

LAND COURT SYSTEM

REGULAR SYSTEM

Return by Mail Pickup To:

Brydeswood Water Company
822 Bishop Street
Honolulu, Hawaii 96813
Attention: Michele Loudermilk

TITLE OF DOCUMENT:

**BRYDESWOOD WATER COMPANY
DECLARATION OF COVENANTS**

PARTIES TO DOCUMENT:

DECLARANT McBRYDE SUGAR COMPANY, LLC, a Hawaii limited liability
company

TAX MAP KEY(S): Kauai 2-4-16-1 to -12, -14 & -20 to -30, inclusive

(This document consists of ___ pages.)

BRYDESWOOD WATER COMPANY DECLARATION OF COVENANTS

THIS DECLARATION OF COVENANTS (this “**Declaration**”) is made effective this _____ day of _____, 20____, by McBRYDE SUGAR COMPANY, LLC, a Hawaii limited liability company, whose address is 822 Bishop Street, Honolulu, Hawaii 96813 (“**Declarant**”).

RECITALS

A. Declarant is the owner of the lands described on Exhibit "A" attached hereto (the initial “Member Properties”). Each of these Member Properties are lots in the Brydeswood Subdivision, Phase II and III (the “Brydeswood Ranch Subdivision”).

B. Declarant has developed wells and water transmission, distribution and storage facilities for purposes of serving the Brydeswood Ranch Subdivision and other properties.

C. Declarant desires to create a common water system ownership, use and management plan, enforceable by the Declarant or any Member Property owner, in accordance with this Declaration that will run with and be binding on the Member Properties.

NOW, THEREFORE, for the reasons set forth above, the Declarant hereby declares as follows:

1. Declaration. The Member Properties shall be held, sold, conveyed, encumbered, leased, occupied and improved subject to the limitations, restrictions, covenants and conditions set forth in this Declaration. The acceptance of a deed, agreement of sale, lease or other conveyance by any person of any Member Property or any interest in any Member Property shall constitute acceptance of these covenants, regardless of whether or not said instrument is expressly made subject hereto. This Declaration shall be binding upon and enforceable against each owner, purchaser, tenant and occupant of all or any part of each Member Property and their respective successors in interest; and shall be deemed incorporated in each deed, lease or other instrument by which any right, title or interest in any Member Property is granted, devised or conveyed, whether or not expressly referred to herein.

2. Definitions. As used in this Declaration, the following capitalized terms shall have the following respective meanings:

“**Articles**” means the Association’s Articles of incorporation as may be amended from time to time.

“**Association**” means the Brydeswood Water Company more particularly described in Section 3 below.

“Board” means the Board of Directors of the Association.

“Declarant” means McBryde Sugar Company, LLC, a Hawaii limited liability company.

“Declaration” means this Declaration of Covenants as it may be amended from time to time.

“Homeowners’ Association” means a homeowners’ association, of which two or more Member Properties are members, and which shall have responsibility for the operation or maintenance of common areas of the subdivision or condominium project of which said Member Properties are a part.

“Member Property” initially means each of the lots in the Brydeswood Ranch Subdivision that are described on Exhibit A. “Member Property” shall also mean such additional lots or condominium units that are annexed to this Declaration in accordance with the terms hereof, including without limitation additional lots in said Subdivision and condominium units in the condominium project called “Makali’i Plantation” located adjacent to said Subdivision in which certain portions of the Water System are located. “Member Property” includes all lands and real estate interests into which said properties may be divided, reconfigured, subdivided, converted or modified, from time to time in the future. “Member Property” may sometimes herein be referred to simply as “Property”.

“Owner” of a Member Property means any person who owns a fee simple interest in said Member Property, and any person to whom all rights as Owner (including voting) shall have been transferred by means of (a) a deed, (b) a lease of said Member Property for a period in excess of five (5) years, or (c) an agreement of sale which transfers all rights of possession and occupancy; provided, however, that in each such case the transferee of said rights will not be recognized as an “Owner” by the Association unless and until a written notice of transfer is filed in the official ownership records of the Association maintained by the Board of Directors.

“Recorded” means recorded in the Bureau of Conveyances of the State of Hawaii (**“Bureau”**).

“Water System” means (a) all Water System Easements (defined below) owned or held by the Association from time to time, including without limitation those listed on Exhibit B; (b) the water system consisting of two (2) wells and water treatment system with their appurtenant pumps, valves, pipes, utility services, tanks, reservoirs and equipment; and (c) the potable water distribution system consisting of all pipes, meters and appurtenances; and all Water System Easements (defined below), and any future replacements of or additions to the foregoing items (a) to (c), and (d) the Association’s rights and interests in the ground water that is the source for the Water System. The term “Water System” shall not include any pipes, lines, conduits, valves or other facilities or equipment that are downstream of the water meter serving a single

Member Property, said meter being the limit of the Association's ownership and maintenance responsibility.

“Water System Easements” means all easements held or to be acquired by the Association in connection with the Water System, including but not limited to those listed on Exhibit B.

“Voting and Assessment Percentage” is a percentage assigned to each Member Property determined by dividing the maximum number of meters allocated to that Member Property as set forth in Section 3d or a supplement to this Declaration (whether or not those meters are actually installed or in use) by the total number of meters (initially 86) allocated to the Member Properties. The Voting and Assessment Percentage of each Member Property, as adjusted from time to time, represents and quantifies the voting rights in the Association associated with each Member Property and is the basis for allocating and assessing certain Common Expenses as provided in Section 3f. Each Member Property's initial Voting and Assessment Percentage is listed in Section 3d. Upon annexation of additional Member Properties, or allocation of any additional meter(s) to any existing Member Property, this percentage shall be recalculated using the formula described in this paragraph, with such minimal rounding as is necessary for the total Voting and Assessment Percentage of all Member Properties to equal 100%.

3. THE ASSOCIATION

a. Membership. The Owners of each and every Member Property shall automatically be members of Brydeswood Water Company, a Hawaii nonprofit corporation organized and existing pursuant to Chapter 414D, Hawaii Revised Statutes (the Hawaii Nonprofit Corporations Act) and Chapter 421J, Hawaii Revised Statutes (the Hawaii Planned Community Associations Act), and (herein called “the Association”), and such membership shall be mandatory for each Member Property. Said membership may be transferred or encumbered only with and to the same extent as the Member Property to which it is appurtenant is transferred or encumbered. In the event fee title to a Member Property is transferred without mention of said membership, said membership shall be deemed to be automatically transferred with said Property. As set forth in the definition of “Owner” above, certain other persons or entities with an interest in a Property may be recognized as “Owners” as well. No waiver of rights under this Declaration shall operate to excuse any Owner from its obligations hereunder. No Owner shall have a separate interest in the funds of the Association, or right to withdrawal of same.

b. The Association's Authority Over the Water System. The Declarant shall convey the Water System to the Association at no cost and not later than five (5) years following the date on which this Declaration is Recorded. The Association shall hold, control, manage and operate the Water System, as a common expense, as set forth below in more detail, from and after the time when management thereof shall have been transferred to the Association by Declarant, and may exercise all reasonable

management rights, powers and authority with respect thereto including, but not limited to (a) the power to enter into contracts for, or otherwise to implement, the maintenance, operation, repair and replacement of the Water System; (b) the power to maintain appropriate casualty and liability insurance; (c) the power to adopt, implement and enforce reasonable rules and regulations to govern the orderly use and operation of the Water System; (d) the power to assess and collect common expenses as set forth below; (e) the authority to take all steps and actions required by applicable law; (f) the power to enforce, and carry out, the terms and conditions of this Declaration, in all respects; and (g) all such other powers and authority granted by Chapters 414D and 421J, Hawaii Revised Statutes, or that are otherwise necessary or convenient to the ownership and operation of the Water System and the implementation of this Declaration. All such dominion, control and authority shall cease with respect to any facility, the responsibility of which shall be accepted by the County of Kauai or other governmental authority or any regulated public utility.

Notice shall be given to the State of Hawaii Department of Health upon (a) Declarant's transfer of the ownership of the Water System to the Association; (b) the relinquishment of Declarant's control to The Association under Section 4b below; and (c) any transfers to the County of Kauai, a public utility or other entity.

c. Water System Operation and Service. The Association shall operate, maintain, repair and replace the Water System for the exclusive use and benefit of the Member Properties, and each Member Property shall share in all expenses of the Association as provided below. The Association shall contract with a professional water system operations company to manage and operate the potable and non-potable water systems comprising the Water System. Each Member Property will be entitled to receive water service from the Water System in amounts necessary and reasonable to provide normal potable water service for domestic use and non-potable agricultural (and domestic non-portable irrigation) uses in amount(s) to be determined from time to time by the Board, all subject to reasonable rules, regulations and limits which the Board may adopt from time to time. The extent of water use by each Member Property shall be measured by one (1) or more separate water meter(s). The fees for issuing and installing any meter, the water lateral line and the connection shall be determined by the Board and shall be paid by the Owner of the Member Property to be served thereby.

d. Meters. Each Member Property shall be entitled to issuance of the maximum number of Water System meters listed on the charts below. Upon annexation of any additional Member Properties, a maximum number of meters for those additional Member Properties shall be established as well. Meters shall generally be 5/8-inch in capacity, provided that upon an Owner's request the Board may permit issuance of larger meters where necessary for the Owner's reasonable usage and without compromising overall system integrity, provided that in connection with its approval of such a request the Board may reduce the total number of meters allocated to the Member Property so that the overall capacity of the meters allocated to any Member Property shall not be increased by virtue of issuance of one or more larger meters. Any

reduction of the number of meters allocated to a Member Property in connection with the issuance of larger meters shall not reduce that property's Voting and Assessment Percentage. The following are the maximum number of meters allocated to the initial Member Properties in Phase II of the Brydeswood Subdivision:

Subdivision Lot Number	TMK Number	Meters	Initial Voting & Assessment Percentage
1	(4) 2-4-16-1	5	
2	(4) 2-4-16-2	5	
3	(4) 2-4-16-3	5	
4	(4) 2-4-16-4	3	
5	(4) 2-4-16-5	2	
6	(4) 2-4-16-6	3	
7	(4) 2-4-16-7	5	
8	(4) 2-4-16-8	5	
9	(4) 2-4-16-9	5	
10	(4) 2-4-16-10	4	
11	(4) 2-4-16-11	4	
12	(4) 2-4-16-12	5	
14	(4) 2-4-16-14	2	

The following are the maximum number of meters allocated to the initial Member Properties in Phase III of the Brydeswood Subdivision:

Subdivision Lot Number	TMK Number	Meters	Initial Voting & Assessment Percentage
1	(4) 2-4-16-20	4	
2	(4) 2-4-16-21	3	
3	(4) 2-4-16-22	3	
4	(4) 2-4-16-23	3	
5	(4) 2-4-16-24	3	
6	(4) 2-4-16-25	3	
7	(4) 2-4-16-26	2	
8	(4) 2-4-16-27	4	
9	(4) 2-4-16-28	2	
10	(4) 2-4-16-29	3	
11	(4) 2-4-16-30	3	

The maximum number of meters available to a Member Property are fixed and shall not be changed or increased as a result of subdivision, submission of the Member Property to a condominium property regime, or any other division of the Member Property.

e. Shortages. If any water shortage shall occur for any reason, including but not limited to drought, failure of the well(s) to produce, or a failure of any pump or any portion of the storage or distribution system, the Board shall have the right

to impose additional restrictions and conservation measures in its discretion to assure an equitable distribution within the reasonable production capabilities of the system. All Owners and occupants shall strictly comply with all such rules and requirements and in the event of any breach or violation the Board shall have the power and right to stop or curtail all water service to any non-complying Member Property (with no reduction in said Member Property's obligations to pay its share of Association expenses) until compliance is assured. In establishing any such restrictions and conservation measures, the Board will recognize that, to the extent feasible, water use limitations should be imposed against domestic non-potable water service, first; non-potable agricultural use, second; and reasonable domestic potable service, third. If water use by any Member Property exceeds an established limit in any month or any other applicable designated period, the Board may in its discretion require an additional payment or penalty for said excess or may curtail the supply of water to said Member Property, as the Board may determine to be in the best interests of the system as a whole.

f. Assessments and Management. Each Member Property shall be liable for its proportionate share of all expenses of the Association for the maintenance, repair, operation and replacement of the Water System, the expenses of operating the Association, reasonable reserves as determined by the Board from time to time, and other reasonable costs in connection with such operations (collectively the "Common Expenses"). Initially, the assessment of Common Expenses shall be allocated by the Board among all Member Properties in two components:

(1) one component shall include all estimated and actual base capital costs, and fixed operating costs and reserves for the Water System and the Association. The costs included in this component shall be assessed to each Member Property proportionately, based on its Voting and Assessment Percentage.

(2) the second component shall include all variable operating costs, such as costs of electricity. This cost component shall be assessed based on each Member Property's actual metered usage of water.

The Board may from time to time revise the methods for allocating Common Expenses as it deems equitable and necessary for the prudent management of the Water System, provided that any such revision shall be subject to the approval of the Owners at a meeting of the Association and the approval of the Declarant so long as it owns any Member Property or retains the power under this Declaration to annex additional Member Properties to the Association.

(2) Special Assessments. The Board may make special assessments against any Member Property for any extraordinary costs or expenses caused by the act or omission of the Owner or occupant of said Member Property under circumstances where it would be unfair, in the reasonable discretion of the Board to assess said cost to all Member Properties as a Common Expense.

(3) Billings. Common Expense billings procedures shall be established and managed by the Board or the Board's hired managers. The Board may for convenience work cooperatively with a Homeowners' Association established for one or more Member Properties provided such association has been established pursuant to applicable law, of each condominium and subdivision to coordinate billings and collections and to reduce costs.

f. Financial Management. The financial management of the Water System shall be delegated by the Board to a qualified professional management firm who shall assist the Board and perform the Board's delegated functions with respect to the financial planning, budgeting and management of the system and which shall manage the billing of customers, collection of payments, paying water system expenses and providing financial reports to the Department of Health, the Board and the members on a periodic basis, consistent with sound and prudent financial management principles. Without limiting the generality of the foregoing, the said financial manager shall assist the Board in the following tasks:

(1) Long-Term Planning. The preparation and periodic updating of a long term business plan with a term of not less than five (5) years which indicates the revenue needs to cover The Association's annual operating and maintenance expenses, and the repayment of debt, if any, using projected interest and inflation rates as needed. The plan shall project detailed breakdowns of the income sources and the operating and maintenance cost items such as utilities, chemicals, repairs, water testing, insurance, major equipment and emergency repairs and replacement, management services.

(2) Reserve Funds. One or more reserve funds shall be established for major Water System component emergency repairs and planned replacement of major Water System components at the end of service life. The reserve funds shall have sufficient detail including a listing of major Water System components, construction estimates to purchase and install components, the estimated service life of components and the projected replacement cost of components at the end of service life, based on projected interest and inflation rates to obtain the projected replacement costs.

(3) Special Assessments. If at any time projected revenues shall appear to be insufficient to cover the timely payment of costs and reserves, the Board shall have the power to levy special assessments to all Member Properties from time to time over and above the pre-established period assessments, based on a budget or business plan, if the special assessment is necessary to meet unforeseen costs or liabilities or to deal with emergency repairs and replacements. Any such Association-wide special assessments shall be allocated among the Member Properties based on the number of meters that a Member Property is entitled to (whether or not such meters is actually installed or in use).

h. Payments and Defaults. Each assessment of expenses by the Association or the Board shall be a separate, distinct and personal debt of the Owners of a Member Property (or in the case of multiple Owners of a Member Property, each Owner jointly and severally) against which the same is assessed. If the Owner shall fail to pay the Owner's assessment when due, then said Owner shall pay an additional assessment of \$50.00 (or such other fine or fines adopted by the Board from time to time) for each such failure and all delinquent assessments shall bear interest at the rate of one and one-half percent (1½%) per month from the assessment due date (or the highest rate permitted by Hawaii law, if such highest rate is less than one and one-half percent (1½%) per month).

All amounts owed hereunder by a Member Property shall be a lien on said Member Property and, in the case of a Member Property subject to a Homeowners' Association, the common funds of such association. In the event of a default or defaults by the Owners of any Member Property, and in addition to any other remedies provided by law, the Board may enforce such obligation by bringing a suit or suits at law to enforce each such assessment obligation and may enforce said lien on said Member Property in any appropriate court. Said lien may be enforced by judicial foreclosure or non-judicial power of sale in the same manner as a mortgage is enforced under Hawaii law, as amended from time to time. Any such action shall be brought in the name of the Board or the Association, and the Association shall be entitled to recover from the defendant, as part of any judgment, additional compensation in the amount of the Association's or Board's attorney's fees and costs in prosecuting the action. The Owner of each Member Property by accepting a deed to a Member Property (or other interest therein) or by accepting water service from the Water System hereby irrevocably consents to these provisions and the right of the Board as set forth herein and consents to the imposition of a lien (without notice or service of process) against the Owner's Member Property at any time to enforce said obligations.

Said lien shall be junior and subordinate in lien priority to the lien of any first mortgage which shall have been in existence and duly recorded in the Bureau prior to the date the Association's notice of lien is recorded.

In addition to the above remedies, the Board or the Association may, upon ten (10) days' written notice stop water service to any delinquent Member Property or remove or lock its meter(s). Neither the Board nor the Association, its members, any employee, or agent thereof, shall be liable for any damages or losses caused by said stoppage or disconnection. Reconnection shall be subject to curing all defaults in payment and payment of such reconnection fee as the Board may establish from time to time.

The Board may also levy special assessments against all of the Member Properties under its authority for the purpose of meeting attorneys' fees and costs in connection with all legal actions.

h. Notice. The address of each Owner as it appears on the records of the Association and as may be changed from time to time by written notice to the Association by any Owner shall constitute the official address of the Owner. Service of process may be carried out through registered mail, addressed to the particular Owner at his or her address.

i. Statements. The Board will, when requested, issue written statements to purchasers or mortgagees of Member Properties stating whether or not the assessments against said Property or Member Property have been paid to the date of the statement, and if not, the amount owed, together with any additional information that may be reasonably requested concerning the account of said Property or member Property.

j. Liability. Neither the Declarant, its members, directors, officers or principals, the Owners and occupants of any Member Property, the Board members, the Association, or their respective employees or agents (collectively the "Released Parties") shall be liable to any Owner or to the tenant or other occupant of any Member Property or any other affected person for any claims, losses, damages or expenses which shall be caused by or shall result from (a) any failure of the Association or the Water System to provide water to any Member Property, or (b) or any contamination or defects in water quality or its unsuitability for any reason for drinking, irrigation or any other purpose, regardless of the cause of said failure or contamination, and regardless of the fact that said failure, stoppage or contamination may have been due to the error, negligence or other causes relating to the management or operation of the Water System. ALL OWNERS ACKNOWLEDGE THAT CONTAMINATION IN SOME CIRCUMSTANCES MAY CAUSE SERIOUS PHYSICAL ILLNESS, INJURY OR DEATH AND ARE URGED TO TAKE PREVENTATIVE ACTION BY PERIODIC TESTING.

Similarly, if any Member Property is damaged by fire, none of the Released Parties shall be liable for any claim, damage or loss resulting from the water volume or supply being insufficient to fight the fire, regardless of the cause of such insufficiency. It is understood that each Owner fully accepts the risk of any such problems. ALL OWNERS ARE ENCOURAGED TO INSTALL FIRE PROTECTION DEVICES WHICH ARE INDEPENDENT FROM THE WATER SYSTEM AND TO NOT RELY ON THE ADEQUACY OF WATER SYSTEM FOR FIRE PROTECTION.

Without limiting the generality of the foregoing, it shall be incumbent on each Owner and occupant of each Member Property to protect himself or herself against the risk of loss from water service interruptions or failures or water quality problems or fire risk by means of appropriate business interruption, insurance or similar coverage, by obtaining water from other sources, or by storing water in reasonable amounts or other appropriate measures, if said Owner or occupant deems that protection against said risks is needed, and by complying with all applicable safe drinking water regulations and guidelines.

k. Maintenance of Backflow Prevention Devices. Backflow prevention devices approved by the Board are required for all connections to the Water System. Each Owner shall be responsible for testing and maintaining said device which is appurtenant to said Owner's service.

l. Drainage Maintenance. The Association shall be responsible for compliance with the reporting and drainage maintenance obligations of the initial Member Properties under that certain Brydeswood Subdivision, Phases II & III Detention Basin Agreement between the Declarant and the County of Kauai, dated June 1, 2011, and Recorded as Document No. 2011-137119. All costs of such compliance with such obligations shall be included in the Common Expenses, but shall only be assessed against the initial Member Properties identified on Exhibit A, each of which is subject to said agreement. If additional Member Properties not subject to said agreement are annexed in the future, they shall not bear any of the expenses of compliance with that agreement.

m. Dissolution. In the event that Brydeswood Water Company as a corporate entity is dissolved (whether voluntarily or involuntarily) or otherwise ceases to exist, then, in every such case, an unincorporated nonprofit association organized and existing pursuant to Chapter 421J, Hawaii Revised Statutes, and Chapter 429, Hawaii Revised Statutes (the Hawaii Uniform Unincorporated Nonprofit Associations Act), and governed by the Articles shall forthwith and without further action or notice be formed and shall succeed to all of the rights, duties, privileges, assets, benefits and obligations of the corporation unless otherwise provided in a resolution and plan of distribution adopted pursuant to Part V of Chapter 414D, Hawaii Revised Statutes, or any successor statute. Those persons who are serving as directors and officers of the corporation at the time of any such dissolution shall, upon such dissolution, become directors and officers of the unincorporated Association and shall continue to serve as such until their successors are duly elected in accordance with the Articles.

4. EASEMENTS & RESTRICTIVE COVENANTS.

a. Easements. The Association holds or will hold easements located within the Member Properties outside of the Member Properties, including easements in roadway lots and other parcels. All such Easements are part of the Water System.

b. Expenses. Except as paid for by Declarant as part of the initial development of the Water System, all costs and expenses related to the construction, operation, maintenance, repair and replacement of all Water System within each Easement area shall be borne by the Association as a Common Expense, except as otherwise provided in this Declaration. The Association shall pay, or reimburse to the owner of the land underlying each Easement area, all real estate taxes assessed with respect to the Water System located within each Easement area, but the owner of the land shall pay all such taxes which shall be assessed with respect to the land itself and the Easement area.

c. Safeguards. The Association, in connection with all work in each Easement area, shall (i) observe and perform all laws, ordinances, rules and regulations now or hereafter imposed by any governmental authority which are applicable to the Easement area, (ii) complete the construction or repair of all Water System free and clear of all liens, and (iii) promptly upon the completion of all work, restore the surface of the Easement area to even grade and good and orderly condition.

d. Compliance. The terms and conditions of each Easement shall be strictly performed and complied with.

e. “As Is”. The Association accepts each designated Easement in “as is” condition without any representations or warranties expressed or implied by the Property or Member Property owner as to the physical condition of the Easement area or the suitability of the Easement area for the purposes of the designated Easement or the Water System.

5. ADMINISTRATIVE PROVISIONS.

a. Violations and Disputes.

(1) If any person or entity shall violate, attempt to violate or threaten to violate any of the covenants herein contained, any rules or regulations of the Association or any ruling of the Board, the Association, by and through the Board, or any Owner of any Property or Member Property may, in addition to and not exclusive of any other remedies available to the Association and such Owners, commence legal action at law or in equity against such person or entity, either to prevent or abate such violation or to recover damages caused by such violation or attempted or threatened violation, or both. Said damages may expressly include a judgment for all of the plaintiff’s costs of suit, including reasonable attorneys’ fees.

(2) All costs and expenses, including reasonable attorneys’ fees, incurred by or on behalf of the Association for (a) collecting any delinquent Common Expenses and assessments against any Member Property or the Owner of any Member Property, (b) foreclosing any lien on any Member Property, or (c) enforcing any provision of the Association documents or Chapter 421J, Hawaii Revised Statutes, against an Owner, occupant, tenant, employee of an Owner, or any other person who in any manner may use the Member Property shall be promptly paid on demand to the Association by such person or persons; provided that if the Association is not the prevailing party, all costs and expenses, including reasonable attorneys’ fees, incurred by any such person or persons as a result of the actions of the Association, shall be promptly paid on demand to the person by the Association.

(3) If any Owner is the prevailing party in an action against the Association, any of its officers or directors, or its Board of Directors to enforce any provision of the Association documents, then all reasonable and necessary expenses,

costs and attorneys' fees incurred by the Owner shall be awarded to the Owner; provided that no such award shall be made in any derivative action unless:

(a) The Owner first shall have demanded and allowed reasonable time for the Board to pursue an enforcement action; or

(b) The Owner demonstrates to the satisfaction of the tribunal that a demand for enforcement made to the Board would have been fruitless.

If an Owner is not the prevailing party in any action against the Association, any of its officers or directors, or its Board, to enforce any provision of the Association documents, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by the Association shall be awarded to the Association, unless the action was filed in small claims court, or, prior to filing the action in a higher court, the Owner has first submitted the claim to mediation pursuant to Section 421J-13, Hawaii Revised Statutes, and made a good faith effort to resolve the dispute under any of those procedures.

b. Declarant's Control. Notwithstanding anything herein to the contrary, the Declarant and its appointees shall act in all respects as and on behalf of the Association and its Board in all matters until the first to occur of the following: (a) the expiration of ten (10) years from the date of Recording of this Declaration; (b) the first date on which, by virtue of sales or other transfers, none of the initial Member Properties listed on Exhibit A are owned by Declarant or an entity affiliated with the Declarant; or (c) the date on which Declarant notifies the Association or Owners of the Member Properties of its voluntary relinquishment of said authority. The Declarant may in its discretion relinquish said authority either in full at one time or in portions or stages over time during said 10-year period. Upon the expiration or relinquishment of Declarant's control, the Association shall promptly elect a Board of Directors so as to minimize any disruption in the Association's affairs caused by the transition.

c. Duration of Covenants. These covenants shall be binding in perpetuity or until terminated by order of a court of competent jurisdiction.

d. Assignment of Declarant's Rights and Powers. The Declarant may assign all of its rights, powers, reservations and other interests hereunder by Recorded instrument.

e. Notice of Sale or Transfer of Title. Upon the sale or transfer of title to any Member Property, the transferee shall promptly notify the Association in writing of the name of each new Owner of said Member Property and his or her mailing address and home and business phone numbers.

f. Records of Ownership and Notices. The Declarant and the Association shall be entitled to rely conclusively on the records of ownership of the Member Properties provided to the Association pursuant to Sections 5.e, Notice of Sale or Transfer of Title above and in definition of Owner as provided for herein, for all

purposes, including, but not limited to, names and addresses for all communications, notices, service of process, approvals, voting and consents, it being the obligation and burden of each Owner to ensure that the Declarant and the Association have ownership records which are accurate and up-to-date. The Declarant and the Association may also conclusively rely, in the sole discretion of each, on the records of ownership and addresses of Owners as shown on the real property tax records for the County of Kauai in any particular case.

6. PROVISIONS RELATING TO DECLARANT'S COMMITMENTS.

a. First Year and Hookup Commitments. Declarant agrees to provide the Association upon commencement of Water System operation with a cash start up subsidy of \$240,000. Declarant shall cause each purchaser of a Member Property a minimum of \$10,000 as a "start up" fee for the Association, which fees are intended as replacement of Declarant's initial startup subsidy and not in addition to it. Accordingly, upon receipt of such fees they shall be used to refund the Declarant's start up subsidy until it is repaid in full (without interest). Additionally, each Owner will pay to the Association a one (1) time meter fee of \$2,500.00 (such fee may be amended from time to time) for each new meter hookup upon that unit's connection to the water system.

b. Monthly Service Charge and Assessments for Unsold Properties. Declarant agrees to pay the Association the monthly service charge and assessments for all unsold Member Properties, commencing with the official transfer of ownership of the water system from Declarant to the Association.

7. DISPUTE RESOLUTION.

All disputes, claims and disagreements involving the Association, the Declarant or any Member Property which relate to this Declaration or the Water System or its operation shall be submitted to binding arbitration before a single arbitrator in Lihue, Hawaii under the auspices of Dispute Prevention & Resolution, Inc., or other qualified dispute resolution agency.

8. ANNEXATION. The Declarant shall have the right to annex additional Member Properties to this Declaration. In order to implement an annexation, the Declarant shall execute and Record a Supplement to this Declaration identifying such Member Properties, the maximum number of meters which each is entitled to, the Voting and Assessment Percentage of each annexed Member Property, and the adjusted Voting and Assessment Percentage of all existing Member Properties resulting from the addition of the annexed properties. Annexation shall be effective on recordation of the Supplement. The owner(s) of the new Member Properties shall join in or consent to the Supplement, and the Supplement may also designate such additional terms, conditions and restrictions to which such additional Member Properties are subject. Upon recording of such a Supplement, the additional Member Properties and their Owners shall have all rights and obligations set forth in this Declaration, subject to the terms of their Supplement. Notwithstanding the foregoing, the

Association shall not be obligated to construct extensions of the Water System necessary to serve such annexed Member Properties. The Declarant's power to annex additional Member Properties shall expire on the 25th anniversary of the date of this Declaration.

9. MISCELLANEOUS PROVISIONS.

a. No Third Party Beneficiaries; Enforcement. Except with respect to the Association's rights hereunder, this Declaration is not intended, and shall not be deemed or construed, to confer any rights, power or privileges on any person or entity other than the Declarant.

b. Perpetuities. If any of the reservations, limitations, restrictions, covenants or conditions set forth herein 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 descendants of Elizabeth II, Queen of England, living on the date of this Declaration.

c. Effect of Invalidity. The reservations, limitations, restrictions, covenants and conditions set forth herein shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof, of any such reservations, limitations, restrictions, covenants or conditions shall not affect the validity or enforceability of any other provisions hereof. The invalidity of one or more provisions of these Covenants by judgment or court order shall not affect any of the other provisions hereof.

d. Attorneys' Fees. Subject to the limitations herein, in the event of a dispute under this Declaration, the prevailing party shall be entitled to recover from the losing party all costs including reasonable attorneys' fees.

e. Amendment of Covenants. This Declaration may be amended at any time by the affirmative vote or the written consent of the Owners holding not less than seventy-five percent (75%) of the total Voting and Assessment Percentage of all Member Properties, except as otherwise provided by applicable law. In addition, so long as Declarant or any affiliate of Declarant owns any of the Member Properties or so long as Declarant's rights under Section 8 (Annexation) remain in effect, amendments shall require the approval of the Declarant. Any such amendment shall be effective upon the Recording of an instrument which shall (a) recite said amendment; (b) recite that the Owners holding not less than seventy-five percent (75%) of the total Voting and Assessment Percentage of all Member Properties (and Declarant, if required) voted for, or gave their written approval for, said amendment or termination; and (c) be signed and sworn by the Owners of not less than three (3) Member Properties or by the proper officers of the Association. Notwithstanding the foregoing, the Declarant reserves the right so long as it owns any Member Property to make such amendment to this Declaration as are required by law or by any title insurance company.

f. Governing Law. This Declaration shall be governed by laws of the State of Hawaii.

IN WITNESS WHEREOF, Declarant has executed this Declaration of Covenants, effective as of the date first set forth above.

MCBRYDE SUGAR COMPANY, LLC

By _____

Its _____

"Declarant"

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

On this ____ day of _____, 20____, before me personally appeared _____, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

Print Name: _____
Notary Public, State of Hawaii.

My commission expires: _____

Date of Document: _____ # Pages: _____	
Name: _____ Second Circuit	
Doc. Description: <u>Brydeswood Water Association Declaration of Covenants</u>	

_____ Notary Signature	_____ Date
NOTARY CERTIFICATION	(Seal)

EXHIBIT "A"

First:

Lots 1 to 12, inclusive, and Lot 14 of the Brydeswood Subdivision, Phase II, said Lots being identified by Tax Map Key Nos. (4) 2-4-16-1 to -12, inclusive, and (4) 2-4-16-14.

Second:

Lots 1 to 11, inclusive, of the Brydeswood Subdivision, Phase III, said Lots being identified by Tax Map Key Nos. (4) 2-4-16--20 to -30, inclusive.

EXHIBIT "B"

List of Easements