membership basis or otherwise which may include, without limitation, any other club, the Maui Lani Golf Course, and any other golf course.

Section 20. "Properties" shall refer to the real property described in Exhibit "A" attached hereto, together with such

additional property as is hereafter subjected to this Declaration by Supplemental Declaration.

Section 21. "Special Assessment" shall mean assessments levied in accordance with Article XI, Section 5, of this Declaration.

Section 22. "Subassociation" shall mean each separately developed residential area comprised of one (1) or more housing types subject to this Declaration, governed by an additional owners association and an additional declaration of covenants, conditions and restrictions established by the Declarant or other developer prior to any sale of individual units, lots or interest, in which owners may have common interests other than those common to all Association Members, such as a common theme, entry feature, development name, and/or common areas and facilities which are not available for use by all Association Members. For example, and by way of illustration and not limitation, each condominium, townhome development, cluster home development, and single-family detached housing development may constitute a separate subassociation.

Where the context permits or requires, the term Subassociation shall also refer to the association of owners for the Subassociation (as defined in Article V, Section 3 of this Declaration) having jurisdiction over the property within the Subassociation.

Section 23. "Supplemental Declaration" shall mean an amendment or supplement to this Declaration filed pursuant to Article III hereof and/or imposes, expressly or by reference, additional restrictions and obligations on the land described therein.

Section 24. "Unit" shall mean a portion of the Properties, which has been subdivided and improved with the necessary roads and utilities and conveyed to an Owner. By way of illustration (but not limitation), the term shall include condominium units, townhouse units, cluster homes, patio or zero lot line homes as well as single family detached homes and vacant lots ready for construction of a home. In the case of an apartment building or other structures which contain multiple dwellings, each dwelling shall be deemed a separate unit. The term "Unit" shall not include common areas, common property of a subassociation, property dedicated to the government or property owned by the Declarant or developers or builders which have not been conveyed to an Owner.

Article II
DECLARANT'S RIGHTS

Any or all of the special rights and obligations of the Declarant set forth in this Declaration or the Bylaws may be transferred to other Persons, provided that the transfer shall not reduce an obligation nor enlarge a right beyond that contained herein or in the Bylaws, as applicable, and provided further, no such transfer shall be effective unless it is in a written instrument, signed by the Declarant and duly recorded in the State of Hawaii Bureau of Conveyances (the "Bureau") and/or Office of the Assistant Registrar of the Land Court ("Land Court"), as appropriate. Nothing in this Declaration shall be construed to require Declarant or any successor to develop any of the property set forth in Exhibit "B" in any manner whatsoever.

Notwithstanding any provisions contained in the Declaration to the contrary, so long as construction and initial sale of Units shall continue, it shall be expressly permissible for Declarant and any builder designated by Declarant to maintain and carry on upon portions of the Common Area such facilities and activities as, in the sole opinion of Declarant, may be reasonably required, convenient, or incidental to the construction or sale of such Units, including, but not limited to, business offices, signs, model units, and sales offices, and the Declarant and such designated builder(s) shall have easements for access to and egress from and use of such facilities. The right to maintain and carry on such facilities and activities shall include specifically, without limitation, the right to use Units owned by the Declarant and any clubhouse or community center which may be owned by the Association, as models and sales offices, respectively.

So long as Declarant continues to have rights under this Article, no Person shall record any declaration of covenants, conditions and restrictions, or declaration of condominium property regime or similar instrument affecting any portion of the Properties without Declarant's review and written consent thereto, and any attempted recordation without compliance herewith shall result in such declaration of covenants, conditions and restrictions, or declaration of condominium property regime or similar instrument being void and of no force and effect unless subsequently approved by recorded consent signed by the Declarant.

This Article may not be amended without the express written consent of the Declarant; provided, however, the rights contained in this Article shall terminate upon the earlier of (a) thirty years from the date this Declaration is recorded, or (b) upon recordation of a written statement by the Declarant that all sales activity has ceased.

Article III
ANNEXATION AND WITHDRAWAL OF PROPERTY

Section 1. Annexation Without Approval of Membership. Declarant shall have the unilateral right, privilege, and option, from time to time at any time until all property described on Exhibit "B" has been subjected to this Declaration or February 1, 2026, whichever occurs first, to subject to the provisions of this Declaration and the jurisdiction of the Association all or any portion of the real property described in Exhibit "B", attached hereto and as may be amended. Declarant shall have the unilateral right to transfer to any other Person the right, privilege, and option to annex additional property which is herein reserved to Declarant, provided that such transferee or assignee shall be the developer of at least a portion of the real property described in Exhibits "A" or "B". No such transfer shall be effective unless it is in a written instrument, signed by the Declarant and duly recorded in the Bureau and/or Land Court, as appropriate.

Annexation shall be accomplished by filing in the Bureau and/or Land Court, as appropriate, a Supplemental Declaration annexing such property. Such Supplemental Declaration shall not require the consent of the Owners or the Board, but shall require the consent of the owner of such property, if other than Declarant. Any such annexation shall be effective upon the filing for record of such Supplemental Declaration unless otherwise provided therein.

Section 2. Annexation With Approval Of Membership. Subject to the consent of the fee owner of such property, the Association may annex real property other than that described on Exhibit "B", and following the expiration of the Declarant's right set forth in Section 1 above, any property described on Exhibit "B", to the provisions of this Declaration and the jurisdiction of the Association. Such annexation shall require the affirmative vote of a majority of the Class "A" votes of the Association (other than those held by Declarant), either at a meeting duly called for such purpose or by written consent, and the affirmative vote of the Declarant, so long as Declarant owns property subject to this Declaration or which may become subject hereto in accordance with Section 1 of this Article.

Annexation shall be accomplished by filing in the Bureau and/or Land Court, as appropriate, a Supplemental Declaration describing the property being annexed. Any such Supplemental Declaration shall be signed by the President and the Secretary of the Association, and by the fee owner of the property being annexed, and any such annexation shall be effective upon recordation unless otherwise provided therein. The relevant provisions of the Bylaws dealing with regular or special meetings, as the case may be, shall apply to determine the time required for and the proper form of notice of any meeting called

for the purpose of considering annexation of property pursuant to this Section 2 and to ascertain the presence of a quorum at such meeting.

Section 3. Acquisition of Additional Common Area. Declarant may convey to the Association additional real estate, improved or unimproved, located within the properties described in Exhibits "A" or "B", which upon conveyance or dedication to the Association shall be accepted by the Association and thereafter shall be maintained by the Association at its expense for the benefit of its Members.

Section 4. Withdrawal of Property. Declarant reserves the right to amend this Declaration unilaterally at any time up to the termination of the Class "B" Control Period as provided in Article III, Section 3 of the Bylaws, without prior notice and without the consent of any Person or the Association, for the purpose of removing certain portions of the Properties then owned by the Declarant or its affiliates, or the Association from the provisions of this Declaration, provided such withdrawal is not unequivocally contrary to the overall, uniform scheme of development for the Properties, or remove such property from Exhibit "B". Withdrawal shall be accomplished by filing in the Bureau and/or Land Court, as appropriate, a Supplemental Declaration withdrawing such property from the Association or removing such property from Exhibit "B". Such Supplemental Declaration shall not require the consent of the Owners or the Board, but shall require the consent of the Owner of such property, if other than Declarant. Declarant may, but shall not be obligated to, list and include such withdrawn property in Exhibit "B".

Section 5. Additional Covenants and Easements. The Declarant may unilaterally subject any portion of the property submitted to this Declaration initially or by Supplemental Declaration to additional covenants, conditions, limitations, restrictions and easements, including covenants obligating the Association to maintain and insure such property on behalf of the Owners thereof and obligating such Owners to pay the costs incurred by the Association. No provision contained in this Declaration shall be deemed to limit or impair the right of the Declarant to impose additional covenants, conditions, limitations, restrictions and easements by including such in any deed or document of conveyance.

Section 6. Amendment. This Article shall not be amended without the prior written consent of Declarant, so long as the Declarant owns any property described in Exhibits "A" or "B" hereof.

Article IV
PROPERTY RIGHTS

Section 1. Common Areas. Every Owner shall have a right and nonexclusive easement of use, access and enjoyment in and to the Common Area, subject to:

(a) this Declaration and any other applicable covenants, as they may be amended from time to time, and subject to any restrictions or limitations contained in any deed conveying such property to the Association;

(b) the right of the Board to adopt rules regulating the use and enjoyment of the Common Area, including rules limiting the number of guests who may use the Common Area;

(c) the right of the Board to suspend the right of an Owner to use recreational facilities, if any, within the Common Area (i) for any period during which any charge against such Owner's Unit remains delinquent, and (ii) for a period not to exceed thirty (30) days for a single violation or for a longer period in the case of any continuing violation, of the Declaration, Bylaws, or rules of the Association after notice and a hearing pursuant to Article III, Section 23, of the Bylaws;

(d) the right of the Association, acting through the Board, to dedicate or transfer all or any part of the Common Area pursuant to Article VI, Section 8 hereof;

(e) the right of the Board to charge reasonable admission or other fees for the use of any recreational facility situated upon the Common Area;

(f) the right of the Board to permit nonmember use of any recreational facility situated on the Common Area upon payment of use fees established by the Board; and

(g) the right of the Association, acting through the Board, to mortgage, pledge or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred, subject to the approval requirements set forth in Article III, Section 21 of the Bylaws.

Any Owner may delegate his or her right of use and enjoyment to the members of his or her family, lessees and social invitees, as applicable, subject to reasonable regulation by the Board and in accordance with procedures it may adopt. An Owner who leases his or her Unit shall be deemed to have delegated all such rights to the Unit's lessee.

Section 2. Private Amenities.

(a) Neither membership in the Association nor ownership or occupancy of a Unit shall confer any ownership interest in or right to use any Private Amenities, including, but not limited to, the Maui Lani Golf Course. Rights to use the Private Amenities will be granted only to such persons, and on such terms and conditions, as may be determined by their respective owners. Such owners shall have the right, in their sole and absolute discretion and without notice, to amend or waive the terms and conditions of use of their respective Private Amenities, including, without limitation, eligibility for and duration of use rights, categories of use and extent of use privileges, and number of users, and also shall have the right to reserve use rights and to terminate use rights altogether.

(b) No representations or warranties have been or are made by the Declarant or any other person with regard to the continuing ownership or operation of the Private Amenities, and no purported representation or warranty in such regard, either written or oral, shall ever be effective without an amendment to this Declaration executed or joined into by the Declarant. Further, the ownership or operational duties of and as to the Private Amenities may change at any time and from time to time by virtue of, but without limitation, (i) the sale to or assumption of operations by an independent entity, (ii) conversion of the membership structure to an "equity" club or similar arrangement whereby the members of the Private Amenities or an entity owned or controlled thereby become the owner(s) and/or operator(s) of the Private Amenities, or (iii) the conveyance of the Private Amenities to one or more affiliates, shareholders, employees, or independent contractors of the Declarant. No consent of the Association, any Subassociation, or any Owner shall be required to effectuate such a transfer or conversion.

Article V
MEMBERSHIP AND VOTING RIGHTS

Section 1. Membership. Every Owner shall automatically become a member of the Association upon obtaining ownership of a Unit. No Owner, whether one or more Persons, shall have more than one (1) membership per Unit owned. In the event a Unit is owned by more than one Person, all such co-Owners shall be entitled to the privileges of membership, subject to the restrictions on voting set forth in Section 2 of this Article and in the Bylaws, and all such co-Owners shall be jointly and severally obligated to perform the responsibilities of Owners hereunder. The rights and privileges of membership may be exercised by a Member or the Member's spouse, subject to the provisions of this Declaration and the Bylaws. The membership rights of a Unit owned by a corporation or partnership shall be exercised by the individual designated from time to time by the

Owner in a written instrument provided to the Secretary, subject to the provisions of this Declaration and the Bylaws.

Section 2. Voting. The Association shall have two classes of membership, Class "A" and Class "B."

(a) Class "A". Class "A" Members shall be all Owners with the exception of the Class "B" Member, if any.

Class "A" Members shall be entitled to one (1) equal vote for each Unit in which they hold the interest required for membership under Section 1 hereof; there shall be only one (1) vote per Unit.

In any situation in which there is more than one (1) Owner of a particular Unit, the vote for such Unit shall not be fractionalized and shall be cast as one (1) whole vote; provided, further, that the co-Owners shall determine among themselves as to who will cast the vote and advise the Secretary of the Association in writing prior to any meeting of the Person authorized to cast the vote for such Unit. In the absence of such advice, the Unit's vote shall be suspended if more than one (1) Person seeks to exercise it.

(b) Class "B". The sole Class "B" Member shall be the Declarant. The rights of the Class "B" Member, including the right to approve or withhold approval of actions taken under this Declaration and the Bylaws, are specified elsewhere in the Declaration and the Bylaws. The Class "B" Member shall be entitled to appoint a majority of the members of the Board of Directors during the Class "B" Control Period, as specified in Article III, Section 3, of the Bylaws. After termination of the Class "B" Control Period, the Class "B" Member shall have a right to disapprove actions of the Board of Directors and any committee as provided in Article III, Section 18, of the Bylaws.

The Class "B" membership shall terminate and become converted to Class "A" membership upon the earlier of:

(i) two (2) years after expiration of the Class "B" Control Period pursuant to Article III of the Bylaws; or

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

Section 3. Subassociation. Each Owner of a Unit in a Subassociation, as defined in Article I, Section 23 hereinabove, shall also be a Class "A" Member of the Association. As a Class "A" Member, each Owner shall be obligated to pay the assessments levied by the Association in accordance with Article XI hereinbelow and exercise the voting rights set forth herein and in the Bylaws. The assessments levied by the Association shall be in addition to any assessments levied by the Subassociation

and shall take priority over any assessments levied by the Subassociation. The obligation to pay assessments levied by the Association is appurtenant to and may not be severed from the ownership of a Unit subject to this Declaration, as amended. No Owner who is a member of a Subassociation may waive the obligation to pay assessments levied by the Association by non-use of Owner's Unit or the General Common Area or by the abandonment of Owner's Unit.

Article VI
RIGHTS AND OBLIGATIONS OF THE ASSOCIATION

Section 1. Common Areas. The Association, subject to the rights of the Owners set forth in this Declaration, shall be responsible for the exclusive management and control of the Common Areas and all improvements thereon (including, without limitation, furnishings and equipment related thereto and common landscaped areas), and shall keep it in good, clean, attractive, and sanitary condition, order, and repair, pursuant to the terms and conditions hereof and consistent with the Community-Wide Standard.

Section 2. Personal Property and Real Property for Common Use. The Association, through action of its Board of Directors, may acquire, hold, and dispose of tangible and intangible personal property and real property. The Board, acting on behalf of the Association, shall accept any real or personal property, leasehold, or other property interests within the Properties conveyed to it by the Declarant; provided, nothing herein shall obligate the Association to assume or satisfy any monetary encumbrance or other debt associated with such property.

Section 3. Rules and Regulations. The Association, through its Board of Directors, may make and enforce reasonable rules and regulations governing the use of the Properties, consistent with the rights and duties established by this Declaration and the By-laws. Such regulations and use restrictions shall be binding upon all Owners, occupants, invitees and licensees, if any, until and unless overruled, canceled or modified in a regular or special meeting of the Association by the vote of a majority of the total Class "A" votes in the Association and by the Class "B" Member, so long as such membership shall exist.

Section 4. Enforcement. The Association, through its Board of Directors, shall be authorized to impose sanctions for violations of this Declaration, any Supplemental Declaration, the Bylaws, or rules and regulations, which sanctions may include reasonable monetary fines and suspension of the right to vote and the right to use any recreational facilities on the Common Area. In addition, the Association, in accordance with Article III, Section 23, of the Bylaws, shall have the right to exercise self-help to cure violations, and shall be entitled to suspend any services provided by the Association to any Owner or such Owner's

Unit in the event that such Owner is more than thirty (30) days delinquent in paying any assessment or other charge due to the Association. The Board shall also have the power to seek relief in any court for violations or to abate nuisances. Imposition of sanctions shall be subject to the procedures set forth in the Bylaws.

The Association, acting through the Board, shall have the right to enforce federal, state and local laws and ordinances applicable to the Properties or any portion thereof, and may permit such governmental entities to enforce such laws and ordinances on the Properties for the benefit of the Association and its Members.

Section 5. Implied Rights. The Association may exercise any other right or privilege given to it expressly by this Declaration or the Bylaws, and every other right or privilege reasonably to be implied from the existence of any right or privilege given to it herein or reasonably necessary to effectuate any such right or privilege.

Section 6. Governmental Interest. For so long as the Declarant owns any property described on Exhibits "A" or "B", the Association shall permit the Declarant authority to designate sites within the Properties, which may include Common Area owned by the Association, for fire, police, water, sewer and natural gas facilities, public schools and parks, and other public facilities.

Section 7. Indemnification. The Association shall indemnify every officer and director of the Association against any and all expenses, including judgments, fines, attorneys' fees, reasonably incurred by or imposed upon any such officer or director in connection with any action, suit, or other proceeding to which he or she may be a party by reason of being or having been an officer or director, including the cost of reasonable settlement (other than amounts paid to the Association itself) made with a view to curtailment of costs of litigation, to the fullest extent required by the Articles of Incorporation. In addition, the Association shall indemnify every committee member on the same basis and to the same extent as such committee member would be entitled under the Articles of Incorporation if he were an officer or director.

Any right to indemnification provided for herein shall not be exclusive of any other rights to which any officer, director, or committee member, or former officer, director, or committee member may be entitled. The Association shall, as a common expense, maintain adequate general liability and officers' and directors' liability insurance to fund this obligation, if such insurance is reasonably available.

Section 8. Dedication Of Common Areas. The Association, acting through the Board of Directors upon two-thirds (2/3) vote thereof, shall have the power to dedicate portions of the Common Areas to the County of Maui, the State of Hawaii, or to any other local, state, or federal governmental entity.

Section 9. Security. The Association may, but shall not be obligated to, maintain or support certain activities within the Properties designed to make the Properties safer than they otherwise might be. NEITHER THE ASSOCIATION, DECLARANT, NOR ANY SUCCESSOR DECLARANT SHALL IN ANY WAY BE CONSIDERED INSURERS OR GUARANTORS OF SECURITY WITHIN THE PROPERTIES, HOWEVER, AND NEITHER THE ASSOCIATION, THE DECLARANT, NOR ANY SUCCESSOR DECLARANT SHALL BE HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OR FAILURE TO PROVIDE ADEQUATE SECURITY OR INEFFECTIVENESS OF SECURITY MEASURES UNDERTAKEN. ALL OWNERS AND OCCUPANTS OF ANY UNIT, TENANTS, GUESTS AND INVITEES OF ANY OWNER, AS APPLICABLE, ACKNOWLEDGE THAT THE ASSOCIATION, AND IT'S BOARD OF DIRECTORS, DECLARANT, OR ANY SUCCESSOR DECLARANT AND THE COMMUNITY DESIGN COMMITTEE DO NOT REPRESENT OR WARRANT THAT ANY FIRE PROTECTION SYSTEM, BURGLAR ALARM SYSTEM OR OTHER SECURITY SYSTEM DESIGNATED BY OR INSTALLED ACCORDING TO GUIDELINES ESTABLISHED BY THE DECLARANT OR THE COMMUNITY DESIGN COMMITTEE MAY NOT BE COMPROMISED OR CIRCUMVENTED, THAT ANY FIRE PROTECTION OR BURGLAR ALARM SYSTEMS OR OTHER SECURITY SYSTEMS WILL PREVENT LOSS BY FIRE, SMOKE, BURGLARY, THEFT, HOLD-UP, OR OTHERWISE, NOR THAT FIRE PROTECTION OR BURGLAR ALARM SYSTEMS OR OTHER SECURITY SYSTEMS WILL IN ALL CASES PROVIDE THE DETECTION OR PROTECTION FOR WHICH THE SYSTEM IS DESIGNED OR INTENDED. EACH OWNER AND OCCUPANT OF ANY UNIT, AND EACH TENANT, GUEST AND INVITEE OF AN OWNER, AS APPLICABLE, ACKNOWLEDGES AND UNDERSTANDS THAT THE ASSOCIATION AND ITS BOARD OF DIRECTORS AND COMMITTEES, DECLARANT, OR ANY SUCCESSOR DECLARANT ARE NOT INSURERS AND THAT EACH OWNER AND OCCUPANT OF ANY UNIT AND EACH TENANT, GUEST AND INVITEE OF ANY OWNER ASSUMES ALL RISKS FOR LOSS OR DAMAGE TO PERSONS, TO UNITS AND TO THE CONTENTS OF UNITS AND FURTHER ACKNOWLEDGES THAT THE ASSOCIATION AND ITS BOARD OF DIRECTORS AND COMMITTEES, DECLARANT, OR ANY SUCCESSOR DECLARANT HAVE MADE NO REPRESENTATIONS OR WARRANTIES NOR HAS ANY OWNER, OCCUPANT, TENANT, GUEST OR INVITEE RELIED UPON ANY REPRESENTATIONS OR WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, RELATIVE TO ANY FIRE AND/OR BURGLAR ALARM SYSTEMS OR OTHER SECURITY SYSTEMS RECOMMENDED OR INSTALLED OR ANY SECURITY MEASURES UNDERTAKEN WITHIN THE PROPERTIES.

Section 10. Powers of the Association with Respect to Subassociations. The Association, by and through its Board of Directors, shall have the power to veto any action taken or contemplated to be taken by any Subassociation which the Board reasonably determines to be adverse to the interests of the Association or its Members or inconsistent with the Community-Wide Standard. The Association shall also have the power to

require specific action to be taken by any Subassociation in connection with its obligations and responsibilities hereunder or under any other covenants affecting the Properties.

If the Association shall provide written notice of any action required to be performed by a Subassociation, said Subassociation shall perform such action within thirty (30) days from the date of its receipt of such notice. If the Subassociation fails to comply with the requirements set forth in such written notice, the Association shall have the right to effect such action on behalf of the Subassociation and to assess all costs incurred against the Units in such Subassociation as a Special Assessment pursuant to Article XI, Section 4(b).

Section 11. Powers of the Association with Respect to Neighboring Commercial Center and Golf Course. The Association, by and through its Board of Directors, shall have the power to negotiate and enter into a use agreement with the neighboring commercial centers and golf course located within Maui Lani for the use of Common Area. The use agreement shall set forth at a minimum the right of the customers and patrons of the commercial centers and golf course to use the Common Area and the obligation of the commercial centers and golf course to pay a reasonable fee towards the maintenance and repair of said Common Area.

Article VII
MAINTENANCE

Section 1. Association's Responsibility. The Association shall maintain and keep in good repair the Area of Common Responsibility, such maintenance to be funded as hereinafter provided. The Area of Common Responsibility shall include, but need not be limited to:

(a) all landscaping and other flora, structures, and improvements, including any private streets, situated upon the Common Areas;

(b) landscaped areas within public rights-of-way throughout the Properties, except those rights-of-way required to be maintained by Owners or any Subassociation and landscaping and other flora on any public utility easement within the Properties (subject to the terms of any easement agreement relating thereto);

(c) all sewer lines within the Properties; and

(d) such portions of any additional property included within the Area of Common Responsibility as may be dictated by this Declaration, any Supplemental Declaration, other covenant, or any contract or agreement for maintenance thereof entered into by the Association. The Area of Common Responsibility shall not be reduced by amendment of this Declaration or any other means

except with the prior written approval of the Declarant. There are hereby reserved to the Association blanket easements over the Properties as necessary to enable the Association to fulfill responsibilities under this Section.

Except as otherwise specifically provided herein, all costs associated with maintenance, repair and replacement of the Area of Common Responsibility shall be a Common Expense to be allocated among all Units as part of the Base Assessment, subject to any right of the Association to seek reimbursement from the owner(s) of, or other Persons responsible for, certain portions of the Area of Common Responsibility pursuant to this Declaration, other recorded covenants, or agreements with the owner(s) thereof.

Section 2. Owner's Responsibility. Each Owner shall maintain his or her Unit and all structures, parking areas and other improvements comprising the Unit. Owners of Units adjacent to any roadway within the Properties shall maintain the driveways serving their respective Units, whether or not lying entirely within the Unit boundaries, and shall maintain landscaping on that portion of the Common Area, if any, or area between the Unit boundary and the back-of-curb of the adjacent street or streets.

In addition to any other enforcement rights available to the Association, if any Owner fails properly to perform his or her maintenance responsibility, the Association may perform it and assess all costs incurred by the Association against the Unit and the owner thereof in accordance with Article XI, Section 4(b) of this Declaration; provided, however, that unless entry is required due to an emergency situation, the Association shall afford the owner reasonable notice and an opportunity to cure the problem prior to entry.

Section 3. Standard of Performance. Unless otherwise specifically provided herein, responsibility for maintenance shall include responsibility for repair and replacement, as necessary. All maintenance shall be performed in a manner consistent with the Community-Wide Standard and all applicable covenants. Neither the Association, an Owner nor a Subassociation shall be liable for any damage or injury occurring on, or arising out of the condition of, property which it does not own except to the extent that it has been negligent in the performance of its maintenance responsibilities hereunder.

Section 4. Walls and Fences.

(a) Party Walls and Party Fences. A wall or fence shall be deemed to be a party wall or fence if said wall or fence (i) straddles the boundary line; (ii) serves to separate any two (2) adjoining Units; and (iii) was constructed either by Declarant or with the mutual consent of the Owners of the two (2) adjoining Units. To the extent not inconsistent with the provisions of

this Section, the general rules of law regarding party walls and liability for property damage due to negligence or willful acts or omissions shall apply thereto.

(1) Sharing of Repair and Maintenance. The cost of reasonable repair and maintenance of a party wall or fence shall be equally shared by the Owners of the adjoining Units.

(2) Damage and Destruction. If a party wall or fence is destroyed or damaged by fire or other casualty, then to the extent that such damage is not covered by insurance and repaired out of the proceeds of insurance, any Owner who has used the wall or fence may restore it. If the other Owner or Owners thereafter make use of the wall or fence, they shall contribute to the cost of restoration thereof in equal proportions without prejudice, however, to the right of any such Owners to call for a larger contribution from the others under any rule of law regarding liability for negligent or willful acts or omissions.

(b) Wall or Fence. Any Owner may construct a wall or fence upon said Owner's Unit without the consent of the Owner of the adjoining Unit so long as said wall or fence is constructed solely and entirely upon said Owner's Unit. The Owner who has constructed said wall or fence shall be solely responsible for (i) the cost to maintain and repair the wall or fence in a clean and safe condition; (ii) the cost to insure said wall or fence; and (iii) any liability which may arise from the design, construction or use of the wall or fence. If any adjoining Unit Owner shall use the wall or fence, the Owner who has constructed the wall or fence: (i) shall be entitled to demand and receive a contribution towards the maintenance and repair of the wall in proportion to the adjoining Unit Owner's use; and (ii) may exercise any legal remedy available against any adjoining Unit Owner for damage or destruction of the wall or fence, or liability arising from said adjoining Unit Owner's use of the wall or fence.

(c) Right to Contribution Runs With Land. The right of any Owner to contribution from any other Owner under this Section shall be appurtenant to the land and shall pass to such Owner's successors-in-title.

(d) Arbitration. In the event of any dispute arising concerning a wall or fence, or under the provisions of this Section, each party shall appoint one arbitrator. Should any party refuse to appoint an arbitrator within ten (10) days after written request therefor by the Board of Directors, the Board shall appoint an arbitrator for the refusing party. The arbitrators thus appointed shall appoint one additional arbitrator and the decision by a majority of all three arbitrators shall be binding upon the parties and shall be a condition precedent to any right of legal action that either party may have against the other.

Article VIII
INSURANCE AND CASUALTY LOSSES

Section 1. Association Insurance. The Association's Board of Directors, or its duly authorized agent, shall have the authority to and shall obtain blanket "all-risk" property insurance, if reasonably available, for all insurable improvements on the Common Area, and on other portions of the Area of Common Responsibility to the extent that the Association is obligated to maintain, repair and replace the improvements thereon. If blanket "all-risk" coverage is not reasonably available, then at a minimum an insurance policy providing fire and extended coverage, including coverage for vandalism and malicious mischief, shall be obtained. The face amount of such insurance shall be sufficient to cover the full replacement cost of any repair or reconstruction in the event of damage or destruction from any insured peril.

In addition, the Association may, upon request of a Subassociation, and shall, if so specified in a Supplemental Declaration applicable to the Subassociation, obtain and continue in effect adequate blanket "all-risk" property insurance, if reasonably available, on the properties within such Subassociation. If "all-risk" insurance is not reasonably available, then fire and extended coverage may be substituted. Such coverage may be in such form as the Board of Directors deems appropriate and the face mount of the policy shall be sufficient to cover the full replacement cost of all structures to be insured. The costs thereof shall be charged to the Owners of Units within the benefitted Subassociation as a Special Assessment.

Insurance obtained on the properties within any Subassociation, whether obtained by the Subassociation or the Association, shall at a minimum comply with the applicable provisions of this Section 1, including the provisions of this Article applicable to policy provisions, loss adjustment, and all other subjects to which this Article applies with regard to insurance on the Common Area. All such policies shall provide for a certificate of insurance to be furnished to each Member insured, to the Association, and to the Subassociation, if any.

The Board shall also obtain a commercial general liability policy on the Area of Common Responsibility, insuring the Association and its Members against all claims for bodily injury and property damage arising out of the negligence of the Association, any of its Members, employees, agents or contractors while acting on behalf of the Association. The primary policy shall have at least a One Million ($1,000,000.00) Dollars combined single limit per occurrence and in the aggregate, if reasonably available, and, in addition, the Association shall obtain an umbrella policy providing at least One Million

($1,000,000.00) Dollars in additional coverage, if reasonably available.

Premiums for all insurance on the Area of Common Responsibility shall be Common Expenses of the Association and shall be included in the Base Assessment.

Insurance policies may contain a reasonable deductible, and the amount thereof shall not be subtracted from the face amount of the policy in determining whether the insurance at least equals the coverage required hereunder. The deductible shall be paid by the party or parties who would be liable for the loss or repair in the absence of insurance and in the event of multiple parties shall be allocated in relation to the amount each party's loss bears to the total.

All insurance coverage obtained by the Board of Directors shall be governed by the following provisions:

(a) All policies shall be written with a company authorized to do business in Hawaii.

(b) All policies shall be written in the name of the Association as trustee for the respective benefitted parties. Policies on the Area of Common Responsibility shall be for the benefit of the Association and its Members. Policies secured at the request of a Subassociation shall be for the benefit of the Subassociation, the Owners of Units within the Subassociation, and their Mortgagees, as their interests may appear.

(c) Exclusive authority to adjust losses under policies obtained by the Association on the Properties shall be vested in the Association's Board of Directors; provided, however, no Mortgagee having an interest in such losses may be prohibited from participating in the settlement negotiations, if any, related thereto.

(d) In no event shall the insurance coverage obtained and maintained by the Association's Board of Directors hereunder be brought into contribution with insurance purchased by individual Owners, occupants, or their Mortgagees.

(e) All property insurance policies shall have an inflation guard endorsement, if reasonably available, and, if the policy contains an insurance clause, it shall also have an agreed amount endorsement. The Association shall arrange for an annual review of the sufficiency of insurance coverage by one or more qualified persons, at least one of whom must be in the real estate industry and familiar with construction in the Maui County, Hawaii area.

(f) The Association's Board of Directors shall be required to use reasonable efforts to secure insurance policies that will provide the following:

(1) a waiver of subrogation by the insurer as to any claims against the Association's Board of Directors, officers, employees and manager, the Owners and occupants of Units, and their respective tenants, servants, agents, and guests;

(2) a waiver by the insurer of its rights to repair and reconstruct, instead of paying cash;

(3) a statement that no policy may be canceled, invalidated, suspended, or subjected to nonrenewal on account of any one (1) or more individual Owners;

(4) a statement that no policy may be canceled, invalidated, suspended, or subjected to nonrenewal on account of any curable defect or violation without prior demand in writing delivered to the Association to cure the defect or violation and the allowance of a reasonable time thereafter within which the defect may be cured by the Association, its manager, any Owner, or Mortgagee;

(5) a statement that no policy may be canceled, invalidated, suspended, or subjected to nonrenewal on account of the lack of full or a specified percentage occupancy of the Project;

(6) a statement that any "other insurance" clause in any policy exclude individual Owners' policies from consideration; and

(7) a statement that the Association will be given at least thirty (30) days' prior written notice of any cancellation, substantial modification, or nonrenewal.

The Association shall also obtain a fidelity bond or bonds, if reasonably available, covering all persons responsible for handling Association funds. The amount of fidelity coverage shall be determined in the Board of Directors' best business judgment, but if reasonably available, may not be less than one-sixth of the annual Base Assessments on all Units plus reserves on hand. Bonds shall contain a waiver of all defenses based upon the exclusion of persons serving without compensation and may not be canceled or substantially modified without at least thirty (30) days' prior written notice to the Association.

The Board of Directors shall also obtain directors and officers liability insurance coverage in the amount of at least One Million ($1,000,000.00) Dollars, if reasonably available, insuring the Association and its officers and directors (former, present and future) from liability for any actions or decisions on behalf of the Association in their capacities as officers or directors for which the Association would have the duty to indemnify its officers and directors pursuant to Article VI, Section 7 of this Declaration.

In addition to the other insurance required by law or by this Section, the Board shall obtain, as a Common Expense, worker's compensation insurance and employer's liability insurance, if and to the extent required by law, and such other insurance as the Board deems necessary or advisable. The employers' liability limit, if such coverage is required, shall be a minimum of One Million ($1,000,000.00) Dollars.

Section 2. Individual Insurance. By virtue of taking title to a Unit subject to the terms of this Declaration, each Owner covenants and agrees with all other Owners and with the Association that each Owner shall carry blanket "all-risk" property insurance on the Unit(s) and structures constructed thereon meeting the same requirements as set forth in Section 1 of this Article for insurance on the Common Area, unless either the Subassociation in which the Unit is located or the Association carries such insurance (which they are not obligated to do hereunder). Each Owner further covenants and agrees that in the event of damage to or destruction of structures comprising his Unit, the Owner shall proceed promptly to repair or to reconstruct the damaged structure in a manner consistent with the original construction and as approved by the County of Maui, if necessary. Alternatively, the Owner shall clear the Unit of all debris and return the property to substantially the condition in which it existed immediately prior to commencing construction thereon, in which case the Unit shall thereafter be sodded, irrigated and maintained in a neat and clean condition consistent with the Community-Wide Standard. The Owner shall pay any costs of repair or reconstruction which are not covered by insurance proceeds.

Additional recorded covenants applicable to any Subassociation may impose more stringent requirements regarding the standards for rebuilding or reconstructing structures on the Units within the Subassociation and the standard for returning the Units to their natural state in the event the structures are not rebuilt or reconstructed.

Section 3. Damage and Destruction.

(a) Immediately after damage or destruction by fire or other peril to all or any part of the Properties covered by insurance written in the name of the Association, the Board of Directors or its duly authorized agent shall proceed with the filing and adjustment of all claims arising under such insurance and obtain reliable and detailed estimates of the cost of repair or reconstruction of the damaged or destroyed Properties. Repair or reconstruction, as used in this paragraph, means repairing or restoring the Properties to substantially the same condition in which they existed prior to the fire or other peril, allowing for any changes or improvements necessitated by changes in applicable building codes.

(b) Any damage or destruction to the Common Area shall be repaired or reconstructed unless at least seventy-five percent (75%) of the total Class "A" vote of the Association shall decide within sixty (60) days after the damage or destruction not to repair or reconstruct and the approval of the Class "B" Member. Any damage or destruction to the common property of any Subassociation shall be repaired or reconstructed unless the Unit Owners representing at least seventy-five percent (75%) of the total vote of the Subassociation whose common property is damaged shall decide within sixty (60) days after the damage or destruction not to repair or reconstruct. If for any reason either the amount of the insurance proceeds to be paid as a result of such damage or destruction, or reliable and detailed estimates of the cost of repair or reconstruction, or both, are not made available to the Association within said period, then the period shall be extended until such funds or information shall be made available; provided, however, such extension shall not exceed sixty (60) additional days. No Mortgagee shall have the right to participate in the determination of whether the damage or destruction to Common Area or common property of a Subassociation shall be repaired or reconstructed.

(c) If it is determined in the manner described above that damage or destruction to the Common Area or to the common property of any Subassociation shall not be repaired or reconstructed and no alternative improvements are authorized, then the affected portion of the properties shall be cleared of all debris and ruins and thereafter shall be maintained by the Association or the Subassociation, as applicable, in a neat and attractive, landscaped condition consistent with the Community-Wide Standard.

Section 4. Disbursement of Proceeds. If the damage or destruction to the Common Area or to the common property of any Subassociation is to be repaired or reconstructed and the insurance policies held by the Association are paid, the proceeds, or such portion thereof as may be required for such purpose, shall be disbursed in payment of such repairs or reconstruction as hereinafter provided. Any proceeds remaining after defraying such costs of repair or reconstruction, or if no repair or reconstruction is made, any proceeds remaining after making such settlement as is necessary and appropriate with the affected Owner or Owners and their Mortgagee(s), as their interest may appear, shall be retained by and for the benefit of the Association or the Subassociation, as applicable, and placed in a capital improvements account. This is a covenant for the benefit of any Mortgagee of a Unit and may be enforced by such Mortgagee.

Section 5. Repair and Reconstruction. If the damage or destruction to the Common Area or to the common property of a Subassociation for which insurance proceeds are paid is to be repaired or reconstructed, and such proceeds are not sufficient

to defray the cost thereof, the Board of Directors shall, without the necessity of a vote of the Owners, levy a special assessment against those Owners of Units responsible for the premiums for the applicable insurance coverage under Section 1 of this Article. Additional assessments may be made in like manner at any time during or following the completion of any repair or reconstruction.

Article IX
NO PARTITION

Except as is permitted in the Declaration or amendments thereto, there shall be no judicial partition of the Common Area or any part thereof, nor shall any Person holding or acquiring any interest in the properties or any part thereof seek any judicial partition unless the properties have been removed from the provisions of this Declaration. This Article shall not be construed to prohibit the Board of Directors from acquiring and disposing of tangible personal property nor from acquiring title to real property which may or may not be subject to this Declaration.

Article X
CONDEMNATION

Whenever all or any part of the Common Area shall be taken (or conveyed in lieu of and under threat of condemnation by the Board acting on the written direction of at least sixty-seven percent (67%) of the total Class "A" vote in the Association and of the Declarant, as long as the Declarant owns any property described on Exhibits "A" or "B") by any authority having the power of condemnation or eminent domain, each Owner shall be entitled to notice thereof. The award made for such taking shall be payable to the Association as trustee for all Owners to be disbursed as follows:

If the taking involves a portion of the Common Area on which improvements have been constructed, then, unless within sixty (60) days after such taking the Declarant, so long as the Declarant owns any property described in Exhibits "A" or "B" of this Declaration, and at least seventy-five percent (75%) of the total Class "A" vote of the Association shall otherwise agree, the Association shall restore or replace such improvements so taken on the remaining land included in the Common Area to the extent lands are available, in accordance with plans approved by the Board of Directors of the Association. If such improvements are to be repaired or restored, the provisions in Article VIII of this Declaration regarding the disbursement of funds in respect to casualty damage or destruction which is to be repaired shall apply.

If the taking does not involve any improvements on the Common Area, or if there is a decision made not to repair or

restore, or if there are net funds remaining after any such restoration or replacement is completed, then such award or net funds shall be disbursed to the Association and used for such purposes as the Board of Directors of the Association shall determine.

Article XI
ASSESSMENTS

Section 1. Creation of Assessments. There are hereby created assessments for Association expenses as may from time to time specifically be authorized by the Board of Directors, to be commenced at the time and in the manner set forth in Section 9 of this Article. There shall be two (2) types of assessments: (i) Base Assessments to fund Common Expenses for the benefit of all Members of the Association; and (ii) Special Assessments as described in Section 4 below.

Each Owner, by acceptance of a deed or recorded contract of sale for any portion of the Properties, is deemed to covenant and agree to pay all of the foregoing assessments.

Base Assessments shall be levied on all Units based upon a reasonable formula adopted by the Board. Special Assessments shall be levied as provided in Sections 4 below, respectively.

All assessments, together with interest (at a rate not to exceed the highest rate allowed by Hawaii law; provided, that if, at any time, Hawaii law does not limit such interest, the rate shall not exceed twenty percent) as computed from the date the delinquency first occurs, late charges, costs, and reasonable attorney's fees, shall be a charge on the land and shall be a continuing lien upon the Unit against which each assessment is made until paid. Each such assessment, together with interest, late charges, costs, and reasonable attorney's fees, shall also be the personal obligation of the Person who was the Owner of such Unit at the time the assessment arose, and, in the event of a transfer of title, his or her grantee shall be jointly and severally liable for such portion thereof as may be due and payable at the time of conveyance, except no first Mortgagee who obtains title to a Unit pursuant to the remedies provided in the Mortgage shall be liable for unpaid assessments which accrued prior to such acquisition of title.

The Association shall, within five (5) business days after receipt of a written request therefor, furnish to any Owner liable for any type of assessment a certificate in writing signed by an officer or the managing agent, if so authorized by the Board of Directors, of the Association setting forth whether such assessment has been paid as to any particular Unit. Such certificate shall be conclusive evidence of payment to the Association of any assessments therein stated to have been paid.

The Association may require the advance payment of a reasonable processing fee for the issuance of such certificate.

Assessments shall be paid in such manner and on such dates as may be fixed by the Board of Directors and, if the Board so elects, assessments may be paid in two or more installments. Unless the Board otherwise provides, the Base Assessment shall be due and payable in annual installments in advance of the second month after the commencement of the fiscal year. If any Owner is delinquent in paying any assessments or other charges levied on his Unit, the Board may revoke the privilege of paying in installments and require any unpaid installments of the annual assessment and/or any other assessments to be paid in full immediately.

No Owner may waive or otherwise exempt himself from liability for the assessments provided for herein, including, by way of illustration and not limitation, by nonuse of Common Areas or abandonment of the Unit. The obligation to pay assessments is a separate and independent covenant on the part of each Owner. No diminution or abatement of assessment or set-off shall be claimed or allowed (i) by reason of any alleged failure of the Association or Board to take some action or perform some function it is required to take or perform under this Declaration or the Bylaws, (ii) for inconvenience or discomfort arising from the making of repairs or improvements which are the responsibility of the Association; or (iii) from any action taken to comply with any law, ordinance, or with any order or directive of any municipal or other governmental authority.

So long as the Declarant has an option unilaterally to subject additional property to this Declaration, the Declarant may annually elect either to pay regular assessments on its unsold Units or to pay to the Association the difference between the amount of assessments collected on all other Units subject to assessment and the amount of actual expenditures required to operate the Association during the fiscal year. The Declarant's obligations hereunder may be satisfied in the form of a cash subsidy or by "in kind" contributions of services or materials, or a combination of these.

The Association is specifically authorized to enter into subsidy contracts or contracts for "in kind" contribution of services or materials or a combination of services and materials with Declarant or other entities for the payment of some portion of the Common Expenses.

Section 2. Computation of Base Assessment. It shall be the duty of the Board, at least ninety (90) days before the beginning of each fiscal year, to hold a Board meeting to which each Owner shall be invited to attend and provide input on the budget, including the services and maintenance to be performed for a particular Subassociation for the upcoming fiscal year. After

such meeting the Board shall prepare a budget covering the estimated Common Expenses of the Association during the coming fiscal year. The budget shall also include a capital contribution establishing a reserve fund in accordance with a budget separately prepared, as provided in Section 3 of this Article.

The Base Assessments to be levied against each Unit for the coming year shall be set at a level which is reasonably expected to produce total income to the Association equal to the total budgeted Common Expenses, including reserves. The Base Assessments shall be prorated to each Owner based upon a reasonable formula adopted by the Board. In determining the amount of the Base Assessment, the Board, in its sole discretion, may take into account other sources of funds available to the Association and assessments to be levied on additional Units reasonably anticipated to become subject to assessment during the fiscal year.

So long as the Declarant has the right unilaterally to annex additional property pursuant to Article III hereof, the Declarant may elect on an annual basis, but shall not be obligated, to reduce the resulting Base Assessments for any fiscal year by payment of a subsidy (in addition to any amounts paid by Declarant under Section 1 above); provided, any such subsidy shall be conspicuously disclosed as a line item in the Common Expense budget and shall be made known to the membership. <u>The payment of such subsidy in any year shall under no circumstances obligate the Declarant to continue payment of such subsidy in future years</u>.

The Board shall send a copy of the budget and notice of the amount of the Base Assessment to be levied against each Unit for the following year to each Owner at least thirty (30) days prior to the beginning of the fiscal year for which it is to be effective. Such budget and assessment shall become effective unless disapproved at a meeting by at least seventy-five percent (75%) of the total Class "A" votes in the Association and by the Class "B" Member, if such exists. There shall be no obligation to call a meeting for the purpose of considering the budget except on petition of the Owners as provided for special meetings in Article II, Section 4, of the Bylaws, which petition must be presented to the Board within ten (10) days after delivery of the notice of assessments.

Notwithstanding the foregoing, however, in the event the proposed budget is disapproved or the Board fails for any reason to determine the budget for any year, then and until such time as a budget shall have been determined as provided herein, the budget in effect for the immediately preceding year shall continue for the current year.

Section 3. Reserve Budget and Capital Contribution. The Board of Directors shall annually prepare reserve budgets for general purposes which take into account the number and nature of replaceable assets, the expected life of each asset, and the expected repair or replacement cost. The Board shall set the required capital contribution in an amount sufficient to permit meeting the projected needs of the Association, as shown on the budget, with respect both to amount and timing by annual Base Assessments over the period of the budget. The capital contribution required, if any, shall be fixed by the Board and included within and distributed with the applicable budget and notice of assessments, as provided in this Article.

Section 4. Special Assessments.

(a) Unbudgeted Expenses. In addition to the assessments authorized in Section 1 of this Article, the Association may levy Special Assessments from time to time to cover unbudgeted expenses. Such Special Assessment may be levied against the entire membership, if such Special Assessment is for general Common Expenses, or against the Units within any Subassociation, if such Special Assessment is for Neighborhood Expenses. Special Assessments shall be payable in such manner and at such times as determined by the Board, and may be payable in installments extending beyond the fiscal year in which the Special Assessment is approved, if the Board so determines.

(b) Costs to Cure Non-compliance. The Association may levy a Special Assessment against any Unit or Subassociation to reimburse the Association for costs incurred in bringing the Unit or Subassociation into compliance with the provisions of the Declaration, any applicable Supplemental Declaration, the Articles, the Bylaws, and the Association rules and regulations. Such Special Assessments may be levied upon the vote of the Board after notice to the Unit Owner or the senior officer of the Subassociation, as applicable, and an opportunity for a hearing.

Section 5. Lien for Assessments. Upon recording of a notice of lien on any Unit, there shall exist a perfected lien for unpaid assessments prior and superior to all other liens, except (i) all taxes, bonds, assessments, and other levies which by law would be superior thereto; and (ii) the lien or charge of any first Mortgage of record (meaning any recorded Mortgage with first priority over other Mortgages) made in good faith and for value.

Such lien, when delinquent, may be enforced by suit, judgment, and foreclosure.

The Association, acting on behalf of the Owners, shall have the power to bid for the Unit at foreclosure sale and to acquire and hold, lease, mortgage, and convey the same. During the period in which a Unit is owned by the Association following

foreclosure: (i) no right to vote shall be exercised on its behalf; (ii) no assessment shall be levied on it; and (iii) each other Unit shall be charged, in addition to its usual assessment, its equal pro rata share of the assessment that would have been charged such Unit had it not been acquired by the Association as a result of foreclosure. Suit to recover a money judgment for unpaid assessments, interest, late charges and attorney's fees shall be maintainable without foreclosing or waiving the lien securing the same.

Section 6. Subordination of the Lien to First Mortgages. The lien of assessments, including interest, late charges (subject to the limitations of Hawaii law), and costs (including attorney's fees) provided for herein, shall be subordinate to the lien of any first Mortgage upon any Unit. The sale or transfer of any Unit shall not affect the assessment lien. However, the sale or transfer of any Unit pursuant to judicial or nonjudicial foreclosure of a first Mortgage shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Unit from lien rights for any assessments thereafter becoming due. Where the Mortgagee holding a first Mortgage of record or other purchaser of a Unit obtains title pursuant to judicial or nonjudicial foreclosure of the Mortgage, it shall not be liable for the share of the Common Expenses or assessments by the Association chargeable to such Unit which became due prior to such acquisition of title. Such unpaid share of Common Expenses or assessments shall be deemed to be Common Expenses collectible from Owners of all the Units, including such acquirer, its successors and assigns.

Section 7. Date of Commencement of Assessments. The obligation to pay the assessments provided for herein shall commence as to each Unit on the first day of the month following: (i) conveyance of the Unit by the Declarant; or (ii) the month in which the Board first determines a budget and levies assessments pursuant to this Article, whichever is later. Assessments shall be due and payable in a manner and on a schedule as the Board of Directors may provide. The first annual Base Assessment levied on each Unit shall be adjusted according to the number of months remaining in the fiscal year at the time assessments commence on the Unit.

Section 8. Failure to Assess. The omission or failure of the Board to fix the assessment amounts or rates or to deliver or mail to each Owner an assessment notice shall not be deemed or constitute a waiver, modification, or a release of any Owner from the obligation to pay assessments. In such event, each Owner shall continue to pay annual assessments on the same basis as for the last year for which an assessment was made, if any, until a new assessment is made, at which time any shortfalls in collections may be assessed retroactively by the Association.

Section 9. Exempt Property. Notwithstanding anything to the contrary herein, the following property shall be exempt from payment of Base Assessments and Special Assessments:

(a) all Common Area; and

(b) all property dedicated to and accepted by any governmental authority or public utility, including, without limitation, schools, streets, and parks, if any.

Article XII
ARCHITECTURAL STANDARD

Section 1. Design Standards. Regardless of the cost or replacement value of same, the following general and specific conditions, limitations and restrictions shall be applicable to any improvement, modification, addition, renovation, alteration or repair of any Unit:

(a) The improvement, modification, addition, renovation, alteration or repair shall be compatible and in harmony with existing structures and other improvements in the area with respect to quality and type of materials, workmanship, external design and location of the improvements, alteration or repair on the Unit, taking into account topography and ground elevation.

(b) The improvement, modification, addition, renovation, alteration or repair shall conform to the general plan of the entire development of Maui Lani.

(c) The improvement, modification, addition, renovation, alteration or repair shall not because of its design unreasonably interfere with the light, air or view of adjoining Units.

(d) There shall be no change in the natural or existing drainage for surface water upon any such Unit.

(e) No privately installed power, telephone or other utility lines, wires or conduits which would be visible from neighboring Units shall be installed upon any such Unit.

(f) No reflective finishes shall be used on exterior surfaces (other than glass and the surfaces of hardware fixtures) if such exterior surfaces are visible from any neighboring Unit.

(g) All roofs, other than flat roofs, shall be covered with asphalt shakes, wood shakes, tile or of other non-flammable material of comparable or better quality and texture.

(h) No gas tanks will be permitted which are visible from any neighboring Unit.

(i) All telephone, electrical, water lines and all other conduits for utilities shall be installed underground.

(j) Only new materials and materials similar to the existing structure may be used in any construction, modification, renovation, addition or alteration.

(k) Any wall or fence facing a street shall be of a permanent structure of quality design and new material.

(l) Rain gutters shall be of a color to match the dwelling unit being served, provided that copper gutters of any shape shall be permitted so long as it remains unpainted.

(m) All accessory structures such as, but not limited to, playhouses, sheds, storage bins, or dog houses, shall be painted in a color or colors complementary to the main dwelling unit if such accessory structures are visible to any neighboring Unit.

(n) No aluminum, plastic or canvas awning shall be erected so as to be visible from a street.

(o) No part of the exterior of any Unit visible to any neighboring Unit or street shall be unpainted or refinished except in accordance with the original color or finish.

Section 2. Common Area Conditions, Limitations and Restrictions. No improvement, excavation or work which in any way alters any Common Area from its natural or existing state on the date when such Common Area was designated as such by Declarant, Declarant's assignee or was acquired by the Association, shall be made or done, except in strict compliance with and within the restrictions and limitations of the following provisions of this section:

(a) Except to the extent otherwise provided in subsection (d) below, no Person other than the Association or its duly authorized agents, shall construct, reconstruct, refinish, alter or maintain any excavation or fill upon or shall change the natural or existing drainage of, or shall destroy or remove any tree, shrub or other vegetation from or plant any tree, shrub or vegetation upon any Common Area.

(b) Except to the extent otherwise provided in subsection (c) below, if the Association proposes to construct, reconstruct, refinish or alter the exterior of any improvement located or to be located upon any Common Area, or if the Association proposes to make or create any excavation or fill or to change the natural or exiting drainage or surface water, or to remove any trees, shrubs or ground cover upon any Common Area, the Association shall have the final plans and specifications for such work prepared by a licensed architect or professional engineer in compliance with any applicable ordinances, rules and regulations

and may commence construction after the following conditions have been satisfied:

(1) If the plans are to construct any new improvements, including any alteration of the exterior appearance of any existing improvement upon any Common Area, the Board of Directors, or any committee which the Board establishes for the purpose of reviewing proposed improvements to the Common Area, find that the design of such improvement is reasonably necessary or desirable in order to carry out the aims of the Association and is in harmony with other improvement and the overall appearance of Maui Lani as planned; and

(2) The Board of Directors, or any committee which the Board establishes for the purpose of reviewing proposed improvements to the Common Area, find that the proposed work shall not because of its design materially prejudice Maui Lani or any Owner therein in the use and enjoyment of its property.

Such findings by the Board of Directors, or such committee, shall be in writing. In the event of any such rejection of any proposed improvement to the Common Area, any member of the Board shall have the right to submit to a meeting of the Association duly called, the notice of which shall contain reference to the consideration of the matter the question of whether to abandon the proposed improvement, or excavation or work.

(c) The Association may, at any time and from time to time:

(1) Reconstruct, replace or refinish any improvement or portion thereof upon a Common Area in accordance with the last plans for such improvement, or if such improvements existed upon the Common Area when such Common Area was designated as such by the Declarant or was conveyed to the Association, then in accordance with the original design, finish or standard of construction of such improvement when such Common Area was so designated or conveyed to the Association.

(2) Construct, reconstruct, replace or refinish any road improvement upon any portion of the Common Area designated on a map as a road.

(3) Replace any destroyed, diseased or dying tree or any other vegetation on a Common Area to the extent the Association deems necessary for the conservation of water and soil, plant, trees, shrubs and ground cover.

(4) Place and maintain upon any Common Area such signs and markers as the Association, in its sole discretion, may deem necessary for identification of Maui Lani and/or roads, for the regulation of traffic, including parking and for the regulation and use of the Common Area and for the health and welfare and safety of Owners and the public, provided that the design of any

such signs or markers shall be compatible with the overall aesthetic character of Maui Lani.

(d) Any Owner may, at any time and from time to time, install and maintain within a Common Area any subsurface utility system, provided the same be approved by the Board of Directors and an easement therefor be obtained from the Association.

Section 3. Limitation of Liability. Neither the Declarant, the Association, the Board of Directors, the board or committee of any Subassociation, any committee, or member of any of the foregoing shall be held liable for any injury, damages or loss arising out of: (i) any decision to make or not make repairs, reconstruction, or improvements to the Common Area, (ii) any failure to enforce this Article or any decision not to enforce this Article, or (iii) the manner or quality of any construction, reconstruction, modification, addition, alteration, repair, improvement or other work to any portion of the Common Area or to any Unit.

Section 4. Enforcement. Any construction, alteration, or other work done in violation of this Article shall be deemed to be nonconforming. Any Owner may seek to enforce this Article, provided, that such Owner shall first attempt to enforce this Article by submitting to the Board of Directors a written request for enforcement of this Article and identifying the owner of the nonconforming property, the nature of the violation, and the date when such violation occurred. The Board of Directors shall decide whether to investigate the alleged violation and whether to intercede on behalf of the complaining Owner and forward a written request to the alleged violating Owner. If the Board, in its discretion, decides not to intercede on behalf of the complaining Owner, said complaining Owner shall have the right to pursue all legal and equitable remedies available to enforce this Article against the alleged violating Owner.

Regardless of whether a request from an Owner is received, if the Board determines a violation has occurred the Owners shall, at their own cost and expense, upon written request from the Board: (i) remove such construction, alteration, or other work and shall either restore the land and/or improvement to substantially the same condition as existed prior to the construction, alteration, or other work, or (ii) perform such remedial construction, alteration or other work necessary to cause the land and/or improvement to conform with this Article. Should an Owner fail to remove and restore or perform such remedial work as required hereunder, the Board or its designee shall have the right, but not the obligation, to enter the property, remove the violation and restore the property to substantially the same condition as existed prior to the construction, alteration or other work. All costs thereof, together with the interest thereon at the maximum rate then allowed by law, may be assessed against the benefitted Unit and

collected as a Special Assessment pursuant to Article XI, Section 4(b) hereof.

Any contractor, subcontractor, agent, employee or other invitee of an Owner who fails to comply with the terms and provisions of this Article and the Design Standards may be excluded by the Board from the Properties, subject to the notice and hearing procedures contained in the Bylaws of the Association. In such event, neither the Association, its officers, or directors shall be held liable to any Person for exercising the rights granted by this section.

In addition to the foregoing, the Board of Directors shall have the authority and standing, on behalf of the Association, to impose reasonable fines and to pursue all legal and equitable remedies available to enforce the provisions of this Article.

Article XIII
USE RESTRICTIONS

Section 1. General. The Properties shall be used only for residential, recreational, and related purposes (which may include, without limitation, offices for any property manager retained by the Association or business offices for the Declarant or the Association), as may be permitted by the development orders, resolutions, ordinances and zoning plans approved and adopted by the County of Maui subject to such further restrictions as may be set forth in this Declaration and amendments hereto. Any Supplemental Declaration or additional covenants imposed on the property within any Subassociation may impose stricter standards than those contained in this Article. The Association, acting through its Board of Directors, shall have standing and the power to enforce such standards as if such standards were a regulation of the Association and is not visible from any portion of any golf course located adjacent to or within the Properties, including, but not limited to, the Maui Lani Golf Course.

Section 2. Signs. A single "for sale" or "for lease" sign shall be permitted on any Unit being offered for sale or for lease, provided it does not exceed two (2) feet by three (3) feet in size, does not stand higher than two (2) feet from the ground, and is not visible from any portion of any golf course located adjacent to or within the Properties, including, but not limited to, the Maui Lani Golf Course. No other signs of any kind shall be erected within the Properties without the written consent of the Board of Directors except that the Board of Directors and the Declarant shall have the right to erect signs as they, in their discretion, deem appropriate.

The Association, acting through the Board, shall be authorized to enter upon any Unit and remove any sign, advertisement, or similar display placed on a Unit in violation

hereof, and in doing so shall not be subject to any liability for trespass or other tort in connection with or arising from such entry and/or removal.

Section 3. Parking and Prohibited Vehicles.

(a) Parking. Vehicles shall be parked only in the garage or driveway serving the Unit, or in such other parking areas as have been designated by the Board of Directors for parking vehicles, or the street and then subject to such rules and regulations as the Board may adopt. No vehicle (personal, commercial, recreational, tractors, mobile homes, campers, trailers, motorcycles, mopeds, boats or other watercraft) shall be parked or stored on the front lawn or in such a manner as to block the sidewalk area.

No garage shall be enclosed, modified or otherwise used so as to reduce its original capacity for parking vehicles without the prior written approval of the Board of Directors. However, a builder may temporarily convert a garage into a sales or construction office, provided that it is converted back to a garage within ninety (90) days after cessation of construction and sale of new homes within the Properties by such builder.

(b) Prohibited Vehicles. Stored vehicles and vehicles which are either obviously inoperable or do not have current operating licenses shall not be permitted on the Properties except within enclosed garages. Vehicles that become inoperable while on the Properties and outside of an enclosed garage must be removed from the Properties or placed within an enclosed garage within twenty-four (24) hours thereof. For purposes of this Section, a vehicle shall be considered "stored" if it is put up on blocks or covered with any type of material and remains on blocks or so covered for thirty (30) consecutive days without the prior approval of the Board. Notwithstanding the foregoing, service and delivery vehicles may be parked in the Properties during daylight hours for such period of time as is reasonably necessary to provide service or to make a delivery to a Unit or the Common Areas. Any vehicle parked in violation of this Section or parking rules promulgated by the Board may be towed in accordance with the Bylaws.

Section 4. Animals and Pets. No animals classified as a pest by Hawaii law shall be raised, bred, or kept on any portion of the Properties. Those pets which are permitted to roam free, or, in the sole discretion of the Association, endanger the health, make objectionable noise, or constitute a nuisance or inconvenience to the Owners of other Units or the owner of any portion of the Properties shall be removed upon request of the Board. If the Owner fails to honor such request, the pet may be removed by the Board. All animals shall at all times whenever they are outside a Unit be confined within a fenced area under the control of the Owner or occupant of the Unit, or on a leash

or within a cage held by a Person responsible for the dog, cat or other pet.

Section 5. Quiet Enjoyment. All portions of a Unit outside of enclosed structures shall be kept in a clean and tidy condition at all times, and nothing shall be done, maintained, stored or kept outside of enclosed structures on a Unit which, in the determination of the Board of Directors, causes an unclean, unhealthy or untidy condition to exist or is obnoxious to the senses. Nothing shall be done or maintained on any part of a Unit which emits foul or obnoxious odors outside the Unit or creates noise or other conditions which tend to disturb the peace, quiet, safety, comfort, or serenity of the occupants and invitees of other Units. There shall not be maintained any plants or animals or device or thing of any sort whose activities or existence in any way is noxious, dangerous, unsightly, unpleasant, or of a nature as may diminish or destroy the enjoyment of Properties. No noxious, illegal, or offensive activity shall be carried on upon any portion of the Common Areas, or on any portion of a Unit outside of an enclosed structure, which in the determination of the Board of Directors tends to cause embarrassment, discomfort, annoyance, or nuisance to Persons using the Common Areas or the occupants and invitees of other Units. No outside burning shall be permitted within the Properties, except with prior written approval of, and subject to rules promulgated by, the Board of Directors. No speaker, horn, whistle, bell or other sound device, except alarm devices used exclusively for security purposes, shall be installed or operated on any Unit.

Section 6. Unsightly or Unkempt Conditions. It shall be the responsibility of each Owner to prevent the development of any unclean, unhealthy, unsightly, or unkempt condition on his or her Unit. The pursuit of hobbies or other activities, including, without limitation, the assembly and disassembly of motor vehicles and other mechanical devices, which tend to cause disorderly, unsightly, or unkempt conditions, shall not be pursued or undertaken unless screened from view. Notwithstanding the above, the disassembly and assembly of motor vehicles to perform repair work shall be permitted provided such activities are not conducted on a regular or frequent basis, and are either conducted entirely within an enclosed garage or, if conducted outside, are begun and completed within forty-eight (48) hours or such other time period adopted by the Board.

No Owner or occupant shall dump grass clippings, leaves or other debris, petroleum products, paint, fertilizers, other potentially toxic substances or any Hazardous Materials, as defined below, on any portion of the Properties, including, but not limited to, any drainage ditch, storm sewer, stream, or pond within the Properties. The Association shall have the right to assess any costs incurred in clearing or cleaning the Properties

of such items or substances against the Unit of any Owner or occupant who violates this Section as a Special Assessment.

Section 7. Hazardous Materials. No owner shall use, generate or store Hazardous Materials on any portion on the Properties. "Hazardous Materials," as used in this Declaration, shall mean and refer to those materials, substances, gases, or vapors identified as hazardous, toxic, or radioactive by any and all applicable federal, state, and local laws, regulations, or ordinances.

Section 8. Antennas. No exterior antennas, aerials, satellite dishes, or other apparatus for the transmission of television, radio, satellite or other signals of any kind shall be placed, allowed, or maintained upon any portion of the Properties, including any Unit, unless such apparatus is completely screened from view from adjacent Units by an approved fence or other approved structure and such antenna does cause any interference with the operation of any equipment within the Properties. The Declarant and/or the Association shall have the right, without obligation, to erect or install an aerial, satellite dish, master antenna, cable system, or other apparatus for the transmission of television, radio, satellite or other signals for the benefit of all or a portion of the Properties.

Section 9. Garbage Cans Tanks, Etc.. All garbage cans, above-ground storage tanks, mechanical equipment, woodpiles, yard equipment and other similar items on Units shall be located or screened so as to be concealed from view of neighboring Units, streets, and property located adjacent to the Unit. All rubbish, trash, and garbage shall be stored in appropriate containers and shall regularly be removed from the Properties and shall not be allowed to accumulate thereon.

Section 10. Subdivision of Unit. No Unit shall be subdivided or its boundary lines changed except with the prior written approval of the Board of Directors of the Association. Declarant, however, hereby expressly reserves the right to subdivide, change boundary lines of and replat any Unit or Units owned by Declarant. Any such subdivision, boundary line change, or replatting shall not be in violation of the applicable subdivision and zoning regulations.

Section 11. Tents, Mobile Homes and Temporary Structures. Except as may be permitted by the Declarant during construction, no tent, shack, mobile home, or other structure of a temporary nature shall be placed upon a Unit or any part of the Properties.

Section 12. Drainage and Septic Systems. Catch basins and drainage areas are for the purpose of natural flow of water only. No obstructions or debris shall be placed in these areas. No Person other than Declarant may obstruct or rechannel the drainage flows after location and installation of drainage

swales, storm sewers, or storm drains. Declarant hereby reserves for itself and the Association a perpetual easement across the Properties for the purpose of altering drainage and water flow. However, the exercise of such easement shall not materially diminish the value of or unreasonably interfere with the use of any adjacent property without the consent of the Owner thereof. Septic tanks and drain fields, other than those installed by or with the consent of the Declarant, are prohibited within the Properties.

Section 13. Sight Distance at Intersections. All property located at street intersections shall be landscaped so as to permit a clear line of vision across the street corners. No fence, wall, hedge, or shrub planting shall be placed or permitted to remain in a location which does or lends to create a traffic or sight problem.

Section 14. Playground. Any playground or other play areas or equipment furnished by the Declarant or the Association or erected within the Properties shall be used at the risk of the user, and the Declarant and the Association shall not be held liable to any Person for any claim, damage, or injury occurring thereon or related to use thereof.

Section 15. Business Use. No trade or business may be conducted in or from any Unit, except that an Owner or occupant residing in a Unit may conduct business activities within the Unit so long as: (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Unit; (ii) the business activity conforms to all zoning requirements for the Properties; (iii) the business activity does not involve regular visitation of the Unit by clients, customers, suppliers or other business invitees, persons coming onto the Properties who do not reside in the Properties, or door-to-door solicitation of residents of the Properties; and (iv) the business activity is consistent with the residential character of the Properties and does not constitute a nuisance, or a hazardous or offensive use, or threaten the security or safety of other residents of the Properties, as may be determined in the sole discretion of the Board.

The terms "business" and "trade", as used in this provision, shall be construed to have their ordinary, generally accepted meanings, and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation, or other form of consideration, regardless of whether: (a) such activity is engaged in full or part-time; (b) such activity is intended to or does generate a profit; or (c) a license is required therefor. Notwithstanding the above, the leasing of a Unit shall not be considered a trade or business within the meaning of this section. This Section shall not apply

to any activity conducted by the Declarant or conducted by a builder with approval of the Declarant, with respect to its development and sale of the Properties or its use of any Units which it owns within the Properties, including the operation of a timeshare or similar program.

Section 16. On-Site Fuel Storage. No on-site storage of gasoline, heating or of other fuels shall be permitted on any part of a Unit except that gas or propane tanks for the heating of swimming pools, spas, or whirlpool spas are permitted and up to ten (10) gallons of fuel may be stored on each Unit for emergency purposes and operation of lawn mowers, similar tools or equipment and gas barbecue grills. The Association shall be permitted to store fuel for operation of maintenance vehicles, generators and similar equipment.

Section 17. Compliance with Governing Documents. Every Owner shall cause all occupants of his or her Unit to comply with the Declaration, Bylaws, any applicable Supplemental Declaration, and the rules and regulations adopted pursuant to the foregoing, and shall be responsible for all violations and losses to the Common Areas caused by such occupants, notwithstanding the fact that such occupants of a Unit are fully liable and may be sanctioned for any such violation.

Section 18. Laws and Ordinances. Every Owner and occupant of any Unit, their guests and invitees, shall comply with all laws, statutes, ordinances and rules of federal, state and municipal governments applicable to the Properties and any violation thereof may be considered a violation of this Declaration; provided, the Board shall have no obligation to take action to enforce such laws, statutes, ordinances and rules.

Article XIV
EASEMENTS

Section 1. Easements of Encroachment. There shall be reciprocal appurtenant easements of encroachment as between each Unit and such portion or portions of the Common Areas adjacent thereto or as between adjacent Units due to the unintentional placement or settling or shifting of the improvements constructed, reconstructed, or altered thereon (in accordance with the terms of this Declaration) to a distance of not more than three feet, as measured from any point on the common boundary between each Unit and the adjacent Units, as the case may be, along a line perpendicular to such boundary at such point. In no event, however, shall an easement for encroachment exist if such encroachment occurred due to the willful and knowing conduct of an Owner, tenant, or the Association.

Section 2. Easements for Utilities, Etc. There are hereby reserved unto Declarant, so long as the Declarant owns any property described on Exhibit "A" or "B" of this Declaration, the

Association, and the designee of each (which may include, without limitation, the County of Maui and any utility) access and maintenance easements upon, across, over, and under all of the Properties to the extent reasonably necessary for the purpose of replacing, repairing, maintaining and improving cable television systems, master television antenna systems, security and similar systems, roads, walkways, bicycle pathways, ponds, wetlands, drainage systems, irrigation systems, street lights, signage, and all utilities, including, but not limited to, water, sewers, meter boxes, telephone, gas, and electricity, and for the purpose of installing any of the foregoing on property which it owns or within easements designated for such purposes on recorded plats of the Properties. Notwithstanding anything to the contrary herein, this easement shall not entitle the holders to construct or install any of the foregoing systems, facilities, or utilities over, under or through any existing dwelling on a Unit, and any damage to a Unit resulting from the exercise of this easement shall promptly be repaired by, and at the expense of, the Person exercising the easement. The exercise of this easement shall not unreasonably interfere with the use of any Unit and, except in an emergency, entry onto any Unit shall be made only after reasonable notice to the Owner or occupant thereof.

Without limiting the generality of the foregoing, there are hereby reserved for the local water supplier, electric company, and natural gas supplier easements across all the Common Areas for ingress, egress, installation, reading, replacing, repairing and maintaining utility meters and boxes; provided, the exercise of this easement shall not extend to permitting entry into the dwelling on any Unit. Notwithstanding anything to the contrary contained in this Section, no sewers, electrical lines, water lines, or other utilities may be installed or relocated on the Properties, except as may be approved by the Association's Board of Directors or as provided by Declarant.

Section 3. Easements to Serve Additional Property. The Declarant and its duly authorized agents, representatives, and employees, as well as its successors, assigns, licensees and mortgagees, shall have and there is hereby reserved an easement over the Common Areas for the purposes of enjoyment, use, access and development of the Additional Property described in Exhibit "B" attached hereto and by this reference incorporated herein, whether or not such Additional Property is made subject to this Declaration. This easement includes, but is not limited to, a right of ingress and egress over the Common Areas for construction of roads and for connecting and installing utilities on the Additional Property. Declarant agrees that it, its successors or assigns, shall be responsible for any damage caused to the Common Areas as a result of vehicular traffic connected with development of the Additional Property. Declarant further agrees that if the easement is exercised for permanent access to the Additional Property and such Additional Property or any portion thereof is not made subject to this Declaration, the

Declarant, its successors, or assigns shall enter into a reasonable agreement with the Association to share the cost of maintenance of any access roadway serving the Additional Property. Owner, by purchasing or accepting the conveyance of a Unit in any manner whether by court decree, inheritance, foreclosure or any other means, hereby appoints Declarant as its true and lawful attorney-in-fact for the purpose of executing, acknowledging, recording, if necessary, and delivering any instrument necessary or appropriate in granting said access easements to the Additional Property. This power of attorney granted to Declarant shall not be affected by any subsequent mental, physical or emotional disability of Owner. Owner covenants that on the request of Declarant, Owner shall execute, acknowledge and deliver any instrument necessary or appropriate for the purpose of carrying out the provisions and exercising the rights, powers and privileges granted by this provision. This power of attorney provision shall be applicable to any subsequent owner of a Unit and shall terminate upon ninety (90) days after the termination of the Class "B" Control Period.

Section 4. Easement for Golf Balls and Golf Course. Every Unit, the Common Area and the common property of any Subassociation is burdened with an easement permitting golf balls unintentionally to come upon the Units, Common Area or common property immediately adjacent to any golf course and for golfers at reasonable times and in a reasonable manner to come upon the Common Area, common property of a Subassociation, or the exterior portions of a Unit to retrieve errant golf balls. However, if any Unit is fenced or walled, the golfer will seek the Owner's permission before entry. The existence of this easement shall not relieve golfers of liability for damage caused by errant golf balls.

The Association, each Owner, individually and as a member of the Association, and each occupant covenants that it/he/she shall assume all risks associated with the location of a golf course within the Properties, including but not limited to, the risk of nuisance, property damage or personal injury arising from stray golf balls or actions incidental to the operation of the golf course and shall individually and through the Association indemnify, defend and hold harmless Declarant, the owner of the golf course, their respective subsidiaries and affiliates, directors, officers, employees and agents from any liability, claims or expenses (including attorney's fees) arising directly or indirectly from stray golf balls or the operation of the golf course.

Section 5. Easements for Private Amenities. The Private Amenities and their members, if any, (regardless of whether such members are Owners hereunder), guests, invitees, employees, agents, contractors, and designee shall at all times have a right and non-exclusive easement of access and use over all roadways located within the Properties reasonably necessary to travel from

or to the entrance to the Properties and to or from the Private Amenities, respectively, and, further, over those portions of the Properties (whether Common Area or otherwise) reasonably necessary to the operation, maintenance, repair, and replacement of the Private Amenities. Without limiting the generality of the foregoing, members of the Private Amenities and permitted members of the public shall have the right to park their vehicles on the roadways located within the Properties at reasonable times before, during, and after golf tournaments and other similar functions held by or at the Private Amenities.

Section 6. Easement for Agricultural Operations. Each Owner and occupant acknowledge that the Properties are located near or adjacent to properties which are used for the production of sugar cane and other agricultural uses (hereinafter referred to as "Agricultural Properties"). An easement is hereby reserved over the Properties for the benefit of the owners of the Agricultural Properties and their successors-in-title for the transmission, discharge, or emission of surface water runoff, noise, smoke, heat, soot, dust, noxious vapors, odors, agricultural chemicals and other substances and nuisances (hereinafter referred to as the "Agricultural By-Products") which are created by and result from: (i) all activities incidental to the operation of the sugar cane fields including, but not limited to, burning sugar cane and bagasse and milling, trucking, and hauling sugar cane; and (ii) the operation of diversified agricultural projects. The Association and each Owner, individually and as a member of the Association, and occupant agree that neither the Declarant, the owners of the Agricultural Properties, or any successors-in-title or assigns shall be held liable for any nuisance, personal injury, illness or any other loss or damage which is caused by the presence and operation of the Agricultural Properties adjacent to or near the Properties or the Agricultural By-Products. The Association and each Owner, individually and as a member of the Association, and occupant hereby waive any right to: (i) require Declarant, the owners of the Agricultural Properties or any successors-in-title or assigns to take any action to correct, modify, alter, eliminate or abate any agricultural activity, Agricultural By-Product or nuisance; or (ii) file any suit or claim for injunction or abatement of any agricultural activity, Agricultural By-Product or nuisance.

Section 7. Easements for Alexander & Baldwin, Inc. Pursuant to that certain Declaration of Covenants and Restrictions dated January 30, 1990, recorded in the State of Hawaii Bureau of Conveyances as Document No. 90-014464, Alexander & Baldwin, Inc. reserved the right to create easements for roadway, access and utility purposes over the property described in Exhibits "A" and "B" hereof for the benefit and use of other specified properties and those properties which are contiguous with the property described in Exhibits "A" and "B". The Declarant hereby reserves the right to grant easements for roadway, access and utility purposes over the property described

in Exhibits "A" and "B" to Alexander & Baldwin, Inc. in satisfaction of the Declaration of Covenants and Restrictions identified herein. The Association and each Owner hereby agrees to fully cooperate with Declarant and Alexander & Baldwin, Inc. in designating and granting such easements. The Association, each Owner, individually and as a member of the Association, and each occupant covenants that it/he/she shall assume all risks and release the Declarant, Alexander & Baldwin, Inc., or any successors-in-title or assigns from all claims and liabilities which may arise directly or indirectly from such easements. Owner, by purchasing or accepting the conveyance of a Unit in any manner whether by court decree, inheritance, foreclosure or any other means, hereby appoints Declarant as its true and lawful attorney-in-fact for the purpose of executing, acknowledging, recording, if necessary, and delivering any instrument necessary or appropriate in granting said easements to Alexander & Baldwin, Inc. This power of attorney granted to Declarant shall not be affected by any subsequent mental, physical or emotional disability of Owner. Owner covenants that on the request of Declarant, Owner shall execute, acknowledge and deliver any instrument necessary or appropriate for the purpose of carrying out the provisions and exercising the rights, powers and privileges granted by this provision. This power of attorney provision shall be applicable to any subsequent owner of a Unit and shall terminate upon ninety (90) days after the termination of the Class "B" Control Period.

Section 8. Right of Entry. The Association shall have the right, but not the obligation, to enter any Unit for emergency, security, and safety reasons, to perform maintenance pursuant to Article VII hereof, and to inspect for the purpose of ensuring compliance with this Declaration, the Bylaws, any Supplemental Declaration and the rules and regulations of the Association, which right may be exercised by the Association's Board of Directors, officers, agents, employees, managers, and all policemen, firemen, ambulance personnel, and similar emergency personnel in the performance of their respective duties. Except in an emergency situation, entry shall only be during reasonable hours and after notice to the Owner. This right of entry shall include the right of the Association to enter a Unit to cure any condition which may increase the possibility of a fire or other hazard in the event an Owner fails or refuses to cure the condition within a reasonable time after request by the Board.

Section 9. Future Development. Declarant hereby discloses that future development of other residential projects within Maui Lani and commercial, golf course or other recreational projects in the area surrounding Maui Lani will occur over a period of several years (the "Future Projects"). An easement is hereby reserved over the Properties for the benefit of the Declarant, its successors-in-title or assigns, and the contractors hired by Declarant or Declarant's successors-in-title or assigns for the transmission, discharge, or emission of surface water runoff,

noise, smoke, heat, soot, dust, noxious vapors, odors and other substances and nuisances (hereinafter referred to as the "Development By-Products") which are created by and result from the development or construction of the Future Projects. The Association and each Owner, individually and as a member of the Association, and occupant agree that neither the Declarant, or any successors-in-title or assigns, or any contractor hired by Declarant or Declarant's successors-in-title or assigns shall be held liable for any nuisance, personal injury, illness or any other loss or damage which is caused by the development or construction of the Future Projects or the Development By-Products. The Association and each Owner, individually and as a member of the Association, and occupant hereby waive any right to: (i) require Declarant or any successors-in-title or assigns to take any action to correct, modify, alter, eliminate or abate the development or construction of any Future Projects or Development By-Product; or (ii) file any suit or claim for injunction or abatement of any Future Projects or Development By-Product.

Article XV
MORTGAGEE PROVISIONS

The following provisions are for the benefit of holders of first Mortgages on Units in the Properties. The provisions of this Article apply to both this Declaration and to the Bylaws, notwithstanding any other provisions contained therein.

Section 1. Notices of Action. An institutional holder, insurer, or guarantor of a first Mortgage who provides written request to the Association (such request to state the name and address of such holder, insurer, or guarantor and the street address of the Unit to which its Mortgage relates, therefore becoming an "Eligible Holder"), will be entitled to timely written notice of:

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

(b) any delinquency in the payment of assessments or charges owed on a Unit subject to the Mortgage of such Eligible Holder, where such delinquency has continued for a period of sixty (60) days, or any other violation of the Declaration or Bylaws relating to such Unit or the Owner or occupant thereof which is not cured within sixty (60) days;

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

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

Section 2. Actions Requiring Approval of Eligible Mortgage Holders. To the extent possible under Hawaii law:

(a) Any restoration or repair of the Properties after a partial condemnation or damage due to an insurable hazard shall be substantially in accordance with this Declaration and the original plans and specifications unless the approval is obtained of the Eligible Holders of first Mortgages on Units to which at least fifty-one percent (51%) of the votes of Units subject to Mortgages held by such Eligible Holders are allocated.

(b) Any election to terminate the Association after substantial destruction or a substantial taking in condemnation shall require the approval of Owners representing sixty-seven percent (67%) of the total Association vote and the approval of the Eligible Holders of first Mortgages on Units to which at least fifty-one percent (51%) of the votes of Units subject to Mortgages held by such Eligible Holders are allocated.

(c) Any election to terminate the Association under circumstances other than substantial destruction or a substantial taking in condemnation shall require the consent of the Owners representing at least sixty-seven percent (67%) of the Class "A" votes and of the Declarant, so long as it owns any land subject to this Declaration, and the approval of the Eligible Holders of first Mortgages on Units to which at least sixty-seven percent (67%) of the votes of Units subject to a Mortgage are allocated.

(d) Any material amendment to the Declaration, Bylaws, or Articles of Incorporation of the Association shall require the consent of the Owners representing at least sixty-seven percent (67%) of the Class "A" votes and of the Declarant, so long as it owns any land subject to this Declaration, and the approval of Eligible Holders of first Mortgages on Units to which at least fifty-one percent (51%) of the votes of Units subject to a Mortgage held by an Eligible Holder are allocated. An amendment which changes the provisions for any of the following shall be considered material:

(1) voting rights;

(2) assessments, assessment liens, or subordination of such liens;

(3) reserves for maintenance, repair, and replacement of the Common Area;

(4) responsibility for maintenance and repair of the Properties;

(5) rights to use the Common Area;

(6) boundaries of any Unit;

(7) expansion or contraction of the Properties or the addition, annexation, or withdrawal of Properties to or from the Association;

(8) insurance or fidelity bonds;

(9) leasing of Units;

(10) imposition of any right of first refusal or similar restriction of the right of any Owner to sell, transfer, or otherwise convey his or her Unit;

(11) establishment of self-management by the Association where professional management has been required by an Eligible Holder; or

(12) any provisions included in the Declaration, Bylaws, or Articles of Incorporation which are for the express benefit of holders, guarantors, or insurers of first Mortgages on Units.

Section 3. Additional Requirements. So long as required by the Federal Home Loan Mortgage Corporation, the following provisions apply in addition to and not in lieu of the foregoing. Unless at least sixty-seven percent (67%) of the first Mortgagees or the Owners representing at least sixty-seven percent (67%) of the total Association vote entitled to be cast thereon consent, the Association shall not:

(a) by act or omission seek to abandon, partition, subdivide, encumber, sell, or transfer all or any portion of the real property comprising the Common Area which the Association owns, directly or indirectly (the granting of easements for public utilities or other similar purposes consistent with the intended use of the Common Area shall not be deemed a transfer within the meaning of this subsection);

(b) change the method of determining the obligations, assessments, dues, or other charges which may be levied against an Owner of a Unit (A decision, including contracts, by the Board or provisions of any declaration subsequently recorded on any portion of the Properties regarding assessments for Subassociation or other similar areas shall not be subject to this provision where such decision or subsequent declaration is otherwise authorized by this Declaration.);

(c) by act or omission change, waive, or abandon any scheme of regulations or enforcement thereof pertaining to the architectural design or the exterior appearance and maintenance of Units and of the Common Area (The issuance and amendment of architectural standards, procedures, rules and regulations, or use restrictions shall not constitute a change, waiver, or abandonment within the meaning of this provision.);

(d) fail to maintain insurance, as required by this Declaration; or

(e) use hazard insurance proceeds for any Common Area losses for other than the repair, replacement, or reconstruction of such property.

First Mortgagees may, jointly or singly, pay taxes or other charges which are in default and which may or have become a charge against the Common Area and may pay overdue premiums on casualty insurance policies or secure new casualty insurance coverage upon the lapse of an Association policy, and first Mortgagees making such payments shall be entitled to immediate reimbursement from the Association.

Section 4. No Priority. No provision of this Declaration or the Bylaws gives or shall be construed as giving any Owner or other party priority over any rights of the first Mortgagee of any Unit in the case of distribution to such Owner of insurance proceeds or condemnation awards for losses to or a taking of the Common Area.

Section 5. Notice to Association. Upon request, each Owner shall be obligated to furnish to the Association the name and address of the holder of any Mortgage encumbering such Owner's Unit.

Section 6. Amendment by Board. Should the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation subsequently delete any of their respective requirements which necessitate the provisions of this Article or make any such requirements less stringent, the Board, without approval of the Owners, may amend this Article by a written instrument reflecting such changes and recorded in the State of Hawaii Bureau of Conveyances and/or the Office of the Assistant Registrar of the Land Court, as appropriate.

Section 7. Applicability of Article XV. Nothing contained in this Article shall be construed to reduce the percentage vote that must otherwise be obtained under the Declaration, Bylaws, or Hawaii law for any of the acts set out in this Article.

Section 8. Failure of Mortgagee to Respond. Any Mortgagee who receives a written request from the Board to respond to or consent to any action shall be deemed to have approved such action if the Association does not receive a written response from the Mortgagee within thirty (30) days of the date of the Association's request, provided such request is delivered to the Mortgagee by certified or registered mail, return receipt requested.

Article XVI
DISPUTE RESOLUTION AND LIMITATION ON LITIGATION

Section 1. Agreement to Avoid Costs of Litigation and to Limit Right to Litigate Dispute. The Association, Declarant, all Persons subject to this Declaration, and any Person not otherwise subject to this Declaration who agrees to submit to this Article (collectively the "Bound Parties") agree to encourage the amicable resolution of disputes involving the Properties, and to avoid the emotional and financial costs of litigation if at all possible. Accordingly, each Bound Party covenants and agrees that all claims, grievances or disputes between such Bound Party and any other Bound Party involving the Properties, including, without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement of this Declaration, the Bylaws, the Association rules, or the Articles of Incorporation (collectively the "Claim"), except for those Claims authorized in Section 2 hereinbelow, shall be subject to the procedures set forth in Section 3 hereinbelow.

Section 2. Exempt Claims. The following Claims ("Exempt Claims") shall be exempt from the provisions of Section 3 hereinbelow:

(a) any suit by the Association against any Bound Party to enforce the provisions of Article XI;

(b) any suit by the Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and such other ancillary relief as the court may deem necessary in order to maintain the status quo and preserve the Association's ability to enforce the provisions of Articles XII and XIII;

(c) any suit between Owners (other than the Declarant) seeking redress on the basis of a Claim which would constitute a cause of action under the law of the State of Hawaii in the absence of a claim based on the Declaration, Bylaws, Articles of Incorporation, or the rules of the Association; and

(d) any suit or dispute with vendors providing goods or services to the Association.

Any Bound Party having an Exempt Claim may submit it to the alternative dispute resolution procedures set forth in Section 3 hereinbelow, but there shall be no obligation to do so.

Section 3. Mandatory Procedures for All Other Claims. Any Bound Party having a claim (the "Claimant") against any other Bound Party (the "Respondent"), other than a Claim exempted from this provision by Section 2 above, shall not file suit in any court or initiate any proceeding before any administrative tribunal seeking redress or resolution of such Claim until it has complied with the following procedures:

(a) Notice. The Claimant shall notify each Respondent in writing of the Claim (the "Notice"), stating plainly and concisely:

(1) the nature of the Claim, including date, time, location, persons involved, Respondent's role in the Claim and the provisions of this Declaration, the Bylaws, the Rules, the Articles of Incorporation or other authority out of which the Claim arises;

(2) the basis of the Claim, i.e., the provision of the Declaration, Bylaws, Rules, or Articles of Incorporation triggered by the Claim;

(3) what Claimant wishes to resolve the Claim by mutual agreement with Respondent, and is willing to meet in person with Respondent at a mutually agreeable time and place to discuss in good faith ways to resolve the Claim.

(b) Negotiation.

(1) Each Claimant and Respondent (the "Parties") shall make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good faith negotiation.

(2) Upon receipt of a written request from any Party, accompanied by a copy of the Notice, the Board may appoint a representative to assist the Parties in resolving the dispute by negotiation, if in its discretion it believes its efforts will be beneficial to the Parties and to the welfare of the community.

(c) Mediation.

(1) If the Parties do not resolve the Claim through negotiation within thirty (30) days of the date of the Notice (or within such other period as may be agreed upon by the Parties) (the "Termination of Negotiations"), Claimant shall have an additional thirty (30) days to submit the Claim to mediation under a recognized mediation program in the County of Maui providing mediation services which the Parties may mutually agree upon.

(2) If Claimant does not submit the Claim to mediation within thirty (30) days after the Termination of Negotiations, Claimant shall be deemed to have waived the Claim, and Respondent shall be released and discharged from any and all liability to Claimant on account of such Claim; provided, that nothing herein shall release or discharge Respondent from any liability to Persons not a party to the foregoing proceedings.

(d) Final and Binding Arbitration.

(1) If the Parties do not resolve the Claim through mediation, the Claimant shall have thirty (30) days following the termination of the mediation proceedings (as determined by the mediator) (the "Termination of Mediation") to submit the Claim to

arbitration in accordance with the Arbitration of Disputes of the American Arbitration Association or similar association, or the Claim shall be deemed abandoned, and Respondent shall be released and discharged from any and all liability to Claimant arising out of such Claim; provided, that nothing herein shall release or discharge Respondent from any liability to Persons not a Party to the foregoing proceedings.

(2) This subsection (d) is an agreement of the Bound Parties to arbitrate all Claims except Exempt Claims and is specifically enforceable under the applicable arbitration law of the State of Hawaii. The arbitration aware (the "Award") shall be final and binding, and judgment may be entered upon it in any court of competent jurisdiction to the fullest extent permitted under the laws of the State of Hawaii.

Section 4. Allocation of Costs of Resolving Claims.

(a) Each Party shall bear all of its own costs incurred prior to and during the proceedings described in Section 3(a), (b) and (c) above, including the fees of its attorney or other representative. Each Party shall share equally all charges rendered by the mediator(s) pursuant to Section 3(c) above.

(b) Each Party shall bear all of its own costs (including the fees of its attorney or other representative) incurred after the Termination of Mediation under Section 3(c) above and shall share equally in the costs of conducting the arbitration proceeding (collectively the "Post Mediation Costs"), except as otherwise provided in this subsection; provided, however, that if the Claim is rejected in whole or in part, the Claimant shall pay all Post Mediation Costs, including the costs incurred by the Respondent.

Section 5. Enforcement of Resolution. If the Parties agree to resolve any Claim through negotiation or mediation in accordance with Section 3 above and any Party thereafter fails to abide by the terms of such Agreement, or if any Parties agree to accept the Award, then any other Party may file suit or initiate administrative proceedings to enforce such agreement or Award without the need to again comply with the procedures set forth in Section 3 above. In such event, the Party taking action to enforce the agreement or Award shall be entitled to recover from the non-complying Party (or if more than one non-complying Party, from any one (1) Party or from all such Parties pro rata) all costs incurred in enforcing such agreement or Award, including without limitation, attorneys' fees and court costs.

Article XVII
GENERAL PROVISIONS

Section 1. Term. The covenants and restrictions of this Declaration shall run with and bind the Properties, and shall inure to the benefit of and shall be enforceable by the Association or

the Owner of any property subject to this Declaration, their respective legal representatives, heirs, successors, and assigns, for a term of thirty (30) years from the recordation date of this Declaration, after which time said covenants and restrictions shall be automatically extended for successive periods of ten (10) years, unless an instrument in writing, signed by a majority of the then Owners, has been recorded within the year preceding the beginning of each successive period of ten (10) years, agreeing to change said covenants and restrictions, in whole or in part, or to terminate the same, in which case this Declaration shall be modified or terminated as specified therein.

Section 2. Amendment.

(a) By Declarant. So long as the Class "B" Membership exists the Declarant may amend this Declaration for any purpose. Thereafter, the Declarant may unilaterally amend this Declaration at any time and from time to time as otherwise specifically authorized by this Declaration, or if such amendment is (i) necessary to bring any provision hereof into compliance with any applicable governmental statutes, rule or regulation, or judicial determination; (ii) necessary to enable any reputable title insurance company to issue title insurance coverage on the Units; (iii) required by an institutional or governmental lender or purchaser of mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to enable such lender or purchaser to make or purchase mortgage loans on the Units; or (iv) necessary to enable any governmental agency or reputable private insurance company to insure mortgage loans on the Units. Further, so long as it still owns property described in Exhibits "A" or "B" for development as part of the Properties, the Declarant may unilaterally amend for other purposes, provided the amendment has no material adverse effect upon any right of any Owner.

(b) By Owners. Except as otherwise specifically provided above or elsewhere in this Declaration, this Declaration may be amended only by the affirmative vote or written consent, or any combination thereof, of the Owners representing seventy-five percent (75%) of the total Class "A" votes in the Association, including seventy-five percent (75%) of the Class "A" votes held by Members other than the Declarant, and the consent of the Class "B" Member, so long as such membership exists. In addition, the approval requirements set forth in Article XV hereof shall be met, if applicable. Notwithstanding the above, the percentage of votes necessary to amend a specific clause shall not be less than the prescribed percentage of affirmative votes required for action to be taken under that clause.

No amendment may remove, revoke, or modify any right or privilege of Declarant without the written consent of Declarant or the assignee of such right or privilege.

(c) Validity and Effective Date of Amendments. Amendments to this Declaration shall become effective upon recordation in the State of Hawaii Bureau of Conveyances and/or the Office of the Assistant Registrar of the Land Court, as appropriate, unless a later effective date is specified therein. Any procedural challenge to an amendment must be made within six (6) months of its recordation or such amendment shall be presumed to have been validly adopted. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration. If an Owner consents to any amendment to this Declaration or the Bylaws, it will be conclusively presumed that such Owner has the authority so to consent and no contrary provision in any Mortgage or contract between the Owner and a third party will affect the validity of such amendment.

Section 3. Severability. Invalidation of provision or portion of a provision of this Declaration by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

Section 4. Perpetuities. If any of the covenants, conditions, restrictions, or other provisions of this Declaration shall be unlawful, void, or voidable for violation of the rule against perpetuities, then such provisions shall continue only until twenty-one (21) years after the death of the last survivor of the now living descendants of Elizabeth II, Queen of England.

Section 5. Adjoining Properties. Each Owner understands and agrees that his/her Unit is adjacent to other property which is not owned by Declarant. Each Owner understands and agrees that Declarant makes no representations or warranties as to the development or use of the adjoining or neighboring properties and the impact of such development or use may have on his/her Unit and the Properties. Each Owner covenants for itself, its heirs, successors, successors-in-title and assigns that it shall assume all risks associated with such location, including, but not limited to, the risk of nuisances, hazards, property damage or personal injury arising directly or indirectly from the development or use of the adjoining properties and shall indemnify and hold harmless the Association and the Declarant, from any liability, claims, or expenses, including attorney's fees, arising from such property damage or personal injury.

Section 6. Litigation. No judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by a vote of seventy-five percent (75%) of the Owners. This Section shall not apply, however, to (i) actions brought by the Association to enforce the provisions of this Declaration (including, without limitation, the foreclosure of liens), (ii) the imposition and collection of assessments as provided in Article XI hereof, (iii) proceedings involving challenges to ad valorem taxation, or (iv) counterclaims brought by the Association in proceedings instituted against it. This Section shall not be amended unless such amendment is made by the Declarant

or is approved by the percentage votes, and pursuant to the same procedures, necessary to institute proceedings as provided above.

Section 7. Cumulative Effect: Conflict. The covenants, restrictions, and provisions of this Declaration shall be cumulative with those of any Subassociation and the Association may, but shall not be required to, enforce the covenants, conditions and provisions of any Subassociation; provided, however, in the event of conflict between or among such covenants and restrictions, and provisions of any articles of incorporation, bylaws, rules and regulations, policies, or practices adopted or carried out pursuant thereto, those of any Subassociation shall be subject and subordinate to those of the Association. The foregoing priorities shall apply, but not be limited to, the liens for assessments created in favor of the Association.

Section 8. Compliance. Every Owner and occupant of any Unit shall comply with all lawful provisions of this Declaration, the Bylaws, and the rules and regulations of the Association. Failure to comply shall be grounds for an action to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the Association or, in a proper case, by any aggrieved Unit Owner or Owners. In addition, the Association, may avail itself of any and all remedies provided in this Declaration or the Bylaws.

Section 9. Notice of Sale or Transfer of Title. In the event that any Owner desires to sell or otherwise transfer title to his or her Unit, such Owner shall give the Board of Directors at least seven days prior written notice of the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board of Directors may reasonably require. The transferor shall be jointly and severally responsible with the transferee for all obligations of the Owner of the Unit coming due hereunder prior to the date upon which such notice is received by the Board of Directors, including assessment obligations, notwithstanding the transfer of title to the Unit.

Section 10. Ownership of Unit by the United States or the State of Hawaii. Declarant shall have the right to exempt the United States, the State of Hawaii, or County of Maui, or any related entity, as the Owner of a Unit, from any of the restrictions contained in this Declaration, or the Bylaws, or rules and regulations of the Association if such exemption is required by the United States, the State of Hawaii, County of Maui or any related entity.

MAUI LANI

MASTER DESIGN GUIDELINES (Single Family Homes)

September 2010

The Design Guidelines for Maui Lani have been carefully developed to assist you, as an owner of a property in this unique, master-planned residential community, in designing your home. It has been the experience of all successful master-planned residential communities that stringent architectural design guidelines promote a consistent and harmonious living experience for all Homeowners.

These Design Guidelines are only a part of the documents that relate to owning property in Maui Lani. Owners shall familiarize themselves with all the documents related to property ownership, including but not limited to, the Public Offering Statement; the Maui Lani Declaration of Covenants, Conditions and Restrictions (the "Declaration"); the By-Laws and Policies of the Maui Lani Community Association; and the Maui Lani Project District Ordinance. Each development within Maui Lani may have Supplementary Documents, Conditions, Restrictions, Policies, and Design Guidelines and Owners shall read these documents carefully.

As used herein, "Homeowners' Association" shall mean the Association of Homeowners for the subdivision in which your Lot is located, "Association" shall refer to the Maui Lani Community Association; DRC shall mean the Maui Lani Design Review Committee, "Board" shall mean the Maui Lani Community Association Board of Directors and "Declarant" shall refer to Maui Lani Partners and its successors and assigns.

These Design Guidelines should be used as an information source for you, your architect, builder and real estate agent. These guidelines include information regarding the application and approval process, minimum building standards, architectural design criteria and restrictions.

These Design Guidelines shall apply to all single family residential lots in the Maui Lani Community and all improvements to such lots.

DESIGN PROCESS

1. All new construction, and/or exterior alterations (including re-painting) to your property (e.g. house, garages, extensions, additions, walls, hardscape, landscaping, fences, pools, gazebos, lanais, patios, play equipment, etc.) must be submitted for review and must be approved by the DRC prior to being built and before you submit plans to the County of Maui, if required, for building permits.

EXHIBIT B

2. Architectural plans are required, and they shall be drawn to a minimum 1/8" scale, shall be prepared or reviewed and stamped by an architect licensed to do business in the State of Hawaii.
3. Grading plans are required for ground altering work and they shall be prepared by a licensed engineer.
4. Landscape plans are required, and they shall be drawn to a minimum 1/8" scale. They shall also be prepared and stamped by a licensed landscape architect or a licensed landscape contractor prior to submittal to the DRC, unless otherwise determined by the DRC.
5. The use of architects, landscape architects, contractors and engineers currently licensed in the State of Hawaii is required, unless otherwise determined by the DRC.
6. Due to ever changing construction methods and materials, the DRC has the authority to make amendments, additions, clarifications and deletions to these Design Guidelines.
7. If deemed appropriate by the members of the DRC, it may retain a licensed architect to review the submittals for compliance with these guidelines and to assure that an appropriate architectural character and aesthetic appearance is maintained. The DRC may also adjust the design review fee.

DESIGN STANDARDS

1. HOUSE DESIGN.
   1.1. Unless otherwise approved by the DRC, the minimum living area for a house shall be 1,100 square feet, except for those Lots located on the golf course which shall be a minimum of 1,200 square feet. "Ohana" dwellings, cottages, or rental units with separate kitchens and/or separate entrances are not permitted.
   1.2. The exterior body finish material of the house and all accessory structures excluding walls and fences shall be:
      1.2.1. Wood.
      1.2.2. Hardi-plank lap siding or equivalent.
      1.2.3. Masonite or equivalent.
      1.2.4. Stucco, plaster, or CMU/hollow block as long as the blocks are textured in stucco or plaster finish.
      1.2.5. Other material as approved by the DRC.

1.2.6. No plain-surfaced plywood, vinyl siding, metal siding, split-faced CMU block, decorative "cut-out" CMU block, smooth CMU/hollow blocks or other smooth siding material will be allowed. Split-faced CMU block with integral color complimentary to the existing dwelling shall be allowed for storage sheds on lots not adjacent to the golf course.

1.3. Exterior paint colors shall be selected from a color chart supplied by the DRC or in accordance with the following guidelines:

1.3.1. Subtle and muted earth tones are encouraged.

1.3.2. The base/trim colors and the roof color shall be complimentary.

1.3.3. Color requests shall be submitted on a minimum 12" x 12" brush out or larger if determined by the DRC.

1.3.4. Colors similar to approved colors found on the approved color chart may also be considered by the DRC. Other color palettes prepared by a licensed design professional may also be considered by the DRC.

1.3.5. All exterior metal, including gutters, flashing, sheet metal and vents shall be finished to match or complement the house/roof color.

1.4. The maximum percentage of visible light reflectance (exterior) for window tinting shall not exceed 21%. Reflective treatments using gold, silver, bronze, black or metallic are prohibited. Product selections and manufacture's specification sheet must be submitted for approval prior to their application.

1.5. It is highly recommended that the architectural character of all buildings promote a contemporary Hawaiian style featuring generous roof overhangs, ample windows, front porches, lanais and trellises. Pole houses, geodesic domes, cedar "log style" homes, structures with "A" frame roof lines, factory-built structures which have been pre-assembled or pre-cut for assembly and other architectural styles, which in the opinion of the DRC are not compatible with the Maui Lani community, are prohibited. Shed roofs shall be limited to accessory rooms or structures (e.g. covered lanais, sunrooms, or equipment enclosures), only as approved by the DRC.

1.6. Two story homes shall be designed in a fashion that the roof lines and exterior details, including lanais, trellises and staggering wall planes, both articulate the exterior elevations and separate the floor levels to avoid a monotonous, "box-like" appearance. Large two-story dwellings shall be designed to have their second floor either stepped back or cantilevered over

the first floor's exterior wall plate at the front elevation, and additionally, at the rear elevation for properties adjacent to the golf course.

2. GARAGE AND DRIVEWAY.
   2.1. All houses must have an enclosed garage.
   2.2. All garages must be set back from the front property line at least (20) twenty feet. For homes along the golf course, the house structure, including lanais, shall be setback a minimum of (5) five feet from the top of slope.
   2.3. All driveways and aprons must be paved with concrete. Special concrete treatments such as stamped concrete and grass-crete are also acceptable for driveways.
3. ROOF DESIGN (House and Accessory Structures).
   3.1. At least 85% of the total roof area of the house shall have sloped roofs equal to or greater than 4:12. Mansard roofs are not permitted.
   3.2. Roofing material for the sloped roofs shall be:
      3.2.1. Clay, concrete or ceramic tile.
      3.2.2. Wood shingles (No. 1 Blue Label) or wood shakes.
      3.2.3. Asphalt shingles.
      3.2.4. Other material as approved by the DRC.
      3.2.5. No metal roofing, plywood, plastic or rubber membrane is allowed.
      3.2.6. Roofing material shall be installed per manufacturer's specifications and standards.
   3.3. Skylights are to be designed as an integral part of the roofing system and shall be of non-reflective color or tint.
4. LOT GRADING AND DRAINAGE.
   4.1. Lot grading will be limited to excavation not to exceed (3) three feet and embankment not to exceed (2) two feet at any place upon the lot. If special circumstances dictate, the DRC may grant a variance to these limitations.
   4.2. The design for the lot drainage and drywells shall be prepared by an architect or civil engineer licensed in the State of Hawaii. Drywells may be required, as determined by the DRC. There shall be no interference with the established surface drainage pattern established over any lot which affects any other lot, the common area or any Association property. There shall be no additional drainage directed toward the golf course.
   4.3. No activities shall be undertaken on any slope banks which may damage or interfere with

established slope ratios, create erosion or sliding problems, or which may change the direction of flow of drainage channels or obstruct or retard the flow of water through drainage channels.

5. SOLAR.

5.1. No mechanical equipment, other than solar heating or solar electricity (e.g. photovoltaic) panels shall be placed upon the roof.

5.2. The installation of solar heating and solar electricity (photovoltaic) panels shall be limited to the roof and approved structures, and as much as practical, be hidden from view by either incorporating them into a flat roof section or laying them on a parallel plane flush-mounted to a sloped roof. The panels shall be installed along the roof plane which will allow the maximum southerly exposure, while minimizing panel height.

5.3. Solar heating and solar electricity (photovoltaic) panels shall be installed, maintained, repaired, replaced and operated in complete conformity with the required application and plans, as submitted to the DRC, and shall be in compliance with any conditions of DRC approval, regardless of whether or not the current lot owner caused it to be installed.

5.4. The solar panels shall not be installed unless they meet all applicable standards and requirements imposed by state and local permitting authorities, and all applicable safety, performance and reflectivity standards established by industry standards and accredited testing laboratories such as Underwriters Laboratories.

5.5. All exterior metal and conduit, including flashing, sheet metal and vents used for the panels shall be finished to match or complement the house/roof color. All wires shall be underground, or hidden or screened from view as detailed above from the street, golf course and adjacent properties. The DRC may approve pre-finished exterior metal, if deemed to be complimentary to the house and/or roof color.

5.6. Solar panels must be installed by an installer holding all licenses required by state law and local ordinances for installation of solar heating or electric panels.

5.7. The application shall include or be accompanied by the following: a scaled plan, minimum 1/8 inch scale, detailing location (roof elevations), method of installation, mounting rack design, and routing of the brackets and cabling and conduit serving it. The identity of the manufacturer and the model designation shall be made a part of the application. Photographs and/or product brochures and other similarly detailed graphical representations of the solar system to be installed shall be made available to the DRC. The contractor is required to provide a

completed contractor's registration form which includes the license number, name, address and phone number of the contractor. Copies of the permits and any stamped approved plans as submitted to the County shall be provided as part of the application and/or approval process.

5.8. Written notice shall be provided by the owner to the DRC upon completion of the installation.

5.9. The Association will not be responsible for the removal or trimming of trees, or the causing of the removal or trimming of trees which may block sunlight to any solar device or panels.

6. SATELLITE DISH.

6.1. Installation of satellite dishes is restricted to a maximum of (2) two dishes with a maximum diameter of (1) one meter, unless otherwise provided for by the Public Utilities Commission's rules and regulations.

6.2. The owner shall submit an application to the DRC with the type and size of the dish, name of the service provider, type of service, and confirm that the dish is for the exclusive use of the unit resident.

6.3. The owner shall provide plans showing the location and manner of installation, including cables, which shall not be visible from adjacent units or the golf course.

6.4. The owner shall provide certification from the provider that the proposed location is the most inconspicuous location available.

6.5. If required for best reception, as determined by a statement from the service provider, ground mounted satellite dishes are required to be screened from view of the street, golf course, and adjacent properties with materials that will not interfere with reception.

6.6. The dishes shall be maintained in good condition and repair, both with regard to function and appearance, regardless of whether or not the current lot owner caused it to be installed.

7. WALLS AND FENCES.

7.1. All residential walls and/or fences shall not exceed a maximum of (6) six feet measured from the bottom of the exposed wall including any exposed footing, unless a unique condition is approved by the DRC. For retaining conditions over (6) six feet in height, the wall system must be designed such that each wall or wall/fence combination does not exceed a maximum of six feet and shall be terraced a minimum of (4) four feet between walls. The terrace shall be landscaped to diminish the height impact of the terraced wall. Walls retaining more then (3) three feet of soil require plans to be submitted to the DRC that are prepared and stamped by a licensed structural engineer. A copy of the building permit issued by the County of Maui is

also required.

7.2. Retaining walls, privacy walls, and fences, that are up to three (3) feet in height and are located at front property line adjacent to the street (side property lines adjacent to the street are specifically excluded), shall be setback two (2) feet from the street frontage property line. Retaining walls, privacy walls, and fences, that are over three (3) feet in height and are located at property lines adjacent to the street are required to be setback four (4) feet from the street frontage property line. Lots with less than 4,000 square feet are exempt from the setback. For the purpose of this guideline, no setbacks shall be required for walls or fences adjacent to alley ways or other private access easements.

7.3. Property owners that share a property boundary shall coordinate installation of walls and fences with adjacent properties, such that they will conform to these guidelines.

7.4. All walls or fences shall be constructed of new materials. Approved wall and fence materials are as follows:

7.4.1. Rock walls.

7.4.2. CMU with stucco or plaster finish on both sides of the wall.

7.4.3. Double (2) sided split faced block for non-retaining walls on boundary lines not adjacent to the golf course.

7.4.4. Split-faced block, keystone, or anchor blocks for retaining walls on boundary lines not adjacent to the golf course. The exposed flat side of the block shall not exceed ½ of the block height

7.4.5. Redwood or cedar fencing.

7.4.6. Aluminum or wrought iron fencing, subject to the approval of the style and color by the DRC.

7.4.7. Vinyl fencing.

7.4.8. Other material approved by the DRC.

7.4.9. Chain link fencing is prohibited.

7.4.10. For lot boundaries adjacent to the golf course, the approved fence material is a 4' high black, aluminum fencing manufactured by Ameristar, "Majestic" style, or as specified by the DRC. The fence may be installed on a one-foot perimeter wall constructed of an approved material. The fence shall be located on the top of the slope of the finished lot pad or within (3) three feet of the top of slope, in accordance with these Design Guidelines

and as shown in "Exhibit B ". Except for the (4) four foot high black aluminum fencing and perimeter walls, as described above, no additional fences or walls shall be built along the boundary line adjacent to the golf course.

8. LANDSCAPE.

8.1. To ensure the neighborhood is attractive and livable, the installation of landscaping of all homes must be started within (90) ninety days from the completion of the house and completed within (120) one hundred twenty days. The landscape area within the street right-of-way adjacent to the property line shall be landscaped and maintained by the Homeowner. During the interim period prior to landscape installation, the Owner shall take all reasonable steps to minimize dust nuisance to adjacent property owners. A minimum of 50% of the unimproved portion of the lot (i.e. lot minus house pad, original driveway plan, slope bank adjacent to the golf course, and any approved synthetic lawn area) shall be landscaped with lawn, ground cover or other plant materials. The DRC may approve additional paved areas in excess of the above limitation if it is determined that extraordinary circumstances require the accommodation of additional parking on the property.

8.2. Synthetic lawn material may be considered by the DRC for approval along the sides and rear of the property. Upon request, the DRC shall provide specific information on the allowed location of the synthetic lawn, as well as, minimum material specifications, warranties, and maintenance requirements. The applicant shall use this information to prepare and submit a design review application.

8.3. Please take special notice that due to the hybrid grasses on the golf course fairways and greens, the species of grass commonly known as Seashore Paspalum is specifically prohibited from any lawns at Maui Lani. In addition, other plant and tree types may be restricted from the community if determined by the DRC or Board or the State of Hawaii to be invasive or a nuisance to adjacent properties and their owners.

8.4. Any lot remaining vacant for over (60) sixty days shall be maintained in a neat appearance with appropriate measures taken to control dust and to stabilize the lot pad and slope with temporary irrigation and grass, groundcover, and/or approved gravel products on flat lot pads with a silt fence to minimize visibility and weed and dust nuisance to adjacent lots, streets and common areas.

8.5. For those lots that have boundaries adjacent to the golf course, there are design and use

regulations that have been developed to create a natural blending of the home-sites with the golf course fairways.

8.5.1. There shall be no alterations to the natural slope bank, including improvements such as fences, walls, terracing, grading or gardens.

8.5.2. The DRC, in coordination with the golf course, has approved a grass mixture of "Rye" and "Buffel Grass" to maintain the 'Links Style' of the course. One of the characteristics of a links course is its natural landscape features. The natural landscape features at the golf course are Kiawe trees and natural grasses. Aside from the natural appearance, these grasses will retain soil and sand while being environmentally sensitive to water demands.

8.5.3. In certain cases, the golf course may grant a landscape maintenance easement to the Homeowners' Association for the subdivision to allow the Association to maintain, water, plant and re-plant the slope banks within the subdivision to create an attractive appearance compatible with the golf course overall design.

9. SWIMMING POOLS, SPAS AND HOT TUBS.

9.1. Swimming pools, hot tubs, spas and water features must be set back a minimum of (5) five feet from the top of the slope bank and fence for those lots adjacent the golf course. In addition, these improvements shall be kept a minimum of (15) fifteen feet from the front property line. Special care should be taken in designing and locating these improvements so they do not damage the slope bank and they take into account errant golf balls from the golf course. Aboveground swimming pools are prohibited with the exception of small wading pools that are screened from view from adjacent properties, the golf course and roadway.

10. MECHANICAL EQUIPMENT, AIR CONDITIONERS, TANKS, UTILITIES, REFUSE RECEPTACLES.

10.1. All refuse receptacles and mechanical equipment, including pool and spa equipment, should be located adjacent to the house structure or whenever practical, as determined by the DRC, within the buildable area (not in the setbacks), and screened from view. The screening material shall be landscaping, walls or fences which are compatible in appearance and color with the main structure.

10.2. Window-mounted air conditioners are prohibited.

10.3. All utilities, wires and conduit shall be underground and propane gas tanks shall be hidden or screened from view from the street and golf course.

10.4. Screening material for the purpose of these documents shall be landscaping material, exterior finish body material, or fencing which is compatible in appearance and color with the main structure and shall screen the item from view of the street and adjacent properties.

11. STORAGE, KENNELS, MISCELLANEOUS ACCESSORY STRUCTURES.

11.1. Pre-fabricated metal or plastic storage sheds are prohibited. However, plastic storage boxes are permitted provided they do not exceed (3) three feet in height and (4) four feet in length, are screened from view, and are kept adjacent to the house structure.

11.2. Storage sheds, constructed by a licensed contractor, shall have a maximum height of six feet measured from the foundation to the top wall plate and a maximum area of 80 square feet. Storage sheds with a maximum area of 36 square feet and a maximum height of six feet measured from the foundation to the top wall plate may be constructed by an Owner Builder. Sheds shall be located within the buildable area whenever practical, as determined by the DRC. The design and materials of the storage shed shall be complimentary to the house design and materials. Additional information on acceptable building materials can be found in **Section 1. House Design**.

11.3. The maximum roof pitch allowed shall be 5:12 and the minimum roof pitch allowed shall be 2:12. The roof must be complimentary in color and material type to the roof of the existing dwelling.

11.4. The storage shed must include a concrete or post and pier foundation for proper structural integrity.

11.5. All electrical wiring to the shed must be underground and installed by a licensed electrician in accordance with County Code.

11.6. No plumbing is allowed with the exception of an exterior hose bib.

11.7. Building permits shall be required in compliance with County Code

11.8. Other accessory structures such as children's play equipment shall have a maximum height of eight feet and shall be located a minimum of (5) five feet away from the property boundaries. The structures shall be maintained in good condition and shall be residential in character and size.

11.9. Dog kennels shall be located in the backyard only, and a site plan shall be submitted to the DRC showing the location, size and materials to be used for the kennel. Construction plans shall be submitted, as may be required by the DRC. The DRC may require setbacks

when the proposed kennel is adjacent to common areas and the golf course.

11.9.1. The dog kennel shall be appropriately-sized and designed for both the health of the dog, as well as the available space in the backyard, but the kennel area shall not exceed 50 square feet. If the DRC determines, that the backyard has inadequate space for an appropriate-sized kennel, then the applicant may be advised to consider a fenced yard.

11.9.2. Kennels shall be constructed of one or more of the approved materials

11.9.2.1. 8-gauge to 11.5-gauge chain link fabric

11.9.2.2. 8-gauge or 10-gauge welded wire mesh with powder coat finish

11.9.2.3. Sunbrella Fabric or similar material may be used for sun and weather protection. The DRC may consider sunblock covers integral to the design of the kennel and installed flat with the top of the kennel wall. The use of "blue tarps" or polyethylene coated nylon weave is prohibited, unless otherwise determined by the DRC.

11.9.3. A concrete foundation shall be constructed for the kennel.

11.9.4. All kennel construction shall be properly maintained. Rusted or significantly bent wire or metal shall be replaced or repaired immediately. Any fabric awning improvements with tears or severe fading shall be replaced immediately.

11.9.5. Kennels shall be screened from view, as much as reasonably possible. Proposed screening materials may include fence, walls, landscaping, or lattice.

12. POSTAL FACILITIES.

12.1. The DRC may provide a specification sheet for the design and construction of mailboxes. The US Postal Service has requirements regarding postal box grouping which must be followed. All Homeowners are responsible for coordinating installation of the mailboxes with the adjacent property owners.

13. RECREATIONAL VEHICLES.

13.1. Boats, trailers, and other vehicles shall not be parked in any portion of a backyard, side yard or front yard of a lot except as provided in the following guidelines.

13.1.1. Boats, trailers and other similar recreational vehicles may be parked in a garage, carport, driveway, or other paved areas of the front yard or side yard of a lot, if the lot is a minimum of 6,000 square feet and the DRC has approved the proposed parking arrangement and any related improvements.

13.1.2. Regardless of lot size, boats, trailers, and other similar recreational vehicles are

allowed on the lot if they are parked entirely within the enclosed garage of the lot's dwelling unit.

13.2. Boats, trailers and other similar recreational vehicles shall not be visible from the golf course and shall not be parked upon any subdivision roadway lot.

14. MISCELLANEOUS.

14.1. Exterior holiday decorations shall be removed within thirty days of the event.

15. COMPLIANCE.

15.1. The lot owner shall comply with the Maui Lani Project District Ordinance and all other applicable State and County laws, rules and regulations. The lot owner and the owner's architect must field verify the lot's existing conditions prior to preparation of the design submittal documents.

15.2. During the course of construction, any damage done by the lot owner, or the lot owner's contractor on other private lots, subdivision or Association streets, sidewalks or other improvements shall be the responsibility of the lot owner who employs the contractor, and shall be immediately repaired. Temporary drainage and erosion-control measures shall be in place throughout construction.

15.3. The Association requires a damage and compliance deposit from the lot owner to ensure that this type of damage will be repaired and to ensure that construction is completed in compliance with the plans as approved by the DRC. This deposit shall be held by the Association until the construction and landscaping for the house is completed and a representative of the Association and the lot owner have inspected the premises, and any outstanding issues have been resolved.

REVIEW & APPROVAL PROCESS

The review and approval process by the DRC begins with the lot owner or their contractor submitting a complete application to the DRC office.

STEP ONE OF THE DESIGN REVIEW PROCESS

1. Submit two sets of your preliminary plans prepared by your architect. The submittal should include at a minimum:
   - 1.1. Floor plan (minimum scale 1/8").
   - 1.2. All exterior elevations (minimum scale 1/8").
   - 1.3. Roof plans.
   - 1.4. Roof material and color.
   - 1.5. Exterior wall material and colors of body and trim, including samples and brush outs.
   - 1.6. A site plan which includes:
     - 1.6.1. Building location (house, garage).
     - 1.6.2. Driveway location.
     - 1.6.3. Building and required storage square footage.
     - 1.6.4. Roof overhangs.
     - 1.6.5. Setbacks.
     - 1.6.6. Pools, spas, including equipment location and proposed screening.
     - 1.6.7. Fence and wall plans, including location, measurements, material, elevations and cross-sections..
     - 1.6.8. Utility connections and including the A/C lock rotor amperes.
     - 1.6.9. Equipment location and screening, such as A/C and gas tanks.
     - 1.6.10. Existing and proposed finished lot grades.
   - 1.7. Drainage and drywell design plan.
   - 1.8. Landscaping and irrigation plan, including landscape lighting, if any.
   - 1.9. Application and a non-refundable design review fee as determined by the DRC.
2. Submittal requirements shall be modified, as needed, to correlate with the proposed improvements. The lot owner should meet with Property Management to determine the submittal requirements prior to submittal of the application.
3. The DRC shall consider the following in providing comments and approving or rejecting the

submittal:

3.1. Compliance with the Maui Lani Master Association Declaration of Covenants, Conditions and Restrictions.

3.2. Compliance with the Homeowners' Sub-Association Declaration of Covenants, Conditions and Restrictions, if any.

3.3. Compliance with these Design Guidelines.

3.4. Compliance with the Design Guidelines of the Homeowners' Association, if any.

3.5. The proposed location and orientation of the house on the lot.

3.6. The proposed setback lines and height.

3.7. The proposed building shape and massing.

3.8. The architectural character and overall aesthetic appearance of all improvements and landscaping.

3.9. The appropriateness and aesthetic appeal of the exterior materials and colors to be used.

3.10. The completeness of the submittal documents.

3.11. Reasonable standards of the industry in the design of high-quality, architecturally consistent and aesthetically pleasing house plans, site plans and landscaping plans.

STEP TWO OF THE DESIGN REVIEW PROCESS

1. Submit two sets of plan with the revisions as required by the DRC after their initial review. The required revisions must be clouded and submitted with the "Required Revisions Form". The DRC will review the revised plans submitted and upon approval of the plans the lot owner will move to the final steps required to obtain DRC final approval.
2. Upon securing the DRC's written conditional approval of the final plans and incorporating any required revisions, the lot owner shall submit the following to the DRC prior to commencing construction:

2.1. A copy of the building permit issued by the County of Maui.

2.2. A copy of the plans as approved and stamped by the County of Maui for the building permit process. The DRC will review those plans for conformity to the approved plans on file.

2.3. Landscaping and irrigation plans if not previously submitted.

2.4. A damage and compliance bond or deposit issued in favor of the Maui Lani Community Association.

3. Upon receipt of the above items the DRC will then issue final approval with any and all appropriate conditions of approval and construction.

AUTHORITY OF THE DRC

The DRC will review and provide a written response to each step of the review process within (20) twenty business days of a complete submittal. One set of drawings for each step will be held by the DRC for their record. The Final Plans will be kept on file with the DRC and/or Association.

The DRC's final approval is valid for (1) one year from granting. If substantial work, as determined by the DRC, has not commenced or continued within that time, then plans must be re-submitted for re-approval. The DRC may approve submittals with conditions or reject submittals. Plans that require revisions must be re-submitted for review within (6) six months of the original submittal to avoid having to submit a new application and additional review fee.

All approvals and conditions of approval will be issued only in writing by the DRC. **No verbal approvals or comments will be considered as valid.**

The DRC may, in its discretion, retain a licensed architect to review the submittals for compliance with these guidelines and to assure that an appropriate architectural character and aesthetic appearance is maintained. The DRC may charge a design review fee and adjust the amount of the fee from time to time.

For exterior alteration work that the DRC deems relatively minor such as re-painting, play equipment, etc., the DRC has the authority to waive the design review fee and to make determinations on requirements related to the use of licensed professionals.

In the event that these Design Guidelines do not explicitly cover an item in a submittal, the DRC shall make its decision upon its analysis of whether such item is in compliance with the overall quality of the Maui Lani community and the intent of the existing design guidelines.

The DRC shall not be responsible for compliance with building codes or any county, state or federal regulations.

The Design Guidelines may be subject to revisions pursuant to the Association documents. It is the responsibility of the property owner to obtain the most current design and association documents

prior to commencing with the design process.

The DRC or the Board shall have the right at any time, at its sole discretion, to amend, waive, grant variances to enforce or not enforce any of the provisions and requirements herein without any liability whatsoever to any lot owner or other person. Any waiver, variance or non-enforcement shall not affect the application or enforcement of these Design Guidelines with respect to any other lots within the Maui Lani Community.

The review and /or granting of any approvals by the DRC of any item submitted to the DRC shall in no way constitute or should not be construed as a representation, warranty or agreement by the DRC, the Declarant, The Association or any of their members, Directors Officers, Employees Consultants, Agents, Successors or Assigns that such item (1) had been prepared free of defects, is of good workmanship or free of design and construction defects, (2) will result in improvements which are readily marketable or add value to the Lot (3) will result in a government entity's or any other person's approval, or (4) is in compliance with building code or other applicable legal requirements. Neither the DRC, the Declarant, The Association nor any Directors, Officers, Employees, Consultants, Members, Agents, Successors or Assigns shall be liable to any lot owner or to any other person for any damage loss or prejudice suffered or claimed on account of either the approval or rejection of the plans, drawings, specifications or of the actual construction of any improvements, pursuant to the Declaration or these Design Guidelines whether or not the decisions were defective or erroneous and/or whether or not they were in compliance with the Declaration and these Design Guidelines.

NO. 30142

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KAREN GOO, et al., Plaintiffs/Counterclaim-Defendants/Appellants/Cross-Appellees

v.

MAYOR ALAN ARAKAWA, Successor-In-Interest to Mayor Charmaine Tavares, WILLIAM SPENCE, Director of Planning, County of Maui, Successor-In-Interest to Director Jeff Hunt, County of Maui, Defendants/Cross-Claim Defendants/ Appellees/Cross-Appellants/Cross-Appellees

and

VP AND PK(ML) LLC, KCOM Corp., Defendants/Intervenor-Defendants/Cross-Claim Defendants/ Counterclaimants/ Cross-Claimants/Appellees/Cross-Appellees/Cross-Appellants

and

KILA KILA CONSTRUCTION, Defendant/Cross-Claim Defendant/Cross-Claimant

and

(JOHN G.) JOHN G'S DESIGN & CONSTRUCTION, INC., Defendant/Cross-Claimant/Cross-Claim Defendant

and

NEW SAND HILLS LLC., Defendant/Intervenor-Defendant/Counterclaimant/Cross-Claim Defendant/ Appellee/Cross-Appellee/Cross-Appellant

EXHIBIT C

and

DAVID B. MERCHANT; JOYCE TAKAHASHI; BRIAN TAKAHASHI,
Defendants/Intervenor-Defendants

and

DIANE L. REASER, et al.,
Defendants/Intervenor-Defendants/Counter-Claimants

and

HOOKAHI, LLC, SANDHILLS ESTATES COMMUNITY ASSOCIATION,
Intervenors/Appellees/Cross-Appellees/Cross-Appellants

and

CHERYL CABEBE, GERRY RIOPTA, and MELISSA RIOPTA,
Intervenor-Defendants/Appellees/Cross-Appellants

and

DOE DEFENDANTS 1-100,
Defendants/Cross-Claim Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 07-1-0258(1))

MEMORANDUM OPINION
(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

This case relates to the development of the Sandhills Estates (Sandhills Estates) and the Fairways at Maui Lani (Fairways), which are residential projects in the Maui Lani Project District on the island of Maui.

This appeal arises from the Final Judgment (Final Judgment) entered on September 30, 2009 by the Circuit Court of the Second Circuit (circuit court).[1] The Final Judgment entered

[1] The Honorable Joel E. August presided.

judgment in favor of certain remaining Plaintiffs[2] (collectively Homeowners) as to Counts I and II of the Fourth Amended Complaint for Declaratory and Injunctive Relief and Damages (Fourth Amended Complaint). Judgment on Counts I and II were entered against, among others, Defendants/Appellees/Cross-Appellants Mayor Alan Arakawa, Successor-in-Interest to Mayor Charmaine Tavares, William Spence, Director of Planning, County of Maui, Successor-in-Interest to Director Jeff Hunt,[3] and the County of Maui (collectively the County)[4]; and Intervenors/Cross-Appellants KCOM Corp., Sandhills Estates Community Association (Association), and Hookahi, LLC. The circuit court entered judgment on Counts I and II pursuant to its "Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Partial Summary Judgment" filed on December 31, 2008 (2008 Order).

All other claims in the case were dismissed. Counterclaims by Intervenors/Cross-Appellants New Sand Hills, LLC (New Sand Hills) and VP & PK (ML), LLC (VP&PK) were among the claims dismissed by the circuit court.

In this appeal, KCOM Corp., New Sand Hills, VP&PK, and the Association are represented by the same counsel. For

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[2] While the case was before the circuit court, claims by some of the plaintiffs were dismissed for various reasons. At the time Final Judgment was entered in September 2009, the remaining plaintiffs were Karen Goo, Ron Leinweber, Nancy Oshiro, Amber Torrecer-Paz, Reyn Tateyama, Larry Oshiro, Adrienne Owens, Yoshi Sakuma, Jane Sakuma, Lillian Torrecer, Clark Nakamoto, Scott Oshiro, Eric Engh, and Emily Engh.

[3] Pursuant to Rule 43(c)(1) of the Hawai'i Rules of Appellate Procedure, the names have been substituted to reflect the current parties.

[4] On July 15, 2008, the Homeowners' claims against Mayor Charmaine Tavares, Successor-in-Interest to Mayor Alan Arakawa, and Jeff Hunt, Director of Planning, County of Maui, Successor-in-Interest to Director Michael Foley were dismissed as being duplicative of the claims against the County. Nonetheless, these parties were named in the Final Judgment.

purposes of this opinion, these parties will be referred to collectively as "Developers."[5]

I. Issues Raised on Appeal

On appeal, Homeowners challenge the circuit court's April 3, 2009 "Order Granting in Part and Denying in Part Plaintiffs' Motion for Award of Attorneys' Fees and Costs" (Fees/Costs Order), asserting that the circuit court "erred in denying Homeowners' request for attorneys' fees against the County under the private attorney general doctrine."

The County, in turn, cross-appeals and challenges the circuit court's rulings regarding standing, injunctive relief, indispensable parties, the interpretation of Hawaii Revised Statutes (HRS) § 46-4, the deference to be accorded to the County's interpretation of the Maui County Code (MCC), and the grant of summary judgment for Homeowners.

The Developers also cross-appeal, collectively raising challenges to the circuit court's rulings regarding exhaustion of administrative remedies, vested rights, equitable estoppel, interpretation of a unilateral agreement, summary judgment, a laches defense, and a motion to intervene.[6]

II. Background

In Homeowners' initial Complaint filed on July 18, 2007, Homeowners asserted a total of twelve counts against the County and various entities denominated as developers or subcontractors. In Counts I and II of the Complaint, Homeowners asserted that the County, the developers, and the subcontractors of the Sandhills Estates and Fairways violated County zoning ordinances by applying a pre-1991 definition of "building height"

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[5] Hookahi, LLC dismissed its cross-appeal and is no longer party to this appeal.

[6] The Association filed a separate opening brief from a brief filed by New Sand Hills, VP&PK, and KCOM.

for the homes being built. In the subsequent counts, Homeowners alleged, *inter alia*, various claims for negligence, nuisance, emotional distress, and trespass related to the development-related activities. The Complaint sought declaratory relief, injunctive relief, and damages. Subsequently, Homeowners filed a number of amended complaints adding parties, but the substantive counts remained the same.

Over the objection of Homeowners, the circuit court granted a motion to bifurcate Counts I and II of the Complaint from the rest of the counts in the Complaint. As a result, this case proceeded only as to Counts I and II, which sought declaratory and injunctive relief related to the height restriction.

At issue is whether a pre-1991 definition of "building height" in a county ordinance applies to the Sandhills Estates and Fairways subdivisions, or whether a 1991 revised definition, contained in the MCC, applies. The 1991 definition provided a more limited height restriction and Homeowners contend it applied.

Zoning regulations are addressed in Title 19 of the MCC. MCC Chapter § 19.78, which was enacted in 1990 by Ordinance No. 1924 and Ordinance No. 1939, established the Maui Lani Project District and provides development standards. This chapter sets out the maximum building height of residential buildings as "two stories, not exceeding thirty feet[.]" MCC §§ 19.78.020(B)(1)(b)(iv); 19.78.020(B)(2)(b)(iv). However, MCC § 19.78 provides no formula for determining how the maximum height of thirty feet is to be measured.

In September 1990, the Maui Planning Commission approved a preliminary site plan, which the circuit court found constituted Phase II approval for the Maui Lani Project District. At that time, "building height" was defined, in relevant part, as "[t]he vertical distance from finished 'grade' to the highest

point of the finished roof surface . . . ." The Permanent Ordinances of the County of Maui § 8-1.2 (1971) (emphasis added). In other words, if landfill was used to raise the elevation of a lot and then a house was built, the height of the house would be measured from the new elevation or "finished grade" created by the addition of landfill.

On September 4, 1991, the County adopted Ordinance No. 2031, which revised the definition of "building height" as follows: "'Building height' means the same as 'height'" and "'[h]eight' means the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finish grade, whichever is lower." MCC § 19.04.040 (emphasis added). Under this new definition, if fill has been added, the height of the building is measured from the lower natural grade.

The County and Developers contend that the pre-1991 height definition applies to Sandhills Estates and Fairways because those subdivisions had received Phase I and Phase II project district development approval by September 18, 1990, approximately one year before the 1991 change of definition restricted building height.

The circuit court disagreed, and instead determined that the 1991 definition applied to the two subdivisions. On December 31, 2008, the court entered the 2008 Order, which provides, in relevant part:

> IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:
>
> 1. The Maui Lani Project District, as a whole, is subject to the residential height restriction as determined in 1991 and codified at Maui County Code § 19.04.040, which states that building height "means the vertical distance measured from a point on the top of a structure to a corresponding point directly below the natural or finish grade, whichever is lower."
>
> 2. Defendant, County of Maui, is enjoined from taking any action which conflicts with the Court's determination of the applicable height restriction relative to the Sandhills project and the Fairways project including,

> but not limited to, the issuance of building permits the result of which would be inconsistent with Maui County Code § 19.04.04.
>
> 3. This Order shall remain in effect until further order of the Court.

As noted, Final Judgment was entered on September 30, 2009. Homeowners, the County, and Developers filed timely appeals and cross-appeals.

On August 28, 2011, while this case was on appeal, Ordinance No. 3848 was adopted, which further amended the provisions related to "height" in MCC § 19.04.040. In particular, Ordinance No. 3848 clarified that the pre-1991 definition of "height" -- utilizing finish grade -- applied to certain development projects. Ordinance No. 3848 provides in relevant part:

> SECTION 1. Section 19.04.040, Maui County Code, pertaining to comprehensive zoning provisions, is amended by amending the definition of "height" to read as follows:
>
> ""Height" means the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finish grade, whichever is lower. For structures within projects that received site plan approval in association with a project district phase II approval, step II planned development approval, or final subdivision approval after September 4, 1991, building height shall conform to the elevation as indicated on the approved site plan, which may use finish grade to measure height. **For structures within project districts that received phase II approval prior to September 4, 1991, finish grade shall be used to determine height**."
>
> SECTION 2. New material is underscored. . . .
>
> SECTION 3. This ordinance shall take effect upon its approval and shall apply retroactively.

Ordinance No. 3848 (bold emphasis added).[7]

[7] As discussed earlier, September 4, 1991 was the date that Ordinance No. 2031 was adopted, restricting the definition of height to the lower of the natural or finished grade.

Oral argument was originally scheduled for March 30, 2011, but was continued at the request of the parties and rescheduled for September 14, 2011. Prior to the rescheduled oral argument, the parties filed a stipulation to remand, seeking to remand the case to circuit court "for further proceedings in light of passage of Maui County Ordinance 3848." The stipulation to remand was disapproved by this court without prejudice to the parties filing a proper motion or stipulation. The County thereafter filed a motion for remand or alternatively to continue the oral argument in order for the parties to participate in a mediation conference pursuant to Rule 33 of the Hawai'i Rules of Appellate Procedure (HRAP).

Oral argument was held as scheduled on September 14, 2011. The parties first argued the County's motion, which was taken under advisement. The parties then argued the merits of the issues raised on appeal.

Subsequent to oral argument, Homeowners filed a letter indicating that, due to misunderstandings of proposed settlement terms, they now opposed the motion for remand, but did not oppose an appellate conference. The County thereafter filed a Notice of Withdrawal of Motion for Remand asserting that the relief sought was now moot as far as remanding without oral argument, continuing oral argument, or holding an HRAP Rule 33 appellate conference in lieu of oral argument.

On September 20, 2011, this court referred the case to the appellate conference program. On December 15, 2011, the County submitted a report to this court advising that the parties were unable to settle the case. No other party submitted a report regarding the appellate conference.

On June 12, 2013, the parties were ordered to file supplemental briefs as to their respective positions concerning whether, in light of Ordinance No. 3848, any of the issues on

appeal are moot. Homeowners, the County, and the Developers timely filed supplemental briefs.

III. Standards of Review

A. Mootness

"It is axiomatic that mootness is an issue of subject matter jurisdiction." Hamilton ex rel. Lethem v. Lethem, 119 Hawai'i 1, 4, 193 P.3d 839, 842 (2008).

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.
>
> Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so.

Wong v. Bd. of Regents, 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980) (citations omitted).

"A case is moot if it has lost its character as a present, live controversy[.]" Kona Old Hawaiian Trails Grp. v. Lyman, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987) (citation and internal quotation mark omitted). "Put another way, the suit must remain alive throughout the course of litigation to the moment of final appellate disposition." Wong, 62 Haw. at 394, 616 P.2d at 203. "The doctrine [of mootness] seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal-adverse interest and effective remedy-have been compromised." Id. at 394, 616 P.2d at 203-204.

Our courts, however, recognize three exceptions to the mootness doctrine: (1) the public interest exception; (2) the "capable of repetition[,] yet evading review" exception; and (3) the collateral consequences exception. State v. Kiese, 126 Hawai'i 494, 508-09, 273 P.3d 1180, 1194-95 (2012).

In determining whether the public interest exception applies, we look "to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." Hamilton, 119 Hawai'i at 6-7, 193 P.3d at 844-45 (citation and internal quotation mark omitted).

Courts also recognize an exception to the mootness doctrine where the legal issues are capable of repetition, yet evade review. Okada Trucking Co. v. Bd. of Water Supply, 99 Hawai'i 191, 196, 53 P.3d 799, 804 (2002).

> "The phrase, 'capable of repetition, yet evading review,' means that 'a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit[,]'" [In re Thomas, 73 Haw. 223,] 226-27, 832 P.2d [253], 255 [(1992)] (quoting *Life of the Land v. Burns*, 59 Haw. 244, 251, 580 P.2d 405, 409-10 (1978)) (citation omitted).

Kaho'ohanohano v. State, 114 Hawai'i 302, 333 n.23, 162 P.3d 696, 727 n.23 (2007).

Finally, the courts recognize the "collateral consequences" exception to the mootness doctrine. Hamilton, 119 Hawai'i at 7-8, 193 P.3d at 845-46. The collateral consequences exception arises when a party's reputation or legal record would be harmed as the result of a judicial action otherwise unreviewable for mootness. Id.

To invoke the collateral consequences exception:

> [T]he litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment, as in this case, the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can

> afford the litigant some practical relief in the future.
>
> [*Hamilton ex rel. Lethem v. Lethem,*] 119 Hawai'i [1,] 8, 193 P.3d [839,] 846, citing *Putman v. Kennedy*, 279 Conn. 162, 169, 900 A.2d 1256, 1262 (2006) (emphasis omitted).

Kiese, 126 Hawai'i at 509 n.11, 273 P.3d at 1195 n.11.

B. Attorneys' Fees

"The trial court's grant or denial of attorney's fees and costs is reviewed under the abuse of discretion standard." Sierra Club v. Dep't of Transp., 120 Hawai'i 181, 197, 202 P.3d 1226, 1242 (2009) (Sierra Club II) (citations, internal quotation marks and brackets omitted). "The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. In other words, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Maui Tomorrow v. State of Haw., Bd. of Land & Natural Res., 110 Hawai'i 234, 242, 131 P.3d 517, 525 (2006) (internal quotation marks, citations and brackets omitted).

The supreme court recently held that "[w]e retain the abuse of discretion standard, noting however that we review de novo whether the trial court disregarded rules or principles of law that arise in deciding whether or not a party satisfies the three factors of the private attorney general doctrine." Honolulu Const. and Draying Co. v. State of Haw., Dept. of Land & Natural Res., No. SCWC-30484, 2013 WL 4042662, at 7 (Haw. August 9, 2013).

IV. Discussion

A. Mootness

Ordinance No. 3848 settles the question of whether the pre-1991 definition of height or the more restrictive 1991 definition of height applies to the Sandhills Estates and the

Fairways subdivisions within the Maui Lani Project District. The Maui Lani Project District received Phase II approval on September 20, 1990, almost a year prior to September 4, 1991 (the date referenced in Ordinance No. 3848). Thus, pursuant to Ordinance No. 3848, "finish grade shall be used to determine height[,]" including as to the Sandhill Estates and Fairways subdivisions which are part of the Maui Lani Project District.

Because the definition of height applicable to the Sandhills Estate and the Fairways is settled, there is no present or live controversy between the parties on that issue and it is moot. Kona Old, 69 Haw. at 87, 734 P.2d at 165.

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Wong, 62 Haw. at 394-95, 616 P.2d at 204.

Homeowners do not dispute that the effect of the enactment of Ordinance No. 3848 is to render moot the question of height in this case. Indeed, they state in their supplemental briefing that Ordinance No. 3848 "provides all of the relief sought on appeal by the County and the [D]evelopers, thus rendering those appeals moot." Homeowners contend, however, that their appeal of the circuit court's denial of their request for attorney's fees under the private attorney general doctrine remains.

Consistent with the Homeowners, the County asserts that the intervening legislation, Ordinance No. 3848, resolved the issue in controversy by clarifying which height definition was applicable to the two subject subdivisions. As stated by the County, "Ordinance [No.] 3848 amended the height requirement at issue so that the pre-1991 height requirements allowing height to be measured based on finish grade are now unquestionably the proper height requirements for the [Maui Lani Project District]."

Thus, contends the County, the parties no longer have adverse interests and the appeal is moot. Contrary to the Homeowners' assertion, however, the County contends that the Homeowners' claim for attorney's fees has also been rendered moot.

The Developers, in turn, maintain that "the issues on appeal are not moot because reversal of the 2008 Order is critical to Developers." According to the Developers, the County refuses to issue building permits until the 2008 Order is set aside due to the conflict between the height definition in Ordinance No. 3848 and the height definition in the 2008 Order. Developers more specifically contend the appeal is not moot for the following reasons:

> (1) the County's unwillingness to implement the new definition of "height", which conflicts with the definition of height used in the 2008 Order; (2) the susceptibility of Developers to future lawsuits being filed by other lot owners based on the interpretation of the law--as interpreted in the 2008 Order--at the time of the sale; and (3) the availability of reversal and/or vacatur of the 2008 Order as an effective form of relief for Developers and the County.

Furthermore, the Developers contend that "questions of [the] development agreement's application, jurisdiction, standing, and statutory interpretation should be addressed even if the Court determines that there is no live controversy, because those issues clearly fall within the 'public interest' exception" to the mootness doctrine.

In Lathop v. Sakatani, 111 Hawai'i 307, 141 P.3d 480 (2006), the Hawai'i Supreme Court dismissed an appeal as moot because the question of whether the circuit court erred when it expunged a *lis pendens* on certain property was mooted by the sale of the property during the pendency of the appeal. Id. at 310, 141 P.3d at 483.

Likewise, in Wong, the supreme court held that the appellant's claims for injunctive and declaratory relief were no longer viable because the relief the appellant requested - that

the appellee comply with the Hawaii Administrative Procedure Act - had been accomplished. 62 Haw. at 396, 616 P.2d at 204-05.

In the instant case, as conceded by Homeowners and the County, Ordinance No. 3848 has resolved the issue of the applicable height restriction for the Sandhills Estate and Fairways subdivisions and thus the substantive controversy between the parties is moot. Developers' concerns do not undermine the mootness doctrine. Developers' primary concern in challenging mootness appears to be how to deal with the circuit court's 2008 Order.[8] As will be addressed below, when a case becomes moot on appeal, the lower court's rulings can be vacated to avoid any undue prejudice to the parties. Thus, the concerns that the Developers raise can be addressed.[9]

Developers also contend that certain points raised on appeal by the Developers and the County fall within the public interest exception to mootness. First, Developers argue that they have raised the question on appeal of whether the Unilateral

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[8] As earlier noted, the 2008 Order concludes by ordering that:

> 1. The Maui Lani Project District as a whole is subject to the residential height restriction as determined in 1991 and codified at Maui County Code § 19.04.040, which states that building height "means the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finish grade, whichever is lower."
>
> 2. Defendant County of Maui, is enjoined from taking any action which conflicts with the Court's determination of the applicable height restriction relative to the Sandhills project and the Fairways project including, but not limited to, the issuance of building permits the result of which would be inconsistent with Maui County Code § 19.04.04.
>
> 3. This Order shall remain in effect until further order of the Court.

[9] Developers' concerns about future lawsuits should be assuaged by our vacating of the circuit court's 2008 Order and the judgments below. Moreover, such lawsuits are too speculative to prevent this appeal from being moot, especially given that we will vacate the 2008 Order and the judgment below. See Queen Emma Foundation v. Tatibouet, 123 Hawai'i 500, 508, 236 P.3d 1236, 1244 (App. 2010).

Development Agreement vested Developers with the rights to develop projects in the Maui Lani Project District in accordance with then-existing zoning ordinances. Second, Developers argue that the County has challenged on appeal whether HRS § 46-4 grants standing to neighboring property owners to bring a civil suit against the County to require the County to enforce zoning ordinances.

As noted above, the County takes the position that the appeal is moot. Indeed, the County's supplemental brief regarding mootness expressly contends that the public interest exception to mootness is inapplicable to this case. Therefore, we will not address the Developers' contention that a point of error raised by another party -- the County -- supports a public interest exception to mootness.

As to the point of error raised by Developers related to their vesting rights under the Unilateral Development Agreement, in determining whether the public interest exception applies, we look "to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." Hamilton, 119 Hawai'i at 6-7, 193 P.3d at 844-45 (citation and internal quotation mark omitted). "[T]he cases in this jurisdiction that have applied the public interest exception have focused largely on political or legislative issues that affect a significant number of Hawai'i residents." Id. at 7, 193 P.3d at 845. Given these considerations, the public interest exception does not apply because the Developers' vesting rights under the Unilateral Development Agreement is an issue specific to the facts of this case and is of private concern to the Developers.

The challenges raised on appeal to the circuit court's grant of declaratory and injunctive relief to the Homeowners are

therefore moot. We address in the next section, the Homeowners' claim for attorneys' fees.

As noted above, the Developers' primary concerns as to mootness stem from the fact that the 2008 Order is still in effect. Thus, the concern is not mootness *per se*, but rather, how to appropriately dispose of a case that has been rendered moot by intervening legislation when a contrary underlying court order is still in effect.

As recognized in Aircall of Haw., Inc. v. Home Props., Inc., 6 Haw App. 593, 733 P.2d 1231 (1987), "where appellate review has been frustrated due to mootness[,]" the circuit court's judgment, which is unreviewable because of mootness, could lead to issue preclusion. Id. at 595, 733 P.2d at 1232. In Aircall of Haw., and subsequently, in Exit Co. Ltd. P'ship v. Airlines Capital Corp., 7 Haw. App. 363, 766 P.2d 129 (1988), this court noted that such a result would be unfair and resolved the potential for issue preclusion where a case is rendered moot on appeal by adopting "the federal practice of having the appellate court vacate the judgment of the trial court and direct dismissal of the case." Exit Co., 7 Haw. App. at 367, 766 P.2d at 131 (citation and internal quotation marks omitted). We likewise apply this resolution to the present case.

Accordingly, without reaching the merits but because the appeal is moot, we vacate the 2008 Order. We also vacate the Final Judgments entered on January 12, 2009 and September 30, 2009 to the extent they adjudicate Counts I and II of the operative Fourth Amended Complaint. We further remand the case to the circuit court with directions to dismiss the action.

B. Attorneys' Fees and the Private Attorney General Doctrine

On appeal, Homeowners raise a single point of error, challenging the circuit court's April 3, 2009 Fees/Costs Order. Although the circuit court granted Homeowners' request for

declaratory and injunctive relief, it denied Homeowners' request for attorneys' fees under the private attorney general doctrine.

The County asserts that the issue regarding attorneys' fees is moot because the issue regarding the building height definition is moot. On the other hand, Homeowners contend that, although all the issues in the cross-appeals are moot, their appeal from the Fees/Costs Order is not. They argue that this court may consider, under the private attorney general doctrine, whether the circuit court erred when it did not award attorneys' fees to Homeowners.

The County relies on Rapozo v. Better Hearing of Haw., LLC, 120 Hawai'i 257, 262, 204 P.3d 476, 481 (2009) for the argument that "[i]n the absence of a 'final decision from an appellate court' on the principal issues, attorney's fees are improper." Rapozo is inapposite to the present case because the petitioner in Rapozo was seeking attorney's fees and costs related to an appeal, not to the action below, id. at 261, 204 P.3d at 480, and the circumstances in that case were far different than here.

Although this court does not have jurisdiction to address the declaratory and injunctive relief rulings that are rendered moot by the intervening legislation, we do have jurisdiction to rule on the circuit court's order regarding attorneys' fees. This court has previously ruled that

> [a]lthough a claim for attorney's fees does not preserve a case which has otherwise become moot on appeal, . . . the question of attorney's fees is ancillary to the underlying action and survives independently under the Court's equitable jurisdiction. Where the underlying controversy has become moot, there is no right to review or redetermine any of the issues in the underlying action solely for the purpose of deciding the attorney's fees question. Instead, the question of attorney's fees and costs must be decided based on whether the recipient of the attorney's fees and costs award can be considered to be the prevailing party in the underlying action, without regard to whether we think the [trial] court's decision on the underlying merits is correct.

Queen Emma Found. v. Tatibouet, 123 Haw. 500, 510, 236 P.3d 1236, 1246 (2010) (citations, internal quotation marks and brackets omitted).

First, we must determine whether Homeowners were the prevailing party in the court below before considering whether the private attorney general doctrine applies. Generally, a party in whose favor final judgment is rendered is the prevailing party in that court for purposes of attorney's fees. See Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 126, 176 P.3d 91, 125 (2008). "Although a plaintiff may not sustain his entire claim, *if judgment is rendered for him, he is the prevailing party for purposes of costs and attorneys' fees*." Id. (quoting MFD Partners v. Murphy, 9 Haw. App. 509, 514, 850 P.2d 713, 716 (1992) (internal citation, quotation mark and brackets omitted). Here, the circuit court granted Homeowners' request for declarative and injunctive relief, ruling in Homeowners' favor and against the County and certain of the Developer parties. No one argues that Homeowners were not the prevailing party below, nor that the intervening ordinance had any effect on Homeowners' status as the prevailing party in the circuit court.

The next question is whether the private attorney general doctrine applies. Generally, under the "American Rule," each party pays his or her own litigation costs. Sierra Club II, 120 Hawai'i at 218, 202 P.3d at 1263. "This general rule, however, is subject to a number of exceptions: attorney's fees are chargeable against the opposing party when so authorized by statute, rule of court, agreement, stipulation, or precedent." Chun v. Bd. of Trs. of Emps.' Ret. Sys. of State of Haw., 92 Hawai'i 432, 439, 992 P.2d 127, 134 (2000) (citation, internal quotation mark, and brackets omitted).

The Hawai'i Supreme Court has recognized the private attorney general doctrine as a judicially-created exception to the American Rule, noting that the doctrine "is an equitable rule

that allows courts in their discretion to award [attorney's] fees to plaintiffs who have vindicated important public rights." Sierra Club II, 120 Hawai'i at 218, 202 P.3d at 1263 (quoting Maui Tomorrow, 110 Hawai'i at 244, 131 P.3d at 527) (block quote format altered).

In applying this doctrine, courts consider three factors: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision." Id.

The circuit court ruled that the private attorney general doctrine did not apply because the first and third prongs of the doctrine were not satisfied. Because we conclude that the circuit court did not abuse its discretion, we limit our consideration to the first and third prongs of the doctrine.

1. First prong: the strength or societal importance of the public policy vindicated by the litigation

In regards to the first prong, Homeowners assert that their lawsuit "vindicated the important public policy of the rule of law," "clarified the County Charter," and "prevented the dangerous precedent of allowing a mayor to become a one-man county council, making the law by proclamation instead of by democratic process."

At a hearing on February 24, 2009, on Homeowners' motion for attorneys' fees and costs, the circuit court initially concluded that Homeowners met the first prong, reasoning that Homeowners' suit "vindicated important public rights." The circuit court also concluded that Homeowners met the second prong regarding "the necessity for private enforcement and the magnitude of the result and burden on the [Homeowners]." But the circuit court did not find that Homeowners met the third prong, the public benefit prong, reasoning that it was too expansive an

interpretation to conclude "that everybody in the County gets to benefit from clarification of or enforcement of a particular ordinance." Therefore, the circuit court denied Homeowners' motion for attorneys' fees pursuant to the private attorney general doctrine.

After the Hawai'i Supreme Court applied the private attorney general doctrine in Sierra Club II on March 16, 2009, Homeowners filed a motion for reconsideration of the circuit court's denial of attorneys' fees. Homeowners argued that the holding in Sierra Club II affirmed an expansive reading of the third prong and that, based on Sierra Club II, the circuit court should find that "the third prong of the doctrine is readily satisfied, justifying an award of attorneys' fees."

The circuit court heard Homeowners' motion for reconsideration on April 23, 2009. Based on Sierra Club II, the circuit court now questioned whether Homeowners had met the first prong after all. The court noted that "limited members of the general public [were] represented by the [Homeowners'] counsel, specifically the home owners whose view was impacted by an adjoining development." The court also remarked that the view planes in question were not ones statutorily protected under HRS § 205A-2(c)(3)(B) (2001 Repl.), the environmental statute protecting coastal zones. Moreover, noted the court, the effect of the Mayor's interpretation of the height ordinance was limited to the home owners living adjacent to certain projects within the larger Maui Lani Project District. Finally, the court observed that a number of people would have problems building houses on their land given the court's ruling and thus there were potentially more residents negatively affected by the circuit court's ruling than there were people benefitting from the ruling.

Furthermore, it is worth noting that the Homeowners' original complaint set out twelve counts, two of which sought

declaratory and injunctive relief against the County and most of the remaining counts alleging impacts to the Homeowners due to the development of the Sandhills Estates and Fairways and seeking to recover damages. The case was later bifurcated, over the Homeowners' objections, so that the declaratory and injunctive relief claims were separated from the damage claims. In many respects, therefore, this case was not brought to vindicate public policy, but rather to recover damages which ultimately were dealt with in a separate bifurcated proceeding. Even as to the injunctive and declaratory relief claims, although the Homeowners asserted that the Mayor had made an improper administrative decision as to the applicable height restriction, the ultimate goal of the claims was to protect the Homeowners' view planes and properties. That is, the relief sought by the Homeowners was focused on the effect of the County's interpretation of the height restriction on their properties, rather than on a broader issue of public policy.

Given the foregoing, we cannot conclude that the circuit court abused its discretion in concluding that Homeowners did not satisfy the first prong.

2. Third prong: the number of people standing to benefit from the decision

The Homeowners assert that the lawsuit will benefit the entire Maui population by clarifying the role of county agencies and officials and make clear which height restriction definition applies in residential developments on Maui.

At the hearing on Homeowners' motion for attorneys' fees, the circuit court determined that the number of people who would benefit from the circuit court's ruling that the 1991 height definition applied was "very unclear." Furthermore, the court considered it to be too expansive to reason that all people on Maui benefitted from Homeowners' lawsuit to clarify and enforce an ordinance.

At the hearing on Homeowners' motion for reconsideration, the court continued to be unconvinced that Homeowners met the third prong. As earlier noted, the court observed that a limited number of residents benefitted from the ruling, and that there could be more residents hurt by the ruling than benefitted from it.

We agree with the circuit court that the number of people who benefitted from the circuit court's rulings is unclear and that probably it is a limited number of people. Unlike other cases where the private attorney general doctrine has been found to apply, there is no broad ruling of generally applicable law that will benefit large numbers of people. Moreover, the circuit court's rulings affect private property and does not affect public areas or public parks as in Honolulu Const. and Draying Co.

As originally noted by the supreme court when it first considered the private attorney general doctrine, proponents of the doctrine "maintain that limiting the application of the doctrine to exceptional cases pursuant to the three-prong test . . . provides effective constraints on judicial discretion." In re Water Use Permit Applications, 96 Hawai'i 27, 31, 25 P.3d 802, 806 (2001).

Because Homeowners do not satisfy all three prongs of the private attorney general doctrine in this case, the circuit court did not abuse its discretion in denying attorneys' fees.

V. Conclusion

Based on the foregoing, the following order and judgments entered by the Circuit Court of the Second Circuit are hereby vacated:

(1) the Findings of Fact, Conclusions of Law and Order Granting Motion for Partial Summary Judgment entered on December 31, 2008;

(2) the Final Judgment entered on January 12, 2009, to the extent that it entered judgment with respect to Counts I and II in the "Fourth Amended Complaint for Declaratory and Injunctive Relief and Damages"; and

(3) the Final Judgment entered on September 30, 2009, to the extent that it entered judgment with respect to Counts I and II in the "Fourth Amended Complaint for Declaratory and Injunctive Relief and Damages".

The case is further remanded to the circuit court with direction that the case be dismissed.

The "Order Granting in Part and Denying in Part [Homeowners'] Motion for Award of Attorneys' Fees and Costs," entered by the Circuit Court of the Second Circuit on April 3, 2009, is affirmed.

DATED: Honolulu, Hawai'i, September 19, 2013.

On the briefs:

David J. Gierlach
Lance D. Collins
for Plaintiffs/Counterclaim
Defendants/Appellants/Cross-Appellees

Presiding Judge

Madelyn S. D'Enbeau
Deputy Corporation Counsel
Department of the Corporation Counsel
for Defendants/Cross-Claim Defendants/
Appellees/Cross-Appellants/
Cross-Appellees

Associate Judge

Ronald T. Ogomori
Nathan H. Yoshimoto
(Ogomori & Yoshimoto, LLP)
for Defendants/Intervener-Defendants/
Cross-Claim Defendants/Counterclaimants/
Cross-Claimants/Appellees/Cross-Appellees/
Cross-Appellants New Sand Hills, LLC,
VP&PK (ML), LLC and KCOM Corp.
and
for Intervenors/Appellees/Cross-Appellees/
Cross-Appellants Hookahi, LLC and
Sandhills Estates Community Association

Associate Judge

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KAREN GOO, et al.,
Petitioners/Plaintiffs/Counterclaim-Defendants/Appellants/Cross-Appellees,

vs.

MAYOR ALAN ARAKAWA, Successor-In-Interest to Mayor Charmaine Tavares, WILLIAM SPENCE, Director of Planning, County of Maui, Successor-In-Interest to Director Jeff Hunt, County of Maui
Respondents/Defendants/Cross-Claim Defendants/Appellees/Cross-Appellants/Cross-Appellees,

and

VP AND PK(ML) LLC, KCOM Corp.,
Defendants/Intervenor-Defendants/Cross-Claim Defendants/Counterclaimants/Cross-Claimants/Appellees/Cross-Appellees/Cross-Appellants,

and

KILA KILA CONSTRUCTION,
Defendant/Cross-Claim Defendant/Cross-Claimant,

and

(John G.) JOHN G'S DESIGN & CONSTRUCTION, INC.,
Defendant/Cross-Claimant/Cross-Claim Defendant,

and

NEW SAND HILLS LLC.,
Respondent/Defendant/Intervenor-Defendant/Counterclaimant/Cross-Claim Defendant/Appellee/Cross-Appellee/Cross-Appellant,

EXHIBIT D

and

DAVID B. MERCHANT; JOYCE TAKAHASHI; BRIAN TAKAHASHI,
Defendants/Intervenor-Defendants,

and

DIANE L. REASER, et al.,
Defendants/Intervenor-Defendants/Counter-Claimants,

and

HOOKAI, LLC, SANDHILLS ESTATES COMMUNITY ASSOCIATION,
Respondents/Intervenors/Appellees/Cross-Appellees/Cross-Appellants,

and

CHERYL CABEBE, GERRY RIOPTA, and MELISSA RIOPTA,
Intervenor-Defendants/Appellees/Cross-Appellants.

SCWC-30142

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30142; CIV. NO. 07-1-0258(1))

FEBRUARY 19, 2014

RECKTENWALD, C.J., NAKAYAMA, ACOBA, McKENNA, AND POLLACK, JJ.

OPINION OF THE COURT BY POLLACK, J.

This case addresses the issue of the procedure that an appellate court should follow when a case becomes moot on appeal and one party seeks vacatur of the lower court's judgment.

We hold that the Intermediate Court of Appeals (ICA) erred in vacating the circuit court's judgments and December 31, 2008 Order Granting Partial Summary Judgment in this case and

remanding the case for dismissal. In addition, we conclude that the ICA did not err in affirming the circuit court's denial of plaintiffs' request for attorneys' fees.

I. Background

A.

On Maui, approval of development projects is a three-phase process. Phase I involves approval of ordinances by the Maui County Council (Council) that include prescribing the height and density of structures to be built in a project. Phase II requires approval of the preliminary plat by the Planning Commission. Phase III requires the approval of the final plat by the director of the Department of Planning. According to the Charter of the County of Maui, the director of the Department of Planning is charged with enforcing the zoning ordinances. Maui County Charter § 8-8.3(6).

Approval of subdivisions requires the approval of various state and county agencies. Ultimately the planning director can approve subdivisions if they "conform to . . . the county general plan, community plans, land use ordinances, the provisions of the Maui County Code, and other laws relating to the use of land[.]" Maui County Code § 18.04.030 (1993).

At the time of the relevant events in this case, Title 19, Article II, of the Maui County Code (MCC), known as the Comprehensive Zoning Ordinance (CZO), stated that "[n]o building

shall exceed two stories nor thirty feet in height." Prior to September 4, 1991, the CZO "definitions" section defined "height" as the "vertical distance from finished grade to the highest point of the finished roof surface[.]" (pre-1991 definition) (Emphasis added).

On September 29, 1988, an application was filed for Phase I approval of the Maui Lani Project District (MLPD). On June 20, 1990, the Council enacted Ordinance 1924, which constituted Phase 1 approval for the MLPD. MCC Chapter 19.78, which codified Ordinance 1924, restricted structures in residential sub-districts to "two-stories, not exceeding thirty feet."

On September 18, 1990, the MLPD received Phase II approval when the Maui Planning Commission approved the MLPD's preliminary plat site plan.

B.

On September 4, 1991, the Council enacted Ordinance 2031 (Height Restriction Law), which changed the definition of "building height." "Height" was defined as "the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finish grade, whichever is lower." (post-1991 definition) (Emphasis added).

The Height Restriction Law also provided definitions for "natural grade" and "finish grade." "Natural grade" was defined as "the existing grade or elevation of the ground surface which exists or existed prior to man-made alterations such as grading, grubbing, filling, or excavating." "Finish grade" was defined as "the final elevation of the ground surface after man-made alterations such as grading, grubbing, filing, or excavating have been made on the ground surface."

On October 18, 2003, the Sandhills Project within the MLPD received preliminary subdivision approval, and on March 12, 2004, it received Phase III approval. According to former Planning Director Michael Foley (Planning Director), "[t]he Planning Department reviewed the project relative to the finished grade and did not consider the effect of fill on building heights." In other words, the Planning Department did not calculate fill into the allowable building heights of structures in the MLPD.

On August 2, 2004, the Department of Public Works and Waste Management issued a Grading and Grubbing Permit for the Sandhills project that included a warning that adding fill to any lots would "reduce the allowable height to less than 30 feet from finished grade." On the same day, the Fairways project within the MLPD received preliminary subdivision approval. The preliminary subdivision approval letter for the Fairways project

included a similar warning concerning the effect of fill on building heights.

On December 14, 2004, the Planning Director sent an "Interdepartmental Transmittal" rescinding the Planning Department's recommendation of Phase III approval for the Sandhills project based on the fact that the developers who were building the project had raised the finished grade of the project by adding tons of fill on top of the natural ground, and homes built on the fill could violate the Height Restriction Law because their rooftops would be higher than 30 feet from the lower natural grade.

On December 22, 2004, as a result of the rescission, representatives of the developers of the Sandhills and Fairways projects (collectively, "subject projects") had a private meeting with Mayor Alan Arakawa (Mayor), the Planning Director, and numerous representatives from various county agencies. At this meeting, the developers expressed their concerns about the County's application of the post-1991 definition of "height" to the MLPD and the County's "rescission" of final subdivision approval. The developers expressed their belief that Ordinance 1924, which had constituted Phase 1 approval for the MLPD, authorized the application of the pre-1991 definition of height, and the developers had already expended "substantial funds in conjunction with the Sandhills project."

As a result of this meeting and various internal communications, the Mayor orally advised the developers that the County "would continue to adhere to [the pre-1991 definition] to interpret the height restriction since the Sandhills and the Fairways Projects had already received Phase I and Phase II Project District Approvals prior to the 1991 enactment of the building height restriction amendment and were within the [MLPD]."

On May 31, 2005, the Mayor sent a letter to one of the developers confirming this oral agreement. The Mayor wrote that to resolve the conflict over the issue of developments using fill with regard to building projects, which were approved before the 1991 re-definition of height, "I made an administrative decision to allow the project to proceed with the building heights determined from the finished grade." The Mayor's letter went on to state, "Project District Phase III approval was granted based on this decision."

A copy of this letter was sent to the Planning Director on December 22, 2005, seemingly in response to the Planning Director's inquiry concerning the county's granting of Phase III approval for the Fairways project. By mid-2007, both the Sandhills and Fairways projects had received Phase III approval pursuant to the Mayor's decisions.

C.

On July 18, 2007, in response to the grading and compacting of "tons of dirt" allegedly over thirty feet high and a retaining wall of equal size "loom[ing]" over their houses and blocking their view planes over a "pleasant green valley," Karen Goo, et al. (Homeowners), filed a complaint against the Mayor and the Planning Director (collectively, "County") alleging that the Mayor had unlawfully exempted the subject projects from the Height Restriction Law. The complaint also alleged tort claims against the County, defendants VP and PK(ML), KCOM Corp and, eventually, New Sand Hills (collectively, "Developers") alleging.[1] Counts I and II sought declaratory and injunctive relief requiring the County to enforce the Height Restriction Law generally and specifically to projects in the MLPD.

On November 16, 2007, Homeowners filed a motion for partial summary judgment (MPSJ). Homeowners' MPSJ requested an order that the County enforce the Height Restriction Law definition of "height" on the subject projects, and Developers be

[1] In addition to Counts I and II, Homeowners alleged various claims for, inter alia, negligence, nuisance, and intentional and/or negligent infliction of emotional distress against Developers. On April 10, 2008, over the objection of Homeowners, the circuit court bifurcated Counts I and II from the other claims, and this case proceeded on Counts I and II alone. The circuit court also ruled that only the County would remain a defendant on Counts I and II. On May 13, 2008, Developers filed a motion to intervene, which was granted on June 4, 2008. Homeowners amended their complaint four times. Defendant New Sand Hills was added as a defendant in an amended complaint.

required to remove any improvements made in violation of the CZO's post-1991 definition.

On December 28, 2007, Developers filed a motion to dismiss Homeowners' complaint, which the County joined. Developers argued, inter alia, that the complaint failed to join indispensible parties, specifically "each and every lot owner within the [MLPD] permitted after the 1991 Amendment[.]" On February 25, 2008, the circuit court partially granted Developers' motion to the extent that the circuit court ordered Homeowners to provide notice of the lawsuit to "all lot or real property owners within the [MLPD] whose rights would be affected should [the circuit court] grant the relief sought by [Homeowners] in Counts I and II." The order required that Homeowners personally serve all of these "indispensable parties."

On May 21, 2008, the attorney for Homeowners submitted a declaration confirming that all potential parties-in-interest had been notified in accordance with the circuit court's order. A total of 337 parties acknowledged receipt of notice, while 523 parties received the notice, as indicated by certified mail receipts, but had not responded.

A hearing was held on Homeowners' MPSJ on December 9, 2009. On December 31, 2008, the circuit court issued its Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Partial Summary Judgment (Order Granting

Partial Summary Judgment), granting Homeowners' November 16, 2007 MPSJ. In accordance with its Order Granting Partial Summary Judgment, the Court ruled that the Height Restriction Law's definition of height applied to all projects in the MLPD and enjoined the county from issuing any building permits to projects that violated the post-1991 definition. The order stated that declaratory relief would apply to the MLPD as a whole; however, the circuit court limited the scope of the injunctive relief to the Sandhills and Fairways projects, "so that the remedy is no more burdensome to Defendant County of Maui than necessary to provide complete relief to plaintiffs." The order decreed:

> 1. The Maui Lani Project District, as a whole, is subject to the residential height restriction as determined in 1991 and codified at Maui County Code § 19.04.040,[2] which states that building height "means the vertical distance measured from a point on top of a structure to a corresponding point directly below on the natural or finish grade, whichever is lower."
>
> 2. Defendant, County of Maui, is enjoined from taking any action which conflicts with the Court's determination of the applicable height restriction relative to the Sandhills project and the Fairways project including, but not limited to, the issuance of building permits the result of which would be inconsistent with Maui County Code § 19.04.04.
>
> 3. This Order shall remain in effect until further order of the Court.

D.

On January 23, 2009, Homeowners made a motion for attorneys' fees pursuant to the private attorney general doctrine. Homeowners set forth the three prongs of the private attorney general doctrine: "(1) the strength or societal

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[2] MCC § 19.04.040 refers to the CZO's "definitions" section.

importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision."[3]

Homeowners argued their lawsuit forced the county to enforce important zoning laws, was necessary because the Mayor had acted illegally, a significant burden had fallen upon Homeowners because the County and Developers were actively opposing Homeowners, and all the people of Maui stood to benefit from the court's ruling.

On February 24, 2009, the circuit court held a hearing on the motion for attorneys' fees. The circuit court concluded that Homeowners met the first two prongs of the private attorney general doctrine. However, the circuit court found Homeowners did not meet the third prong because of the limited immediate applicability of the Height Restriction Law to only the subject projects within the MLPD and the fact that the offending fill blocking Homeowners' views would not be removed, thus making it unclear how many people would benefit from the circuit court's decision.[4]

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[3] In light of our disposition of this case, we do not expand upon the arguments and court rulings concerning the first two prongs of the private attorney general doctrine.

[4] On April 3, 2009, the circuit court filed its order denying Homeowners' January 23, 2009, motion for attorneys' fees.

On March 16, 2009, this court decided Sierra Club v. Department of Transportation of State of Hawai'i, 120 Hawai'i 181, 202 P.2d 1226 (2009) (Superferry II). On March 31, 2009, Homeowners filed a motion for reconsideration of the denial of their motion for attorneys' fees. Homeowners argued they met the third prong because their lawsuit benefited the entire population of Maui by promoting the rule of law on Maui through enforcement of the zoning code, emphasized the importance of public participation in the zoning process, and reduced the likelihood of "future developers claiming an exemption from the zoning law after holding a closed-door meeting with the mayor."

On April 23, 2009, the circuit court held a hearing on Homeowners' motion for reconsideration. The circuit court found that, based on its reading of Superferry II, Homeowners failed to satisfy the first prong of the private attorney general doctrine as well as the third prong.

Concerning the number of people benefitted in relation to the third prong, the circuit court noted Homeowners' complaint concerned only two subdivisions and not a statute of statewide application. The circuit court noted further that the entire case was limited only to several homeowners living adjacent to the projects involved. While recognizing that its ruling had county-wide implications, the circuit court observed that more people could be harmed by its decision than benefitted because

the owners of property in the MLPD would not be able to build homes.

On June 3, 2009, the circuit court entered its order denying Homeowners' motion for reconsideration.

The County and Developers appealed the circuit court's final judgments.[5] Homeowners appealed the circuit court's denial of attorneys' fees.

II. Appellate Proceedings

A.

On March 19, 2010, Homeowners filed their Opening Brief.[6] Homeowners raised a single point of error:

> Whether the trial court erred in denying Homeowners' request for attorneys' fees against the County under the private attorney general doctrine.

Homeowners argued in their Opening Brief that their lawsuit satisfied the third prong of the private attorney general doctrine because it benefitted the entire population of Maui and any persons who may purchase property on Maui in the future, and denying Homeowners' request for attorneys' fees would discourage future lawsuits such as theirs.

On August 28, 2011, after the briefing was submitted to the ICA, the Council adopted a bill that became Ordinance 3848.

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[5] The circuit court issued three final judgments in this case on January 12, 2009, April 3, 2009 and September 30, 2009.

[6] Neither the County nor the Developers sought a writ of certiorari from the ICA's decision in this case. Similarly Defendant Sandhills Estates Community Association also filed a cross-appeal, but did not seek review of the ICA decision.

Karen Goo, et al., v. Mayor Alan Arakawa, et al., No. SCWC-30142, 2013 WL 5289010, at *3 (App. Oct. 7, 2013) (mem.). Ordinance 3848 amended the CZO's definition of height to the following: "[f]or structures within project districts that received phase II approval prior to September 4, 1991, finish grade shall be used to determine height." Goo, 2013 WL 5289010, at *3. On June 12, 2013, the ICA ordered the parties to file supplemental briefs on the question of "whether, in light of Ordinance 3848, any of the issues raised on appeal are moot." Id. at *4. The ICA's supplemental briefing order did not require the parties to brief the issue of vacatur.

On June 28, 2013, Homeowners filed their supplemental brief. Homeowners argued that all of the issues raised by the County and Developers were moot because Ordinance 3848 granted the County and Developers the exact relief they requested, namely allowing the subject projects to measure building height from finished grade.

Homeowners contended, however, that their appeal concerning attorneys' fees was not moot. Homeowners argued that it would be absurd to allow the County's passage of a law making previously illegal conduct legal to defeat a claim for attorneys' fees under the private attorney general doctrine with regard to a lawsuit that forced the change in the law.

On July 2, 2013, both the County and Developers

submitted their supplemental briefs. The County argued that its appeal and Homeowners' appeals were moot. The County contended, however, that Homeowners' appeal concerning attorneys' fees was also moot.

The County argued further that the ICA should vacate the circuit court's decision because "merely dismissing the appeal due to mootness could result in the trial court's judgment imposing collateral estoppel." The County argued that it was not issuing building permits for the subject projects because of the circuit court's 2008 order. Therefore, the County requested that the order be vacated so that building could proceed pursuant to Ordinance 3848.

Developers also contended in their memorandum that the case was not moot because the County was not issuing building permits.

B.

The ICA issued its Memorandum Opinion on September 19, 2013. The ICA found that Ordinance 3848 settled the primary issue of whether the "pre-1991 definition of height or the more restrictive 1991 definition of height applies to the [subject projects] within the [MLPD]" and, thus, that issue was moot. Goo, 2013 WL 5289010, at *5-6.

The ICA stated that Developers' concerns "should be assuaged" by its decision to vacate the circuit court's order and judgments. Id. at *7 n.9, *8.

The ICA's analysis with respect to the issue of vacatur was as follows:

> As recognized in Aircall of Haw., Inc. v. Home Props., Inc., 6 Haw App. 593, 733 P.2d 1231 (1987), "where appellate review has been frustrated due to mootness[,]" the circuit court's judgment, which is unreviewable because of mootness, could lead to issue preclusion. Id. at 595, 733 P.2d at 1232. In Aircall of Haw., and subsequently, in Exit Co. Ltd. P'ship v. Airlines Capital Corp., 7 Haw. App. 363, 766 P.2d 129 (1988), this court noted that such a result would be unfair and resolved the potential for issue preclusion where a case is rendered moot on appeal by adopting "the federal practice of having the appellate court vacate the judgment of the trial court and direct dismissal of the case." Exit Co., 7 Haw. App. at 367, 766 P.2d at 131 (citation and internal quotation marks omitted). We likewise apply this resolution to the present case.

Id. at *8. Thus, because appellate review of the Height Restriction Law issue was frustrated based on mootness and the judgment had the potential to "lead to issue preclusion," the ICA vacated the circuit court's December 31, 2008 Order Granting Partial Summary Judgment and final judgments[7] with respect to Counts I and II of Homeowners' complaint for Declaratory and Injunctive Relief. Id. at *8. The ICA remanded the case to the circuit court with orders to dismiss the action. Id.

The ICA found that Homeowners' appeal concerning attorneys' fees was not moot, but concluded that Homeowners failed to meet the first and third prongs of the private attorney

[7] It appears the ICA did not vacate the circuit court's April 3, 2009 final judgment.

general doctrine.[8] Id. at *9. On the third prong, the ICA found that the number of people benefitting from the circuit court's ruling was unclear, probably limited, and the three-prong test of the private attorney general doctrine was intended to constrain the doctrine's application to "exceptional circumstances." Id. Therefore, the ICA concluded that the circuit court did not abuse its discretion in denying Homeowners' motions for attorneys' fees, and affirmed the circuit court's April 3, 2009 order denying Homeowners' motion for attorneys' fees. Id. at *12.

On September 27, 2013, Homeowners filed a timely motion for reconsideration addressing the ICA's vacation of the circuit court's judgments and order, and attaching what they stated were meeting minutes created after the circuit court's judgment that showed Ordinance 3848 was only passed as part of a "global settlement." The ICA denied the motion.

III. Application for Writ of Certiorari

A.

On October 25, 2013, Homeowners timely filed their application for writ of certiorari (Application) and present the following questions:

> A. Whether the declaratory judgment obtained by Homeowners should be vacated and dismissed because the County's [sic] caused the mooting of the underlying controversy, or are Homeowners entitled to keep the record of their success as

[8] The ICA did not address the second prong because it found Homeowners failed to meet the first and third prongs. Goo, 2013 WL 5289010, at *10.

> the prevailing party and to guide government officials in the future regarding the challenged illegal actions?
>
> B. Whether Homeowners are entitled to their attorney's fees against the County under the private attorney general doctrine because their suit vindicated important public interests and benefitted the public broadly by compelling the County to faithfully and equally enforce its zoning laws, instead of exempting favored persons from the law's reach?

Homeowners argue the ICA erred in vacating the circuit court's "declaratory judgment." Homeowners agree the appeals of the County and Developers were moot, but contend that if a party to a suit causes the mootness, that party's actions preclude the equitable remedy of vacatur. Citing to "Minutes of Maui County Council Planning Committee," Homeowners maintain that the County passed Ordinance 3848 as part of a "global settlement" of various lawsuits concerning the post-1991 definition of height and its effects on the subject projects. Homeowners also quote "a County attorney" testifying before the Council recommending the passage of Ordinance 3848 so as to correct the decision of the circuit court in this case.[9]

Thus, Homeowners, relying on U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 25 (1994), argue that vacatur was inappropriate in this case because the mootness of the primary issue did not occur through happenstance but rather as the result of a concerted effort by the County and Developers to circumvent the circuit court's decision. Homeowners

[9] These documents were apparently created after Council meetings in 2011 and 2009, respectively. The circuit court rendered its ruling against the County and Developers in 2008.

acknowledge that the injunction can be vacated, but argue the declaratory judgment should be kept in place as recognition of Homeowners' challenge to the Mayor's illegal conduct and their vindication of the important public policy of equal enforcement of zoning laws.

Homeowners also contend the ICA erred in affirming the circuit court's denial of attorneys' fees, arguing that denying their request for attorneys' fees would have a chilling effect on lawsuits filed by "ordinary" people seeking to enforce zoning laws. Homeowners maintain their personal interest in the outcome did not preclude an award of fees under the private attorney general doctrine. They argue further that the hundreds of notices the circuit court ordered Homeowners to mail demonstrated that the case had a widespread effect.

B.

The County, in its Response to Homeowners' Application, argues that the vacatur by the ICA was proper. The County reasons that the Maui County Council is an independent branch of government from the County executive branch defendants and thus, regardless of lobbying by the executive branch, the County "is in a position akin to a party who finds its case mooted on appeal by 'happenstance,' rather than by events within its control."

The County maintains that the ICA properly found that the circuit court did not abuse its discretion in denying Homeowners attorneys' fees.

Developers in their Response to Homeowners' Application also argue that vacatur was proper because the underlying appeal was moot. In addition to arguments made by the County, Developers maintain that Homeowners' citations to the Maui County Council Planning Committee Reports and Minutes were inappropriate because they were not accompanied with citations to the Record on Appeal. Developers also contend that Homeowners were judicially estopped from arguing against the vacatur of the circuit court's declaratory judgment because Homeowners argued in their supplemental briefing on mootness that all issues in the case were moot, and they did not ask the ICA to affirm the circuit court's declaratory judgment.

Further, Developers assert that lot owners who cannot build on their lots may sue Developers and rely on the circuit court's declaratory judgment "for the proposition that the law at the time the lot owners purchased their lots prohibited or limited construction on lots with fill." This would result in Developers being unfairly "forced to expend time, effort, and expense defending against the legal claims that would likely arise if the declaratory judgment is not vacated."

C.

Homeowners replied to both the County's and Developers' responses. Homeowners contend that because the County was defending an illegal action by the Mayor, rather than a pre-existing law, the Council's passing of an ordinance retroactively legalizing the Mayor's conduct amounted to a voluntary action by the County to moot this case. Homeowners argue that vacatur is an equitable remedy, and the action by the Council to legalize the Mayor's illegal conduct did not entitle the County to such a remedy.

In reply to Developers, Homeowners argue that they brought the issue of vacatur to the attention of the ICA in their motion for reconsideration. Homeowners maintain that the ICA did not order them to brief the issue of vacatur, and the first chance Homeowners had to raise the issue was in their motion for reconsideration. Homeowners contend that the Meeting Minutes they referenced could not be part of the Record on Appeal as the minutes were created after the Record on Appeal was created. Finally, Homeowners conclude that vacatur of the declaratory judgment was a "last slap in the faces of [Homeowners] . . . who sought judicial recognition that the mayor's actions were contrary to law[.]" Thus, Homeowners request that this court "remand the matter to the trial court for further proceedings

regarding the effect of [Ordinance 3848] on the injunction but preserving the Declaratory Judgment[.]"

IV. Discussion

A. Vacatur

1.

In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 22 (1994), the Supreme Court held that in cases where "a judgment has become moot while awaiting review, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." The Court explained that vacatur is an "extraordinary remedy." Id. at 26 (brackets omitted).

In Bancorp, at issue was whether vacatur should be granted where mootness results from a settlement agreement between the parties. Id. at 20. In resolving this question, the Court first noted that in the prior leading case on vacatur, United States v. Munsingwear, Inc., 340 U.S. 36 (1950), the Court had stated that vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." Bancorp, 513 U.S. at 22-23 (quoting 340 U.S. at 40). The parties in Bancorp had agreed that pursuant to Munsingwear, vacatur must be ordered for judgments rendered moot "through happenstance"; that is, "where a controversy presented for review has become moot due

to circumstances unattributable to any of the parties." Id. at 23 (quotation marks omitted). However, the Court disagreed, characterizing the reference to "happenstance" in Munsingwear as "dictum." Id. at 23.

In any event, the Bancorp Court held that the "principles that have always been implicit in our treatment of moot cases counsel against extending Munsingwear to settlement," as the Court had always "disposed of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." Id. at 24 (quotation marks and ellipses omitted). "The reference to 'happenstance' in Munsingwear" was merely an "allusion to this equitable tradition of vacatur," given that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." Id. at 25.

Thus, "[t]he principal condition to which [the Court] looked [was] whether the party seeking relief from the judgment below caused the mootness by voluntary action." Id. at 24. The Court emphasized that the settlement of a case is not a result of "happenstance," but a voluntary act of the parties. Id. at 23-27. The Court held that "[w]here mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari,

thereby surrendering his claim to the equitable remedy of vacatur." Id. at 25.

Additionally, the Court explained that its holding "must also take account of the public interest," which "requires" that the "demands of orderly procedure [of appeal] . . . be honored when they can." Id. at 26-27. The Court declared, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." Id. at 26 (quotation marks and citation omitted). Because the primary route for parties to seek relief from judgments was through appeal and certiorari, "[t]o allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system." Id. at 27.

The Bancorp Court thus held that where a case has become moot because the losing party voluntarily abandoned its right of review, e.g., through settlement, vacatur is not justified, although "exceptional circumstances may conceivably counsel in favor of such a course." Id. at 29. Moreover, the Court held that, in all situations, the party requesting relief

from the status quo had the burden of proving "equitable entitlement to the extraordinary remedy of vacatur." Id. at 26. Finally, the Court determined that "even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)." Id. at 29.

Thus, Bancorp established a presumption against vacatur in situations where the party requesting vacatur voluntarily caused the case to become moot. The case also overruled what had become a federal practice under Munsingwear, of automatically vacating judgments that had become moot on appeal so as to avoid issue preclusion attaching to a judgment that could not be reviewed on appeal. 340 U.S. at 39-40. See also Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 120 (4th Cir. 2000) (in the forty-four years between the Court's decision in Munsingwear and its decision in Bancorp, the prevailing practice among district courts was to follow the appellate court practice of automatically vacating moot judgments, pursuant to Munsingwear).

This practice had led to a situation where "repeat litigants," such as insurance companies, were settling cases after losing at the trial level against "one-time litigants,"

such as policy-holders, but only on the condition that judgments adverse to the interests of the repeat litigant were vacated. Eugene R. Anderson, et. al., Out of the Frying Pan and into the Fire: The Emergence of Depublication in the Wake of Vacatur, 4 J. App. Prac. & Process 475, 476 (2002). Thus, "[t]hrough vacatur, insurance companies [could] eradicate or reduce the number of pro-policy holder decisions and then argue that the weight of authority [was] in their favor."[10]

Bancorp responded to this practice by holding that appellate courts could no longer vacate lower court judgments based solely on a settlement agreement, which represents a voluntary abandonment of the right to appellate review, absent "exceptional" or "extraordinary" circumstances. While Bancorp preserved Munsingwear's dictum that mootness resulting from "happenstance" provides sufficient reason to vacate, 513 U.S. at 25 n.3, the Court clearly emphasized the need to consider the public interest in preserving judicial precedents and "the orderly operation of the federal judicial system" when granting equitable relief such as vacatur. 513 U.S. at 26-27. Furthermore, as noted, Bancorp explicitly states that, even before considering the existence or absence of "extraordinary

[10] Cf. Am. Games, Inc. v. Trade Prods., Inc., 142 F.3d 1164, 1170 (9th Cir. 1998) (finding that in cases of merger, the courts should evaluate the "economics and incentives of the transaction to smoke out" whether the merging parties are manipulating the common law through a "buy and bury" strategy of vacating adverse judgments through merger).

circumstances," an appellate court presented with a request for vacatur may remand to the trial court pursuant to the federal rules. Id. at 29. Thus, Bancorp clearly allows an appellate court to weigh the equities of vacatur or to simply remand to the trial court to determine whether a judgment should be vacated based upon consideration of the equities in the case.

The Ninth Circuit's decision in American Games, Inc. v. Trade Products, Inc., 142 F.3d 1164 (9th Cir. 1998), demonstrates the value in an appellate court having the option of remanding in situations where a case has become moot, even by happenstance. In that case, a district court judgment resolving a controversy between two parties was mooted while the case was on appeal to the Ninth Circuit, due to an "asset sale that effectively merged the two companies." Id. at 1165-66. The parties then "requested dismissal of the appeal and vacation of the district court judgment." Id. at 1166. Rather than weighing the equities of vacatur, the Ninth Circuit dismissed the appeal and remanded the case to the district court "for the purpose of considering the motion for vacatur." Id.

On remand, the district court allowed a third-party corporation that had an interest in the preclusionary value of the mooted judgment to intervene and argue against vacatur. Id. at 1166-67. The defendant-corporation (the result of the merger), argued that the judgment should be vacated pursuant to

Munsingwear because the merger was "happenstance." Id. at 1166. The district court decided that the case "[fell] somewhere between [Bancorp] (mootness by settlement) and [Munsingwear] (mootness by happenstance)." Id. However, after balancing the equities, the district court found that the "merger was motivated by legitimate business reasons only incidental to the mooted case, and not for the purpose of settling the case." Id. The district court thus issued the vacatur order. Id. The Ninth Circuit affirmed the vacatur order, holding that due to the "fact-intensive" nature of the "happenstance" inquiry, the district court could conduct an equitable balancing test instead of an "extraordinary circumstances" test. Id. at 1169-70.

Am. Games thus exemplifies how factually complex a "happenstance" vs. "voluntary" analysis can be. Am. Games also demonstrates how, through the "orderly operation of the federal judicial system," Bancorp, 513 U.S. at 27, appellate courts can utilize remand to trial courts to develop a fuller record before deciding the issue of vacatur.

The concurrence in Keahole Defense Coalition, Inc. v. Board of Land & Natural Resources, 110 Hawai'i 419, 437, 134 P.3d 585, 603 (2006) (Del Rosario, Circuit Judge, concurring),[11] also recognized that the Bancorp "exceptional circumstances" test

[11] Justice Acoba wrote the majority opinion and joined the concurring opinion.

applied only to appellate court vacatur. Id. Citing to Am. Games, the concurrence explained that trial courts, on the other hand, could vacate their own judgments based on an equitable balancing test, even in the presence of voluntary action by the party requesting vacatur. Id. (citing 142 F.3d at 1169-70).

In this case, the ICA held that vacatur was proper because, "'where appellate review has been frustrated due to mootness[,]' the circuit court's judgment, which is unreviewable because of mootness, could lead to issue preclusion." Goo, 2013 WL 5289010, at *8 (citing Aircall of Haw., Inc. v. Home Props., Inc., 6 Haw App. 593, 733 P.2d 1231 (1987)). The ICA concluded, based on Exit Co. Ltd. Partnership v. Airlines Capital Corp., 7 Haw. App. 363, 367, 766 P.2d 129, 131 (1988), which in turn cited to Aircall, that such a result would be unfair to defendants and resolved this unfairness "by adopting 'the federal practice of having the appellate court vacate the judgment of the trial court and direct dismissal of the case.'" Goo, 2013 WL 5289010, at *8 (quoting Exit Co., 7 Haw. App. at 367, 766 P.2d at 131).

Aircall, however, relied on Munsingwear to justify the "practice" of appellate courts vacating moot trial court judgments solely to avoid issue preclusion. 6 Haw App. at 595, 733 P.2d at 1233 ("Vacation of the [circuit court's order] and remand of the case to the circuit court with direction to dismiss the action will prevent the . . . Order, which is 'unreviewable

because of mootness, from spawning any legal consequences.' [Munsingwear], 340 U.S. at 41[.]"). However, as set forth above, Bancorp essentially abolished this federal practice.

In its place, Bancorp established the "extraordinary circumstances" test for appellate court vacatur of lower court judgments rendered moot by the voluntary actions of the parties, and directed federal appellate courts to "take account of the public interest" before vacating cases mooted by "happenstance." The procedural history in Am. Games demonstrated further that even cases apparently mooted on appeal by "happenstance" may require "fact-intensive" inquiries that are best left to trial courts to resolve.

Here, the ICA did not evaluate whether the Council's passage of the ordinance was "happenstance," an action not attributable to the voluntary action of the parties, which would have justified vacatur under Munsingwear as affirmed by Bancorp. Munsingwear, 340 U.S. at 39-40; Bancorp, 513 U.S. at 25 n.3. The ICA did not explain how the defendants carried their burden of establishing their "equitable entitlement to the extraordinary remedy of vacatur." Bancorp, 513 U.S. at 26. Finally, the ICA did not "take account" of how vacatur would serve the public interest. Id. at 26-27.

Homeowners also maintain their motion for reconsideration was the first opportunity they had to address the

question of vacatur,[12] and Ordinance 3848 was passed only as part of a "global settlement." Homeowners also quoted what was contended to be "Minutes of Maui County Council Planning Committee" purporting to show that Ordinance 3848 was part of this settlement, but the Minutes were not in the record because the case became moot after the record was developed. Although the record would not be able to reflect the existence of such a settlement because the case became moot due to actions taken by the Council after the appeal was taken, if a settlement agreement had been demonstrated the ICA would have had to find "extraordinary circumstances" to justify vacatur under Bancorp. 513 U.S. at 29.

Thus, the ICA did not properly analyze the vacatur issue.

2.

The County and Homeowners agree that the circuit court's judgment was rendered moot as a result of the Council's enactment of Ordinance 3848. They also agree that the injunction can be vacated. Homeowners argue, however, that the Council's passage of Ordinance 3848 was attributable to the County because the County lobbied for its passage, Ordinance 3848 was part of a

[12] The ICA's supplemental briefing order did not require the parties to brief the issue of vacatur. Additionally, Homeowners filed their supplemental brief before the County and Developers, and thus did not have an opportunity to respond to the defendants' requests for vacatur in their briefs. Thus, Developers' argument that Homeowners waived their right to argue against vacatur is without merit.

"global settlement," and the County was defending an illegal action by the Mayor as opposed to an existing law. The County counters that actions of the legislative branch were not attributable to the executive branch, and thus the County "is in a position akin to a party who finds its case mooted on appeal by 'happenstance,' rather than by events within its control."

Regardless of which party is correct, this is precisely the type of equity-balancing, fact-intensive situation that is best left to the circuit court to evaluate. Because this case became moot while on appeal, Goo, 2013 WL 5289010, at *3, the parties did not have an opportunity to adduce evidence, present memoranda, or make arguments to the circuit court judge, who would have been in the best position to make factual determinations as to the cause of the mootness and to balance the equities of the case. The record on the vacatur issue is not only incomplete, it is virtually non-existent, as all, or virtually all, of the actions resulting in the case becoming moot occurred after the appeals were filed.

A remand to the lower court is commonly invoked by appellate courts when a case becomes moot while awaiting a decision on appeal. See Am. Games, 142 F.3d at 1168 (describing the Ninth Circuit's "established procedure of remanding so the district court can decide whether to vacate its judgment in light of the consequences and attendant hardships of dismissal or

refusal to dismiss and the competing values of finality of judgment and right to relitigation of unreviewed disputes" (quotation marks omitted)).

Given the "fact-intensive" nature of the inquiry into whether the party seeking vacatur caused the case to become moot, a trial court is better equipped than an appellate court operating at a distance to fashion equitable relief. See id. at 1170 ("Given the fact-intensive nature of the inquiry required, it seems appropriate that a district court should enjoy greater equitable discretion when reviewing its own judgments than do appellate courts operating at a distance."). See also Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1139 (10th Cir. 2010) (Henry, J., dissenting) ("the district court is better equipped than we are to fashion equitable relief, and we afford it considerable discretion in doing so"). Remand to the lower court also better protects the "orderly operation of the judicial system" by leaving fact-finding powers with the trial courts and review of the trial courts' discretion to the appellate courts. Bancorp, 513 U.S. at 27.

Moreover, unlike an appellate court that is more likely to be in the position of rendering an "all or nothing" determination (vacating or not vacating), a lower court may modify a judgment to address the interests of both parties.

Thus, the better rule to apply is that, when a case becomes moot on appeal and the trial court has not had an opportunity to evaluate a motion for vacatur, the appellate court, in the absence of exceptional circumstances, should remand the case to the trial court to give the court the first opportunity to evaluate the cause of the mootness based on a complete record.

Bancorp's preservation of Munsingwear's "happenstance" analysis is, in practice, impractical. As shown by Am. Games, even the analysis of "happenstance" is "fact-intensive." 142 F.3d at 1170. Additionally, if a case became moot while on appeal, there would likely be no record on which an appellate court could properly analyze whether the "controversy . . . has become moot due to circumstances unattributable to the parties." Bancorp, 513 U.S. at 23.

Enabling the trial court to evaluate the issue first, and perhaps reach a middle ground, or allow agreement of the parties, would also be consistent with the policy of preserving judgments. Bancorp, 513 U.S. at 26-27 (judicial precedents are valuable to the legal community as a whole). A remand to the trial court also furthers the interests of judicial economy, as it avoids a situation in which an appellate court analyzes a motion for vacatur, denies it, and then a party below files an

HRCP Rule 60(b) motion for vacatur in the circuit court.[13] Am. Games, 142 F.3d at 1169 ("[A trial court] is not precluded by [an appellate court's denial of a request for vacatur] from vacating its own judgment after an independent review of the equities, and we therefore follow our established practice of remanding the case to the [trial court] for such a determination." (quoting Cammermeyer v. Perry, 97 F.3d 1235, 1239 (9th Cir. 1996))).

Accordingly, when a case is mooted while on appeal, the appellate court should, absent exceptional circumstances, remand the case to the trial court for a consideration of the vacatur issue.

3.

The ICA erred by vacating the circuit court's December 31, 2008 Order Granting Partial Summary Judgment and judgments and remanding to the court for dismissal given that the more equitable rule for cases that have been rendered moot on appeal

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[13] HRCP Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . . .
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

is for appellate courts, in the absence of extraordinary circumstances, to remand to the trial court to evaluate the issue of vacatur based upon a developed record. The case should have therefore been remanded to the circuit court to allow that court an opportunity to consider an HRCP Rule 60(b) motion for vacatur. The circuit court may then make factual findings, balance the equities of the case, and exercise its discretion as to whether its own judgment should be vacated in whole or in part. Am. Games, 142 F.3d at 1168, 1170. See also Keahole, 110 Hawai'i at 437, 134 P.3d at 603 (Del Rosario, Circuit Judge, concurring); Bancorp, 513 U.S. at 29.

B. Private Attorney General Doctrine

"[N]ormally, pursuant to the 'American Rule,' each party is responsible for paying his or her litigation expenses." Superferry II, 120 Hawai'i at 218, 202 P.3d at 1263 (quotation marks, brackets and citation omitted). This general rule is subject to several exceptions, including the private attorney general doctrine. Id.

The private attorney general doctrine "is an equitable rule that allows courts in their discretion to award [attorneys'] fees to plaintiffs who have vindicated important public rights." Id. (quoting Maui Tomorrow v. State, 110 Hawai'i 234, 244, 131 P.3d 517, 527 (2006)). Courts applying this doctrine consider three basic factors: "(1) the strength or societal importance of

the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." Superferry II, 120 Hawai'i at 218, 202 P.3d at 1263. All three prongs must be satisfied by the party seeking attorneys' fees. See Waiahole II, 96 Hawai'i at 31, 25 P.3d at 806 (although the parties satisfied the first and third prongs, failure to satisfy the second prong meant the private attorney general doctrine did not apply). Maui Tomorrow, 110 Hawai'i at 245, 131 P.3d at 528 (the private attorney general doctrine did not apply because the plaintiffs' case failed to satisfy the second prong of the private attorney general doctrine).

The circuit court in this case denied attorneys' fees to Homeowners, holding that Homeowners failed to satisfy the first and third factors of the doctrine. The ICA agreed with the circuit court's analysis and affirmed the court's order denying Homeowners' motion for attorneys' fees. Goo, 2013 WL 5289010, at *8-12.

This court reviews circuit court awards of attorneys' fees under the abuse of discretion standard. Honolulu Const. & Draying Co., Ltd. v. State, Dep't of Land & Natural Res. (Irwin Park II), 130 Hawai'i 306, 313, 310 P.3d 301, 308 (2013). However, "we review de novo whether the trial court disregarded rules or principles of law that arise in deciding whether or not

a party satisfies the three factors of the private attorney general doctrine." Id.

In Waiahole II, the court held that the third prong of the private attorney general doctrine appeared to be met, as the case "involved constitutional rights of profound significance, and all of the citizens of the state, present and future, stood to benefit from the decision." 96 Hawai'i at 31, 25 P.3d at 806. The court found the impact of the decision similar to cases in other jurisdictions that applied the doctrine to award fees in situations involving the public trust doctrine. Id.

In Superferry II, the third criterion was satisfied because the underlying action resulted in "generally applicable law that established procedural standing in environmental law and clarified the need to address secondary impacts in environmental review[.]" 120 Hawai'i at 221, 202 P.3d at 1266. Thus, the decision would "benefit large numbers of people over long periods of time." Id. The court in the underlying case had expressly stated that "'[a]ll parties involved and society as a whole' would have benefitted had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawai'i Environmental Policy Act." Id. (quoting Sierra Club I, 115 Hawai'i at 343, 167 P.3d at 336)).

Similarly in Kaleikini v. Yoshioka, the third prong was satisfied because the court's opinion "established 'generally applicable law' regarding standing to enforce historic preservation laws" and ensure that such laws would be enforced as written, "for the public good" and "in the public interest[.]" 129 Hawaiʻi 454, 466, 304 P.3d 252, 264 (2013). The court in Nelson v. Hawaiian Homes Commission also found the third prong satisfied where the underlying decision allowed the Department of Hawaiian Home Lands to shift funding from administrative expenses to operating expenses, thereby "provid[ing] a benefit to the Hawaiian Home Lands trust, impacting at least the tens of thousands of known beneficiaries on the waiting list, and ultimately benefitting the State as a whole, because stewardship of Hawaiian Home Lands was an obligation taken on by the State as a condition for admission into the union." 130 Hawaiʻi 162, 167-68, 307 P.3d 142, 147-48 (2013).

In Irwin Park II, the court considered the application of the third prong in "a situation where the public policy involves a discrete property or historic site open to the general public." 130 Hawaiʻi at 317-18, 310 P.3d at 312-13. The court explained that the underlying decision, which denied a petition to expunge a deed restriction requiring a historic site to be preserved as a public park, resulted in "benefits [that] would clearly accrue to residents and tourists who visit the Aloha

Tower area through the continued preservation of Irwin Park." Id. at 318, 310 P.3d at 313.

The court recognized that the case "involved a discrete determination, rather than a direct challenge to a law or policy." Id. However, although the "litigation concerned a specific property, . . . the result vindicated the dedication of public parks and historic sites across the state." Id. The court noted that the litigation prevented the state agency from "altering a historic site and acting in contravention" of applicable laws and the original grantor's intent in dedicating the property to be used as a public park. Id. at 318-19, 310 P.3d at 313-14. Thus, the case had "general precedential value for enforcing governmental adherence to the dedication of private land for public parks and as historic sites, and for the enforcement of the government's commitments to the preservation of such parks and historic sites." Id. at 319, 310 P.3d at 314.

This case in contrast did not involve the enforcement of a law of general state-wide applicability, did not benefit a substantial number of people on a scale comparable to decisions such as Superferry II or Waiahole II, and lacks general precedential value.

The circuit court's order in this case established that the MLPD as a whole was subject to the Height Restriction Law. The circuit court enjoined the County from taking any action that

would conflict with the court's determination of the applicable height restrictions, as applied to the MLPD. Thus, the direct impact of the court's order was limited to the MLPD subdivisions.

Even within the MLPD, as the circuit court recognized, it was "very unclear" how many people would actually benefit from the court's ruling that the Height Restriction Law applied. The court's ruling did not result in removing the improvements that blocked Homeowners' view, and did not benefit the other lot owners within the MLPD who were prevented from building homes on their property.

Finally, this case involved private property and lacks precedential value, given the subsequent enactment that modified the Height Restriction Law by establishing that the pre-1991 height definition governed project districts that received phase II approval prior to September 4, 1991.

Accordingly, this case does not satisfy the third prong of the private attorney general doctrine pertaining to the number of people standing to benefit from the decision. Because we find that Homeowners' failed to satisfy the third prong of the private attorney general doctrine, we do not examine the first two prongs. Waiahole II, 96 Hawaiʻi at 31, 25 P.3d at 806; Maui Tomorrow, 110 Hawaiʻi at 245, 131 P.3d at 528. Thus, the ICA did not err in finding that the circuit court did not abuse its discretion in denying Homeowners' request for attorneys' fees.

V. Conclusion

For the foregoing reasons, we vacate that portion of the ICA's judgment that vacated the circuit court's judgments and December 31, 2008 Order Granting Partial Summary Judgment. The case is remanded to the circuit court for further proceedings consistent with this opinion. We affirm that portion of the ICA's judgment that affirmed the circuit court's denial of Homeowners' request for attorneys' fees.

David J. Gierlach and
Lance D. Collins
for petitioners

Patrick K. Wong,
Caleb P. Rowe,
Brian T. Moto, and
Jane E. Lovell (Madelyn S.
D'Enbeau on the briefs)
for respondents Mayor Alan
Arakawa, Successor-in-
Interest to Mayor Charmaine
Tavares, William Spence,
Director of Planning, County
of Maui, Successor-in-
Interest to Director Jeff
Hunt, County of Maui

Ronald T. Ogomori,
Nathan H. Yoshimoto, and
T.F. Mana Moriarty
for respondents New Sand
Hills, LLC., VP and PK (ML),
LLC., KCOM Corp., and
Sandhills Estates Community
Association

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack