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13                  *Attorneys for the Plaintiff*

14                                   **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
15                                   **IN AND FOR THE COUNTY OF MARICOPA**

16                  GALLERY COMMUNITY ASSOCIATION,  
17                  an Arizona non-profit corporation,

18                                  Plaintiff,

19                                  v.

20                  K. HOVNANIAN AT GALLERY, LLC, an  
21                  Arizona limited liability company; K.  
22                  HOVNANIAN ARIZONA OPERATIONS,  
23                  LLC, an Arizona limited liability company; K.  
24                  HOVNANIAN DEVELOPMENTS OF  
25                  ARIZONA, INC., an Arizona corporation; K.  
26                  HOVNANIAN COMPANIES OF ARIZONA,  
27                  LLC, an Arizona limited liability company;  
28                  JOHN DOES I-X AND JANE DOES I-X,  
                                WHITE CORPORATIONS I-X; BLACK  
                                PARTNERSHIPS I-X; AND GRAY LIMITED  
                                LIABILITY COMPANIES I-X,

  Defendants.

---

                                K. HOVNANIAN AT GALLERY, LLC, an  
                                Arizona limited liability company; K.  
                                HOVNANIAN ARIZONA OPERATIONS,  
                                LLC, an Arizona limited liability company; K.  
                                HOVNANIAN DEVELOPMENTS OF

Case No. CV2020-008714

Assigned to Hon. Katherine Cooper

**DECLARATION OF PENNY J.  
MANSHIP**

1 ARIZONA, INC., an Arizona corporation; K.  
2 HOVNANIAN COMPANIES OF ARIZONA,  
3 LLC, an Arizona limited liability company;

4 Third-Party Plaintiffs,

5 v.

6 CHAS ROBERTS AIR CONDITIONING,  
7 INC., an Arizona corporation; DESERT  
8 VISTA, INC., an Arizona corporation;  
9 GOTHIC LANDSCAPING, INC., a California  
10 corporation; HOME BUILDERS SITE  
11 SERVICES OF ARIZONA, LLC, an Arizona  
12 limited liability company; LEBLANC  
13 BUILDING CO., INC., an Arizona corporation;  
14 LIBERTY CONSTRUCTORS, LLC, an  
15 Arizona limited liability company, dba  
LIBERTY ARIZONA; RENCO LLC, an  
Arizona limited liability company, dba RENCO  
ROOFING; R/S SERVICE & SUPPLY, INC.,  
an Arizona corporation; SARGON MASONRY  
CONSTRUCTION, LLC, an Arizona limited  
liability company; and DOES 1-50.

16 Third-Party Defendants.

17  
18 I, Penny J. Manship, declare as follows:

19 1. I am counsel of record for the plaintiff, Gallery Community Association (the  
20 “Association” or “Plaintiff”) in the above-entitled action. I have personal knowledge of, or  
21 am otherwise competent to testify as to, each and every fact set forth in this Declaration.

22 2. The Association and Defendants K. Hovnanian at Gallery, LLC, K.  
23 Hovnanian Arizona Operations, LLC, K. Hovnanian Developments of Arizona, Inc., and  
24 K. Hovnanian Companies of Arizona, LLC (collectively “Defendants” or “KHov”) engaged  
25 in the pre-litigation notice process under the Purchaser Dwelling Act, A.R.S. § 12-1361, et  
26 seq.

27 3. Defendants did not argue during the PDA process that the Association was  
28 not the proper party to assert the claim.

1           4.       Defendants offered nominal repairs during the PDA process and several of  
2 the repairs were inadequate and the defective conditions returned. I am not aware of any  
3 involvement by either Renco Roofing or Desert Vista in the PDA process.

4           5.       After the Association filed its Complaint in this action, Defendants agreed to  
5 withdraw their motion to dismiss and answer the Complaint in exchange for a dismissal of  
6 the Association's negligence cause of action.

7           6.       Third-Party Defendant Liberty Constructors, LLC performed work related to  
8 the concrete flatwork at the Gallery project. Third-Party Defendant Home Builders Site  
9 Services of Arizona, LLC performed work related to earthwork and grading at the Gallery  
10 project. Third-Party Defendant Gothic Landscaping, Inc. performed work related to the  
11 landscaping at the Gallery project. Third-Party Defendant Chas Roberts Air Conditioning,  
12 Inc. performed work related to the air conditioning at the Gallery project. The Association  
13 did not allege any defects related to the air conditioning or Chas Robert's work in this  
14 lawsuit. Third-Party Defendants Renco Roofing and Desert Vista were hired by KHov, not  
15 the Association, to perform work on the Gallery project, and the Association is not a party  
16 to their Master Subcontract Agreements.

17           7.       Attached hereto as Exhibit 2 is a true and correct copy of the Judge Kemp's  
18 Apr. 27, 2021, Minute Entry.

19           8.       Attached hereto as Exhibit 3 is a true and correct copy of Defendants Notice  
20 of Withdrawal of Motion without Prejudice.

21           9.       Attached hereto as Exhibit 4 is a true and correct copy of the January 26, 2022  
22 Order Granting Stipulated Motion for Dismissal of Plaintiff's Claims against  
23 Defendant/Third-Party Plaintiff K. Hovnanian Companies of Arizona, LLC.

24           10.      Attached hereto as Exhibit 5 is a true and correct copy of the March 22, 2022,  
25 2022 Order Granting Stipulated Motion for Dismissal of Plaintiff's Claims, Without  
26 Prejudice, Against Defendant/Third-Party Plaintiff K. Hovnanian Developments of  
27 Arizona, Inc.

28           11.      Plaintiff and Defendants K. Hovnanian at Gallery, LLC and K. Hovnanian

1 Arizona Operations, LLC settled claims related to civil grading and drainage and concrete  
2 issues, and the settlement included an agreement for the parties to bear their own attorney's  
3 fees and costs with respect to those issues.<sup>1</sup>

4 12. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from  
5 Declaration of Covenants, Conditions Restrictions and Easements for Gallery ("CC&Rs").

6 13. Attached hereto as Exhibit 7 is a true and correct copy of the February 8, 2023  
7 Rulings re Motions for Summary Judgment.

8 14. I am unaware of any another Arizona superior court rulings on the specific  
9 standing issue raised in this case.

10 15. In this case, the Association incurred litigation costs, including expert  
11 investigation costs, in excess of \$400,000.

12 16. Alan Shelton was Third-Party Defendant Liberty Constructors' expert  
13 witness, and Todd Sarager (incorrectly spelled as Sarger in the Statement of Costs) was the  
14 Rule 30(b)(6) deponent for Liberty Constructors.

15 17. On February 19, 2021, Defendants filed their original motion for summary  
16 judgment. Defendants' original motion for summary judgment did not include an argument  
17 that the Association lacked standing to bring a claim for breach of implied warranty. I  
18 reviewed the official court recording for the status conference held before Judge Kemp on  
19 April 27, 2021, which was set to address the Association's request for an extension of time  
20 to file an amended response so the parties could engage in discovery. During the status  
21 conference Defendants' counsel, Dennis I. Wilenchik, admitted on the record that:

- 22 • "The case will proceed in some form against probably the builder [K.  
23 Hovnanian Arizona Operations, LLC], who we've admitted is the builder,  
24 who they've alleged is the builder, and we've admitted."
- 25 • The original motion for summary judgment is about "who [among the

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26 <sup>1</sup> The settlement related to civil grading and drainage and concrete issues contains a  
27 confidentiality clause which prevents disclosure of the terms of the agreement. Plaintiff is willing  
28 to provide a copy of the draft settlement agreement to the Court for in camera review upon  
request.

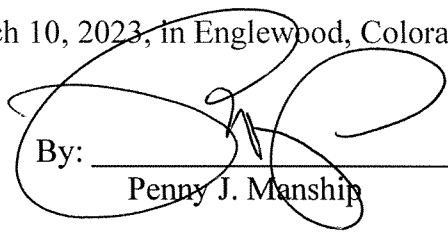
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Defendants] are the proper parties.”

- Defendants’ counsel said to the Association’s counsel, “we don’t have a problem with you suing the builder right now, there may be other issues that we raise on summary judgment in the future on that, but of course I understand that their claim against the builder may proceed to a certain extent.”
- “This is a very complicated area of the law because it is not fleshed out.”

I declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

Executed on March 10, 2023, in Englewood, Colorado.

By:  \_\_\_\_\_  
Penny J. Manship

## **EXHIBIT 2**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2020-008714

04/27/2021

HONORABLE MICHAEL W. KEMP

CLERK OF THE COURT  
K. Ballard  
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

v.

K HOVNANIAN AT GALLERY L L C, et al.

DENNIS I WILENCHIK

STEPHEN BEST  
JASON J BOBLICK  
SAMANTHA EGAN  
LEONARD T FINK  
AMANDA R HOUGH  
TERESA HAYASHI WALES  
JUDGE KEMP

MINUTE ENTRY

Courtroom: ECB-711

10:25 a.m. This is the time set for a status conference to address Plaintiff's Request for Rule 56(d) Relief, filed March 22, 2021.

Appearances are all telephonic and are as follows:

- Plaintiff Gallery Community Association is represented by Counsel Penny J. Manship.
- Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC; K. Hovnanian Arizona Operations, LLC; K. Hovnanian Developments of Arizona, Inc.; and K.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2020-008714

04/27/2021

Hovnanian Companies of Arizona, LLC (“Defendants/Third-Party Plaintiffs”) are represented by Counsel Dennis I. Wilenchik.

- Third-Party Defendant Chas Roberts Air Conditioning, Inc. is represented by Counsel Teresa Hayashi Wales.
- Third-Party Defendant Sargon Masonry Construction, LLC is represented by Counsel David S. Schopick (appearing in place of Leonard T. Fink).
- Third-Party Defendant Gothic Landscaping, Inc. is represented by Counsel Amanda R. Hough.
- Third-Party Defendant Liberty Constructors is represented by Counsel Thomas Shorall, Jr. (appearing in place of Jason J. Boblick).
- Third-Party Defendants Renco Roofing is represented by Counsel Shannon Huff (appearing in place of Samantha Egan).
- No other party is present or represented.

A record of the proceedings is made digitally in lieu of a court reporter.

The Court notes that Plaintiff has already filed a response to the pending summary judgment motion but is seeking additional time to file a more substantive response after discovery.

The Rule 56(d) request is discussed.

For the reasons set forth on the record,

**IT IS ORDERED** granting, out of abundance of caution, Plaintiff an extension of time to file an amended response. **THE COURT FINDS** no prejudice to Defendants/Third-Party Plaintiffs in granting the extension.

**IT IS FURTHER ORDERED** Plaintiff shall file an amended response to Defendants/Third-Party Plaintiffs’ Motion for Summary Judgment (filed February 19, 2021) no later than **September 24, 2021**. Defendants/Third-Party Plaintiffs shall file an amended reply within the normal time limits.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2020-008714

04/27/2021

Counsel for Defendants/Third-Party Plaintiffs requests that the Court parse out a portion of the pending summary judgment motion for early resolution. Court and counsel discuss same.

**IT IS ORDERED** denying the request to parse out the legal issue discussed on the record.

**IT IS FURTHER ORDERED** affirming the briefing schedule set forth above.

10:55 a.m. Matter concludes.

**ALERT:** Due to the spread of COVID-19, the Arizona Supreme Court Administrative Order 2020-79 requires all individuals entering a court facility to wear a mask or face covering at all times they are in the court facility. With limited exceptions, the court will not provide masks or face coverings. Therefore, any individual attempting to enter the court facility must have an appropriate mask or face covering to be allowed entry to the court facility. Any person who refuses to wear a mask or face covering as directed will be denied entrance to the court facility or asked to leave. In addition, all individuals entering a court facility will be subject to a health screening protocol. Any person who does not pass the health screening protocol will be denied entrance to the court facility.

## **EXHIBIT 3**

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4 [awilkens@lorberlaw.com](mailto:awilkens@lorberlaw.com)

5 *Attorney for Defendants/Third-Party Plaintiffs K. Hovnanian*  
*at Gallery, LLC, K. Hovnanian Arizona Operations, LLC., and*  
6 *K. Hovnanian Developments of Arizona, Inc.*

7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
8 **IN AND FOR THE COUNTY OF MARICOPA**

9 GALLERY COMMUNITY ASSOCIATION, an  
Arizona non-profit corporation,

Case No. CV2020-008714

10 Plaintiff,

11 v.

**NOTICE OF WITHDRAWAL OF  
MOTION WITHOUT PREJUDICE**

12 K. HOVNANIAN AT GALLERY, LLC, an  
13 Arizona limited liability company; K.  
HOVNANIAN ARIZONA OPERATIONS, LLC,  
14 an Arizona limited liability company; K.  
HOVNANIAN DEVELOPMENTS OF  
15 ARIZONA, INC., an Arizona corporation; K.  
HOVNANIAN COMPANIES OF ARIZONA,  
16 LLC, an Arizona limited liability company; JOHN  
DOES I-X AND JANE DOES I-X, WHITE  
17 CORPORATIONS I-X; BLACK  
PARTNERSHIPS I-X; AND GRAY LIMITED  
18 LIABILITY COMPANIES I-X,

(Assigned to the Honorable Katherine  
Cooper)

19 Defendants.

20 K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
21 HOVNANIAN ARIZONA OPERATIONS, LLC,  
an Arizona limited liability company; K.  
22 HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.  
23 HOVNANIAN COMPANIES OF ARIZONA,  
LLC, an Arizona limited liability company;

24 Third-Party Plaintiffs,

25 v.

26 CHAS ROBERTS AIR CONDITIONING, INC.,  
27 an Arizona corporation; DESERT VISTA, INC.,  
an Arizona corporation; GOTHIC  
28 LANDSCAPING, INC., a California corporation;

1 HOME BUILDERS SITE SERVICES OF  
2 ARIZONA, LLC, an Arizona limited liability  
3 company; LEBLANC BUILDING CO., INC., an  
4 Arizona corporation; LIBERTY  
5 CONSTRUCTORS, LLC, an Arizona limited  
6 liability company, dba LIBERTY ARIZONA;  
7 RENCO LLC, an Arizona limited liability  
8 company, dba RENCO ROOFING; R/S SERVICE  
& SUPPLY, INC., an Arizona corporation;  
SARGON MASONRY CONSTRUCTION, LLC,  
an Arizona limited liability company; and DOES  
1-50.

Third-Party Defendants,

Defendants/Third-Party Plaintiffs K. Hovnanian at Gallery, LLC, K. Hovnanian Arizona  
Operations, LLC, and K. Hovnanian Developments of Arizona, Inc., now known as K.  
Hovnanian Phoenix Division, Inc. (collectively the “K. Hovnanian Defendants”), by and  
through undersigned counsel, hereby provide notice of their withdrawal of their Motion for  
Summary Judgment, filed in this matter on February 19, 2021. K. Hovnanian Defendants  
withdraw their Motion without prejudice, pursuant to agreement with Plaintiff, and may  
hereafter reassert the same, all or in part.

Dated: March 10, 2022

LORBER, GREENFIELD & POLITO, LLP

By: /s/Amy Wilkens  
Amy Wilkens, Esq.  
3930 E. Ray Road, Suite 260  
Phoenix, AZ 85044  
*Attorney for Defendants/Third-Party  
Plaintiffs K. Hovnanian at Gallery, LLC,  
K. Hovnanian Arizona Operations, LLC,, and  
K. Hovnanian Developments of Arizona, Inc,*

Original of the foregoing e-filed  
this 10<sup>th</sup> day of March, 2022 with:

Clerk of the Court  
Maricopa County Superior Court  
101 W. Jefferson  
Phoenix, AZ 85003

1 COPY of the foregoing emailed this  
10<sup>th</sup> day of March, 2022 to:

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4 Penny J. Manship  
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23 *Operations, LLC, and K. Hovnanian Developments of*  
24 *Arizona, Inc.,*

25  
26 Michael Ryan Williams  
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*Leasing, Inc. d/b/a Home Builders Site Services*  
*of Arizona, LLC*

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*Chas Roberts Air Conditioning, Inc.*

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*Attorneys for Third-Party Defendant*  
21 *Sargon Masonry Construction, LLC*

22  
23 By: /s/Erikka Rico

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## **EXHIBIT 4**

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*Attorneys for the Plaintiff*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

GALLERY COMMUNITY ASSOCIATION,  
an Arizona non-profit corporation,

Plaintiff,

v.

K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
HOVNANIAN ARIZONA OPERATIONS,  
LLC, an Arizona limited liability company; K.  
HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.  
HOVNANIAN COMPANIES OF ARIZONA,  
LLC, an Arizona limited liability company;  
JOHN DOES I-X AND JANE DOES I-X,  
WHITE CORPORATIONS I-X; BLACK  
PARTNERSHIPS I-X; AND GRAY LIMITED  
LIABILITY COMPANIES I-X,

Defendants.

---

K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
HOVNANIAN ARIZONA OPERATIONS,  
LLC, an Arizona limited liability company; K.  
HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.

Case No. CV2020-008714

**[PROPOSED] ORDER GRANTING  
STIPULATED MOTION FOR  
DISMISSAL OF PLAINTIFF’S  
CLAIMS AGAINST  
DEFENDANT/THIRD-PARTY  
PLAINTIFF K. HOVNANIAN  
COMPANIES OF ARIZONA, LLC**

Assigned to Hon. Katherine Cooper

1 HOVNANIAN COMPANIES OF ARIZONA,  
2 LLC, an Arizona limited liability company;

3 Third-Party Plaintiffs,

4 v.

5 CHAS ROBERTS AIR CONDITIONING,  
6 INC., an Arizona corporation; DESERT  
7 VISTA, INC., an Arizona corporation;  
8 GOTHIC LANDSCAPING, INC., a California  
9 corporation; HOME BUILDERS SITE  
10 SERVICES OF ARIZONA, LLC, an Arizona  
11 limited liability company; LEBLANC  
12 BUILDING CO., INC., an Arizona corporation;  
13 LIBERTY CONSTRUCTORS, LLC, an  
14 Arizona limited liability company, dba  
15 LIBERTY ARIZONA; RENCO LLC, an  
16 Arizona limited liability company, dba RENCO  
17 ROOFING; R/S SERVICE & SUPPLY, INC.,  
18 an Arizona corporation; SARGON MASONRY  
19 CONSTRUCTION, LLC, an Arizona limited  
20 liability company; and DOES 1-50.

21 Third-Party Defendants.

22 Having reviewed the Stipulated Motion for Dismissal of Plaintiff’s Claims against  
23 Defendant/Third-Party Plaintiff K. Hovnanian Companies of Arizona, LLC, the Court  
24 hereby order that the claims asserted by the Plaintiff against K. Hovnanian Companies of  
25 Arizona, LLC shall be dismissed with prejudice, with each party to bear their own attorneys’  
26 fees and costs. This stipulation does not affect any of Plaintiff’s claims against any other  
27 Defendants in this action.

28 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2022

Hon. Katherine Cooper

# eSignature Page 1 of 1

Filing ID: 13855385 Case Number: CV2020-008714  
Original Filing ID: 13836916

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Granted as Submitted



/S/ Katherine Cooper Date: 1/24/2022  
Judicial Officer of Superior Court

**ENDORSEMENT PAGE**

CASE NUMBER: CV2020-008714

SIGNATURE DATE: 1/24/2022

E-FILING ID #: 13855385

FILED DATE: 1/26/2022 8:00:00 AM

AMANDA R HOUGH

DOCKET-CIVIL-CCC

AMY WILKENS

DENNIS I WILENCHIK

JASON J BOBLICK

LEONARD T FINK

M. RYAN WILLIAMS

MOHAMAD TOKKO

PENNY JANE MANSHIP

STEPHEN BEST

TERESA HAYASHI WALES

## **EXHIBIT 5**

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HERSH & JARDINE P.C.**

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*Attorneys for the Plaintiff*

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF MARICOPA**

GALLERY COMMUNITY ASSOCIATION,  
an Arizona non-profit corporation,

Plaintiff,

v.

K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
HOVNANIAN ARIZONA OPERATIONS,  
LLC, an Arizona limited liability company; K.  
HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.  
HOVNANIAN COMPANIES OF ARIZONA,  
LLC, an Arizona limited liability company;  
JOHN DOES I-X AND JANE DOES I-X,  
WHITE CORPORATIONS I-X; BLACK  
PARTNERSHIPS I-X; AND GRAY LIMITED  
LIABILITY COMPANIES I-X,

Defendants.

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K. HOVNANIAN AT GALLERY, LLC, an  
Arizona limited liability company; K.  
HOVNANIAN ARIZONA OPERATIONS,  
LLC, an Arizona limited liability company; K.  
HOVNANIAN DEVELOPMENTS OF  
ARIZONA, INC., an Arizona corporation; K.

Case No. CV2020-008714

**ORDER GRANTING  
STIPULATED MOTION FOR  
DISMISSAL OF PLAINTIFF’S  
CLAIMS, WITHOUT PREJUDICE,  
AGAINST DEFENDANT/THIRD-  
PARTY PLAINTIFF K.  
HOVNANIAN DEVELOPMENTS  
OF ARIZONA, INC.**

Assigned to Hon. Katherine Cooper

1 HOVNANIAN COMPANIES OF ARIZONA,  
2 LLC, an Arizona limited liability company;

3 Third-Party Plaintiffs,

4 v.

5 CHAS ROBERTS AIR CONDITIONING,  
6 INC., an Arizona corporation; DESERT  
7 VISTA, INC., an Arizona corporation;  
8 GOTHIC LANDSCAPING, INC., a California  
9 corporation; HOME BUILDERS SITE  
10 SERVICES OF ARIZONA, LLC, an Arizona  
11 limited liability company; LEBLANC  
12 BUILDING CO., INC., an Arizona corporation;  
13 LIBERTY CONSTRUCTORS, LLC, an  
14 Arizona limited liability company, dba  
15 LIBERTY ARIZONA; RENCO LLC, an  
16 Arizona limited liability company, dba RENCO  
17 ROOFING; R/S SERVICE & SUPPLY, INC.,  
18 an Arizona corporation; SARGON MASONRY  
19 CONSTRUCTION, LLC, an Arizona limited  
20 liability company; and DOES 1-50.

21 Third-Party Defendants.

22 Having reviewed the Stipulated Motion for Dismissal of Plaintiff’s Claims, without  
23 prejudice, against Defendant/Third-Party Plaintiff K. Hovnanian Developments of Arizona,  
24 Inc., now known as K. Hovnanian Phoenix Division, Inc. (“K. Hovnanian Developments”),  
25 the Court hereby orders that the claims asserted by the Plaintiff against K. Hovnanian  
26 Developments shall be dismissed without prejudice, with each party to bear their own  
27 attorneys’ fees and costs. This stipulation does not affect any of Plaintiff’s claims against  
28 any other Defendants in this action.

29 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2022

30 \_\_\_\_\_  
31 Hon. Katherine Cooper

# eSignature Page 1 of 1

Filing ID: 14070186 Case Number: CV2020-008714  
Original Filing ID: 14023092

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Granted with Modifications



/S/ Katherine Cooper Date: 3/20/2022  
Judicial Officer of Superior Court

**ENDORSEMENT PAGE**

CASE NUMBER: CV2020-008714

SIGNATURE DATE: 3/20/2022

E-FILING ID #: 14070186

FILED DATE: 3/22/2022 8:00:00 AM

AMANDA R HOUGH

DOCKET-CIVIL-CCC

AMY WILKENS

DENNIS I WILENCHIK

JASON J BOBLICK

LEONARD T FINK

M. RYAN WILLIAMS

MOHAMAD TOKKO

PENNY JANE MANSHIP

STEPHEN BEST

TERESA HAYASHI WALES

## **EXHIBIT 6**

New Land Title Agency, LLC

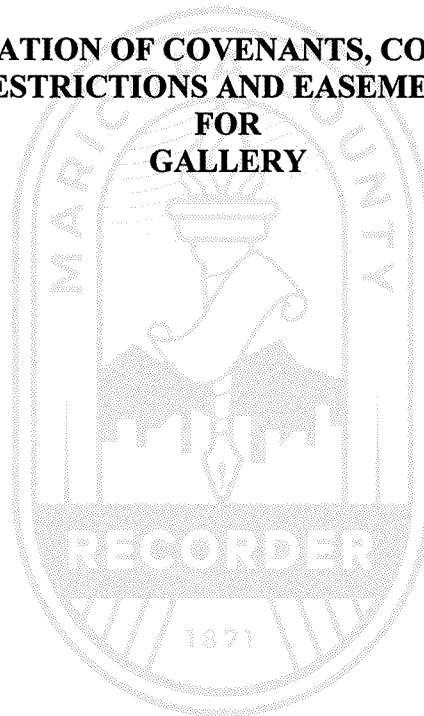
AX1312CCR-44-1-1--  
sarabiam

**WHEN RECORDED, RETURN TO:**

K. Hovnanian at Gallery, LLC  
20830 N. Tatum Boulevard, Suite 250  
Phoenix, Arizona 85050  
Attention: Chad Fuller

Courtesy Recording  
No Title Liability

**DECLARATION OF COVENANTS, CONDITIONS,  
RESTRICTIONS AND EASEMENTS  
FOR  
GALLERY**



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**DECLARATION OF COVENANTS, CONDITIONS,  
RESTRICTIONS AND EASEMENTS  
FOR  
GALLERY**

---

This Declaration of Covenants, Conditions, Restrictions and Easements for Gallery (this "*Declaration*") is made as of     MAY 10    , 2016 by K. HOVNANIAN AT GALLERY, LLC, an Arizona limited liability company ("*Declarant*").

**RECITALS:**

A. Declarant is the owner and developer of certain real property in the City of Scottsdale, Maricopa County, Arizona, which is more particularly described in Exhibit A attached hereto and by reference incorporated herein (the "*Property*").

B. Declarant has formed, or intends to form, Gallery Community Association as an Arizona nonprofit corporation, for the purpose of the efficient preservation of the values and amenities of the Property and to which shall be delegated certain powers of administering and maintaining the Common Area, enforcing this Declaration, and collecting and disbursing the Assessments created herein.

C. Declarant desires to establish for its own benefit and for the mutual benefit of all future Owners, or other holders of interests in any portion of the Property, certain mutually beneficial covenants, conditions, restrictions, easements and obligations with respect to the proper development, use and maintenance of the Property.

D. Declarant desires and intends that the Owners, Mortgagees, trustees and other persons who may acquire any interest in the Property, shall at all times enjoy the benefits of, and shall hold their interest subject to the rights, privileges, easements, covenants, conditions, restrictions, easements and obligations set forth in this Declaration, all of which are declared to be in furtherance of a plan to promote and protect the value, desirability and attractiveness of the Property.

NOW, THEREFORE, DECLARANT hereby declares, covenants and agrees as follows:

**DECLARATION:**

1. Definitions.

1.1 "*Additional Property*" shall mean any real property located adjacent to or near the Property.

1.2 "*Annual Assessment*" shall mean the annual charge levied and assessed against each Lot, Dwelling Unit and Owner pursuant to Section 6 of this Declaration.

1.3 “Architectural Committee” shall mean the committee created pursuant to Section 7 hereof.

1.4 “Architectural and Landscape Design Guidelines” shall mean the guidelines and rules adopted by the Board, within the Community Rules and Regulations, as defined in Section 7.5 hereof.

1.5 “Articles” shall mean the Articles of Incorporation of the Association, as such may be amended from time to time.

1.6 “Assessment” shall mean Annual Assessments, Special Assessments, Enforcement Assessments, Maintenance Charges, Special Use Fees, security fees or any other assessments, fees, fines or charges assessed hereunder.

1.7 “Association” shall mean and refer to GALLERY COMMUNITY ASSOCIATION, an Arizona nonprofit corporation, its successors and assigns.

1.8 “Association Property” shall mean the Common Area, along with any other part or parts of the Property, together with any buildings, structures, streets, gates and improvements thereon, and other real property, held by Declarant or by a trustee, for conveyance to the Association as may be provided for herein, or that the Association now or hereafter owns in fee or in which the Association now or hereafter has a leasehold or easement interest, for as long as the Association is the owner of the fee, leasehold or easement interest, or such property is so held by Declarant for conveyance to the Association. Except as otherwise provided in this Declaration, all Association Property shall be maintained by the Association for the benefit of all the Owners. From time to time Declarant may convey easements, leaseholds or other property within the Property to the Association and such property shall automatically be deemed accepted by the Association.

1.9 “Board” shall mean the Board of Directors of the Association.

1.10 “Bylaws” shall mean the Bylaws of the Association, as such may be amended from time to time.

1.11 “Collection Costs” shall mean all costs, fees, charges and expenditures including, without limitation, attorneys’ fees (whether a legal action is filed), court costs, filing fees and recording fees incurred by the Association in collecting and/or enforcing payment of Assessments, monetary penalties, late fees, demand fees, interest or other amounts payable to the Association pursuant to this Declaration.

1.12 “Common Area” shall mean all areas (including the improvements thereon) owned, or to be owned, by the Association for the common use and enjoyment of the Owners and/or Residents of the Property, and any other areas that the Association is required to maintain, either by this Declaration or the recorded subdivision plat, other than those areas located on the Lots.

1.13 “Community Rules and Regulations” shall mean the Association Rules, including the Architectural and Landscape Design Guidelines, as defined in Section 1.4, to be adopted by the Board as defined in Section 7.5.

1.14 “Covenants” shall mean the covenants, conditions, restrictions, easements, obligations, assessments, charges, servitudes, liens and reservations set forth herein.

1.15 “Declarant” shall mean and refer to the entity that is the developer of the Property, and shall be K. Hovnanian at Gallery LLC, an Arizona limited liability company, its successors and assigns, or any person or entity to whom all of Declarant’s rights reserved to the Declarant hereunder are assigned in accordance with the provisions hereof. The Declarant’s rights shall only be assigned by a written, Recorded instrument expressly assigning those rights.

1.16 “Declaration” shall mean this document and the covenants, conditions, restrictions, easements and obligations set forth in this document, as such may be amended from time to time.

1.17 “Detached Structure” shall mean a detached garage, gazebo, guest quarters or similar structures approved in writing by the Architectural Committee in compliance with the guidelines established for such structures either in this Declaration or in any Rules established by the Board, as further defined in Section 8.1.1 below.

1.18 “Dwelling Unit” shall mean any building or portion of a building situated upon a Lot, which building or portion of a building is designed and intended for use and occupancy as a residence.

1.19 “Enforcement Assessment” shall mean an assessment levied pursuant to Section 6.5 of this Declaration.

1.20 “Enforcement Costs” shall mean the costs incurred by the Association in enforcing compliance or specific performance of the terms and conditions of this Declaration, or for any other purpose in connection with the breach of this Declaration, Articles of Incorporation, Bylaws, or any Rules and Regulations of the Association, whether or not a lawsuit is filed, including, but not limited to, reasonable attorney’s fees and costs, and all other expenses incurred by the Association.

1.21 “Exempt Property” shall mean the following parts of the Property:

1.21.1 All land and improvements owned by, or dedicated to and accepted by, the United States, the State of Arizona, Maricopa County, the City of Scottsdale or any other municipality or political subdivision thereof, for as long as any such governmental entity or political subdivision is the owner thereof, or for so long as such dedication remains effective; provided, however, that any such land shall be Exempt Property only while it is being used by such governmental entity owner for governmental or public purposes;

1.21.2 All Association Property, for as long as the Association is the owner thereof (or of the interest therein that makes such land Association Property); and

1.21.3 Each portion of any and all residential areas designated in a recorded subdivision plat, deed, tract declaration or other declaration as an area to be used in common by the Owners and Residents.

All Exempt Property shall be exempted from Assessments and Membership in the Association and its associated privileges and responsibilities, but shall nevertheless be subject to all other provisions of this Declaration. The Board may restrict or prohibit the use of the Common Area (except any easements, rights-of-way, utility improvements and landscaping, drainage and flood control areas) by the Owners of Exempt Property, except for Declarant, its affiliates, subcontractors, employees, agents, guests and invitees. This subsection may not be amended without the approval of any and all Owners of Exempt Property affected by the amendment.

1.22 “First Conveyance” shall mean the first Lot sold and conveyed by the Recording of a deed, from Declarant or Homebuilder to a Purchaser.

1.23 “First Mortgage” shall mean a Mortgage Recorded against a Lot that has priority over all other Mortgages Recorded against that Lot.

1.24 “First Mortgagee” shall mean such a beneficiary or mortgagee under a First Mortgage.

1.25 “Lot” shall mean any numbered parcel of real property shown upon any recorded plat of the Property together with any improvements constructed thereon, with the exception of the areas designated as lettered tracts and areas dedicated to the public.

1.26 “Homebuilder” shall mean any homebuilder in the business of constructing residential improvements on Lots and who buys Lots from Declarant.

1.27 “Maintenance Charge” shall mean any and all costs assessed pursuant to Section 6 of this Declaration.

1.28 “Maximum Annual Assessment” shall have the meaning given that term in Section 6.3 of this Declaration.

1.29 “Member” shall mean any Person who is a member of the Association as provided in Section 5.1.

1.30 “Membership” shall mean a membership in the Association.

1.31 “Mortgage” shall mean a deed of trust or a mortgage Recorded against a Lot.

1.32 “Mortgagee” shall mean a beneficiary under a deed of trust, or a mortgagee under a mortgage, Recorded against a Lot.

1.33 “Occupant” shall mean any Person in actual legal possession of any Lot.

1.34 “Owner” shall mean the record owner, whether one or more Persons, of equitable or beneficial title in fee simple (or legal title if same have merged) of any Lot, and shall include the Purchaser under a Recorded deed pursuant to a contract for sale of any Lot. The foregoing does not include a Person who holds an interest in any Lot merely as security for the performance of an obligation. Except as stated otherwise herein, Owner(s) shall not include a lessee or tenant of a Lot. Owners shall include Declarant so long as Declarant or a Related Entity owns or has a Recorded option to purchase any Lot within the Property.

1.35 “Party Walls and/or Fences” shall mean a wall and/or fence constructed on or immediately adjacent to the common boundary of Lots, the Common Area or other areas in the Property.

1.36 “Person” shall mean a natural person, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, governmental entity, governmental subdivision or agency, or other legal or commercial entity.

1.37 “Property” shall mean the real property described on Exhibit A, together with all improvements located thereon, and all real property, together with all improvements located thereon, which is annexed and subjected to this Declaration pursuant to Section 2.2, but excluding any real property, together with all improvements thereon, which is withdrawn pursuant to Section 2.3.

1.38 “Purchaser” shall mean any Person, other than the Declarant, who by means of a voluntary transfer becomes the Owner of a Lot, except for: (a) any Person who purchases a Lot and then leases it to the Declarant for use as a model in connection with the sale or lease of other Lots; or (b) any Person who, in addition to purchasing a Lot, is assigned or has acquired any or all of the Declarant's rights under this Declaration.

1.39 “Record,” “Recordation” and/or “Recording” shall mean placing or the placement of an instrument of public record in the office of the County Recorder of Maricopa County, Arizona, as applicable.

1.40 “Resident” shall mean:

1.40.1 Each buyer under a Recorded deed pursuant to a contract (as defined in Arizona Revised Statutes Section 33-741) covering any part of the Property, and each Owner, tenant or lessee on any part of the Property;

1.40.2 Members of the immediate family of each Owner, lessee, tenant, or buyer referred to in Section 1.40.1 actually living in the same household with such Owner, lessee, tenant or buyer on any part of the Property; and

1.40.3 Subject to the Rules as the Association may hereafter specify (including the imposition of special nonresident fees for the use of Association Property if the Association shall so direct), the onsite employees, guests or invitees of any Owner, lessee, tenant or buyer, if and to the extent the Board so directs, in its absolute discretion, by resolution.

1.41 “Rules” and/or “Association Rules” shall mean the rules and regulations adopted by the Board, if any, as such may be amended from time to time, as further described in Section 4.5, which shall be part of the Community Rules and Regulations.

1.42 “Special Assessment” shall mean any assessment levied and assessed pursuant to Section 6.4.

1.43 “Special Use Fees” shall mean special fees authorized by this Declaration which an Owner, Resident or any other person is obligated to pay to the Association over, above and in addition to any Assessments imposed or payable hereunder. The amount of any Special Use Fees shall be determined by the Board, in its absolute discretion, provided all such fees must be fair and reasonable.

1.44 “Supplemental Declaration” shall mean any declaration of additional covenants or provisions applicable to the Property which are consistent with this Declaration and which have been approved in writing by Declarant.

1.45 “Transition Date” shall mean the day on which occurs the earlier of: (a) when one hundred percent (100%) of the Lots are owned by Members other than the Declarant ; (b) when Declarant notifies the Association in writing that Declarant relinquishes its Class B Membership; or (c) December 31, 2031.

1.46 “Visible from Neighboring Property” shall mean, with respect to any given object, visible to a person six (6) feet tall, standing on any part of neighboring property at an elevation no greater than ground level where the object is located (assuming the ground level where the person is standing is at the same height as the ground level where the object is located).

## 2. Property Subject to this Declaration.

2.1 General Declaration. Declarant hereby declares that the Property is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part, subject to this Declaration, as amended from time to time; provided, however, Property which is not part of a Lot and which is dedicated or transferred to a public authority or utility pursuant to Section 4.8 shall not be subject to this Declaration while owned by the public authority or utility. This Declaration is declared and

agreed to be in furtherance of Declarant's general plan for, and improvement and sale of, the Property and is established for the purpose of enhancing and perfecting the value, desirability and attractiveness of the Property. This Declaration shall run with all of the Property for all purposes and shall be binding upon and inure to the benefit of Declarant, the Association, all Owners, Members and their respective successors in interest. Nothing in this Declaration shall be construed to prevent Declarant from modifying Declarant's general plan or development plan for the Property, or any portions thereof, provided Declarant obtains the consent of the Owner of the property that is the subject of the modification.

2.2 Annexation of Additional Property. Declarant may, without obligation to do so, annex Additional Property into the Property and subject such Additional Property to the terms and conditions of this Declaration, by Recording one or more Supplemental Declarations which may incorporate this Declaration and establish such additional covenants, conditions, restriction, Assessments, charges, servitudes, liens, reservations and easements with respect to such real property as Declarant may from time to time deem appropriate.

2.3 Withdrawal of Property. At any time that Declarant or a Related Entity owns or has a Recorded option to purchase any portion of the Property, Declarant has the right to withdraw property from the Property without the consent of any other Owner or Person (other than the Owner of such property, if other than the Declarant). The withdrawal of all or any portion of the Property shall be effected by the Declarant Recording a written instrument setting forth the legal description of the property being withdrawn. Upon the withdrawal of any property from the Property pursuant to this Section 2.3, such property shall no longer be subject to any of the covenants, conditions and restrictions set forth in this Declaration.

### 3. Property Rights.

3.1 Owners' Easements of Enjoyment. Every Owner shall have a non-exclusive right and easement of enjoyment in and to the Common Area, which shall be appurtenant to and shall pass with the title to every Lot, subject to the following provisions:

3.1.1 The right of the Association to charge reasonable admission and other fees for the use of any recreational or storage facilities or areas situated upon the Common Area;

3.1.2 The right of the Association to suspend the voting rights and the right to use the Common Area by an Owner for any period during which any Assessments against the Owner's Lot remains unpaid;

3.1.3 The right of the Board to impose a monetary penalty (in such amount as the Board may determine in its sole discretion) against a Member for any infraction or violation of this Declaration, the Bylaws or the Rules after notice to such Member and an opportunity to be heard. The Board may also impose a late fee on any monetary penalty not paid within fifteen (15) days after its due date, such late fee not to exceed the maximum amount

allowed under ARS Section 33-1803. Charges for penalties are enforceable in the manner allowed by law.

3.1.4 The right of the Association to suspend the right to use the Common Area for a period initially not to exceed sixty (60) days for any infraction of the Association Rules, and then additional consecutive thirty (30) day periods for so long as the infraction continues;

3.1.5 The right of the Association to limit the number of guests of Members using the Common Area;

3.1.6 The right of the Association to change and regulate the use of the Common Area in accordance with Section 4.7;

3.1.7 The right of the Association to change the size, shape or location of the Common Area, and to exchange the Common Area for other property or interests which become Common Area in accordance with Section 4.8 hereof; and

3.1.8 The right of the Association, in accordance with its Articles and Bylaws, to borrow money for the purpose of improving the Common Area and facilities, and in aid thereof, to mortgage said Property, and pledge future assessments, in accordance with Section 8.2.5 hereof. The rights of such mortgagee in said Property shall be subordinate to the rights of the Owners hereunder.

3.2 Easements and Encroachments. Each Lot, the Common Area and all other areas in the Property shall be subject to an easement of not more than five (5) feet for encroachments of walls, ledges, roofs, air conditioners and other structures created by construction, settling and overhangs as originally or subsequently designed and constructed by Declarant or its affiliates and contractors. If any such improvement on the Common Area encroaches upon any Lot or other area, or if any such improvement on any Lot or other area encroaches upon any portion of the Common Area, or if any such improvement on any Lot or other area encroaches upon another Lot or other area, a valid easement for said encroachment and for the maintenance thereof shall exist. In the event any structure on any Lot, the Common Area or other area is repaired, altered or reconstructed in accordance with the original plans and specifications or subsequent plans and specifications of Declarant or its affiliates, similar encroachments shall be permitted and a valid easement for said encroachments and for the maintenance thereof shall exist.

3.3 Rights of Ingress and Egress. Every Owner shall have an unrestricted right of ingress and egress to its Lot which right shall be perpetual, shall be appurtenant to and shall pass with title to such Lot. There are hereby created easements for ingress and egress for pedestrian traffic over, through and across sidewalks, paths, walks and lanes that from time to time may exist upon the Common Area. There is also created an easement for ingress and egress for pedestrian and vehicular traffic over, through and across all streets, driveways and parking areas as from time to time may be paved and intended for such purposes. Such easements shall

run in favor of and be for the benefit of the Owners. Any Owner may, in accordance with and subject to this Declaration, the Rules and the limitations contained therein, delegate its right of ingress and egress to the members of its family, its guests and its tenants (including its tenant's family and guests). There is also created an easement upon, across and over the Common Area and, to the extent there are any, all private streets, private roadways, private driveways and private parking areas within the Property for pedestrian and vehicular ingress and egress, including, without limitation, for police, fire, medical and other emergency vehicles and personnel.

3.4 Delegation of Use. Any Owner may delegate, in accordance with and subject to any restrictions contained in the Bylaws, the Owner's right of enjoyment to the Common Area and improvements thereon to the Owner's tenants, Occupants or guests.

3.5 Title to Common Area. Declarant covenants that it shall convey fee simple title to the Common Area to the Association, free of all encumbrances except current real and personal property taxes and other easements, conditions, reservations and restrictions then of record. The conveyance shall be made to the Association prior to the First Conveyance.

3.6 Further Restrictions and Rights and Duties of Owners. The rights and duties of Owners shall be as follows:

3.6.1 Each Owner shall obtain and maintain in full force and effect, at such Owner's expense, a policy or policies of insurance issued by insurers authorized to provide such insurance in the State of Arizona, in forms and amounts commonly obtained and maintained by homeowners for similar properties in the greater Scottsdale, Arizona metropolitan area, which provides liability coverage with respect to the acts and negligence of such Owner and the members of such Owner's household on or about such Owner's Lot, and shall also add incidental workers' compensation coverage to protect against claims by workers injured on or about such Owner's Lot.

3.6.2 No Owner or other Person shall erect, construct, maintain, permit or allow any fence, landscaping or other improvement or other obstruction or alteration of grading (a) which would interrupt the normal drainage of a Lot from its natural or improved state existing on the date that Lot was first conveyed by the Declarant to another Owner, or (b) within any area designated on the plat described in Section 1.12 above as a "Drainage Easement" (or similar designation).

3.6.3 No Owner or other Person shall erect, construct, maintain, permit or allow any fence, landscaping or other improvement or other obstruction or alteration of grading which would interrupt any physical or chemical termite "barrier" of the Lot in the improved state existing on the date the Lot was first conveyed by the Declarant to another Owner.

3.7 Maintenance of Lots. Each Owner of a Lot is responsible for maintaining, repairing or replacing its Lot, and the Dwelling Unit, landscaping and other improvements situated thereon.

3.8 Site Disclosure. Notice is hereby given that property located adjacent to the Property and not owned by or within the control of Declarant is being or may be used for commercial or industrial purposes that generate noise, dust or odors that may not and should not be considered to be an actionable or detrimental nuisance unless the same violate the then current Scottsdale City Code.

#### 4. The Association.

4.1 Association Bound. Upon acceptance by the Arizona Corporation Commission of the Articles of Incorporation of the Association and upon the Recordation of this Declaration, this Declaration shall be binding upon and shall benefit the Association.

4.2 The Association. The Association is an Arizona nonprofit corporation charged with the duties and invested with the powers prescribed by law and set forth in the Articles, Bylaws and this Declaration. Neither the Articles nor Bylaws shall, for any reason, be amended or otherwise modified or interpreted so as to be inconsistent with this Declaration.

4.3 The Board of Directors and Officers. A Board of Directors and such officers as are provided for in the Articles and Bylaws shall conduct the affairs of the Association as the Board may elect or appoint, in accordance with the Articles and Bylaws.

4.3.1. Declarant, or its successors or assigns, shall be entitled to at least one (1) position on the Board of Directors for ten (10) years after the period of Declarant control ceases, as provided in Section 5.3 below. The number of positions shall be determined by Declarant, in its discretion, so long as the number does not create a majority of the Board after the period of Declarant control. This provision may not be amended without the express written consent of the Declarant as provided in Section 10.18 below.

4.4 Powers and Duties of the Association. The Association shall have such rights, duties and powers as set forth herein and in the Articles and Bylaws.

4.5 Community Rules and Regulations. By action of the Board, the Association may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal Rules governing any portion of the Property. Such Rules may govern, but are not limited to pertaining to: (a) the management, operation and use of the Common Area including, without limitation, any recreational facilities situated on the Common Area; (b) traffic and parking restrictions including, without limitation, speed limits on private streets within the Property; (c) minimum standards for any maintenance of Common Area and the Lots; (d) uses of the Lots; (e) any other matters deemed to be in the best interest of the Association; or (f) any other aspects of the Association's rights, activities and duties. The Rules shall restrict and govern the use of the Property provided, however, that the Rules shall not discriminate among

Owners and shall not be inconsistent with this Declaration, the Articles, the Bylaws or the laws of the State of Arizona. A copy of the Rules, as they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Owner. The Rules shall have the same force and effect as if they were set forth herein and were a part of this Declaration.

4.6 Personal Liability. The liability of the members of the Board of Directors of the Association shall be limited to the greatest extent allowed by law.

4.7 Procedure for Change of Use of Common Area. Upon: (a) the adoption of a resolution by the Board stating that the then current use of a specified part of the Common Area is no longer in the best interests of the Owners and Members, and (b) the approval of such resolution by Members casting a majority of the votes entitled to be cast by Class A Members who are present in person or by absentee ballot at a meeting duly called for such purpose and who are entitled to use such Common Area under the terms of this Declaration, the Board shall have the power and right to change the use thereof (and in connection therewith to take whatever actions are required to accommodate the new use), provided such new use: (i) also shall be for the common benefit of the Owners and Members, and (ii) shall be consistent with any recorded tract declaration, deed restrictions or zoning regulations. Alternatively, the Board, upon satisfaction of Section 4.7 (a) above, may in lieu of calling a meeting notify in writing all Members of the proposed transaction and of their right to object thereto, and if no more than ten percent (10%) of the Class A Membership eligible to vote object in writing within thirty (30) days after receipt of such notice, the proposed transaction shall be deemed approved by the Members and a meeting of the Members shall not be necessary.

4.8 Procedure for Transfers of Common Area. The Association shall have the right to dedicate or transfer all or any part of the Common Area: (a) if the transfer or dedication does not have a substantial adverse effect on the enjoyment of the Common Area by the Owners and Members, or (b) if required by a recorded subdivision plat, a zoning stipulation or an agreement with the City of Scottsdale effective prior to the date hereof. Except as authorized in (a) or (b) above, no such dedication or transfer shall be effective without the approval of the Owners representing two-thirds (2/3) of the votes in each class of Members. Notwithstanding the preceding sentence or any other provision of this Declaration to the contrary, the Association has the right, without the consent of the Owners or any other Person (except Declarant, whose consent shall be required so long as Declarant or a Related Entity owns or has a Recorded option to purchase any part of the Property or of the Additional Property), to dedicate portions of the Common Area to the public, or grant easements over, under or through portions of the Common Area to the public, to any municipal or other governmental agency or entity, or to any public, quasi-public or private utility company, for use as right-of-way, for utilities, for public landscape purposes and the like, as may be required or requested by the City of Scottsdale or any municipal or other governmental agency or entity having jurisdiction, or by a public, quasi-public or private utility company, in connection with or at the time of the development of portions of the Property or of portions of the Additional Property.

4.9 Procedure For Other Changes to Common Area. The Association shall have the right to change the size, shape or location of the Common Area or to exchange the Common Area for other property or interests which become Common Area upon: (a) the adoption of a resolution by the Board stating that ownership and/or use of the relevant Common Area is no longer in the best interests of the Owners and Members, and that the change desired shall be for their benefit and shall not substantially adversely affect them, and (b) the approval of such resolution by Members casting a majority of the votes entitled to be cast by Members who are present in person or by absentee ballot at a meeting called for such purpose. Alternatively, the Board, upon satisfaction of Subsection (a) above, may notify in writing all Members of the proposed transaction and of their right to object thereto and, if no more than ten percent (10%) of the Members eligible to vote object in writing within thirty (30) days after receipt of such notice, the proposed transaction shall be deemed approved by the Members and a meeting of the Members shall not be necessary.

4.10 Easements. In addition to the easements specifically granted or reserved herein, the Association is authorized and empowered to grant upon, across or under the Association Property such permits, licenses, easements and rights-of-way for sewer lines, water lines, underground conduits, storm drains, television cable security lines, roadways and other similar public or private purposes, as may be reasonably necessary and appropriate, as determined by the Board.

## 5. Membership and Voting Rights.

5.1 Membership. Every Owner of a Lot shall be a Member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot.

5.2 Voting Rights. The Association shall have two (2) classes of voting Membership:

5.2.1 Class A. "Class A" Members shall be all Owners and Homebuilder, with the exception of the Declarant. Each Owner shall be entitled to one (1) vote for each Lot owned. When more than one (1) Person holds an interest in any Lot, all such Persons shall be Members. The vote for such Lot shall be exercised as the Owners of such Lot determine among themselves, but in no event shall more than one (1) vote be cast with respect to any Lot.

5.2.2 Class B. The "Class B" Member shall be the Declarant, who shall be entitled to three (3) votes for each Lot owned. The Class B Membership shall cease and be converted to Class A on the Transition Date.

5.3 Declarant's Control of Association. Notwithstanding anything in this Declaration to the contrary, Declarant shall maintain absolute control over the Association, including appointment and removal of the President, the members of the Board, and the members of the Architectural Committee, until the Transition Date. Declarant voluntarily may (but shall not be required to) permit the Owners to assume control of the Association at any time by

notifying the Association in writing. Declarant may relinquish partial control without relinquishing full control at any time, in its sole and absolute discretion.

6. Covenant for Maintenance Assessments.

6.1 Creation of Lien and Personal Obligation of Assessments. The Declarant, for each Lot, hereby covenants and agrees, and each Owner, other than the Declarant, by becoming the Owner of a Lot, is deemed to covenant and agree, to pay Assessments to the Association in accordance with this Declaration. A Lot owned by the Association shall not be subject to Assessments. All Assessments, together with interest and all costs, including, without limitation, reasonable attorneys' fees, incurred by the Association in collecting or attempting to collect delinquent Assessments, whether suit is filed, shall be a charge on the Lot and shall be a continuing lien thereon as well as the personal obligation of the Person who was the Owner of the Lot at the time when the Assessments fell due. The personal obligation for delinquent Assessments shall not pass to any such Owner's successors in title, unless expressly assumed.

6.2 Annual Assessments. To provide for the operation and management of the Association and to provide funds for the Association to pay for the improvement, maintenance and replacement of the Common Area, and to perform the Association's duties and obligations under this Declaration, the Articles and the Bylaws, including, without limitation, the establishment of reasonable reserves for replacements, maintenance and contingencies, the Board, for each fiscal year, shall assess an Annual Assessment against each Lot (except for Exempt Property), which shall be determined in accordance with Section 6.3.

6.3 Maximum Annual Assessment. The Annual Assessments provided for herein shall not at any time exceed the Maximum Annual Assessment, as determined in accordance with this Section 6.3. The "*Maximum Annual Assessment*" for each fiscal year of the Association shall be as follows:

6.3.1 Prior to the fiscal year ending December 31, 2016, an Annual Assessment shall be established, and shall be payable in monthly installments.

6.3.2 Following the fiscal year ending December 31, 2016, the Maximum Annual Assessment for any fiscal year shall be equal to the Maximum Annual Assessment for the immediately preceding fiscal year increased at a rate equal to the greater of: (a) the percentage increase for the applicable fiscal year over the immediately preceding fiscal year in the Consumer Price Index -- All Urban Consumers -- All Items (1982-1984 Average = 100 Base) published by the Bureau of Labor Statistics of the U.S. Department of Labor (or its successor governmental agency), or, if such index is no longer published by said Bureau or successor agency, in the index most similar in composition to such index; or (b) ten percent (10%). The foregoing notwithstanding, the Board has no obligation to increase the Annual Assessment to the amount of the Maximum Annual Assessment.

6.3.3 In addition to Section 6.3.2 above, the Maximum Annual Assessment during each fiscal year of the Association shall be automatically increased by the amounts of any increases in water or other utility charges or any increases to insurance rates charged to the Association;

6.3.4 From and after January 1, 2017, the Maximum Annual Assessment may be increased above the amount indicated in Sections 6.3.2 and 6.3.3 above by the approval of Members casting a majority of the votes entitled to be cast by Members who are present in person, by absentee ballot, or in any other manner allowed by law, at a meeting duly called for such purpose;

6.3.5 The Board of Directors may fix the rate at an amount not in excess of the maximum rate set forth in this Section; and

6.3.6 In no event shall the Annual Assessment be increased by an amount that is more than twenty percent (20%) greater than the immediately prior year's Annual Assessment without the approval of the majority of the Members of the Association.

6.4 Special Assessments for Capital Improvements. In addition to the Annual Assessments authorized above, the Association may levy, in any Assessment year, a Special Assessment for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area, including fixtures and personal property related thereto, or for any other valid Association purpose; provided, however, that any such Special Assessment must be approved at a meeting duly called for such purpose by at least two-thirds (2/3) of the votes of each class of Members who are represented at that meeting, in person, by absentee ballot, or any other manner allowed by law.

6.5 Enforcement Assessment. The Association may impose against an Owner as an Enforcement Assessment the following expenses: (a) any Collection Costs incurred by the Association in attempting to collect Assessments or other amounts payable to the Association by the Owner; and (b) any Enforcement Costs. The Enforcement Assessment shall be automatically imposed against an Owner at such time as the Collection Costs or Enforcement Costs or other amounts are incurred by the Association or, in the case of a monetary penalty, the date the monetary penalty is imposed on the Owner by the Board. All Collection Costs and Enforcement Costs shall be collectible in the same manner as Annual Assessments.

6.6 Notice and Quorum for an Action Authorized Under Sections 6.3 and 6.4. Written notice of any meeting called for the purpose of taking any action authorized under Sections 6.3 and 6.4 above, shall be sent to all Members not fewer than fifteen (15) days nor more than sixty (60) days in advance of the meeting. At the first such meeting called, the presence of Members (whether in person, by absentee ballot, or any other manner allowed by law) entitled to cast a majority of the votes of each class of Members shall constitute a quorum. If the required quorum is not present, another meeting may be called subject to the same notice requirement, and the required quorum at the subsequent meeting shall be one half (½) of the

required quorum at the preceding meeting. No such subsequent meeting shall be held more than sixty (60) days following the preceding meeting.

## 6.7 Assessments.

6.7.1 Regular Assessments. Except as provided herein, the Annual Assessment must be fixed at a uniform rate for all Lots and may be collected on a monthly basis, or other basis as designated by the Board. Anything in this Declaration to the contrary notwithstanding, Declarant shall pay twenty-five percent (25%) of the Assessment for each Lot that Declarant owns in equal monthly installments in the same manner established for payment of the amount by other Lot Owners, except that Declarant shall pay and be liable for the full Assessment amount for any Lots owned by Declarant that are being used by Declarant as model homes or otherwise being used and occupied for residential purposes, but not sooner than the First Conveyance. Notwithstanding the above, any Homebuilder shall pay one hundred percent (100%) of the Assessment for each Lot such builder owns or leases.

6.7.2 Deficits. In the event that the Assessments set forth herein are insufficient to meet the operating and business expenses of the Association, the Association shall give notice to the Declarant of such insufficiency and the Declarant shall subsidize the difference; provided, however, that Declarant's subsidy obligation set forth herein shall automatically terminate on the Transition Date. Notwithstanding any other provision of this Section, in no event shall the subsidy and Assessments paid by Declarant per year exceed the total amount of Annual Assessments that Declarant would have paid had Declarant been required to pay the full Annual Assessment set forth in Section 6.7.1.

6.8 Date of Commencement of Annual Assessment(s): Due Date. The Annual Assessments provided for herein shall commence as of the date of the First Conveyance. The first Annual Assessment shall be adjusted according to the number of months remaining in the calendar year. The Board of Directors shall fix the amount of the Annual Assessment against each Lot at least thirty (30) days in advance of each Assessment period. The Board of Directors shall give written notice of the Annual Assessment. The Association shall, upon demand, and for a reasonable charge, furnish a certificate signed by an officer of the Association setting forth whether the Assessments on a specified Lot have been paid. A properly executed certificate from the Association as to the status of any Assessment on a Lot is binding upon the Association as to the matters described therein.

6.9 Reserve Fund Contribution. In addition to all other Assessments set forth herein, each Owner (other than Declarant or any Related Entity) shall pay a Reserve Fund Contribution equal to one-sixth (1/6<sup>th</sup>) of the Annual Assessment (the "*Reserve Fund Contribution*") to the Association at the time of purchasing a Lot. The Reserve Fund Contribution shall be collectible at the close of escrow and shall be subject to the same lien rights as the Annual Assessments. The Reserve Fund Contribution shall be used to contribute to funding the reserve fund to pay for repairs, replacement and capital improvements to the Common Area of the Association. Furthermore, any funds collected through the Reserve Fund

Contribution shall not be used until after the period of Declarant control. Payments made pursuant to this Section shall be non-refundable and shall not be considered as an advance payment of any Assessments. Payments made pursuant to this Section shall be deemed a contribution to the reserves of the Association.

6.10 Effect of Non-Payment of Assessments: Remedies of the Association.

Any Assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of ten percent (10%) per annum or such higher rate that is equivalent to the maximum rate allowed by law. In addition, to the extent permitted by applicable law, the Board may establish a late fee to be charged to any Owner who has not paid any Assessment, or any installment of an Assessment, within thirty (30) days after such payment was due. No Owner may waive or otherwise escape liability for the Assessment provided for herein by non-use of the Common Area or abandonment of such Owner's Lot. The Association may exercise any and all remedies allowed by law for collection of assessments, and the exercise of the Association of one or more remedies shall not prevent the Association from exercising any other available remedies.

6.10.1 Enforcement by Suit. In accordance with applicable law, the Board may cause a suit at law to be commenced and maintained in the name of the Association against an Owner to enforce each such Assessment obligation. Any judgment rendered in any such action shall include the amount of the delinquency together with interest thereon at the rate of ten percent (10%) per annum or such higher rate that is equivalent to the maximum rate allowed by law, from the date of delinquency, court costs, and reasonable attorneys' fees in such amount as the court may adjudge against the delinquent Owner, and all other Collection Costs.

6.10.2 Enforcement by Lien. In accordance with applicable law, the Association shall have a lien on each Lot for all Assessments levied against the Lot and for all other fees and charges payable to the Association by the Owner of the Lot pursuant to this Declaration. Recording of this Declaration constitutes record notice and perfection of the Assessment Lien. The Association may, at its option, Record a notice of lien setting forth the name of the delinquent Owner as shown in the records of the Association, the legal description or street address of the Lot against which the notice of lien is Recorded and the amount claimed to be past due as of the date of the Recording of the notice, including interest, lien recording fees and reasonable attorneys' fees. The Assessment Lien shall have priority over all liens or claims except for: (a) tax liens for real property taxes; (b) assessments in favor of any municipal or other governmental body; and (c) the lien of any First Mortgage. The Association shall not be obligated to release any Recorded notice of lien until all delinquent Assessments, interest, lien fees, Collection Costs and all other sums payable to the Association by the Owner of the Lot have been paid in full.

To the extent permitted by applicable law, any such lien may be foreclosed by appropriate action in court in the manner provided by law for the foreclosure of a realty mortgage, as set forth by the laws of the State of Arizona, as the same may be changed or amended. The lien provided for herein shall be in favor of the Association and shall be for the benefit of all Owners except for the defaulting Owner. The Association shall have the power to bid at any foreclosure or trustee's sale and to purchase, acquire, hold, lease, mortgage and convey any such Lot. In the event of

such foreclosure or trustee's sale, reasonable attorneys' fees, court costs, trustee's fees, title search fees, interest and all other Collection Costs shall be allowed to the extent permitted by law. Each Owner, by becoming an Owner of a Lot, hereby expressly waives any objection to the enforcement and foreclosure of any such lien in this manner.

6.11 Subordination of the Lien to First Mortgages. The lien of the Assessments provided for herein shall be subordinate to the lien of any First Mortgage. Sale or transfer of any Lot shall not affect the Assessment Lien. However, the sale or transfer of any Lot due to the foreclosure of a First Mortgage, or trustee's sale of a First Mortgage, or any proceeding in lieu thereof, shall extinguish the lien of such Assessment as to payments that become due prior to such sale or transfer. No such sale or transfer of a Lot shall relieve the subsequent Owner of the Lot from liability for any Assessments thereafter becoming due or from the lien thereof.

6.12 Working Capital Contribution. In addition to all other Assessments set forth herein, each Owner (other than Declarant or any Related Entity) shall pay a Working Capital Contribution equal to one-sixth (1/6<sup>th</sup>) of the Annual Assessment (the "*Working Capital Contribution*") to the Association at the time of purchasing a Lot. The Working Capital Contribution shall be collectible at the close of escrow and shall be subject to the same lien rights as the Annual Assessments. The Working Capital Contribution shall be used to pay operating expenses of the Association, or any other purpose permitted under this Declaration, the Bylaws or the Articles. Payments made pursuant to this Section shall be non-refundable and shall not be considered as an advance payment of any Assessments. Payments made pursuant to this Section shall be deemed a contribution to the capital of the Association.

6.13 Transfer Fee. In addition to all other Assessments set forth herein, each Owner (other than Declarant or any Related Entity) shall pay a Transfer Fee to the Association in such amount as is established from time to time by the Board (the "*Transfer Fee*") to defray administrative costs associated with transfer of ownership of a Lot, changing the Association's (and any association manager's) records and the like. The Transfer Fee is not intended to compensate the Association for the costs incurred in the preparation of the statement which the Association is required to mail or deliver to a purchaser under A.R.S. § 33-1806A and, therefore, the Transfer Fee shall be in addition to the fee which the Association is entitled to charge pursuant to A.R.S. § 33-1806C.

7. Architectural Committee. The Board may establish an Architectural Committee which, if established, shall consist of at least three (3) persons, none of whom shall be required to be an architect, officer or Director of the Association or to meet any other particular qualifications other than as provided in Section 7.1 below. If the Board does not establish an Architectural Committee or eliminates the Architectural Committee, the rights and duties of the Architectural Committee shall remain with the Board.

7.1 Membership. Declarant shall appoint all of the original members of the Architectural Committee, if established, and all replacements thereof until the first anniversary of the First Conveyance. Thereafter, Declarant shall have the right to appoint the members of the

Architectural Committee until the Transition Date. Thereafter, the Board shall have the power to appoint all the members of the Architectural Committee. Members appointed to the Architectural Committee need not be Members of the Association.

7.2 Duties of Architectural Committee. Subject to Board approval, as provided in Section 7.8 below, it shall be the duty of the Architectural Committee to consider and act upon any and all architectural and landscape proposals or plans submitted pursuant to the terms of the Declaration, to ensure that all improvements constructed on the Property by anyone other than Declarant (or any Related Entity) conform to plans approved by the Architectural Committee, and to perform other duties imposed upon it by the Board.

7.3 Meetings. The Architectural Committee, once established, shall meet from time to time as necessary to perform its duties hereunder. Subject to the approval of the Board, the vote or written consent of a majority of the members of the Architectural Committee, at a meeting or otherwise, shall constitute the act of the Architectural Committee unless the unanimous decision of the Architectural Committee is required by any other provision of the Declaration. The Architectural Committee shall keep and maintain a written record of all actions taken by it at such meetings or otherwise. Members of the Architectural Committee shall not receive any compensation for services rendered.

7.4 Assignment of Rights. The Architectural Committee, may, from time to time and in its sole discretion, assign its rights and duties under this section to a third party, or hire an independent professional to review plans submitted by an Owner. If the Architectural Committee opts to assign its rights and duties to a third party, or hires an independent professional to review plans, as provided herein, the Architectural Committee may charge the costs of such assignment to the Owner who submitted the architectural and/or landscape proposals or plans for review. Such charges may be established in the Architectural and Landscape Design Guidelines. Any plans submitted by an Owner will not be considered complete until any charges imposed by the Architectural Committee are paid to the Association.

7.5 Architectural and Landscape Design Guidelines. The Board may, from time to time, adopt, amend and repeal rules and regulations to be known as "*Architectural and Landscape Design Guidelines.*" The Architectural and Landscape Design Guidelines shall interpret and implement the Declaration by setting forth the standards and procedures for Architectural Committee review, the guidelines for design and placement of improvements, as well as all other duties of the Architectural Committee as particularly set forth in Section 7.2 above.

7.6 Waiver. The approval by the Architectural Committee, or a third party hired by the Architectural Committee, of any plans, drawings or specifications for any work done or proposed, or for any other matter requiring the approval of the Architectural Committee, shall not be deemed to constitute a waiver of any right to withhold approval of any similar plan, drawing, specification or matter subsequently submitted for approval.

7.7 Liability. Neither the Architectural Committee nor any member thereof, nor any third party hired by the Architectural Committee, shall be liable to the Association, any Owner or to any other party, for any damage, loss or prejudice suffered or claimed on account of: (a) the approval or disapproval of any plans, drawings or specifications; or (b) the construction or performance of any work, whether pursuant to approved plans, drawings and specifications.

7.8 Board Approval. All decisions of the Architectural Committee shall be subject to final approval by the Board of Directors. Upon rendering a decision with regards to an architectural and/or landscape submission, the Architectural Committee shall submit its decision to the Board of Directors for approval. The Board shall then inform the submitting party of the final decision. If the Board does not provide the Owner with a written response within sixty (60) days from the Association's receipt of a complete submittal, which includes all costs owed by the Owner to the Association relating to such submittal, the request will be deemed approved. As provided in Section 7.2 above, the Declarant shall be exempt from obtaining approval of the Architectural Committee or the Board of Directors for any improvements made by the Declarant (or any Related Entity).

7.9 Appeal. In the event plans and specifications submitted to the Architectural Committee are disapproved, the party or parties making such submission may appeal in writing to the Board within thirty (30) days following the issuance of the notice sent to the Owner of the final decision. The Board shall consult with the Architectural Committee regarding its decision, whose recommendations shall be submitted to the Board. Within forty-five (45) days following the Board's receipt of the request for appeal, the Board shall render its written decision, which decision shall be final. Failure of the Board to render a decision within said forty-five (45) day period shall be deemed approval of the submission.

## 8. Use Restrictions.

8.1 Permitted Uses and Restrictions - Residential. The permitted uses, easements and restrictions for all Property covered by this Declaration shall be as follows:

8.1.1 Single Family Residential Use. All Lots shall be used, improved and devoted exclusively to single family residential use. No gainful occupation, profession, trade or other non-residential use shall be conducted thereon excepted as provided for in Section 8.1.2 below. Nothing herein shall be deemed to prevent the leasing of any Lot with the improvements thereon to a single family from time to time by the Owner thereof, subject to all of the provisions of this Declaration. No structure whatsoever shall be erected, placed or permitted to remain on any Lot without the expressed written approval of the Architectural Committee. The Architectural Committee shall consider requests for construction of a Detached Structure. Written approval by the Architectural Committee of any Detached Structure must be obtained prior to the construction of any Detached Structure. All Detached Structures, if permitted by the Architectural Committee, must comply with all guidelines established for Detached Structures, whether contained in this Declaration or in any rules established by the Architectural Committee and/or the City of Scottsdale. Anything in this Declaration to the contrary notwithstanding,

Declarant, Homebuilder or any entity related to Declarant or Homebuilder (a “*Related Entity*”) shall have the right to use any Lot owned or leased by Declarant, Homebuilder or a Related Entity for purposes related to the development and marketing of the Property and/or other property owned by Declarant, Homebuilder or a Related Entity, and the sale of Lots and/or Dwelling Units on the Property or other property owned by Declarant, Homebuilder or a Related Entity, including, without limitation, the right to place a temporary structure (*e.g.*, a temporary sales or construction trailer), store construction materials and construct and use model homes on any such Lots.

8.1.2 Trade or Business. No trade or business may be conducted on any Lot or in or from any Dwelling Unit, except that an Owner or Resident may conduct a business activity in a Dwelling Unit so long as: (a) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Dwelling Unit; (b) the business activity is a legal activity and conforms to all applicable zoning ordinances or requirements for the Property; (c) the business activity does not involve persons, clients or customers coming to the Lot or Dwelling Unit or the door-to-door solicitation of Owners or other Residents at the Property; (d) the use of the Dwelling Unit for trade or business in no way destroys or is incompatible with the residential character of the Dwelling Unit or the Property; (e) the trade or business must be conducted only inside the Dwelling Unit and may not involve the viewing, purchasing or taking delivery of goods or merchandise at, to, from or in any Dwelling Unit; (f) the trade or business shall be conducted by a Resident or Residents of the Dwelling Unit; (g) no more than twenty percent (20%) of the total floor area of the Dwelling Unit may be used for trade or business; (h) the Dwelling Unit used for trade or business shall not be used as a storage facility for a business conducted elsewhere; (i) a trade or business must not utilize flammable liquids or hazardous materials in quantities not customary to a residential use; (j) a trade or business must not utilize large vehicles not customary to a residential use; and (k) the use of the Dwelling Unit for a trade or business must not violate any other provision of the Declaration, the Articles, the Bylaws or the Rules. The terms “business” and “trade” as used in this Section 8.1.2 shall be construed to have 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: (x) such activity is engaged in full or part time; (y) such activity is intended to or does generate a profit; or (z) a license is required for such activity. The leasing of a Dwelling Unit by the Owner thereof shall not be considered a trade or business within the meaning of this Section 8.1.2. Nothing in this Section 8.1.2 or this Declaration shall be construed as preventing Declarant or Homebuilder from using any Lot owned or leased by Declarant, Homebuilder or any Related Entity for any purpose associated with or related to the development of the Property, the construction of Dwelling Units and other improvements on the Property, marketing and sales activities associated with homebuilding and sales operations, or for the purposes set forth in this Declaration, the Articles or the Bylaws.

8.1.3 Antennas. Unless governed by 47 C.F.R. § 1.400 (Over-the-Air Reception Devices Rule), as amended, repealed, or recodified, no antenna or other device for the

transmission or reception of television, internet or radio signals or any other form of electromagnetic radiation or any associated equipment shall be erected, used or maintained outdoors on any Lot or Parcel or Common Area, whether attached to a building or structure or otherwise, so as to be Visible From Neighboring Property or the street, unless approved in writing by the Architectural Committee. Any device governed by 47 C.F.R. § 1.400 (Over-the-Air Reception Devices Rule), as amended, repealed, or recodified, shall comply with the applicable antenna installation rules of the Association and shall be mounted, to the extent reasonably possible, so as to not be Visible From Neighboring Property or the street.

8.1.4 Utility Service. All lines, wires or other devices for the communication or transmission of electric current or power, including, without limitation, telephone, television and radio signals, shall be contained in conduits or cables installed and maintained underground or concealed in, under or on buildings or other structures approved by the Architectural Committee. Temporary power or telephone structures incident to construction activities approved by the Architectural Committee are permitted. Solar panels and other solar energy devices will not be effectively prohibited by the Association. Rather, solar panels and other solar energy devices will be allowed, subject to prior written approval from the Architectural Committee. All such solar energy devices must be in conformance with the Architectural and Landscape Design Guidelines.

8.1.5 Improvements and Alterations. No improvement, alteration, landscaping, repair, excavation or other work which in any way alters the exterior appearance of the Property or the improvements located thereon from its natural or improved state existing on the date such Property was first conveyed by Declarant to a home buyer shall be made without the prior approval of the Architectural Committee, except as otherwise expressly provided in this Declaration, and except in emergency circumstances. Emergency circumstances shall include any circumstance in which personal injury or extensive damage to the Owner's property, neighboring property or the Common Area is likely to occur if alteration, improvement, repair, excavation or other work is not undertaken immediately. No building, fence, wall or other structure shall be erected, maintained, improved, altered, made or done (including choice of exterior color scheme and building materials) without the prior written approval of the Architectural Committee or any subcommittee thereof, except in emergency circumstances as provided above. Pursuant to its rule making power, the Architectural Committee shall establish a procedure for the preparation, submission and determination of applications for any such alteration or improvement. The Architectural Committee shall have the right, in its sole discretion, to refuse to approve any plans, specifications or grading plans, which are not suitable or desirable, for aesthetic or other reasons, and in so passing upon such plans, specifications and grading plans, and without any limitation of the foregoing, it shall have the right to take into consideration the suitability of the proposed building or other structure, the building materials used and the site upon which it is proposed to be erected, and the harmony thereof with the surroundings and the effect of the building or other structure as planned, and the appearance thereof from adjacent or neighboring Property. No changes or deviation in or from such plans and specifications once approved shall be made without the prior written approval of the Architectural Committee.

8.1.6 Installation and Maintenance of Lawns and Plantings. Declarant or Homebuilder may install the front yard landscaping on a Lot when a Dwelling Unit is constructed by Declarant, Homebuilder or a Related Entity on such Lot. Except as provided in the immediately preceding sentence, each Owner shall install, at its own expense, all other landscaping on a Lot (including, without limitation, front yard, if not installed by Declarant, side yard and backyard landscaping) within ninety (90) days after becoming an "Owner" under this Declaration. Each Owner shall maintain diligently, at its own expense, the landscaping on its Lot, keeping it free of weeds and debris. Lawns shall be neatly mowed and trimmed. Other vegetation, including, without limitation, trees, bushes and flowers, shall be neatly trimmed, and all dead vegetation shall be removed and replaced.

8.1.7 Repair of Buildings. No Dwelling Unit or any other improvement upon any Property shall be permitted to fall into disrepair, and each such Dwelling Unit or improvement shall at all times be kept in good condition and repair and adequately painted or otherwise finished. Notwithstanding the foregoing to the contrary, in no event shall an Owner apply any paint to the exterior of its Dwelling Unit, including, without limitation, window or other trim, doors, eaves, roof deck, fences or other exterior features or replace the exterior masonry or other surface installed by Declarant. In order to insure a uniform appearance of the Property, the Association will, from time to time, as it may determine appropriate, paint the exterior of the Dwelling Units and repair, maintain and replace the exterior walls, stucco, façade, roofs or other surfaces. In order for the Association to do so, it may be necessary for Declarant to have access to, in and through an Owner's Dwelling Unit. Any such access shall be coordinated with the Owner thereof, upon reasonable prior notice and only at reasonable times, except in an emergency where there is imminent danger to person or property. The Association shall promptly repair or replace any damage or destruction to the Dwelling Unit or contents thereof caused by such entry or work.

8.1.8 Trash Containers and Collection. No rubbish, trash or garbage shall be placed or kept on any Property except in covered sanitary containers, not Visible from Neighboring Property, and shall not be set out for collection except in community rubbish, trash or garbage containers (e.g., dumpsters) authorized by the Association. All rubbish, trash and garbage shall be removed from each Lot and shall not be allowed to accumulate thereon. No incinerators shall be kept or maintained on any Lot.

8.1.9 Overhangs. No tree, shrub or planting of any kind on any Property shall be allowed to overhang or otherwise to encroach upon any Common Area, sidewalk, or street, from ground level to a height of twelve (12) feet, without the prior approval of the Architectural Committee.

8.1.10 Machinery and Equipment. No machinery or equipment of any kind shall be placed, operated or maintained upon the Property except usual and customary equipment and machinery used in connection with the use, maintenance or construction of

permitted improvements, and except that which Declarant or the Association may require for the operation and maintenance of the Common Area. Outdoor decks, gazebos and other such equipment or structures shall be allowed provided they are approved by the Architectural Committee. Slides, playground equipment, basketball poles and hoops and other play equipment must first be approved by the Architectural Committee if the equipment protrudes over the fence line.

8.1.11 Restriction on Further Subdivision. No Lot shall be further subdivided or separated into smaller Lots or parcels by any Owner, and no portion less than all of any such Lot, shall be conveyed or transferred by any Owner, without the prior written approval of the Board. No Lot may be converted into a condominium or cooperative or other similar type of entity without the prior written approval of the Board. No further covenants, conditions, restrictions or easements shall be Recorded against any Lot without the written consent of the Board being evidenced on the Recorded instrument containing such restrictions, and without such approval such restrictions shall be null and void. No application for rezoning, variances or use permits shall be filed without the written approval of the Board and then only if such proposed use is in compliance with this Declaration. Notwithstanding anything to the contrary in this Declaration, none of the restrictions or prohibitions in this Section shall apply to Declarant.

8.1.12 Signs. For a period of one (1) year after the last Dwelling Unit in the Property is sold and has closed escrow, or, until January 1, 2018, whichever occurs earlier, no sign, banner, or any other type of advertising, including signs stating "For Rent", "For Lease", "For Lease to Own", or "For Sale" (other than a name address sign, not exceeding 9"x30" in size) shall be permitted on any Lot or on the exterior of any Dwelling Unit. Notwithstanding the foregoing portion of this Section 8.1.12, to the extent permitted by law, Members may display political signs but not earlier than forty-five (45) days prior to the applicable election or seven (7) days following such election. The Association may regulate the number and size of political signs in accordance with applicable law, including without limitation, Arizona Revised Statute Section 33-1808. The Declarant or Homebuilder or its designee or assignee may erect any signs during construction. These restrictions shall not apply to the Association in furtherance of its powers and purposes herein set forth.

8.1.13 Utility Easements. There is hereby created a blanket easement upon, across, over and under the Common Area for ingress, egress, installation, replacing, repairing and maintaining all utility and service lines and systems, including, without limitation, water, sewer, gas, telephone, electricity, television cable or communication lines and systems, and similar utility facilities. By virtue of this easement, it shall be expressly permissible for the providing utility or service company to install and maintain facilities and equipment, and to affix and maintain wires, circuits and conduits on, in and under roofs and exterior walls. Notwithstanding anything to the contrary contained in this paragraph, no sewers, electrical lines, water lines or other utilities or service lines may be installed or relocated except as initially developed and approved by the Declarant or thereafter approved by the Board. This easement shall in no way affect any other recorded easements. This easement shall be limited to improvements as originally constructed, and no common utility shall be permitted to pass over

any improvements on the Lots, and no connection line shall be permitted to pass over any improvement on the Lot other than the one it serves.

8.1.14 Animals. No animal, bird, fowl, poultry or livestock, other than a reasonable number of generally recognized house or yard pets, shall be maintained on any Lot or parcel and then only if they are kept or raised thereon solely as domestic pets and not for commercial purposes. No house or yard pet kept on the Lot shall be allowed to make an unreasonable amount of noise or to become a nuisance. No structure for the care, housing or confinement of any house or yard pet shall be maintained so as to be Visible From Neighboring Property. Upon the written request of any Member or Resident, the Board shall conclusively determine, in its sole and absolute discretion, whether, for purposes of this Section, a particular animal, bird, fowl, poultry or livestock is a generally recognized house or yard pet, whether such pet is a nuisance, or whether the number of such pets on any such Lot is unreasonable. Any such decision by the Board shall be enforceable in the same manner as any other restrictions contained herein. The Board may adopt reasonable rules and regulations as part of the Community Rules and Regulations regarding the number, size and types of pets allowed within the Property and on any Lot.

8.1.15 Temporary Occupancy. No temporary building, structure or vehicle of any kind shall be used as a residence, either temporary or permanent. Temporary buildings or structures used during construction periods shall be removed immediately after completion of such construction. The provisions of this Section shall not apply to Declarant or Homebuilder.

8.1.16 Trailers, Boats, Aircraft, and Motor Vehicles. Except as otherwise provided by law, no motor vehicle classified by manufacturer rating as exceeding one (1) ton, mobile home, trailer, camper shell, boat, boat trailer, hang glider or other similar equipment or vehicle may be parked, stored, maintained, constructed, reconstructed or repaired on any Lot, street or Common Area within the Property so as to be Visible from Neighboring Property; provided, however, the provisions of this Section 8.1.16 do not preclude the parking in garages of (a) vehicles or pickup trucks (with or without camper shells) providing the height of such vehicle or pickup truck and camper shall not exceed seven (7) feet, or (b) mini motor homes or other recreation vehicles which do not exceed seven (7) feet in height or eighteen (18) feet in length, if those vehicles described in (a) and (b) are used on a regular and recurring basis for basic transportation and are not Commercial Vehicles. Commercial Vehicles shall be defined as any vehicle that meets any one or more of the following criteria: any type of signage, design or lettering for advertising exceed three (3) square feet, vehicle classed by manufacturer's rating as exceeding one-ton, commercial racks located on the vehicle, or work equipment stored on the vehicle that is visible from outside of the vehicle. No automobile, motorcycle, motor bike, motorized hang glider or other motor vehicle shall be constructed, reconstructed or repaired on any Lot, street or Common Area within the Property and no inoperable vehicle may be stored or parked so as to be Visible from Neighboring Property, except on a temporary basis in the event of an emergency. For purposes of this section, an "inoperable vehicle" shall be defined as any

vehicle without current required license plates and tags, or that is unused, stripped, scrapped, junked, discarded, dismantled, on blocks or similar devices, or vehicles with deflated tires.

8.1.17 Nuisances/Construction Activities. No rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to a Lot, and no odors or loud noises shall be permitted to arise or emit therefrom, so as to create a nuisance, render any such Property or any portion thereof or activity thereon unsanitary, unsightly, offensive or detrimental to the Lot or person in the vicinity thereof. Without limiting the generality of any of the foregoing provisions, no speakers, horns, whistles, bells or other sound devices, except security devices used exclusively for security purposes, shall be located, used or placed on any such Property. No motorcycles or motor driven vehicles (except lawn maintenance equipment) shall be operated on any walkways or sidewalks within the Property. The Board in its sole discretion shall have the right to determine the existence of any violation of this Section 8.1.17 and its determination shall be final and enforceable as provided herein. Normal construction activities shall not be considered a nuisance or otherwise prohibited by this Declaration, but Lots shall be kept in a neat and tidy condition during construction periods. Supplies or building materials and construction equipment shall be stored only in such areas and in such manner as may be approved by the Architectural Committee or the Declarant. The provisions of this Section shall not apply to Declarant or Homebuilder.

8.1.18 Clothes Drying Facilities. Outside clotheslines or other outside facilities for drying or airing clothes shall not be erected, placed or maintained on any Property unless they are erected, placed or maintained exclusively within a fenced service yard and are not Visible from Neighboring Property.

8.1.19 Mineral Exploration. No Property shall be used in any manner to explore for or to remove any water, oil or other hydrocarbons, minerals of any kind, gravel, earth or any earth substance of any kind.

8.1.20 Diseases and Insects. No Owner or Resident shall permit anything or condition to exist upon the Property that shall induce, breed or harbor infectious plant diseases or noxious insects.

8.1.21 Party Walls and/or Fences. Subject to the provisions of Section 3.6 above, the rights and duties of each Owner with respect to Party Walls and/or Fences shall be as follows:

8.1.21.1 Owners of contiguous Lots who have a Party Wall and/or Fence shall both equally have the right to use such wall or fence, provided that such use does not interfere with the use and enjoyment thereof by the other Owner.

8.1.21.2 If any Party Wall and/or Fence is damaged or destroyed through the act of an Owner, its agents, guests or family members, it shall be the obligation of such Owner to rebuild and repair the Party Wall and/or Fence without cost to the

other adjoining Owner or Owners. Any dispute over an Owner's liability shall be resolved as provided in Section 8.1.21.5 below.

8.1.21.3 If any Party Wall and/or Fence is destroyed or damaged (including deterioration from ordinary wear and tear and lapse of time), other than by the act of an adjoining Owner, its agents, guests or family members, it shall be the joint obligation of all Owners whose Lots adjoin such wall or fence to rebuild and repair such wall or fence, such expense to be divided among the Owners on a pro rata basis in accordance with the length of the frontage of their respective Lots on the Party Wall and/or Fence.

8.1.21.4 Notwithstanding anything to the contrary herein contained, there shall be no impairment of the structural integrity of any Party Wall and/or Fence without the prior written consent of the Board.

8.1.21.5 If a dispute arises between Owners about the construction, repair or rebuilding of a Party Wall and/or Fence or the sharing of the cost thereof, such adjoining Owners shall submit the dispute to the Board, the decision of which shall be final and enforceable.

8.1.21.6 Each Owner shall permit the Owners of adjoining Lots or their representatives, when reasonably required to enter its Lot for the purpose of repairing or maintaining a Party Wall and/or Fence or for the purpose of performing installation, alterations or repairs to the Property of such adjoining Owners, provided that requests for entry are made in advance and that such entry is at a time reasonably convenient to the Owner. In case of an emergency, such right of entry shall be immediate. An adjoining Owner making entry pursuant to the terms of this subsection shall not be deemed guilty of trespass by reason of such entry.

8.1.21.7 Surfaces of Party Walls and/or Fences that are generally accessible or viewable from only the adjoining Property, may be planted against, painted, maintained and used by the adjoining Owners, so long as such use does not damage the Party Wall and/or Fence. If such surfaces are viewable from public streets or the Common Area, the color scheme shall not be changed without the written consent of the Architectural Committee.

8.1.21.8 The Owner of a Lot having a wall or fence adjacent to the Common Area that separates the Lot from the Common Area, shall be considered to have a Party Wall and/or Fence with the Association and the provisions of this Section 8.1.21 shall apply as though the Common Area were an adjacent Lot.

8.1.21.9 The Owners with a wall adjacent to a street, or adjoining property, other than Lots or Common Area within the Property, shall be solely responsible for repair and maintenance of such wall, and if repair is necessary, the repaired wall must match the size, color and texture of the existing adjacent walls within the Property.

8.1.22 Drainage Easement. There is hereby created a blanket easement for drainage of groundwater on, over and across the Common Area and the Lots. No Owner or other Person shall erect, construct, maintain, permit or allow any fence, landscaping or other improvement or other obstruction, diversion of water or alteration of grading which would interrupt the normal drainage (a) of a Lot from its natural or improved state existing on the date that Lot was first conveyed by the Declarant to an Owner, (b) of a Common Area, or (c) within any area designated on the plat described in Section 1.12 above as a "Drainage Easement" (or similar designation). Each Owner shall, at its own expense, maintain the drainage ways and channels on its Lot in proper condition free from obstruction. Notwithstanding the foregoing, in emergency circumstances, the Association may, but has no obligation to, maintain the drainage ways and channels on each Owner's Lot. Emergency circumstances shall include any circumstance in which personal injury or extensive damage to the Owner's property, neighboring property or the Common Area is likely to occur if maintenance, improvement, repair or other work is not undertaken immediately.

8.1.23 Parking. To the extent permitted by law, it is the intent of the Declarant to prohibit on street parking within the Property (other than for emergency or utility vehicles pursuant to separate and specific easement rights or legal entitlement). Vehicles of all Owners, Residents, guests and invitees are to be kept in garages. On-street parking within the Property is not allowed. On-street parking outside the Property may be available. Enforcement of parking and access and all Rules relating to parking and access shall be the responsibility of the Association.

8.1.24 Right of Entry. During reasonable hours and upon reasonable notice to the Owner or Resident of a Lot, any Member or authorized representative of the Architectural Committee or the Board shall have the right to enter upon and inspect any Lot or improvements thereon, except for the interior portions of any completed improvements, to determine if the improvements are in compliance with this Declaration. Any such persons shall not be deemed guilty of trespass by reason of such entry.

8.1.25 Health, Safety and Welfare. If uses, activities and facilities are deemed by the Board to be a nuisance or to affect adversely the health, safety or welfare of Owners or Residents, the Board may make rules restricting or regulating their presence as part of the Community Rules and Regulations or may direct the Architectural Committee to make rules governing their presence on Lots as part of the Architectural and Landscape Design Guidelines.

The Association shall strive to maintain the residential areas of the Property as a safe residential environment. **HOWEVER, NEITHER THE BOARD, THE ASSOCIATION NOR DECLARANT SHALL BE HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OF FAILURE TO PROVIDE ADEQUATE SECURITY OR FOR INEFFECTIVENESS OF SECURITY MEASURES UNDERTAKEN. ALL OWNERS, RESIDENTS, TENANTS, AND THEIR GUESTS AND INVITEES, AS APPLICABLE, ACKNOWLEDGE THAT THE BOARD, THE ASSOCIATION AND DECLARANT, AND COMMITTEES ESTABLISHED BY ANY OF THE FOREGOING ENTITIES, ARE NOT INSURERS AND THAT EACH**

OWNER, RESIDENT, TENANT, GUEST AND INVITEE ASSUMES ALL RISK OF LOSS OR DAMAGE TO PERSONS, TO PROPERTY, TO LOTS, TO RESIDENCES AND TO THE CONTENTS OF LOTS AND RESIDENCES AND FURTHER ACKNOWLEDGES THAT DECLARANT HAS MADE NO REPRESENTATIONS OR WARRANTIES NOR HAS ANY OWNER, RESIDENT, TENANT, GUEST OR INVITEE RELIED UPON ANY REPRESENTATION OR WARRANTY, EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE, RELATIVE TO ANY SECURITY MEASURES THAT MAY BE RECOMMENDED OR TAKEN.

8.1.26 Declarant's Exemption. Nothing contained in this Declaration shall be construed to prevent the erection or maintenance by Declarant or Homebuilder, or their duly authorized agents, of improvements or signs necessary or convenient to the development or sale of Lots within the Property.

8.1.27 Storage Sheds. Storage sheds shall not exceed six (6) feet in height and shall not be Visible from Neighboring Property or the street. The color of the storage shed shall match the color of the house body or be a neutral beige or eggshell color, and the color and composition of the roofing material of the storage shed shall match the color and composition of the roofing material of the house.

8.1.28 Model Homes. The provisions of this Declaration which prohibit nonresidential use of Lots and regulate parking of vehicles shall not prohibit the construction and maintenance of model homes, sales offices, administrative offices and parking areas incidental thereto by Declarant or Homebuilder and their designees engaged in the construction or marketing of Dwelling Units in the Property.

8.1.29 Leases and Non-Owner Occupants. Any agreement for the lease of a Lot must be in writing and must be expressly subject to this Declaration. Any violation of this Declaration shall be deemed a default under the lease. All leases shall be required to be in writing and shall be for a term of one (1) year or more. Prior to the commencement of any lease for the entire Lot, the Owner shall notify the Association regarding the existence of the lease, and shall submit a "rental registration form" to the Association for each new tenant and each new lease, including lease renewals, in a form prepared for the Association by the Board of Directors. Instructions regarding obtaining this form can be found in the Community Rules and Regulations. If the lease is only for part of the Lot, and the Owner will also continue to occupy the Lot, the Owner need not submit the rental registration form. The Owner shall notify the Association upon the termination of any lease. No more than twenty percent (20%) of the Lots in the Property shall be leased in their entirety or entirely occupied by a non-Owner occupant at any given time. The Board of Directors shall have the power to deny the lease of any Owner if twenty percent (20%) of the Lots in the Property are leased in their entirety at the time such Owner submits a rental registration form. Any lease for only a portion of a Lot shall not count toward the twenty percent (20%) cap so long as the Owner continues to reside within the Lot and the lease does not violate any laws or ordinances. Any Owner who leases or allows a non-owner

to occupy all or part of their Lot shall remain liable for compliance with the Declaration, the Articles, the Bylaws and any other set of Rules, regulations and guidelines regarding the Property and shall be responsible for any violations thereof by its tenant or its tenant's family, guests and invitees.

8.1.30 Construction. As long as Declarant or a Related Entity owns or has a Recorded option to purchase one or more Lots, all Dwelling Units on the Property must be constructed by Declarant or its designees. Notwithstanding anything to the contrary in this Declaration, this Section 8.1.30 can be amended, changed, waived or terminated only by Declarant by executing an instrument in recordable form that is Recorded.

8.1.31 Rooftop Equipment. No air conditioning units, heating units, or evaporative coolers shall be mounted on any roof unless originally installed by Declarant.

8.1.32 No Modification by Private Agreement. No private agreement of any Owner(s) shall modify or abrogate any of these Covenants or the obligations, rights and duties of the Owners hereunder.

8.1.33 Gates. If so elected by Declarant, the Property may be equipped with entry gates. As long as Declarant, Homebuilder or a Related Entity owns or has a Recorded option to purchase one or more Lots, the entry gates will be opened and closed at the times determined by Declarant and Homebuilder in their sole discretion, and Declarant and Homebuilder shall have exclusive control of the entry gates; provided, however, that maintenance, repair and replacement of the entry gates shall be the responsibility of the Association. The entry gates are not intended to provide security for the Property and no additional security should be implied by the fact that there is gated access to the Property. The entry gates at the Property are only designed to attempt to limit vehicular and pedestrian access; they are not designed to prohibit access or to provide security of any kind. Conversely, the entry gates at the Property may prohibit, impede response time and/or limit access to the Property by emergency vehicles.

8.1.34 Restrictions of Record. Each Owner, by accepting a deed or other conveyance of title, shall be deemed to have acknowledged on Owner's own behalf and on behalf of any occupants of Owner's Lot, that the Lot is subject to various easements, limitations and restrictions of record (collectively, "*Restrictions of Record*"), including but not limited to utility and other easements that may be located along or adjacent to Lot borders or internally on the Lot, and that Owner has the responsibility to and shall fully and independently investigate all Restrictions of Record, including but not limited to the exact locations of, uses of, and restrictions on interference with such Restrictions of Record, and shall not use or do, cause or permit anything to be done on the Lot that would violate any prohibitions or requirements expressly contained in the Restrictions of Record or that would in any manner prohibit, damage, jeopardize, conflict with or interfere with the Restrictions of Record or the facilities or uses (including maintenance and replacement) contemplated or permitted therein, including but not limited to digging, excavating, planting, or constructing or maintaining improvements or

landscaping, except to the extent expressly permitted in the applicable Restrictions of Record. Each Owner may consider obtaining and reviewing title insurance for the Lot and contacting the holders of Restrictions of Record to obtain assistance with the foregoing.

8.2 Permitted Uses and Restrictions - Common Area. The permitted uses and restrictions for the Common Area shall be as follows:

8.2.1 Permitted Uses. Except as otherwise provided herein, the Common Area shall be used in general for the exclusive benefit of the Owners, for the furnishing of services and facilities for which the same are reasonably intended and for the enjoyment to be derived from such reasonable and proper use, without hindering the exercise of or encroaching upon the right of any other Owner to utilize the Common Area, provided that no unlawful use shall be permitted.

8.2.2 Restricted Uses.

8.2.2.1 The Common Area shall not be used by Owners for storage of supplies, material or personal property of any kind; and

8.2.2.2 Except as otherwise provided herein, no activity shall be carried on nor condition maintained by any Owner upon the Common Area that spoils the appearance of the Property or hinders or encroaches upon the right of any other Owner to utilize the Common Area as reasonably intended.

8.2.3 Maintenance by Association. Except as may otherwise be provided herein, the Association, or its duly delegated representative, shall maintain and otherwise manage all Common Areas in a manner deemed appropriate by the Board, in its sole and absolute discretion. Without the Owners' approval, the Association shall have the right, in its sole and absolute discretion, as to the Common Area conveyed, leased or transferred to it or as to any other area placed under its jurisdiction:

8.2.3.1 Maintain the planting. For this purpose, Declarant and the Association shall have the right, at any time, to plant, replace, maintain and cultivate landscaping, shrubs, trees and plantings on any Common Area and on any area placed under its jurisdiction. No Owner shall remove, alter, injure or interfere in any way with any landscaping, shrubs, trees, grass or plantings placed upon any Common Area or upon any area placed under the jurisdiction of the Association without the prior written consent of Declarant or the Association. Declarant and the Association shall have the right to enter upon or cross over any Lot, at any reasonable time, for the purpose of planting, replacing, maintaining or cultivating such landscaping, shrubs, trees, grass or plantings and shall not be liable for trespass for so doing;

8.2.3.2 Reconstruct, repair, replace or refinish any improvement or portion thereof upon the Common Area or any other area placed under its

jurisdiction (to the extent that such work is not the responsibility of any governmental entity or public utility);

8.2.3.3 Do all such other and further acts that the Board deems necessary to preserve and protect the Common Area and the beauty thereof, in accordance with the general purposes specified in this Declaration; and

8.2.3.4 Be the sole judge as to the appropriate maintenance within the Common Area and individual front yards.

Nothing herein shall be construed so as to preclude the Association from delegating its powers set forth above to a project manager or agent or to other persons, firms or corporations.

8.2.4 Damage or Destruction of Common Area by Owners. If any Common Area is damaged or destroyed by an Owner or any of its guests, tenants, licensees or agents, such Owner does hereby authorize the Association to repair such damaged area, and the Association shall so repair such damaged area in a good workmanlike manner in conformity with the original plans and specifications of the area involved, or as the area may have been modified or altered subsequently by the Association, in the discretion of the Association. The amount necessary for such repairs shall be paid by such Owner, to the Association, and the Association may enforce collection of such amounts in the same manner as provided elsewhere in this Declaration for collection and enforcement of Assessments.

8.2.5 Mortgage or Conveyance of Common Area. The Common Area shall not be mortgaged or conveyed, nor shall future assessments be pledged to pay for such mortgage, without the prior consent of two-thirds (2/3) of the votes in each class of Members, following the First Conveyance.

## 9. Insurance.

9.1 Scope of Coverage. Commencing not later than the time of the First Conveyance, the Association shall maintain adequate insurance for the Common Area, including liability in an amount no less than One Million Dollars (\$1,000,000), as well as directors' and officers' liability. Each Owner shall be responsible for coverage on its Lot and any improvement thereon, including, without limitation, the Dwelling Unit.

9.2 Certificate of Insurance. An insurer that has issued an insurance policy under this Section 9 shall issue certificates or memoranda of insurance to the Association and, upon request, to any Owner or Mortgagee. Any insurance obtained pursuant to this Section 9 shall not be canceled until thirty (30) days after notice of the proposed cancellation has been mailed to the Association, and each Owner and each Mortgagee under a deed of trust to whom certificates or memoranda of insurance have been issued.

9.3 Repair and Replacement of Damaged or Destroyed Property. Any portion of the Common Area damaged or destroyed shall be repaired or replaced promptly by the

Association unless (a) repair or replacement would be illegal under any state or local health or safety statute or ordinance or (b) Owners owning at least eighty percent (80%) of the Lots vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves shall be paid by the Association. If the proceeds attributable to the damaged Common Area shall be used to restore the damaged area to a condition that is not in violation of any state or local health or safety statute or ordinance, then any such proceeds in excess of the amount used to restore such damage may, at the Board's discretion, be kept by the Association to help fund the expenses of the Association, or be distributed to the Owners on the basis of an equal share for each Lot.

## 10. General Provisions.

10.1 The Declaration. By acceptance of a deed or by acquiring any ownership interest in any portion of the Property, each Owner, its heirs, representatives, successors, transferees and assigns, binds itself, its heirs, representatives, successors, transferees and assigns, to restrictions, covenants, conditions, rules and regulations now or hereafter imposed by this Declaration and any amendments thereof to the extent permitted by law. In addition, each Owner by so doing hereby acknowledges that this Declaration sets forth a general scheme for the improvement and development of the Property and thereby evidences its interest that all the restrictions, conditions, covenants, rules and regulations contained herein shall run with the land and be binding on all subsequent and future Owners, grantees, purchasers, transferees and assignees thereof. Furthermore, each such Owner fully understands and acknowledges that this Declaration shall be mutually beneficial, prohibitive and enforceable by the various future Owners.

10.2 Enforcement. The Association, or any Owner, shall have the right, but not the duty, to enforce, by any proceeding at law or in equity, the provisions of this Declaration. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. If any portion of any Lot is maintained so as to: (a) present a public or private nuisance, (b) substantially detract from or affect the appearance or quality of any surrounding Lot or the Property, or (c) is used in a manner which violates this Declaration, or if the Owner or Resident of any Lot fails to perform its obligation under this Declaration or the Community Rules and Regulations, the Association or any Owner may give notice to the violating Owner that corrective action must be completed within fourteen (14) days of the receipt of such notice. If the violating Owner fails to take corrective action within said period of time, the Association, or the notifying Owner, may take, at the violating Owner's cost, appropriate corrective action to remedy such nuisance, detraction, violation or failure of performance including, without limitation, appropriate legal action. Charges incurred by the Association or the notifying Owner, as applicable, shall be paid by the violating Owner on demand together with interest at the rate of ten percent (10%) per annum or such higher rate that is equivalent to the maximum rate allowed by law accruing from the date said charges are incurred until paid in full. Furthermore, if the Association hires an attorney or attorneys to enforce compliance with or specific performance of the terms and conditions of this Declaration, or for any other purpose in connection with the breach of this Declaration, Articles

of Incorporation, Bylaws, or any Rules and Regulations of the Association, whether or not a lawsuit is filed, the defaulting Owner shall pay all costs incurred by the Association in relation to such matter, including, but not limited to, reasonable attorney's fees and costs, and all other expenses incurred by the Association ("*Enforcement Costs*"). Any sum not paid hereunder by the violating Owner to the Association shall be treated as an Assessment and collected in accordance with the procedures provided in Section 6.

10.3 Severability. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions, all of which shall remain in full force and effect.

10.4 Term; Method of Termination. Unless terminated in accordance with this Section 10.4, this Declaration (as amended from time to time) shall continue in full force and effect for a term of thirty (30) years from the date this Declaration is Recorded, after which time this Declaration shall be automatically extended for successive periods of ten (10) years each. This Declaration may be terminated at any time if such termination is approved by the affirmative vote or written consent, or any combination thereof, of Members holding ninety percent (90%) or more of the votes in the Association. If the necessary votes and consents are obtained, the Board shall cause to be Recorded a certificate of termination, duly signed by the president or vice president and attested by the secretary of the Association, with their signatures acknowledged. Thereupon this Declaration shall have no further force and effect, and the Association shall be dissolved pursuant to applicable law.

10.5 Amendments.

10.5.1 This Declaration may be amended at any time and from time to time during the original term of this Declaration or any extensions thereof, but, except for amendments made pursuant to Sections 10.5.2 or 10.5.3 of this Declaration, this Declaration may only be amended by the written approval or the affirmative vote, or any combination thereof, of Members owning not fewer than two-thirds (2/3) of the Lots in the Property.

10.5.2 Either the Board or the Declarant may amend this Declaration, without obtaining the approval or consent of any Owner, Mortgagee or other Person, to conform this Declaration to the requirements or guidelines of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, the Veterans Administration or any federal, state or local governmental agency whose approval of the Property or the Declaration, the Articles or the Bylaws is required by law or requested by the Declarant. Furthermore, either the Board or the Declarant may amend this Declaration, without obtaining the approval or consent of any Owner, Mortgagee or other Person, to comply with changes in the law.

10.5.3 Prior to the Transition Date, the Declarant may amend this Declaration without the consent or approval of any other Owner or other Person.

10.5.4 As long as Declarant or a Related Entity owns or has a Recorded option to purchase one or more Lots, no amendment to this Declaration shall be effective unless approved in writing by the Declarant (or unless the Declarant expressly waives in writing its right to approve such amendments).

10.5.5 Any amendment approved pursuant to Section 10.5.1 of this Declaration or by the Board pursuant to Section 10.5.2 of this Declaration must be signed by the president or vice president of the Association and must be Recorded. Any such amendment must certify that the amendment has been approved as required by this Section. Any amendment made by the Declarant pursuant to Sections 10.5.2 or 10.5.3 of this Declaration must be executed by the Declarant and must be Recorded.

10.6 Notices. Notices provided for in this Declaration shall be in writing and shall be addressed to the last known address of each Owner in the files of the Association. Notices shall be deemed delivered when mailed by United States First Class, Registered or Certified Mail, addressed to the Owner at such address or when delivered in person to such Owner.

10.7 Condemnation. The Association, upon receipt of notice of intention or notice of proceedings whereby all or any part of the Property is to be taken by any governmental body by exercise of the power of condemnation or eminent domain, shall immediately notify all Owners and First Mortgagees who have provided the Association with their names and addresses and a request to be notified if this situation were to occur. The Association shall represent the Owners in any condemnation or eminent domain proceeding for the acquisition of any part of the Common Area, and every Owner appoints the Association its attorney-in-fact for this purpose. The entire award made as compensation for such taking of Common Area, including, without limitation, any amount awarded as severance damages, or the entire amount received and paid in anticipation and settlement for such taking, after deducting from such award, in each case, reasonable and necessary costs and expenses, including, without limitation, attorneys' fees, appraisers' fees and court costs (which net amount shall hereinafter be referred to as the "*Award*"), shall be paid to the Association as trustee for the use and benefit of any Owners and their First Mortgagees as their interests may appear. The Association shall, as it is practicable, cause the Award to be utilized for the purpose of repairing and restoring the Property, including, if the Association deems it necessary or desirable, the replacement of any improvements so taken or conveyed.

If any Lot or portion thereof is taken by condemnation or eminent domain, the Owner of such Lot shall be entitled to receive the award for such taking, and after acceptance thereof said Owner and all of said Owner's Mortgagees shall be divested of all interest in the Property if such Owner shall be required to vacate the Lot as a result of such taking. The remaining Owners shall decide by vote of a majority of the Owners voting on the matter whether to rebuild or repair the Property or take other action. The remaining portion of the Property shall be resurveyed, if necessary, and the Declaration shall be amended to reflect such taking. If more than one Lot is taken at the same time, the Association shall participate in the negotiations and shall propose the

method of division of the proceeds of condemnation if the Lots are not valued separately by the condemning authority or by the court. Condemnation proceeds received for the Common Area that are not used for the purpose of repairing and restoring the property or replacement of improvements may, at the discretion of the Board, be kept by the Association to pay expenses of the Association, or be apportioned among the Owners in a fair and equitable manner as determined by the Association. If any Owner disagrees with the proposed allocation, such Owner may have the matter submitted to arbitration under the rules of the American Arbitration Association.

10.8 Waiver; Remedies Cumulative. No failure or delay on the part of any person in exercising any right, power or privilege hereunder and no course of dealing between or among the persons subject hereto shall operate as a waiver of any provision hereof, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any other right, power or privilege. The rights and remedies herein expressly provided are cumulative and not exclusive of any rights or remedies which any person subject hereto would otherwise have. No notice to or demand upon any person in any case shall entitle such person to any other or further notice or demand in similar or other circumstances or constitute a waiver of rights to any other or further action in any circumstances.

10.9 Interpretation. Except for judicial construction, the Association has the exclusive right to construe and interpret the provisions of this Declaration. In the absence of any adjudication to the contrary by a court of competent jurisdiction, the Association's construction or interpretation of the provisions hereof shall be final, conclusive and binding as to all Persons and Property benefited or bound by this Declaration.

10.10 Change of Circumstances. Except as otherwise expressly provided in this Declaration, no change of conditions or circumstances shall operate to extinguish, terminate or modify any of the provisions of this Declaration.

10.11 Laws, Ordinances and Regulations.

10.11.1 The covenants, conditions and restrictions set forth in this Declaration and the provisions requiring Owners and other Persons to obtain the approval of the Board or the Architectural Committee with respect to certain actions are independent of the obligation of the Owners and other Persons to comply with all applicable laws, ordinances and regulations, and compliance with this Declaration shall not relieve an Owner or any other Person from the obligation also to comply with all applicable laws, ordinances and regulations.

10.11.2 Any violation of any state, municipal or local law, ordinance or regulation pertaining to the ownership, occupation or use of any property within the Property is hereby declared to be in violation of this Declaration and subject to any or all of the enforcement proceedings set forth herein.

10.12 References to this Declaration in Deeds. Deeds to and instruments affecting any Lot or any other part of the Property may contain the covenants, conditions and

restrictions herein set forth by reference to this Declaration, but whether any such reference is made in any deed or instrument, each and all of the provisions of this Declaration are and shall be binding upon the grantee-Owner or other Person claiming through any instrument and its heirs, executors, administrators, successors and assigns.

10.13 Gender and Number. Wherever the context of this Declaration so requires, any word used in the masculine, feminine or neuter genders includes each of the other genders, words in the singular include the plural, and words in the plural include the singular.

10.14 Captions and Title; Section References; Exhibits. All captions, titles or headings of the articles and sections in this Declaration are for the purpose of reference and convenience only and are not to be deemed to limit, modify or otherwise affect any of the provisions hereof or to be used in determining the meaning or intent thereof. References in this Declaration to numbered articles, sections or subsections, or to lettered exhibits, shall be deemed to be references to those paragraphs or exhibits so numbered or lettered in this Declaration, unless the context otherwise requires. Any exhibits referred to in this Declaration are hereby incorporated herein by reference and fully made a part hereof.

10.15 Indemnification. The Association shall indemnify each and every officer and director of the Association, each and every member of the Architectural Committee, and each and every member of any committee appointed by the Board (including, for purposes of this Section 10.15, former officers and directors of the Association, former members of the Architectural Committee, and former members of committees appointed by the Board) (collectively, "*Association Officials*" and individually an "*Association Official*") against any and all expenses, including, without limitation, attorneys' fees, reasonably incurred by or imposed upon an Association Official in connection with any action, suit or other proceeding (including settlement of any suit or proceeding, if approved by the Board serving at the time of such settlement) to which he or she may be a party by reason of being or having been an Association Official, except for his or her own individual willful misfeasance, malfeasance, misconduct or bad faith. No Association Official shall have any personal liability with respect to any contract or other commitment made by them or action taken by them, in good faith, on behalf of the Association (except indirectly to the extent that such Association Official may also be a Member of the Association and therefore subject to Assessments hereunder to fund a liability of the Association), and the Association shall indemnify and forever hold each such Association Official free and harmless from and against any and all liability to others on account of any such contract, commitment or action. Any right to indemnification provided for herein is not exclusive of any other rights to which any Association Official may be entitled. If the Board deems it appropriate, in its sole discretion, the Association may advance funds to or for the benefit of any Association Official who may be entitled to indemnification hereunder to enable such Association Official to meet on-going costs and expenses of defending himself or herself in any action or proceeding brought against such Association Official by reason of his or her being, or having been, an Association Official. In the event it is ultimately determined that an Association Official to whom, or for whose benefit, funds were advanced pursuant to the preceding sentence does not qualify for indemnification pursuant to this Section or otherwise

under the Articles, Bylaws or applicable law, such Association Official must promptly upon demand repay to the Association the total of such funds advanced by the Association to him or her, or for his or her benefit, with interest (should the Board so elect) at a rate not to exceed ten percent (10%) per annum from the date(s) advanced until paid.

10.16 Number of Days. In computing the number of days for purposes of any provision of this Declaration or the Articles or Bylaws, all days shall be counted including Saturdays, Sundays and holidays, but if the final day of any time period falls on a Saturday, Sunday or legal holiday, then the final day shall be deemed to be the next day which is not a Saturday, Sunday or legal holiday.

10.17 Disclaimer of Representations. Notwithstanding anything to the contrary herein, neither the Declarant nor any affiliate of Declarant makes any warranties or representations whatsoever that the plans presently envisioned for the complete development of the Property can or shall be carried out, or that any real property now owned or hereafter acquired by the Declarant or by any affiliate of Declarant is or shall be subjected to this Declaration, or that any such real property (whether it has been subjected to this Declaration) is or shall be committed to or developed for a particular (or any) use, or that if such real property is once used for a particular use, such use shall continue in effect. While neither the Declarant nor any affiliate of Declarant believes that any of the restrictive covenants contained in this Declaration is or may be invalid or unenforceable for any reason or to any extent, neither the Declarant nor any affiliate of Declarant makes any warranty or representation about the present or future validity or enforceability of any such restrictive covenant. Any Owner acquiring a Lot in reliance on one or more of such restrictive covenants assumes all risks of the validity and enforceability thereof and by accepting a deed to the Lot agrees to hold the Declarant and all affiliates of Declarant harmless therefrom.

10.18 Amendments Affecting Declarant Rights. Notwithstanding any other provision of this Declaration to the contrary, no provision of this Declaration (including but not limited to, this Section) which grants to or confers upon the Declarant or upon any affiliates of Declarant any rights, privileges, easements, benefits or exemptions (except for rights, privileges, easements, benefits or exemptions granted to or conferred upon Owners generally) may be modified, amended or revoked in any way, so long as the Declarant, any affiliate of Declarant or a trustee for the benefit of the Declarant or any affiliate of Declarant owns or has a Recorded option to purchase any portion of the Property, without the express written consent of the Declarant.

**[Remainder of page intentionally left blank]**

Declarant has executed this Declaration to be effective as of 5/10/2016, 2016.

**DECLARANT:** K. HOVNANIAN AT GALLERY, LLC,  
an Arizona limited liability company

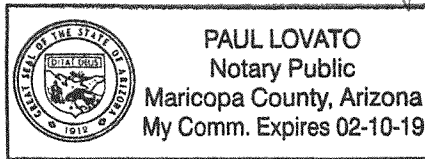
By: [Signature]  
OFFICER

STATE OF ARIZONA        )  
  ) ss.  
County of Maricopa        )

The foregoing instrument was acknowledged before me this 10th day of MAY, 2016, by Chad Fuller, Officer of K. Hovnanian at Gallery, LLC, an Arizona limited liability company, on behalf of the company.

[Signature]  
\_\_\_\_\_  
Notary Public

My Commission Expires:  
2/10/19



http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=249894 [20160317923] 45 Pages

**EXHIBIT A****Legal Description of the Property**

The land referred to herein below is situated in the County of Maricopa, State of Arizona and is described as follows:

**PARCEL NO. 1:**

A portion of the Southeast quarter of the Southeast quarter of Section 27, Township 2 North, Range 4 East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

Commencing at the Northeast corner of said Southeast quarter of the Southeast quarter, a City of Scottsdale brass cap in handhole, from which the Northwest corner thereof a City of Scottsdale brass cap flush, bears South 89 degrees 10 minutes 30 seconds West (basis of bearings) along the monument line of Earll Drive, a distance of 1310.75 feet;

Thence South 89 degrees 10 minutes 30 seconds West along the North line of the Southeast quarter of the Southeast quarter of said Section 27, a distance of 510.07 feet;

Thence leaving said North line, South 00 degrees 02 minutes 06 seconds West, a distance of 20.00 feet, to a point on the Southerly right-of-way line of Earll Drive, also being the point of beginning;

Thence continuing South 00 degrees 02 minutes 06 seconds West, along the West line of the East 121.81 feet of Olene Place as recorded in Book 48 of Maps, Page 5, MCR, a distance of 238.44 feet to the North line of the South 80 feet of said Olene Place;

Thence South 89 degrees 11 minutes 08 seconds West along said North line, a distance of 151.80 feet;

Thence North 00 degrees 02 minutes 06 seconds East leaving said North line, a distance of 228.41 feet to the South right of way line of Earll Drive;

Thence North 89 degrees 10 minutes 30 seconds East along said right of way, a distance 127.63 feet;

Thence North 00 degrees 00 minutes 15 seconds East along said right of way, a distance of 10.00 feet;

Thence North 89 degrees 10 minutes 15 seconds East along said right-of-way line, a distance of 24.18 feet to the point of beginning.

**PARCEL NO. 2:**

The West 30.00 feet of the South 80.00 feet of OLENE PLACE, according to the plat of record in the County Recorder of Maricopa County, Arizona, recorded as Book 48 of Maps, Page 5.

**PARCEL NO. 3:**

The South 80.00 feet of OLENE PLACE, according to the plat of record in the County Recorder of Maricopa County, Arizona, recorded as Book 48 of Maps, Page 5 and that portion of Marshall Avenue abandoned by Resolution recorded in Instrument No. 84-0493240, records of Maricopa County, Arizona;

Except the East 121.81 feet of said OLENE PLACE;

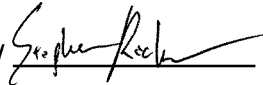
Except the West 30.00 feet of said OLENE PLACE.

20160317923  
OFFICIAL RECORDS OF  
MARICOPA COUNTY RECORDER  
STEPHEN RICHER



The foregoing instrument is an  
**electronically prepared**  
full, true and correct copy  
of the original record in this  
office.

Attest: 03/15/2021 10:31:04 AM

By  Recorder

To Verify this purchase visit  
<http://recorder.maricopa.gov/recdocdata/verifycert.aspx?id=249894>

## **EXHIBIT 7**

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2020-008714

02/08/2023

HONORABLE KATHERINE COOPER

CLERK OF THE COURT  
C. Ladden  
Deputy

GALLERY COMMUNITY ASSOCIATION

PENNY JANE MANSHIP

v.

K HOVNANIAN AT GALLERY L L C, et al.

LOUIS W HOROWITZ

STEPHEN BEST  
JASON J BOBLICK  
LEONARD T FINK  
SHANNON G HUFF  
RINA K RAI  
AMY WILKENS  
DENNIS I WILENCHIK  
JUDGE COOPER

RULINGS RE MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are the following dispositive motions fully-briefed and argued:

- Defendants' Motion for Summary Judgment Regarding Each of Plaintiff's Causes of Action filed September 30, 2022;
- Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects filed September 30, 2022; and
- Third-Party Defendants Desert Vista, Inc. and Renco, LLC dba Renco Roofing's Joint Motion for Summary Judgment filed September 30, 2022.

The Court has reviewed the briefs and considered counsels' oral argument.

SUPERIOR COURT OF ARIZONA  
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KHOV MOTION FOR SUMMARY JUDGMENT  
REGARDING PLAINTIFF'S CAUSES OF ACTION

Defendants K. Hovnanian at Gallery, LLC ("KHov Gallery") and K. Hovnanian Arizona Operations, LLC ("KHov Arizona") move for judgment on the remaining claims against them, Counts 2, 3, and 4.

For the reasons stated, the Court finds that:

1. Plaintiff Gallery Community Association's ("Association"), a homeowners association, cannot assert the claim for breach of the implied warranty of workmanship and habitability. (Count 3)
2. The Association cannot establish that KHov Gallery breached a contract or the implied covenant of good faith and fair dealing because the Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery ("Declaration") does not impose a contractual obligation on KHov Gallery to perform or warrant construction. (Counts 2 and 4)

Summary judgment is granted, and Counts 2, 3, and 4 are dismissed.

**Facts**

The following facts are undisputed:

The Association is a homeowner's association ("HOA") and non-profit corporation formed under A.R.S. § 10-3010, et. seq. for The Gallery subdivision in Scottsdale.

The Article of Incorporation for the Association state that the Association was formed to maintain the "Common Area," collect assessments, and enforce the Declaration. It also imposes on the Association the duty to maintain the "Association Property" for the benefit of the unit owners. These terms are defined in the Declaration.

KHov Gallery developed The Gallery and sold the units. KHov Gallery is the "Declarant" of the Declaration.

KHov Gallery conveyed fee simple title to the Common Area to the Association by quit claim deed dated October 6, 2016.

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KHov Arizona was the general contractor responsible for constructing the residences.

The Association filed this action on behalf of itself, not the individual homeowners within The Gallery.

**Count 3 - Breach of the Implied Warranty of Workmanship and Habitability**

Count 3 alleges that KHov Gallery and KHov Arizona breached an implied warranty of workmanship and habitability.

The implied warranty of workmanship and habitability is a right of action available to individual purchasers of single-family homes. In Arizona, the Court of Appeals first recognized the implied warranty in *Columbia Western Corp. v. Vela*, 122 Ariz. 28 (App. 1979). The Supreme Court defined it further in *Richards v. Powercraft Homes*, 139 Ariz. 242 (1984).

The implied warranty arises from the construction of a home. *Lofts at Fillmore Condominium Assoc'n v. Reliance Commercial Construction*, 218 Ariz. 574, 577 (2008) (“*Columbia Western* and *Richards*...make clear that an implied warranty arises from construction of the home...”). It is implied into all contracts between builder-vendors and a home buyer. It is enforceable by the original owner per *Columbia Western* and by subsequent purchasers under *Richards*. A claim based on the implied warranty is a cause of action for damages caused by latent construction defect(s) that manifest after an owner buys a home and are not detectable with a reasonable pre-purchase inspection. The owner must prove that the builder-vendor caused the defect. *Columbia Western*, 122 Ariz. at 32; *Richards*, 139 Ariz. at 245. The implied warranty is enforceable against the builder even if the builder (who constructs the home) and the vendor (who sells the home) are separate entities. *Lofts*, 218 Ariz. 574, 577 (2008).

The cases hold that the right of implied warrant belongs to the homeowner and applies to homes. It serves “to protect innocent purchasers and hold builders accountable for their work.” *Richards*, 139 Ariz. at 245. *Richards* extended this protection to subsequent purchasers based on the same policy considerations underlying an original owner’s right to an implied warranty. *Id.* as a warranty of habitability, the warranty applies to structures built for living purposes. As stated in *Zambrano v. M & RC II, LLC*, 254 Ariz. 53, 59 (2022), “Under this implied warranty, the builder-vendor guarantees it built the home in a workmanlike manner *and that it is habitable*.” (emphasis added.) The public policy behind the implied warranty is “to protect buyers of newly built *homes* and successive owners against latent construction defects that were not reasonably discoverable when the *home* was initially sold.” *Id.* (internal citations omitted) (emphasis added).

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In this case, the Association holds no implied warranty. It does not own the residences. It owns the Common Area that KHov Gallery conveyed to it in the quit claim deed and as defined in the Declaration. The Common Area is exactly that -- areas such as the parking lot, pool, and cabana intended for “for the common use and enjoyment” of the homeowners, not the residences. The Declaration defines Common Area as “all areas (including the improvements thereon) owned, or to be owned, by the Association for the common use and enjoyment of the Owners and/or Residents of the Property, and any other areas that the association is required to maintain, either by this Declaration or the recorded subdivision plat, other than those areas located on the Lots.” Decl. § 1.12

The Association’s responsibility to maintain common aspects of the residences, such as exterior walls and roofs, cannot create an implied warranty. The Association did not purchase the homes; it assumed a duty to help maintain their exteriors. The homes – and the implied warranty – belongs to the homeowners.

Finally, the Association relies on *Lofts* for the proposition that the Association can assert an implied warranty claim. In fact, the Lofts Association brought an action against the builder *on behalf of the unit owners* and was statutorily authorized to do so. *Id.* at 577 (issue was whether “suit on this warranty can be brought by residential homebuyers like those in the Association,”); (A.R.S. § 33-1242(A)(4). Here, the Association filed this lawsuit on behalf of the Association only and has no authority to bring an action for the affected homeowners. *Lofts* is consistent with *Columbia Western* and *Richards* and does not support the Association’s position. Count 3 is dismissed.

### **Counts 2 and 4 -- Breach of Contract Claims**

Counts 2 and 4 allege Breach of the Implied Covenant of Good Faith and Fair Dealing and Breach of Contract, respectively, against KHov Gallery only.<sup>1</sup> The Association claims that, under the Declaration, KHov Gallery owed the Association a contractual duty to perform, construct, and warrant “work.” It claims KHov Gallery breached that duty and the implied covenant of good faith and fair dealing.

To prove that KHov Gallery breached a contract, the Association must prove the terms of the contract, that KHov Gallery breached a term of the contract, and that the Association incurred damages as a result of that breach. Revised Arizona Jury Instructions (Civil) 6<sup>th</sup> – Contract 2; *Holmes v. Graves*, 83 Ariz. 174, 177 (1957).

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<sup>1</sup> Counts 2 and 4 are not alleged as to KHov Arizona. The Defendants who were named with KHov Gallery have been dismissed.

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To prove breach of the duty of good faith and fair dealing, the Association must prove the existence of a valid contract and that KHov Gallery deprived the Association from receiving the benefit of the contract. *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 14 (1998) (citing *Rawlings v. Apodaca*, 151 Ariz. 149, (1986); *Johnson Int'l, Inc. v. City of Phoenix*, 192 Ariz. 466 (App. 1998).

The Complaint does not identify the “terms” of the Declaration that KHov Gallery allegedly violated. Nor does the Association’s Response. In fact, there is no provision in the Declaration that states that KHov Gallery agreed to “build[ing] a project” that conformed to “applicable laws and building codes” or that KHov Gallery promised that the work would be or had been done correctly.” Complaint, ¶¶ 25-26, 39.

Alternatively, the Association contends that KHov Gallery’s contractual obligation to construct and warrant work is derived from the “duties and obligations” imposed on KHov Gallery in the Declaration. Response, 11:7. The Association relies on Arizona cases that hold that a declaration (also referred to as the Covenants, Conditions, and Restrictions or CC&Rs) is a contract between and among lot owners and cases from other jurisdictions that also find a contract between owners and the declarant. *See Powell v. Washburn*, 211 Ariz. 553, 557 (2006) citing *Ahwatukee Custom Estates Management Ass’n Inc. v. Turner*, 196 Ariz. 631 634 (App. 2000); *Villa Milano Homeowners Assn. v. IL Davorge*, 84 Cal. App. 4<sup>th</sup> 819 (2000); *Solowicz v. Forward Geneva Nat’l, LLC*, 780 N.W.2d 111, 125 (Wis. 2010).

The cases cited by the Association rely on widely recognized principles of contract interpretation. Courts construe contract language to give effect to the intent of the parties. Courts look to the language to ascertain the scope and purpose of the document, meaning of the words as well as the surrounding circumstances. *Powell*, 211 Ariz. at 376 (citing *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153 (1993) (“When interpreting a contract ... it is fundamental that a court attempt to ‘ascertain and give effect to the intention of the parties at the time the contract was made if at all possible.’”)

In this case, the language shows that KHov Gallery prepared the Declaration to promote the orderly preservation and use of The Gallery by establishing permitted uses and restrictions for the property and an Association to enforce the restrictions, collect assessments, and maintain the Common Area. (Recitals B, C, D). The Declaration imposed minimal requirements on KHov Gallery. Under the Declaration, KHov Gallery is required:

- to convey fee simple title to the Common Area to the Association, § 3.5
- to control the make-up of the Association, including the Board and Architectural Committee until control transferred to the Owners, and then to keep one seat on the Board post-transition §§ 5.3, 7.1, 4.3.1

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- as an Owner of a unit (if any), to pay for repairs in the Common Area caused by Owner or Owner's guest, § 8.2.4

(Declaration, Exh. A to Defendants' SOF). None of these duties are at issue. This case is about alleged defective original construction.

Further, the Declaration provisions related to construction appear as restrictive covenants under Section 8 regarding "Use Restrictions." For example, Section 8.1.1 restricts development to single family residences that are subject to Architectural Committee approval. Section 8.1.30 limits an owner's choice of contractor to KHov Gallery or its designee as long as KHov Gallery owns or has an option to purchase a lot.

These provisions state limitations on the use of the lots; they do not impose a contractual obligation on KHov Gallery. The restrictions refer specifically to the property: § 8.1.1.1 -- "All lots shall be used [for]...single family residential use;" 8.1.30 -- "Dwelling Units on the Property must be constructed by Declarant or its designees." By contrast, where KHov Gallery is required to act, the Declaration states that it "shall" act: § 3.5 -- "Declarant covenants that it shall convey fee simple title to the Common Area to the Association." 5.3 -- "Declarant shall maintain absolute control over the Association...until the Transition Date;" § 7.1 -- Declarant shall appoint all of the original member of the Architectural Committee; § 8.2.4 -- repairs caused by an Owner to the Common Area "shall be paid by such Owner." Had KHov Gallery intended to require it to perform and warrant construction for the Association, it would have stated that requirement -- as it did for the duties listed above.

Accordingly, in considering the language of the Declaration and the purpose behind it, no contractual duty to perform or warrant construction for the Association can be derived from this document. As a result, KHov Gallery cannot be held liable for breaching a contract or the implied covenant of good faith within a contract. There are no disputed issues of fact, as the Association relies solely on the Declaration in alleging a contractual duty. Summary judgment is granted on Counts 2 and 4.

### **Conclusion**

The ruling granting Defendants' Motion on Plaintiff's Causes of Action disposes of the Complaint and, therefore, Defendants' Third-Party Complaint for indemnity. The Court need not reach Defendants' Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects and Third-Party Defendants Desert Vista, Inc. and Renco, LLC's Joint Motion for Summary Judgment. Had the Court reached those motions, material issues of fact would have precluded summary judgment as to both motions.

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**IT IS ORDERED:**

1. Granting Defendant's Motion for Summary Judgment Regarding Each of Plaintiff's Causes of Action,
2. Denying as moot Defendant's Motion for Partial Summary Judgment Regarding Claims of Unsupported Defects, and
3. Denying as moot Third-Party Defendants Desert Vista, Inc. and Renco, LLC's Joint Motion for Summary Judgment.

**IT IS FURTHER ORDERED** Defendants shall submit a proposed Judgment and Statement of Costs by **February 24, 2023**.

**IT IS FURTHER ORDERED** vacating the Final Trial Management Conference set on February 24, 2023 at 2:00 p.m. and the Jury Trial set to begin on March 13, 2023 at 9:00 a.m. in this division.