

FIFTH AMENDMENT OF THE RESTATED DECLARATION  
OF CONDOMINIUM PROPERTY REGIME  
AND BY-LAWS OF WAIKIKI BANYAN

WHEREAS, the Trustees of the Liliuokalani Trust, herein referred to as "Liliuokalani Trust", are the owners in fee simple of the real property described in Original certificate of Title No. 209,663 and the Transfer Certificates of Title listed in Exhibit "A" attached hereto and incorporated herein by reference; and

WHEREAS, by Indenture of Lease dated February 22, 1978, effective as of December 1, 1977, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 12746, Page 429, herein referred to as the "Master Lease", said Liliuokalani Trust and Kawaiahao Church, a Hawaii eleemosynary corporation, herein referred to as "Kawaiahao", the owner of certain adjoining real property, being herein collectively referred to as the "Lessor", leased all the real property to BANYAN ONE, INC., a Hawaii corporation, herein referred to as the "Lessee"; and

WHEREAS, by Master Sublease dated February 22, 1978, effective as of December 2, 1975, recorded as aforesaid in Liber 12746, Page 473, the Lessee sublet said property to Waikiki Banyan, Inc., a Hawaii corporation, hereinafter referred to as the "Developer"; and

WHEREAS, the Developer improved said land by constructing thereon certain improvements hereinafter described in accordance with plans incorporated herein by reference filed and recorded in said Bureau of Conveyances as Condominium File Plan No. 637; and

WHEREAS, to create a condominium project (herein called the "project") known as "WAIKIKI BANYAN", the Lessor, Lessee and Developer submitted all of their interests in the property to a Horizontal Property Regime (now known as a Condominium Property Regime) under Chapter 514A, Hawaii Revised Statutes, and adopted a Declaration, dated February 28, 1978 and recorded in the Bureau of Conveyances of the State of Hawaii in Liber 12789, Page 613; and

WHEREAS, the Declaration was duly amended by an amendment dated December 9, 1971, filed in Liber 16136, Page 148 and subsequently restated by a First Restatement of the Declaration of Condominium Property Regime of Waikiki Banyan dated August 31, 1992, recorded as Land Court Document No. 1951836 and also filed in the Bureau of Conveyances as Document No. 92-147513; and the First Restatement was subsequently amended by three amendments, one amendment dated February 26, 1993 and recorded as Land Court Document No. 2006511; the second amendment dated August 4, 1993 recorded

as Land Court Document No. 2054583 and also filed in the Bureau of Conveyances as Document No. 93-131432; the third amendment dated July 7, 1999 recorded as Land Court Document No. 2561101 and also filed in the Bureau of Conveyances as Document No. 99-115283; and the fourth amendment dated July 25, 2000 recorded as land Court Document No. 2642313 and also filed in the Bureau of Conveyances as Document No. 2000-108303; and

WHEREAS, the Declaration as restated and amended, and the By-Laws for the project attached to and recorded contemporaneously with the Declaration, provided for the organization and operation of the ASSOCIATION OF APARTMENT OWNERS OF WAIKIKI BANYAN (the "Association") in accordance with the By-Laws; and

WHEREAS, pursuant to Sections 514A-11(11) and 514A-82(b)(2) of the Hawaii Revised Statutes, more than seventy-five percent (75%) and sixty-five percent (65%), respectively, of all apartment owners of the project gave their written consent to amend the Declaration and By-Laws of the Association as indicated below;

NOW THEREFORE, the Declaration and By-Laws are hereby amended as hereinafter set forth.

A. DIVISION OF PROPERTY. The project is hereby divided into the following separate freehold estates:

1. Apartments. 876 separate condominium apartments are hereby designated in the spaces within the perimeter and party walls, floors and ceilings of each of the 876 apartment units of the project, contained in two buildings, designated the "Mauka Tower" and the "Makai Tower", respectively, containing thirty-seven (37) and thirty-six (36) stories, respectively, both without basements, constructed principally of concrete, which spaces together with appurtenant lanai spaces, if any, are referred to herein as "apartments" and are designated on said condominium file plan and described as set forth in Exhibit "C" attached hereto and for every purpose made a part hereof.

(a) The apartments are constructed according to several different floor plans. A description of each of said floor plans, designating the layout, number of rooms and approximate area thereof is set forth in Exhibit "C" attached hereto and for every purpose made a part hereof.

(b) The apartments are numbered and located in the manner as shown on said Condominium File Plan recorded in the Bureau of Conveyances of the State of Hawaii.

(c) The apartments in each of the Towers have immediate access to a corridor, four elevators and two stairways, all such corridors, elevators and stairways

being common elements, on each floor of each respective tower leading to the grounds of the project.

(d) The respective apartments shall not be deemed to include the undecorated or unfinished surfaces of the perimeter or party walls or interior load-bearing walls, the floors and ceiling surrounding each apartment or any pipes, wires, conduits or other utility or service lines running through such apartment which are utilized for or serve more than one apartment, the same being deemed common elements as hereinafter provided. Each apartment shall be deemed to include all the walls and partitions which are not load-bearing within its perimeter or party walls, doors and door frames, windows and window frames, the lanai air space (if any), the inner decorated or finished surfaces of all walls, floors and ceilings, and all fixtures originally installed therein.

2. Common Elements. One freehold estate is hereby designated in all remaining portions of the project, herein called the "common elements", including specifically but not limited to:

- (a) Said land in fee simple;
- (b) All foundations, floor slabs, columns, girders, beams, supports, unfinished perimeter, party and load bearing walls, roofs, entries, stairways, elevators, walkways, entrances and exits of said building;
- (c) All yard, grounds and landscaping;
- (d) All parking areas;
- (e) All pipes, cables, conduits, ducts, fan rooms, electrical equipment, wiring and other central and appurtenant transmission facilities and installations over, under and across the project which serve more than one apartment for services such as power, light, gas, water, sewer, telephone and television signal distribution, if any;
- (f) Two (2) utility/mail rooms and one (1) lounge on the ground floor of each of the Mauka and Makai Towers;
- (g) Three (3) utility rooms on each of the third, fourth and fifth floors of each of the Mauka and Makai Towers; and a Makai storage area on the fourth floor of the Makai Tower;
- (h) A utility/trash room; two (2) lounge areas; and a housekeeping-electrical room on the sixth floor of the Mauka Tower; men's and women's dressing-sauna-restrooms; one (1) janitor's room, two (2) lounge areas, a laundry room, housekeeping room, electrical room, utility/trash room and snack bar on the sixth floor of

the Makai Tower; and a recreation deck and swimming pool on the roof of the garage connecting the Mauka and Makai Towers;

(i) Laundry, housekeeping, utility and electrical rooms located on each of the seventh through twelfth and fourteenth through thirty-seventh floors of the Makai Tower and the seventh through twelfth and fourteenth through thirty-eighth floors of the Mauka Tower;

(j) Jogging track on the roof of each of the Mauka and Makai Towers.

(k) Any and all other apparatus and installations of common use and all other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.

(l) Automatic sprinkler system, smoke detectors, fire alarm system, annunciator panels, emergency generators, and any and all other apparatus and installations required to comply with the requirements of Ordinance No. 83-58 of the Revised Ordinances of Honolulu.

B. COMMON INTEREST. Each apartment shall have appurtenant thereto an undivided 1/876 fractional interest and the equivalent thereof stated as a percentage (.11415++%) in all common elements of the project (herein called the "common interest") and the same proportionate share in all common profits and expenses of the project and for all other purposes including voting.

C. EASEMENTS. In addition to any easements herein designated in the limited common elements, if any, the apartments and common elements shall have and be subject to the following easements:

1. Each apartment shall have appurtenant thereto nonexclusive easements in the common elements designated for such purposes for ingress to, egress from, utility services for and support of such apartment; in the other common elements for use according to their respective purposes; and in all other apartments of the building for support.

2. If any part of the common elements encroaches upon any apartment, or if any apartment encroaches upon the common elements, a valid easement for such encroachment and the maintenance thereof, so long as it continues, shall and does exist. In the event the building of the project shall be partially or totally destroyed and then rebuilt or in the event of any shifting, settlement or movement of any portion of the project, minor encroachments of any parts of the common elements or apartments

due to such construction shall be permitted, and valid easements for such encroachments and the maintenance thereof shall exist.

3. The Association of Apartment Owners of the project shall have the right, to be exercised by its Board of Directors or Managing Agent, to enter any apartments from time to time during reasonable hours as may be necessary for the operation of the project or at any time for making emergency repairs therein required to prevent damage to any apartments or common elements or for the installation, repair or replacement of any common elements.

D. ALTERATION AND TRANSFER OF INTERESTS. The common interest and easements appurtenant to each apartment shall have a permanent character, shall not be altered without the consent of all owners of apartments affected thereby as expressed in an amendment to this Declaration duly recorded, which amendment shall contain the consent thereto by the holders of any first mortgage on such apartments or of an apartment lease demising the same, as shown in the Association's record of ownership, or who have given the Board notice of their interest through the Secretary of the Association or the Managing Agent, shall not be separated from such apartment and shall be deemed to be conveyed or encumbered with such apartment even though not expressly mentioned or described in the conveyance or other instrument. The common elements shall remain undivided, and no right shall exist to partition or divide any part thereof or the apartments except as provided by said Horizontal Property Act; and, without limiting the provisions of Section 514A-21(a) of the Hawaii Revised Statutes, any such partition or division shall be subject to the prior written consent thereto by the holders of any first mortgage, filed of record, of any apartment or of any apartment sublease or condominium conveyance document demising the same.

E. USE. The apartments shall be occupied and used only for purposes permitted from time to time by this Declaration and the By-Laws attached hereto, and by applicable zoning ordinances, rules and regulations, and for no other purpose. The owners of the respective apartments shall have the absolute right to lease such apartments subject to all provisions of this Declaration and the By-Laws attached hereto.

F. ADMINISTRATION OF PROJECT. Administration of the project shall be vested in its Association of Apartment Owners, herein called the "Association", consisting of all apartment owners of the project in accordance with the By-Laws of the Association attached hereto as Exhibit "E" and made a part hereof. Operation of the project and maintenance, repair, replacement and restoration of the common elements, and any additions and alterations thereto, shall be in accordance with the provisions of said

Horizontal Property Act, this Declaration and the By-Laws and specifically but without limitation the Association shall:

1. Make, build, maintain and repair all fences, sewers, drains, roads, curbs, sidewalks and parking areas which may be required by law to be made, built, maintained and repaired upon or adjoining or in connection with or for the use of the project or any part thereof.

2. Keep all common elements of the project in a strictly clean and sanitary condition, and observe and perform all laws, ordinances, rules and regulations now or hereafter made by any governmental authority for the time being applicable to the project or the use thereof.

3. Well and substantially repair, maintain, amend and keep all common elements of the project, including without limitation the building thereof, with all necessary reparations and amendments whatsoever in good order and condition except as otherwise provided herein, and maintain and keep said land and all adjacent land between any street boundary of the project and the established curb or street line in a neat and attractive condition and all trees, shrubs and grass thereon in good cultivation and replant the same as may be necessary, and repair and make good all defects in the common elements of the project herein required to be repaired by the Association, of which notice shall be given by any owner or his agent, within 30 days after the giving of such notice.

4. Before commencing or permitting construction of any improvement on the project, obtain and deposit with the Lessor and Lessee a bond or certificate thereof naming as obligees the Lessor, Lessee and collectively all other apartment owners as their interests may appear, in a penal sum not less than one hundred per cent (100%) of the cost of such construction and with a corporate surety authorized to do business in Hawaii, guaranteeing performance of such construction free and clear of all mechanics' and materialmen's liens, and all claims in lieu of mechanics' and materialmen's liens arising under Section 514A-16 of the Hawaii Revised Statutes, as amended.

5. Observe any setback lines affecting the project and not erect, place or maintain any building or structure whatsoever except approved fences or walls between any street boundary of the project and the setback line along such boundary.

6. Not erect or place on the project any building or structure including fences and walls, nor make additions or structural alterations to or exterior changes of any common elements of the project nor place or maintain thereon any signs, posters or bills whatsoever, except in accordance with plans and specifications including detailed

plot plan, prepared by a licensed architect if so required by the Lessor, first approved in writing by the Lessor and the board, and also approved by a majority of apartment owners (or such larger percentage as required by law or this Declaration) including all owners of apartments thereby directly affected, and complete any such improvements diligently after the commencement thereof. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS DECLARATION, the Association of Apartment Owners shall have the irrevocable right, to be exercised by the Board of Directors:

a. To install an automatic sprinkler system, smoke detectors, fire alarm system, annunciator panels, emergency generators and any and all apparatus and installations required to comply with Ordinance No. 83-58 of the Revised Ordinances of Honolulu. The Board shall not be required to obtain the consent of the Lessor or any of the owners of apartments to proceed with the aforesaid installations.

b. To have access to each apartment from time to time during reasonable hours as may be necessary for the installation and maintenance of the automatic sprinkler system, smoke detectors, fire alarm system, annunciator panels and any and all apparatus and installations required to comply with Ordinance No. 83-58 of the Revised Ordinances of Honolulu.

7. Not make or suffer any strip or waste or unlawful, improper or offensive use of the project.

8. Have the right, to be exercised by its Board of Directors or Managing Agent, to enter any apartments from time to time during reasonable hours as may be necessary for the operation of the project or at any time for making emergency repairs therein required to prevent damage to any apartments or common elements or for the installation, repair or replacement of any common elements.

9. Fee Conversion. Notwithstanding any other provision contained in this Declaration or By-Laws to the contrary, the Board on behalf of the Association, shall have the power to do all such things as it deems necessary or appropriate to negotiate with the owners of the leased fee interest, including any sandwich interest, in the land, apartments and other improvements on the property (herein called the "Lessors") to sell all or any portion of the leased fee interest to the Association and/or its members and/or any other parties interested in purchasing all or any portion of the leased fee interest, and to facilitate the completion of the sale, and shall have the power to purchase all or any portion of the leased fee interest, and to sign any documents and do any and all other

acts or things incidental to the consummation of the transaction, including but not limited to the powers set forth in the By-Laws.

10. Voiding Lessors' Consent Requirement. Upon the acquisition from all the Lessors of all their leased fee interest in the land, apartments and other improvements of the property by the Association and/or the apartment owners, all approval and other requirements pertaining to the Lessors and their successors and assigns, if any, as contained in this Declaration and the By-Laws, shall thereupon become null and void and of no effect. The term "Lessors", as used herein, includes any assignee or other holder of the leased fee interest, including any sandwich interest, or any portion thereof.

G. MANAGING AGENT. Operation of the project shall be conducted for the Association by a responsible corporate Managing Agent who shall be appointed by the Association in accordance with the By-Laws. The Managing Agent is hereby authorized to receive service of legal process in all cases provided in said Horizontal Property Act. The initial Managing Agent shall be Dillingham Land Corporation whose principal place of business and post office address is 1441 Kapiolani Boulevard, Honolulu, Hawaii. The Managing Agent shall also collect rent payable under Apartment Subleases or Condominium Conveyance Documents issued by the Lessor or Lessee and cause the same to be paid as and when due thereunder, without comingling any such funds with other funds in its custody at any time. Any agreement for professional management for the project shall provide for termination of either the managing agent or the Association without cause or payment of a termination fee on ninety (90) days' or less written notice.

H. COMMON EXPENSES. Except as hereinafter provided, all charges, costs and expenses whatsoever incurred by the Association for or in connection with the administration of the project, including without limitation the operation thereof, any maintenance, repair, replacement and restoration of the common elements and any additions and alterations thereto, any labor, services, materials, supplies and equipment therefor, any liability whatsoever for loss or damage arising out of or in connection with the common elements or any accident, fire or nuisance thereon, and any premiums for hazard and liability insurance herein required with respect to the project, and all charges, costs, and expenses incurred for or in connection with the purchase of all or any portion of the leased fee interest, including any sandwich interest, from the Fee Owners or any Sublessors, (or any efforts toward that end), and/or the administration of all or any portion of said leased fee interest, including but not limited to all costs associated with obtaining any needed financing in connection with such acquisition and all payments

that become owing to the lender under the terms of any note or mortgage entered into in connection with such financing shall constitute common expenses of the project for which all apartment owners shall be severally liable in proportion to their respective common interests. Rent and real property taxes and special assessments referred to in Section 514A-6, Hawaii Revised Statutes, as amended, and charges, including those for utilities, which are separately metered, shall not be common expenses of the horizontal property regime hereby created and no payments thereof shall be payments of such common expenses; provided, however, all such expenses for maintenance, repair, replacement, additions and improvements to limited common elements shall be charged to the apartment owner to which the limited common element is appurtenant. The Board of Directors of the Association (herein called the "Board") shall from time to time assess the common expenses against all the apartments in their respective proportionate shares, and the unpaid amount of such assessments against any apartment shall constitute a lien against such apartment prior to all other liens, except only (i) liens for taxes and assessments lawfully imposed by governmental authority against such apartment and (ii) liens for sums unpaid on mortgages of record, and costs and expenses including attorney's fees provided in such mortgages. Such lien may be foreclosed by the Board or Managing Agent as provided by said Horizontal Property Act, provided that thirty (30) days' prior written notice of intention to foreclose shall be mailed, postage prepaid, to the Lessor and all other persons having any interest in such apartment as shown in the Association's record of ownership. Without limiting the provisions of Section 514A-90 of the Hawaii Revised Statutes, as amended, where the holder of a mortgage of record of an apartment or of an apartment sublease or condominium conveyance document demising the same comes into possession of the apartment pursuant to the remedies provided in the mortgage, foreclosure of the mortgage, or conveyance in lieu of foreclosure of the mortgage, such mortgagee shall take such possession of the apartment free of any claims for unpaid assessments or charges chargeable to the apartment, which accrue prior to the time such mortgagee comes into possession of the apartment (except for claims for a pro rata share of such assessments or charges resulting from a pro rata reallocation of such assessments or charges to all apartments, including such apartment).

In the event that assessments received during any year are in excess of the actual expenditures for such year by the Association for common expenses of the project, the Board of Directors may determine in its sole discretion that such excess shall be:

(a) Applied in whole or in part to reduce the assessments for the immediately subsequent year;

(b) Designated in whole or in part as a capital contribution to the Association to be used for future capital improvements and replacements;

(c) Segregated and held in whole or in part as a Custodial Fund to be expended solely for specifically designated capital improvements and replacements;  
or

(d) Segregated and added in whole or in part to the Maintenance Reserve Fund established hereunder.

The proportionate interest of each apartment owner in said capital contributions, Custodial Fund or Maintenance Reserve Fund, cannot be withdrawn or separately assigned but shall be deemed to be transferred with such apartment even though not expressly mentioned or described in the conveyance thereof. In case the Horizontal Property Regime hereby created shall be terminated or waived, said capital contributions, Custodial Fund or Maintenance Reserve Fund, remaining after full payment of all common expenses of the Association shall be distributed to all apartment owners in their respective proportionate shares except for the owners of any apartments then reconstituted as a new horizontal property regime.

I. COMPLIANCE WITH DECLARATION AND BY-LAWS. All apartment owners, their tenants, families, servants and guests, and any other persons who may in any manner use the project, shall be bound by and comply strictly with the provisions of this Declaration and the By-Laws of the Association, and all agreements, decisions and determinations of the Association as lawfully made or amended from time to time, and failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the Board or Managing Agent on behalf of the Association or, in a proper case, by any aggrieved apartment owner; in the event of the failure of any apartment owner to comply fully with any of the same within thirty (30) days after written demand therefor by the Association, the Association shall promptly give written notice of such failure to the holder of any first mortgage of such apartment or of the apartment lease demising the same, as shown in the Association's record of ownership or who has given the Board notice of its interest through the Secretary of the Association or the Managing Agent.

J. INSURANCE. The Association at its common expense shall at all times keep all buildings of the project, including the common elements and, whether or not part of the common elements, all exterior and interior walls, floors and ceilings, in accordance with the "as built" condominium plans and specifications, insured against loss or damage by fire with extended coverage in an insurance company authorized to do business in

Hawaii having a financial rating by Best's Insurance Reports of Class VI or better, in an amount sufficient to provide for the full repair or full replacement thereof without deduction for depreciation, in the name of the Association, and mortgagees as their interests may appear, and payable in case of loss to such bank or trust company authorized to do business in the State of Hawaii as the Board shall designate for the custody and disposition as herein provided of all proceeds of such insurance, and from time to time cause to be deposited promptly with Lessor, Lessee and the Secretary of the Association true copies of such insurance policies or current certificates thereof, without prejudice to the right of each apartment owner to insure his apartment for his own benefit. Flood insurance shall also be provided under the provisions of the Federal Flood Disaster Protection Act if the property is located in an identified flood hazard area as designated by the Department of Housing and Urban Development in the amount of the aggregate of the outstanding principal balance of all mortgage loans on apartments in the project or the maximum limit of coverage available under the National Flood Insurance Act of 1968, as amended, whichever is less. The members of the Association may by majority vote at any meeting of the Association require that exterior glass of the project also be insured under such policy. In every case of such loss or damage all insurance proceeds shall be used as soon as reasonably possible by the Association for rebuilding, repairing or otherwise reinstating the building, except as provided in paragraph K, in a good and substantial manner according to the original plan and elevation thereof or such modified plans conforming to laws and ordinances then in effect as shall be first approved by Lessor and Lessee and as herein provided, and the Association at its common expense shall make up any deficiency in such insurance proceeds. Every such policy of insurance shall:

1. Provide that the liability of the insurer thereunder shall not be affected by, and that the insurer shall not claim any right of set-off, counterclaim, apportionment, proration or contribution by reason of, any other insurance obtained by or for any apartment owner;

2. Contain no provision relieving the insurer from liability for loss occurring while the hazard to such building is increased, whether or not within the knowledge or control of the Board, Lessor or Lessee, or because of any breach of warranty or condition or any other act or neglect by the Board, Lessor, Lessee or any apartment owner or any other persons under either of them;

3. Provide that such policy and the coverage thereunder may not be cancelled or substantially modified (whether or not requested by the Board) except by

the insurer giving at least sixty (60) days' prior written notice thereof to the Board, Lessor, Lessee, every first mortgagee of an apartment and every other person in interest who shall have requested such notice of the insurer;

4. Contain a waiver by the insurer of any right of subrogation to any right of the Board, Lessor, Lessee or apartment owners against any of them or any other persons under them;

5. Provide that the insurer, at the inception of the policy and on each anniversary date thereof, shall provide the Board with a written summary, in layman's terms, of the policy. This summary shall include, without limitation, a description of the type of policy, the coverage and limits thereof, the amount Of the annual premium, and the renewal dates. Upon receipt of such summary from the insurer, the Board shall provide the summary to the apartment owners; and

6. Contain a standard mortgagee clause which shall:

(a) Provide that any reference to a mortgagee in such policy shall mean and include all holders of mortgages of any apartment or condominium conveyance document of the project, in their respective order and preference, whether or not named therein;

(b) Provide that such insurance as to the interest of any mortgagee shall not be invalidated by any act or neglect of the Board, Lessor, Lessee or apartment owners or any persons under any of them;

(c) Waive any provision invalidating such mortgagee clause by reason of the failure of any mortgagee to notify the insurer of any hazardous use or vacancy, any requirement that the mortgagee pay any premium thereon, and any contribution clause; and

(d) Provide that, without affecting any protection afforded by such mortgagee clause, any proceeds payable under such policy shall be payable to said bank or trust company designated by the Board.

7. Contain a waiver by the insurer of any right of the insurer to repair, rebuild or replace, if the apartment owners decide pursuant to Paragraph K of this Declaration not to repair, reinstate, rebuild or restore the damaged or destroyed improvements.

The Board on behalf of the Association at its common expense shall also effect and maintain at all times comprehensive general liability insurance, covering all apartment owners with respect to the project and naming the Lessor and Lessee as additional assureds , in an insurance company authorized to do business in Hawaii with minimum

limits of not less than One Million Dollars (\$1,000,000.00) for injury in any one accident or occurrence and Five Hundred Thousand Dollars (\$500,000.00) for property damage, and from time to time deposit promptly with the Lessor and Lessee current certificates of such insurance, without prejudice to the right of any apartment owners to maintain additional liability insurance for their respective apartments. Any such policy of insurance shall (a) provide that the same shall not be invalidated by any act or neglect of the Board, Lessor, Lessee or apartment owners or any persons under any of them; (b) contain a waiver by the insurer of any right of subrogation to any right of the Board, Lessor, Lessee or apartment owners against any of them or any other persons under them; (c) contain a "severability of interest" endorsement, precluding the insurer from denying the claim of an apartment owner because of negligent acts of the Association or other apartment owners; and (d) Provide that the policy and its coverage may not be cancelled or reduced (whether or not requested by the Board), except by the insurer giving at least sixty (60) days' prior written notice thereof to the Board, Lessor, Lessee, apartment owners, every first mortgage of an apartment sublease or condominium conveyance document and every other person in interest who shall have requested such notice of the insurer.

All premiums for insurance herein required to be obtained by the Board on behalf of the Association shall be a common expense to be paid by monthly assessment thereof, and such payments shall be held in a separate escrow account of the Association and shall be used solely for the payment of such premiums as the same become due.

The Board shall review not less frequently than annually the adequacy of its entire insurance program and shall adjust its insurance program accordingly; the Board shall then report in writing its conclusions and action taken on such review to Lessor, the owner of each apartment and to the holder of any first mortgage on any apartment who shall have requested a copy of such report or copies of all such reports; provided that no adjustment shall be made which decreases any insurance coverage.

At the request of any mortgagee of any interest in any apartment, the Board shall furnish to such mortgagee a copy of the casualty and liability insurance policies referred to in the foregoing paragraph J.

K. INSURED DAMAGE OR DESTRUCTION. Notwithstanding the provisions of paragraph J, if any part of the improvements of the project shall be damaged by an insured casualty, the determination of whether or not to reconstruct or repair the same shall be made as follows:

1. Partial destruction, which shall be deemed to mean destruction which does not render one-half or more of the apartments untenable, shall be reconstructed or repaired unless at a meeting of the Association of Apartment Owners, which shall be called prior to commencement of such reconstruction or repair, eighty percent (80%) or more of the apartment owners vote against such reconstruction or repair, and this Declaration is terminated pursuant to the provisions of Section 514A-21(a)(1) of the Hawaii Revised Statutes.

2. Total destruction, which shall be deemed to mean destruction which does render one-half or more of the apartments untenable, shall be reconstructed or repaired unless at a meeting of the Association of Apartment Owners, which shall be called within ninety (90) days after the occurrence of the casualty, or, if by such date the insurance loss has not been finally adjusted, then within 30 days thereafter, eighty percent (80%) or more of the apartment owners vote against such reconstruction or repair. In the event the property shall not be reconstructed or repaired pursuant to such vote, the provisions of Section 514A-21(a)(2) of the Hawaii Revised Statutes shall apply.

L. CONDEMNATION. In case at any time or times the project or any part thereof shall be taken or condemned by any authority having the power of eminent domain, all compensation and damages for or on account of any land shall be payable to and be the sole property of the Lessor and Lessee as their interests may appear, and all compensation and damages for or on account of any improvements of the project shall be payable to such bank or trust company authorized to do business in Hawaii as the Board shall designate as trustee for all apartment owners and mortgagees according to the loss or damage to their respective apartments and appurtenant common interests and shall be used promptly by the Association to the extent necessary for restoring or replacing such improvements on the remaining land according to plans therefor first approved as herein provided, unless such restoration or replacement is impractical in the circumstances. Unless such restoration or replacement is undertaken within a reasonable time after such condemnation the Association at its common expense shall remove all remains of such improvements so taken or condemned and restore the site thereof to good orderly condition and even grade.

M. UNINSURED CASUALTY. In case at any time or times any improvements of the project shall be damaged or destroyed by any casualty not herein required to be insured against, such improvements shall be rebuilt, repaired or restored unless eighty percent (80%) or more of the apartment owners vote to the contrary. Any such restoration of the common elements shall be completed diligently by the Association at

its common expense and the apartment owners shall be solely responsible for any restoration of their respective apartments so damaged or destroyed, according to the original plans and elevation thereof, or such other plan first approved as provided herein. Unless such restoration is undertaken within a reasonable time after such casualty, the Association at its common expense shall remove all remains of improvements so damaged or destroyed and restore the site thereof to good orderly condition and even grade.

N. ALTERATION OF PROJECT. Restoration or replacement of the project or any building or other structure thereof or construction of any additional building or other structure or structural alteration or addition thereto, different in any material respect from said condominium map of the project, shall be undertaken by the Association or any apartment owners only pursuant to an amendment of this Declaration, duly executed by or pursuant to the affirmative vote of all the apartment owners and accompanied by the written consent of the holders of all liens affecting any of the apartments, and in accordance with complete plans and specifications therefor first approved in writing by the Lessor and Board, and promptly upon completion of such restoration, replacement, construction, alteration or addition the Association shall duly record or file of record such amendment together with a complete set of floor plans of the project as so altered, certified as built by a registered architect or professional engineer. Provided, however, that notwithstanding any provision in this Declaration to the contrary, any alterations or additions within an apartment or within a limited common element appurtenant to and for the exclusive use of an apartment, or of certain apartments, shall require only the written approval thereof, including the apartment owner's plans therefor, by the holder of a first lien affecting such apartment (if the lienholders require such approval), the Board, all other apartment owners thereby directly affected (as determined by said Board), and the Lessor, and such alterations or additions may be undertaken without an amendment to this Declaration or filing of a complete set of floor plans of the project as so altered, provided further, however, that in the event and to the extent the layout, location, description, or area of the apartment is changed from that described in the Declaration or as depicted on the Condominium File Plan, an amendment to this Declaration, or Condominium File Plan, or both, shall be duly executed and recorded by the owners of all apartments directly affected by such change (as determined by the Board as aforesaid), the Board and the holders of all first liens affecting such affected apartments.

O. MAINTENANCE RESERVE FUND. The Board shall establish and maintain a Maintenance Reserve Fund by the assessment of and payment by all apartment owners in

equal monthly installments of their respective proportionate shares of such reasonable annual amount as the Board may determine in its sole discretion as adequate to cover each apartment owner's obligations to provide for utilities, insurance, maintenance and repair of the common elements and other expenses of administration of the project, which shall be deemed conclusively to be a common expense of the project. The Board may include reserves for contingencies in such Fund, and such Fund may from time to time be increased or reduced in the discretion of the Board. The proportionate interest of each apartment owner in said Fund cannot be withdrawn or separately assigned but shall be deemed to be transferred with such apartment even though not expressly mentioned or described in the conveyance thereof. In case the horizontal property regime hereby created shall be terminated or waived, said Fund remaining after full payment of all common expenses of the Association shall be distributed to all apartment owners in their respective proportionate shares except for the owners of any apartments then reconstituted as a new horizontal property regime.

P. AMENDMENT OF DECLARATION. Except as otherwise provided herein or in said Horizontal Property Act, this Declaration may be amended by vote of seventy-five percent (75%) of the apartment owners and shall be effective only upon the recording of an instrument setting forth such amendment and vote duly executed by such owners or by the proper officers of the Association; provided, however, that any material amendment of this Declaration shall also require the prior written approval thereof by the Lessor and at least seventy-five percent (75%) of the institutional holders of first mortgages on apartment subleases or condominium conveyance documents demising or transferring the same (based upon one vote for each first mortgage owned); and, further provided, that the Lessor and Lessee reserve the right to amend this Declaration without the consent or joinder of persons then owning or leasing the apartments by filing an amendment to this Declaration pursuant to the provisions of Section 514A-13, Hawaii Revised Statutes, after completion of the building described herein by attaching to such amendment a verified statement of a registered architect or professional engineer certifying that the final plans theretofore filed or being filed simultaneously with such amendment fully and accurately depict the layout, location, apartment numbers and dimensions of the apartments as built. Notwithstanding the foregoing provisions of this paragraph, the Declaration may further be amended as set forth in Paragraph N hereof. Provided that such amendment shall be effective only upon the recording of the same in the appropriate registry of conveyances of the State of Hawaii.

Q. DEFINITIONS. The terms "majority" or "majority of apartment owners" herein means the owners of apartments to which are appurtenant more than fifty percent (50%) of the common interests, and any specified percentage of the apartment owners means the owners of apartments to which are appurtenant such percentage of the common interests. The term "institutional lender" or "institutional holder" used herein and in the By-Laws attached hereto means a mortgagee which is a bank or savings and loan association or established mortgage company, or other entity chartered under federal or state laws, any corporation or insurance company, or any federal or state agency.

R. LATENT DEFECTS. Lessor hereby agrees to take no action which would adversely affect the rights of the Association of Apartment Owners with respect to assurances against latent defects in the property or other right assigned to the Association by reason of the establishment of this horizontal property regime.

S. EXPENSES RELATED TO THE INSTALLATION OF THE FIRE SPRINKLER SYSTEM. All expenses related to the purchase and installation of the automatic sprinkler system, smoke detectors, fire alarm system, annunciator panels, emergency generators and any and all apparatus and installations required to comply with ordinance No. 83-58 of the Revised Ordinances of Honolulu shall constitute common expenses as defined in paragraph "H." of this Declaration, for which all apartment owners shall be severally liable in proportion to their respective common interests. Any sums unpaid for the foregoing purchases and installations shall constitute liens on the apartments, as fully and effectually as to all other assessments for common expenses .

T. BORROWING. In compliance with Section 514A-82.3, Hawaii Revised Statutes, the Board of Directors may authorize the borrowing of money to be used by the Association for the repair, replacement, maintenance, operation, or administration of the common elements of the project, or the making of any additions, alterations, and improvements thereto. The cost of such borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to such borrowing, shall be a common expense of the project; provided that owners representing fifty percent (50%) of the common interest and apartments give written consent to such borrowing, having been first notified of the purpose and use of the funds.

IN WITNESS WHEREOF, the undersigned have executed this instrument on this 7th day of July, 1999.

ASSOCIATION OF APARTMENT OWNERS

OF WAIKIKI BANYAN

By Shraga Dachner

Its President

By Margaret S. Walker

Its Secretary