ARIZONA COURT OF APPEALS

DIVISION ONE

GALLERY COMMUNITY ASSOCIATION, an Arizona non-profit corporation,

Plaintiff/Appellant,

vs.

K. HOVNANIAN AT GALLERY, LLC, et al.,
Defendants/Appellees.

Court of Appeals
Division One
No. 1 CA-CV 23-0375

Maricopa County
Superior Court
No. CV 2020-008714

BRIEF OF *AMICUS CURIAE AIRE ON MCDOWELL COMMUNITY ASSOC.* SUPPORTING GALLERY COMMUNITY ASSOCIATION AND APPENDIX

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INTRODUCTION

Arizonans reasonably expect their homeowners' associations (whether condominium or planned development) to protect their interests by holding builders accountable for latent defects they cause in their common and shared maintenance areas ("shared maintenance areas"). After all, the Legislature has explicitly told homeowners that "a homeowners' association may file a homeowners' association dwelling action" on their behalf, once their association gives them notice and meets other requirements. A.R.S. 33-2002(A). Decisively, this statute uses substantively identical language ("may file") to a statute Defendants concede gives condominium associations authority to file these dwelling actions. *See* A.R.S. § 33-1242(A)(4) ("may institute"). The Court should reverse on that basis alone.

Moreover, the common law permits all associations to sue in their own name to enforce the implied warranty. Defendants ignore that the implied warranty often arises in the original contract for the construction of the residential development before any purchase agreement is signed, it applies to all residential construction, and the Supreme Court has eliminated any requirement that the owner of the residential property at issue have any contractual relationship whatsoever with the builder or developer to hold

them accountable for defects they caused. *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 245 (1984) ("[P]rivity is not required to maintain an action for breach of the implied warranty of workmanship and habitability.").

Numerous settled doctrines permit associations to pursue such actions in their own name, whether in connection with enforcing their own rights or the rights of their members who consist entirely of innocent homebuyers. To hold otherwise would require ignoring the Legislature's directive, longstanding common law, and would upset homeowners' reasonable reliance on their associations' right to enforce the implied warranty.

INTEREST OF AMICUS CURIAE

Amicus sponsor Aire on McDowell Community Association ("Aire") is a homeowners' association currently in litigation relating to the implied warranty over shared maintenance areas (substantially the same issue in this case) with an affiliate of the Developer. *Aire on McDowell Community Ass'n v. K Hovnanian at Aire on McDowell, LLC*, CV2022-008601. The Court's ruling in this case on whether HOAs can sue for breaches of the implied warranty will have a direct effect on the outcome of that lawsuit, and other similarly situated homeowners' associations and their members (i.e., homeowners). The law firm Kadan Turner Thomson Booth LLP is a nationally recognized

law firm with over thirty years of experience as consumer advocates in the homebuilding industry. This law firm represents Aire in its case involving the same issue presented here, and it has provided financial support for this amicus brief.

ARGUMENT SUMMARY

In *Lofts at Fillmore Condominium Ass'n v. Reliance Commerical Construction, Inc.*, the Supreme Court held "that the superior court erred in dismissing the Association's implied warranty claim for lack of privity." 218 Ariz. 574, 578, ¶ 20 (2008). The superior court distinguished *Lofts* because it found that the Lofts Association was purportedly "statutorily authorized" by A.R.S. § 33-1242(A)(4) to file a dwelling action, even though *Lofts* does not say that. (Appendix to Opening Brief at APP000091.)

Defendants make this same argument (at 9), claiming § 33-1242 gave the Lofts Association authority to file that action, whereas the Association "has no authority to bring an action for the affected homeowners." These arguments overlook A.R.S. § 33-2002(A), in which the Legislature gave all associations authority to bring a dwelling action for their affected homeowners.

In addition, no statute is required because the common law gives all associations the right to enforce the implied warranty in an action filed in its own name, whether on behalf of itself or its members. Defendants ignore that the implied warranty here arose in the construction contract (express or implied) between Defendant K. Hovnanian Arizona Operations, LLC (the "Builder") and Defendant K. Hovnanian at Gallery, LLC (the "Developer"), and extended automatically to the Association.

Just like in *Lofts*, no privity is required between the Association and the Builder regardless of any statute (which *Lofts* never cites or mentions). Under Arizona common law, that implied warranty covers all residential developments (including areas owned or maintained by associations) and extends to protect all subsequent owners who acquire property rights in the developed property, without regard to privity. The Owners (who Defendants concede may enforce the implied warranty) stand in the same relationship to the Builder as the Loft Association—neither is in privity. Moreover, privity exists between the Developer and the Association through the Declaration because in that contract the Developer made promises to the Association and imposed obligations on it.

If the Association has authority to enforce the implied warranty (either by statute or the common law), then it may sue in its own name to enforce that right directly or on its members' behalf. All relevant policy considerations confirm this.

ARGUMENT[1]

I. The Legislature expressly provided that "a homeowners' association may file a homeowners' association dwelling action."

A.R.S. § 33-2002(A) resolves this case in a straightforward manner.

A. The Legislature gave both planned development associations and condominium associations the *same* power to enforce the implied warranty.

The superior court erroneously concluded that the Lofts Association "was statutorily authorized" to bring its lawsuit pursuant to A.R.S. § 33-1242(A)(4), but that the Association here lacks any such "authority to bring an action for the affected homeowners." (APP000091.) But the Legislature expressly gave *all* homeowners' associations the power to hold builders accountable for shoddy workmanship.

[1] This brief includes copies of the key statutes in an appendix: A.R.S. §§ 12-1361, 12-1362, 12-1366, 33-1242, 33-2001, and 33-2002.

1. A.R.S. § 33-2002(A) expressly authorizes homeowners' associations to sue in their own name.

Under the Purchaser Dwelling Act, A.R.S. § 12-1366 et seq., "[a] dwelling action brought by an association is also subject to title 33, chapter 18." A.R.S. § 12-1366(B). Title 33 governs property (the same title in which the condo statute, § 33-1242 is found). A.R.S. § 33-2002(A) (within title 33, Chapter 18) provides that a homeowners' association may file a "homeowners' association dwelling action" (i.e., the action pled in the Complaint):

> Notwithstanding any provision to the contrary in title 10, chapter 39 or chapter 9 [i.e., where 33-1242 is found] or 16 of this title and in addition to any requirements prescribed in the community documents of a homeowners' association, **a homeowners' association may file a homeowners' association dwelling action** only after all of the following have occurred:

That language is followed by a list of conditions, such as full disclosure to homeowners, notice, a meeting, and board authorization to ensure the action is taken on behalf of the association's members' interests. A.R.S. § 33-2002(A)(1)-(4).

Decisively, both the superior court and Defendants agree that A.R.S. § 33-1242 authorizes condominium associations to sue (that's how they

distinguish *Lofts* from this case). But § 33-1242 and § 33-2002(A) use substantively identical language—synonyms—"may institute" and "may file"—to confirm that both types of associations may file dwelling actions:

A.R.S. § 33-1242 (condominiums)	A.R.S. § 33-2002(A) (associations)
The Association **may institute**, defend or intervene in litigation . . . in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.	[A] homeowners' association **may file** a homeowners' association dwelling action [if conditions are met]

If "may institute" gives condominium associations the right to pursue a dwelling action, as Defendants concede, then surely the words "may file" give "a homeowners' association" the right to file a "dwelling action" (assuming the other conditions are satisfied). That language is substantively identical, and to read it otherwise would ignore the text's plain meaning.

"*May*" means "to be permitted to." Black's Law Dictionary (11th ed. 2019). In statutes, using "may" to give such permission means to "affirmatively grant authority." *See Fragoso v. Fell*, 210 Ariz. 427, 431, ¶ 10 (App. 2005) ("We first note that § 13–3967(D) and Rule 7.3(b) are couched in terms of what 'a judicial officer *may impose*' and what '[a]n order of release *may include*.' By their express terms, *those provisions affirmatively grant*

authority to trial courts to determine and fashion appropriate conditions for a defendant's release on bail." (emphasis added)).

So when the Legislature says "a homeowners' association may file a homeowners' association dwelling action" it means exactly that: a homeowners' association may file a homeowners' association dwelling action pursuant to A.R.S. §§ 12-1361 et seq., and A.R.S. §§ 33-2001 et seq. *Cf. Hannosh v. Segal*, 235 Ariz. 108, 111, ¶ 7 (App. 2014) (emphasis added) (Statute allows a cause of action for racketeering because it said "[a] person who sustains reasonably foreseeable injury to his person . . . by a pattern of racketeering activity . . . **may file an action**. . . ."); *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, 313, ¶ 17 (2017) (explaining that "may file an action" in statute authorizes lawsuits by vulnerable adults). Indeed, § 33-2002 is more *specific* than § 33-1242 because it specifically authorizes—"may file"—"a dwelling action." The explicit use of the words "may file" means the legislature gave homeowners' associations the power and discretion to file such an action *in its own name*.

True, § 33-2002(A) provides additional hurdles to ensure the action has the support of its members, but there is no question here that the Association cleared those hurdles. Once cleared, "a homeowners' association may file a

homeowners' association dwelling action," A.R.S. § 33-2002(A). There are no further requirements, such as an assignment of any implied warranty rights from individual homeowners to the association. Nor is there any privity requirement or anything else. The Legislature set forth the conditions that an association must meet to pursue a dwelling action, and once met the Court should not be judicially writing into the statute conditions missing from the text. *See Tucson Unified Sch. Dist. v. Borek ex rel. Cnty. of Pima*, 234 Ariz. 364, 368, ¶ 11 (App. 2014) ("We are not at liberty to rewrite a statute under the guise of judicial interpretation.") (internal quotations and brackets omitted).

2. The express grant of authority in A.R.S. § 33-2002(A) and the related definitions show the Court should reverse.

In this case, the Association is a non-profit corporation that has the right to "[s]ue and be sued, complain and defend in its corporate name." A.R.S. § 10-3302(1). The Association also fits the relevant statutory definition of "**Association**":

> 1. "Association" means either of the following:
>
> (a) The unit owners' association organized under § 33-1241 [i.e., condos].

> (b) A **nonprofit corporation** or unincorporated association of owners **created pursuant to a declaration to own and operate portions of a planned community** . . . [i.e., planned development associations].

A.R.S. § 12-1361(1) (emphasis added); A.R.S. § 33-2001(4) ("'Homeowners' association' means an association as defined in § 33-1202 [Condo. Act] or 33-1802 [Planned Community Act].").

Tellingly, the Legislature included both types of associations in this definition, evidencing its intent to put both types of associations on equal footing to pursue dwelling actions. To hold builders accountable for shoddy workmanship, the Legislature wisely did not make planned community owners worse off than condominium owners. After all, that distinction would make no sense.

The Legislature's intent to put all associations on equal footing with each other (*and with individual homeowners*) is also reflected in the definition of "**Dwelling**." Although in ordinary usage "dwelling" means "a shelter (such as a house) in which people live," *Dwelling*, Merriam Webster.com (Jan. 2024), the Legislature gave that term a special meaning in this context. It defined "Dwelling" broadly to include both "common areas and improvements that are owned or maintained by an association"—basically

everything within the Association's "jurisdiction" as that term is defined in the Declaration:

> "'Dwelling' means a single or multifamily unit designed for residential use **and common areas and improvements that are owned or maintained by an association** or by members of an association."

A.R.S. § 12-1361(6) (emphasis added); *see also* 33-2001 ("'Dwelling" means a newly constructed single family or multifamily unit designed for residential use and property and improvements that are either owned by a homeowners' association or jointly by all of the members of a homeowners' association.").

Section 33-2001 also defines "**Homeowners' association dwelling action**" to mean "any action involving a construction defect as defined in § 12-1361 **filed by a homeowners' association** against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling." A.R.S. § 33-2001(5) (emphasis added).

This statute also defines "seller" broadly. Among other things, "'**Seller**' means" "(a) Any person, firm, partnership, corporation, association or other organization **that is engaged in the business of building or selling** dwellings." A.R.S. § 33-2001(6) (emphasis added). So, contrary to

Defendants' argument, it does not matter whether the Association purchased anything from Defendants because Defendants are "engaged in the business of building or selling dwellings" (defined broadly). (*See* Ans. Br. at 4 (Plaintiff "purchased nothing from Declarant."); *id*. at 9 ("Plaintiff purchased nothing from any homebuilder.").

Given those definitions, the Association had the right to file this action in its own name. Those who bought the townhomes in this development reasonably expected their association—an association of innocent townhome buyers—to hold Defendants accountable if they later learned their shared maintenance areas were infected with construction defects that they "could not have reasonably discovered at the time of purchase," *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 57, ¶ 2 (2022). The Legislature unquestionably had authority to give associations this right to enforce the common law implied warranty. It also furthers the policies underlying the implied warranty, which include protecting "the public at large." *Id.* at 61, ¶ 25 ("The implied warranty serves to protect homebuyers and the public at large in multiple ways.").

B. Defendants' arguments miss the mark.

Defendants will ask the Court to not decide this case on this straightforward basis. The Court should decline that request.

1. Procedural versus substantive.

The Opening Brief argued (at 15) that the "'homeowners association' may file a 'homeowners' association dwelling action,' A.R.S. § 33-2002(A)." It cited (at 15) "Fact Sheet, 2015 Amendments to PDA and HADA ("Statute *permits* an HOA to file a homeowners' association dwelling action against a seller for issues related to the design, construction, condition or sale of dwellings.") (emphasis added)." But Defendants insist (at 15) that "§ 33-2002 merely creates requirements that a homeowner's association must follow when filing a 'dwelling action,'" but authorizes nothing substantive.[2]

Nonsense. For starters, although the Purchaser Dwelling Act appears in Title 12 governing "Courts and Civil Proceedings," § 33-2002 appears in Title 33 governing "Property"—the same title as the condominium statute

[2] Even had the parties not addressed this argument, the Court would be permitted to consider it. See, *e.g.*, *Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993) ("Furthermore, when we are considering the interpretation and application of statutes, we do not believe we can be limited to the arguments made by the parties if that would cause us to reach an incorrect result.").

(A.R.S. § 33-1242). Substantively, the statute's express language says that once requirements are met, "a homeowners' association may file a homeowners' association dwelling action." A.R.S. § 33-2002(A). It is substantively identical to A.R.S. § 33-1242(A)(4). Section 33-2002(A) does not say "to the extent permitted by law" or include other qualifying language to limit the association's power to sue once the conditions are met. *Cf.* A.R.S. § 15-241.01 (a school alternative operation plan "may authorize the appointed organization or person to do any of the following: . . . Hire personnel, terminate personnel and cancel existing employment contracts . . . *to the extent permitted by law*.") (emphasis added); A.R.S. § 12-3004(A) ("a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this chapter *to the extent permitted by law*.") (emphasis added).

Moreover, A.R.S. § 33-2002(B) expressly acknowledges "**the right of the association to bring a homeowners' association dwelling action.**" (emphasis added). After granting associations that substantive right in subsection (A), subsection (B) extends "the right of the association to bring a homeowners' association dwelling action" if a statute of limitations would affect that right during the notice period:

> B. If the notice required by subsection A, paragraph 2 of this section is provided to the homeowners' association's members less than sixty days before the expiration of a statute of limitations **affecting the right of the association to bring a homeowners' association dwelling action**, the statute of limitations is tolled for sixty days. The homeowners' association may meet the remaining requirements of subsection A of this section during the tolling period.

A.R.S. § 33-2002(B) (emphasis added). Regardless of how one labels § 33-2002, it gives associations "the right" to bring a homeowners' association dwelling action.

Defendants' theory would render much of § 33-2002 and the related statutes meaningless. The Legislature expressly said the statutes apply to planned community associations. *See* A.R.S. § 33-2001(4) ("'Homeowners' association' means an association as defined in § 33-1202 [Condo. Act] or 33-1802 [Planned Community Act]."). Yet according to Defendants, such associations have no right to sue; the Legislature completely wasted its time by enacting these so-called procedural hurdles for planned community associations because they will never come into play.

The Court should not interpret § 33-2002 to produce this absurd result. The Court should respect the Legislature's decision to give all homeowners'

associations the power to bring a common law implied warranty action in its own name on behalf of itself or its members.

2. The condo statute, A.R.S. § 33-1242.

Defendants' contention (at 16) that only condominium associations but not planned community associations may bring implied warranty actions fails. For starters, drawing such a distinction between condominiums and planned communities makes no sense. That distinction would create two standards for residential development contrary to the Legislature's decision to cover both types of association in its inclusive definition of "associations," A.R.S. § 33-2001(4). Although Defendants say (at 16) that condominiums have a "unique configuration as to shared walls and ownership," this case also involves shared exterior walls, roofs, and common areas and the Association has the same authority and obligation as a condominium association to maintain and repair these shared maintenance areas.

Moreover, § 33-2002(A) begins by declaring that "**[n]otwithstanding any provision to the contrary in** . . . **chapter 9** or 16 **of this title** . . . a homeowners' association **may file** a homeowners' association dwelling action . . . ." (emphasis added). Chapter 9 title 33 includes § 33-1242. By its terms, § 33-2002 expressly instructs courts to *not* read § 33-1242 as somehow

limiting an association's right to file a dwelling action. Section 33-1242 merely solves a problem unique to condominiums because a condominium association, unlike a planned development association, does not own any property. (*See* Argument § II.D.1.)

If Defendants now wish to abandon their argument that § 33-1242 authorized the action in *Lofts*, that means *Lofts* is on all fours with this case. In fact, the relevant language in A.R.S. § 33-2002(A) was on the books when *Lofts* was decided. *See* 1999 Ariz. Legis. Serv. Ch. 72 (H.B. 2668) (WEST) (codifying previous version at A.R.S. § 33-1902(A), included in Appendix at AIRE093). So if *Lofts* relied on any statute (notwithstanding its silence on the issue), it likely relied on § 33-2002, not the condo statute, because § 33-2002 specifically gives condominium associations permission to file dwelling actions; courts generally rely on specific not general statutes if available.

3. The association's right to sue on behalf of itself or others.

Section 33-1242 contains a limitation that a condominium association may only bring an action "on behalf of itself or two or more unit owners," i.e., not just one unit owner. But the absence of that limiting language in A.R.S. § 33-2002(A) does not mean an association may not file a dwelling

action. To conclude otherwise would require ignoring § 33-2002(A)'s plain text ("may file").

Section 33-2002(A) must be read just as § 33-1242: it gives the association the power *to sue in its own name*—whether such an action is technically on behalf of itself, its members, or both does not matter; § 33-2002(A) gives both associations the power to enforce the common law implied warranty for the "dwelling" and ensures the action is taken for the benefit of its members.

Moreover, any action brought under A.R.S. § 33-2002 would be on behalf of an association and its members because the statute requires the association to provide "members of the association" "all material information relating to the *filing of the action*," A.R.S. § 33-2002(1) (emphasis added), hold "a meeting of its members and board" after providing "reasonable and adequate notice," A.R.S. § 33-2002(A)(2), and the board "authorizes the filing of the action," A.R.S. § 33-2002(A)(3). In addition, the homeowners' association must disclose to the owners how "the proceeds of a homeowners' association dwelling action . . . have been or will be allocated." A.R.S. § 33-2002(C). This presupposes the association collects the damages for the members' benefit. So when an association initiates an action

in its own name and follows these procedures, the action is necessarily brought to benefit the homeowners who make up the association and they will be bound by the judgment.

The superior court emphasized that the Lofts Association brought the action "on behalf of the unit owners," (APP000091), but *Lofts* does not say that. As the caption reflects, the Lofts Association sued in its own name in its capacity as a nonprofit corporation, like the Association here. *Lofts*, 218 Ariz. at 575, ¶ 2 ("Claiming various construction defects, the Association subsequently sued the Developer and Reliance for breach of the implied warranty of workmanship and habitability."). Both nonprofits are legal entities distinct from their members, but both share their members' interests.

Here, the Complaint alleges that "breaches of the implied warranty damaged the Association *and its members* in an amount to be proven at trial." (APP000038 (emphasis added).) If the Court nevertheless finds that the complaint in this case needs additional magical words for the Association to have its claim heard on the merits, it should remand with instructions to permit leave to amend the Complaint to add those words or make clear that other associations may bring dwelling actions with new pleading requirements not found in § 33-2002.

C. As a practical matter, it only makes sense for associations to enforce the implied warranty over shared maintenance areas.

Section 33-2002 makes eminent sense: if the implied warranty applies to the shared maintenance areas, the entity charged with maintaining those areas should have the right to enforce the implied warranty rather than forcing individual homeowners to incur the expense and risk of litigation. In fact, homebuyers reasonably expect their associations to hold the builder-developer accountable for shoddy workmanship in the shared maintenance areas. Again, the Legislature told homeowners their associations have that right. *See* A.R.S. § 33-2002(A) ("a homeowners' association may file a homeowners' association dwelling action").

Moreover, when builder-developers sell new townhomes, they often emphasize the benefits the common areas provide to homeowners. They promise swimming pools and cabanas to escape the summer heat, grassy areas to play with one's dogs and kids, and sidewalks, roads, and plumbing to make life more enjoyable and easier. Accordingly, the sold homes not only include the literal abodes, but under "[a]ny plain construction of 'individual residence' . . . would also include *structures and appurtenances commonly associated with a personal abode, including the pools, spas, and access*

roads." *Shelby v. Registrar of Contractors*, 172 Ariz. 95, 99 (1992) (emphasis added). In other words, the common areas quite literally become extensions of the homes and townhomes in a planned community, and the very reason some individuals make their purchases—you can own a swimming pool or cabana without having to maintain it. Sold!

The purchase price for a home in a planned development includes the right to use and enjoy the common areas *without* having to worry about maintaining them (or suing over them). (Declaration § 3.1, (APP000055) ("Every Owner shall have a nonexclusive right and easement of enjoyment in and to the Common Area . . . .").) The so-called "bundle of sticks" that one gets with a townhome expressly includes the shared maintenance areas. It makes no sense to say that the implied warranty applies only to property homebuyers purchase *individually* and not to property they purchase *collectively* to use and enjoy with each other. *Cf. Zambrano*, 254 Ariz. at 61, ¶ 25 ("The implied warranty serves to protect homebuyers *and the public at large* in multiple ways." (emphasis added)).

After all, the builder quite literally controls the materials, processes, and quality of workmanship that determines whether these common areas will last. The implied warranty provides a floor on quality, and covers only

defects that could not be discovered with a "reasonable inspection." *Richards*, 139 Ariz. at 245. The Purchaser Dwelling Act defines "[c]onstruction defect," to mean a "material deficiency" (also defined) that results from specified causes all within the builder's control. A.R.S. § 12-1361(4), (8). But sometimes builders cut corners and defects crop up later in the common areas that "could not have [been] reasonably discovered at the time of purchase," *Zambrano*, 254 Ariz. at 57, ¶ 2.

When that happens, it makes no sense to force innocent homeowners (through their association dues) to pay to repair a defect caused by the builder-developer's "violation of construction codes applicable to the construction of the dwelling," which by definition includes the "common areas" and areas "maintained by an association." *See* A.R.S. § 12-1361(4)(a) (construction defect definition); A.R.S. § 12-1361(6) (dwelling definition).

When it comes to holding builders accountable for shoddy workmanship in shared maintenance areas, it makes far more sense for an association to do so, and in some instances only associations may do so. For starters, only the association has the incentives necessary to hold builders accountable for their work in the shared maintenance areas. If, for example, a swimming pool becomes unusable without expensive repairs because a

builder failed to follow code, no individual homeowner is likely to take on a lawsuit. Homeowners expect their association to do so.

When it comes to damages, only an association has a claim for the full extent of the repair costs necessary to fully repair the shared maintenance areas. Contrary to Defendants' assertion (at 23), this would not require "individual proof" of damages, but rather proof of damages to the shared maintenance areas under the Association's jurisdiction (like cabanas and shared exterior walls). The Developer controlled this arrangement, and due to the Developer's design, the association has responsibility for the shared maintenance areas. Accordingly, "any cost of repairs to the defects in the common elements will be passed on to the homeowners in the form of assessments, regardless of whether that individual homeowner has damage to his or her own property." *Lakeview Reserve Homeowners v. Maronda Homes Inc.*, 48 So.3d 902, 909 (Fla. App. 2010).

In contrast, if a homeowner sued because he or she could no longer enjoy the swimming pool (or because of defects in a shared exterior wall), what damages could the homeowner collect? The homeowner has no right or obligation to repair the shared pool or the shared exterior wall, so even a successful lawsuit would not fix the pool. The Declaration *prohibits* owners

from even "apply[ing] any paint to the exterior of its Dwelling Unit." (Declaration § 8.1.7, (APP000070).) Individual homeowners have no right to maintain the common areas, and are typically precluded from so doing. Defendants have never explained how an individual homeowner could meaningfully pursue a claim for a defect in a pool owned by the homeowners' association.

Moreover, as other courts have observed, forcing individual homeowners to sue means duplicate litigation, which wastes judicial resources. "To require each homeowner to maintain a separate suit for damages is contrary to public policy in that it contemplates a multiplicity of lawsuits for the same issues, something we do not countenance." *Lakeview*, 48 So.3d at 909. Instead of having one lawsuit involving common areas on behalf of 18 owners, courts would have to deal with 18 lawsuits with different damages for each homeowner. That arrangement is "not in the best interest of plaintiffs or defendants, and seriously erodes judicial economy." *Id.*

But more realistically, those suits would never happen. That is why Defendants urge the Court to leave homeowners with no practical remedy.

The solution to this classic collective-action problem is, of course, to have homeowners join forces in an association that would represent their collective interests. That is exactly what the Association is—a non-profit corporation created by the Developer to benefit the homeowners. Don't forget, the Association—like all homeowners' associations—consists of innocent "home purchasers" who fit Defendants' narrow definition of this concept. Membership in the Association is *mandatory*: "Every Owner of a Lot shall be a Member of the Association." (Declaration § 5.1. (APP000060).) Homeowners also cannot leave the Association: "Membership shall be appurtenant to and may not be separated from ownership of any Lot." (*Id.*) The Developer even gives the Association the right and duty to maintain property that the individual home purchasers get to use and enjoy. (*See*, e.g., Declaration §§ 8.1.7 (Repair of Buildings), (APP00070), 8.2.3 (Maintenance by Association), (APP000078).) It would be bizarre, to say the least, if the law had not developed a solution to the collective action problem Defendants' arguments pose in this case. A.R.S. § 33-2002(A) is the easy solution.

II. The common law likewise permits *all* homeowners' associations to enforce the implied warranty.

The Court may decide this case on the basis of A.R.S. § 33-2002(A) and stop there. But Defendants are also wrong that the common law does not allow associations to enforce the implied warranty, either directly or on their members' behalf. To avoid accountability for their work, Defendants make yet another privity argument—an argument like the one the Supreme Court has twice rejected. *See Lofts*, 218 Ariz. at 578, ¶ 20 ("[T]he superior court erred in dismissing the Association's implied warranty claim for lack of privity."); *Richards*, 139 Ariz. at 246 ("All of the plaintiffs, whether or not in privity with [the Developer] are entitled to" recover).

At bottom, Defendants' argument rests on a misunderstanding of the implied warranty. First, the implied warranty arises in the original agreement with the contractor improving the realty: either (1) the developer's contract with the builder if they are two entities (as in this case) or (2) the contract between the builder-vendor and the purchaser if the builder-vendor is one entity. Second, in the residential development context, that warranty covers all aspects of the development, including the common areas. Third, the implied warranty automatically extends to those who later

acquire property rights in the property improved by the contractor; privity requirements are gone in this context. Fourth, that means the Association may enforce the implied warranty by suing in its own name under garden variety standing doctrines the courts deal with every day.

A. The implied warranty arises from the original construction contract between the developer and contractor.

In general, it is the original residential construction contract that gives rise to the implied warranty. In this case, that is the contract between the Builder and the Developer.

For over seventy years Arizona courts have recognized that the judicially-created implied warranty requires contractors of all sorts to perform their work "in a manner befitting a skilled" worker. *Cameron v. Sisson*, 74 Ariz. 226, 230 (1952) ("It is incumbent upon a contractor who undertakes to build a structure or as in this case, a well, to do so in a manner befitting a skilled well-driller."); *Reliable Elec. Co. v. Clinton Campbell Contractor*, 10 Ariz. App. 371, 374 (1969) ("[T]he law implies a requirement that a contractor who undertakes to design and install an electrical system must do so in a good workmanlike manner and in a manner befitting a skilled contractor."); *Kubby v. Crescent Steel*, 105 Ariz. 459, 460 (1970) ("A

contractor [building the metal roof of a car storage shed] impliedly warrants that he will perform in a workmanlike manner even though the contract itself does not contain an express warranty of good workmanship."). Simply put, Arizona law holds accountable contractors who hold themselves out as having the requisite skill to improve realty. *See Zambrano*, 254 Ariz. at 59, ¶ 14 ("The warranty . . . serves . . . to hold builders accountable for their work.").

Initially, it remained unresolved whether the same implied warranty applied to the sale of newly-constructed homes in light of the caveat emptor rule that "no implied warranties arise from the Sale of realty." *See Columbia W. Corp. v. Vela*, 122 Ariz. 28, 30 (App. 1979). In other words, courts initially treated contracts for new home *sales* differently than contracts for the underlying construction that gave rise to the home.

But in 1979 this Court correctly found the caveat emptor rule was "not dispositive of the issue of implied warranties arising out of the Construction of new housing which ultimately becomes 'realty.'" *Id.* at 31. *Columbia* observed that the authority cited for finding no implied warranty, *Allen v. Reichert*, 73 Ariz. 91 (1951), was "silent as to implied warranties arising out of new construction." *Id.* at 30; *see also id.* at 31 (observing that the case citing

Allen, *Voight v. Ott*, 86 Ariz. 128, 132 (1959) did not consider "the possibility of an implied warranty *arising from the construction of realty*.") (emphasis added).).

Moreover, *Columbia* explained that although the prior contractor cases (i.e., *Cameron*, *Reliable*, and *Kubby*) did "not discuss the implied warranty of contractors in relationship to their work product subsequently becoming part of realty, . . . facially a roof, a well, and arguably an electrical system are as much a part of 'realty' as a house constructed on the land." *Id.* In other words, although not previously made explicit, the implied warranty arises *from the construction of realty*, that warranty is implied in the original construction contract with the contractor making the improvements, and it should therefore apply to new residential construction. Accordingly, "as to new home construction," "the builder-vendor impliedly warrants that the construction was done in a workmanlike manner and that the structure is habitable." *Id.* at 33 (App. 1979); *cf. Highland Village Partners, L.L.C. v. Bradbury & Stamm Constr. Co.*, 219 Ariz. 147, 150, ¶ 12 (App. 2008) ("The implied warranty of workmanship and habitability is imposed by law in construction contracts."); *see also Zambrano*, 254 Ariz. at 59, ¶ 14 (explaining that in *Columbia* Arizona applied the existing implied warranty to new

residential construction and "eliminat[ed] application of caveat emptor—or 'buyer beware'—to the purchase of newly built homes.").

Columbia accordingly held that the implied warranty arises in the original construction contract that gives birth to the real estate improvements, and is accordingly found in that contract. *See also Sirrah Enters., LLC v. Wunderlich*, 242 Ariz. 542, 547, ¶ 22 (2017) (explaining in the context of a contract to build a residential basement that the "Implied Warranty arises out of the construction contract."). Therefore, this part of the implied warranty (how it arises and its original source) is identical in the residential and non-residential development contexts.

B. The implied warranty that arises from the construction contract applies to all residential construction, including common areas.

The implied warranty is not limited to "homes," but covers every improvement the contractor makes.

At times, Defendants suggest that the residential implied warranty applies narrowly to the construction of a new house, rather than broadly to new residential construction, including common areas. For example, Defendants claim (at 13) that the implied warranty "right arises from the construction of the home itself" and "no home was constructed on the

common areas . . . ." The implied warranty, however, also covers the shared maintenance areas. That matters because *if* there is an implied warranty that covers particular property, and only associations may, as a practical matter, enforce the implied warranty on that property, the common law would *not* leave associations without a means to do so.

In *Lofts*, the Supreme Court confirmed that the implied warranty that arises *in the original construction contract* does so for the construction of *any residential realty*. 218 Ariz. at 577 (implied warranty applies to "the residential structures as part of a package including the land. . . ." (quoting *Moxley v. Laramie Builders Inc.*, 600 P.2d 733, 735 (Wyo. 1979))).

This conclusion also follows from the extension of the implied warranty from non-residential to residential construction. When explaining *Columbia*'s rationale, the Supreme Court emphasized it "turned to settled Arizona law" (i.e., *Cameron*, *Reliable*, and *Kubby*) "holding that 'a contractor impliedly warrants that the construction he undertakes *which ultimately becomes realty* will be performed in a good and workmanlike manner.'" *Lofts*, 218 Ariz. at 576, ¶ 9 (quoting *Columbia*, 122 Ariz. at 30) (emphasis added). Within this context, the Supreme Court explained that "*Columbia Western* thus rests on the premise that an implied warranty arises from the

construction of a new home, whether or not the builder is also a vendor of the home." *Id.* at 576, ¶ 11.

But as *Lofts*, *Columbia*, and Arizona's more than seventy-year history with the implied warranty illustrate, the implied warranty does not *only* arise from the "construction of the home itself" as Defendants' suggest (at 13). Instead, "[i]t is the structure and all its intricate components *and related facilities* that are the subject matter of the implied warranty." *Lofts*, 218 Ariz. at 577, ¶ 13 (quoting *Moxley*) (emphasis added).

One could only conclude that the residential implied warranty applies *only* to houses and not all residential construction by ignoring *Lofts* rationale set forth in in § II.B (*Id.* at 576-77, ¶¶ 7-13), by taking words from the opinion out of context, or by ignoring that the non-residential implied warranty was extended to include residential development. No court has ever suggested a narrower scope, e.g., the implied warranty does not apply to this type of improvement to realty. *See also, e.g.*, *Buchanan v. Scottsdale Env't Constr. and Dev. Co.*, 163 Ariz. 285, 287 (App. 1989) (rejecting argument that implied warranty does not extend to the pre-home construction homesite preparation).

Consequently, Defendants' assertion that "[t]he [implied] right arises from the construction of the home itself" (Ans. Br. at 13) is irrelevant or wrong. It is irrelevant if it means the implied right *also* arises from home construction. It is wrong if it means the right *only* arises from the construction of the home itself, a point Defendants all but concede.[3]

C. The implied warranty extends automatically to homeowners' associations when they acquire property rights subject to the implied warranty.

Once the implied warranty arises in the residential construction contract, any owner may enforce the implied warranty against the builder/developer without regard to the commercial context's privity requirement. Moreover, in the residential context the law does not require any particular form of transfer to give the new owner implied warranty rights. Indeed, this extension automatically takes place to ensure that owners downstream from the original builder (without any carve out for

[3] Defendants state (at 4) that "Appellant's first 'Issue Presented'" (i.e., whether the implied warranty "is limited to 'homes' or otherwise 'habitable' structures" (Op. Br. at 29)), "does not actually relate to any part of the Superior Court's ruling or any material issue." In other words, they seem to concede that the implied warranty applies to the common areas. But they never explain how this squares with their erroneous claim (at 13) that "[t]he [implied] right arises from the construction of the home itself."

associations), may "hold builders accountable for their work." *Lofts*, 218 Ariz. at 576, ¶ 12 (quoting *Richards*, 139 Ariz. at 245). Nevertheless, if the common law still requires privity between the builder-developer and the first owner, that privity exists in this case via the Declaration. Alternatively, the privity between the homeowners and the developer would permit the association to sue on behalf of the owners in its own name (like with condominiums).

1. In the residential context, any property owner may enforce the implied warranty even if the owner purchased nothing from the builder or developer.

Arizona courts have thus far enforced implied warrant/contractual privity requirements for those downstream from the contractor (where the implied warranty arises) only in the context of non-residential construction. *See Hayden Bus. Ctr. Condos. Ass'n v. Pegasus Dev. Corp.*, 209 Ariz. 511, 515, ¶ 24 (App. 2005) ("[W]e uphold the privity requirement in commercial cases"); *Lofts*, 218 Ariz. at 577, ¶ 17 n.3 ("We have no occasion today to decide whether privity is a requirement for enforcement of implied warranties in the context of non-residential construction" but disapproving *Hayden* "to the extent that it rests on the premise that the *Richards* [privity] exception applies only to homebuilders who are also vendors."); *cf Yanni v. Tucker Plumbing,*

Inc., 233 Ariz. 364, 368-369, ¶¶ 12-14 (App. 2013) (homeowners could not enforce the implied warranty against subcontractors *upstream* from the general contractor due to privity and the availability of a meaningful remedy against the contractor).

But in *Richards*, the Supreme Court expressly held that in the residential context "*privity is not required* to maintain an action for breach of the implied warranty of workmanship and habitability" against the builder-developer. *Richards*, 139 Ariz. at 245 (emphasis added). The *Richards* plaintiffs had "bought repossessed homes from Farmers Home Administration." *Id.* at 243. Nevertheless, because acquiring and enforcing the implied warranty requires no privity with the homebuilder, *Richards* permitted the subsequent *owners* to sue the homebuilder/developer in that case for breach of the implied warranty. *See id.* at 246 (reversing lower court that set aside "the verdicts in favor of the plaintiffs" that acquired repossessed homes).

In doing so, the Court drew guidance from "the public policy of this state," and emphasized that "[b]ecause the builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems, the costs of poor workmanship should be his to bear." *Id.* at 245.

Importantly, the *Richards* plaintiffs, like the Association here, had "purchased nothing from any homebuilder," (Ans. Br. at 9). In fact, the *Richards* plaintiffs did not even acquire their homes from the original buyers; they bought "repossessed homes," *Richards*, 139 Ariz. at 243.

Decisively, *Richards* did not turn on whether the original owners had entered into a purchase agreement with the builder-vendor, or the legal details by which the lender acquired the homes through repossession. Instead, *Richards* turned on the fact that builder-vendor should bear "the costs of poor workmanship" because the "builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems." *Id.* at 245.

Lofts confirmed that lower courts should not interpret *Richards* as only a partial abrogation of the privity requirement in the residential context:

> The courts below held that *Richards* abrogated the common law requirement of privity in contract actions only when the builder of the new home is also the vendor. We disagree.

Lofts, 218 Ariz. at 577, ¶ 15. In *Lofts*, the developer "contracted with a builder ("Reliance") to convert a building owned by the Developer into condominiums." *Id.* at 575, ¶ 2. "The Developer later sold condominium units to individual buyers, who [purportedly] formed The Lofts at Fillmore

Condominium Association" (the "Lofts Association"), *id.*, a non-profit corporation like the Association (as the caption reflects). (In fact, the developer Lofts at Fillmore, LLC created the Lofts Association. *See id.* (defining this LLC and an individual as "the Developer"); *see also* (the Lofts Declaration) ("'Declarant' means **THE LOFTS AT FILLMORE LLC**") (AIRE096).)[4] "Claiming various construction defects, the Association subsequently sued the Developer *and* Reliance for breach of the implied warranty of workmanship and habitability." *Id.* (emphasis added).

To explain where the lower courts went astray, the Supreme Court initially noted the legal rules Defendants invoke: "[a] claim for breach of the implied warranty sounds in contract" and "*as a general rule* only the parties and privies to a contract may enforce it." *Id.* ¶ 5 (citations omitted) (emphasis added). But *Lofts* once again explained that the general privity rule must

[4] Nothing should turn on who formed the nonprofit association because its members are homeowners, but the Court may take judicial notice of this declaration available at the Maricopa County Recorder's office (online at https://recorder.maricopa.gov/UnOfficialDocs/pdf/19990701048.pdf). See *Sitton v. Deutsche Bank Nat'l Tr. Co.*, 233 Ariz. 215, 218, ¶ 14 n.2 (App. 2013) ("The trustee's deed upon sale is not a part of the record before us. But because it is available in the records of the Maricopa County Recorder, we take judicial notice of it.").

give way in the residential context to fulfill "the policies behind the implied warranty—to protect innocent buyers and hold builders responsible for their work." *Id.* at 577, ¶ 16.

To further those policies, *Lofts* "conclude[d] that absence of contractual privity does not bar" enforcement of the implied warranty against "a homebuilder who is not also the vendor of the residence." *Id.* at 575, ¶ 1. Accordingly, *Lofts* held that a homeowners' association could sue the builder (Reliance) to enforce the implied warranty that arose in connection with the residential real estate construction notwithstanding the complete lack of privity between them. *Id.* at 576, ¶ 6 ("The issue before us is whether the absence of privity bars the Association's suit on the implied warranty against Reliance."); *id.* at 578, ¶ 20 ("[W]e hold that the superior court erred in dismissing the Association's implied warranty claim for lack of privity.").

So again, neither the *Richards* plaintiffs, the Association here, nor the Lofts Association had purchased anything "from any homebuilder," (Ans. Br. at 9). Indeed, neither *Richards* nor *Lofts* required that consideration be paid from the party seeking to enforce the implied warranty to the builder/developer as a condition of being able to make a claim under the implied warranty. *Richards* involved subsequent buyers so it naturally

spoke in those terms, but they bought nothing from the builder-vendor. Presumably for that reason, *Richards* also used the term "owner" interchangeably with buyer. *See*, *e.g.*, *Richards*, 139 Ariz. at 245 ("Because the builder-vendor is in a better position than a *subsequent owner* to prevent occurrence of major problems, the costs of poor workmanship should be his to bear.") (emphasis added).

Lofts involved "individual buyers, who [purportedly] formed the Lofts at Fillmore Condominium Association," 218 Ariz. at 575, ¶ 2, so it naturally spoke in terms of "residential homebuyers, like those in the [Lofts] Association," *Id.* at 577, ¶ 14. But the Lofts Association itself (a separate entity) purchased *nothing* from the builder-vendor. Moreover, neither *Lofts* nor *Richards* assigned any significance to the term "buyer" or "purchaser" or otherwise distinguished between literal "purchasers" or "buyers" and those who may have acquired ownership rights in some other fashion.

After all, title to property often transfers through operation of the law, including through gifts, donations, or inheritance. But it would be illogical to conclude that someone inheriting property from an owner that held an implied warranty cannot enforce the implied warranty whereas someone who paid $1 for that same home could. *Cf. Strong v. Johnson*, 280 S.E.2d 37,

57 (N.C. App. 1981) ("[W]e see no reason why an implied warranty should not extend to one who inherits a new home from the original vendee.").

To top it off, the Legislature has confirmed that in this context the term "purchaser" has a broader meaning than Defendants suggest: it includes "*any person or entity, including the current owner of the dwelling*, who files a dwelling action during the time period described in § 12-552." A.R.S. § 12-1364(E)(2). The Legislature has accordingly foreclosed any argument that one must literally qualify as a purchaser to sue for construction defects, and "any relief for builder-vendors" from that definition "lies squarely with the legislature." *Zambrano*, 254 Ariz. at 66, ¶ 48.

Defendants have tried to distinguish *Lofts* by invoking A.R.S. § 33-1242. But not only does that statute lacks the significance Defendants assign to it (for the reason in Argument § I.B.2), that misses the point here: *Lofts* did not rely on that statute, *and nothing in Lofts rationale*—which expressly permitted a non-profit homeowners' association that purchased nothing from the builder-vendor to sue to enforce the implied warranty—turned on that statute. A careful reading of *Lofts* shows it applies to this case. Indeed, the Lofts Association held only easements and maintenance rights and obligations. The Association has those same property rights *and* it owns the

common areas developed by the Builder. So it has a stronger case to enforce the implied warranty than the Lofts Association.

In light of *Lofts*, Defendants' assertion (at 2) that "the Implied Warranty of Workmanship and Habitability is a remedy belonging to individual homebuyers, and not a remedy extended to an Association" is false. *See also* Ans. Br. at 6 (incorrectly stating "that our courts have thus far reserved [the implied warranty] for *purchasers of new homes or subsequent purchasers*," (emphasis added) because the *Lofts Association* purchased nothing from the builder.)

2. In this context, the implied warranty from the original construction contract is extended by law to an association that acquires property and/or easements with maintenance right and obligations.

With the abandonment of privity in the residential development context, the Supreme Court necessarily abandoned requiring contractual assignment. Instead, "the law effectively assigns the Warranty to subsequent homeowners" (or owners). *Sirrah*, 242 Ariz. at 547, ¶ 22. In other words, it extends by operation of law to those who acquire property rights in property subject to an implied warranty. That rule best explains all of the relevant case law in this context: When a contractor/builder/developer

holds themselves out as having residential development expertise (like Defendants) the improvements they make to realty come with an implied warranty, and anyone acquiring property rights in that realty, including easements with maintenance rights, may enforce the implied warranty against them without regard to privity.

(a) A party not in privity with the builder-developer may enforce the implied warranty if it owns residential property the builder improved.

In *Richards,* the implied warranty extended automatically as a matter of law from the builder-vendor (Powercraft Homes) to those who purchased their homes from Powercraft—a classic automatic assignment of the implied warranty. *Richards*, 139 Ariz. at 243. But in *Richards*, the implied warranty also extended automatically as a matter of law from Powercraft to a federal agency when the Farmers Home Administration repossessed some original buyers' homes—something very different from a home purchase agreement between the builder-vendor and original buyer. *Id.* That agency merely acquired property rights in the improved property, and had "purchased nothing from any homebuilder." (Ans. Br. at 9.) The implied warranty then also automatically extended from that federal agency to the *Richards*

plaintiffs when they acquired homes from that agency. They too had purchased nothing from any homebuilder.

In *Lofts*, the implied warranty held by the developer arose "from construction of the home" by the builder Reliance, 218 Ariz. at 577, ¶ 13, and then extended from the developer to the individual buyers of the townhomes, and to the Lofts Association when the association was formed (either directly or as a right it could enforce under the common law on its members behalf). *See id.* at 575, ¶ 2. Although *Lofts* did not discuss these automatic assignments, it recognized the Association could sue in its own name to directly enforce the implied warranty. *See id.* 578, ¶ 20 ("the superior court erred in dismissing *the Association's implied warranty claim*") (emphasis added).

Everything Defendants have said about the Association applies equally to the Lofts Association.

- That Lofts Association "never identified any contractual agreement to perform construction" for it. (Ans. Br. at 13.)
- The Lofts Association "never identified any assignment of rights to perform construction." *Id.*
- The Lofts Association "never identified any term of any agreement where either Defendant agreed to perform construction or warrant construction" to it. *Id.*

Simply put, the common law does not require any contract between the party enforcing the warranty and the builder. *See Lofts*, 218 Ariz. at 577, ¶ 13 ("[A]n implied warranty arises from construction of the home, without regard to the identity of the vendor."). (Moreover, everything relevant about the Lofts Association's members holds for the Association's members, i.e., they purchased "homes" with an implied warranty in a development with an association maintaining certain areas.)

Richards and *Lofts* confirm that a non-party to the contract may enforce the implied warranty if they acquire property rights in the improved residential property the builder created as a means of protecting their property rights. So although the Association here lacks privity with the Builder (but not the vendor) (just as in *Lofts*), so do the Owners who Defendants have conceded hold an implied warranty (notwithstanding this lack of privity with the Builder).

True, a plaintiff must be able to trace the realty improvements at issue back to the defendant. But the details of how the owners acquired their property rights (whether by quitclaim, inheritance, repossession or otherwise) do not matter under the common law. Instead, the law automatically extends the implied warranty to those who acquire property

rights in residential real estate to ensure fulfillment of the implied warranty's underlying purposes. *See Richards*, 139 Ariz. at 245 ("The same policy considerations that led to" adoption of the implied warranty in the residential development context in *Columbia* apply equally "to subsequent homebuyers."); *Lofts*, 218 Ariz. at 577, ¶ 17 ("Identical concerns guide us today.").

(b) In this case, the common law automatically extended the implied warranty to the Association when it acquired its property rights.

In this case, like *Lofts*, the Builder and Developer/vendor were separate entities. Accordingly, for the reasons in the prior section the law automatically extended the implied warranty that arose in the construction contract with the Builder to the original owners when they acquired their property rights from the Developer *and to the Association when it acquired its property rights from the Developer*. In both this case and *Lofts*, neither the association nor the homeowners have contractual privity with the builder. But in both cases the associations held easements (and ownership rights in this case), and both had *the right and obligation* to maintain certain property. When a builder-developer creates an association as in this case, and charges

it with maintaining residential property, that property necessarily comes with an implied warranty from the builder-developer.

Although a contractual relationship is a prerequisite to an implied warranty claim, that contractual relationship need not be between the party enforcing the implied warranty and the party giving the implied warranty; it arises in the original construction contract and extends to others by operation of law to serve the implied warranty's purpose.

(c) To the extent privity is required between the Developer and the Association, that privity exists.

If the Court nevertheless concludes that privity must exist between the Developer and the Association for the Association to hold its own implied warranty, that privity exists in this case. *Privity* means "[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property)." Black's Law Dictionary (11th ed. 2019). *Privity of contract* means "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." *Id.* In other words, if there is an enforceable contract between the parties, privity exists.

In this case, the Association and the Developer are in privity via the Declaration. The Declaration qualifies as a contract. *See Hawk v. PC Village Ass'n, Inc.*, 233 Ariz. 94, 98, ¶ 10 (App. 2013) ("CC&Rs are contracts that create enforceable property rights and obligations that may run with the land."). Some cases describe restrictive covenants as "a contract between the subdivision's property owners as a whole and individual lot owners." *See*, e.g., *Ahwatukee Custom Ests. Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 634, ¶ 5 (App. 2000) ("CC & Rs constitute a contract between the subdivision's property owners as a whole and individual lot owners." (citation and internal quotations omitted)). But these cases do not say they are *only* a contract between these parties. In fact, CC&Rs often also include obligations between the developer and association. In other words, CC&Rs may include terms that constitute a contract among the owners, but they may also include terms between the declarant and the association.[5]

[5] The authority for the quoted assertion in *Ahwatukee Custom Estates* traces to *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co., Inc.*, 124 Ariz. 413, 416 (1979), which merely says "[t]he words in a restrictive covenant must be given their ordinary meaning."

In this case, the Declaration does more than establish deed restrictions. Among other things, the Developer promised to form the "Gallery Community Association as an Arizona nonprofit corporation." (Declaration Recitals (APP000049).) In addition, "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." (APP000057.) In other words, in the Declaration the Developer has made legally enforceable promises to the Association, including a promise to convey the improved property to the Association in fee simple—the property developed to benefit the homeowners subject to the CC&Rs. That's privity.

That privity exists even when a developer forms the association after recording the declaration or selling any homes because the declaration creates enforceable obligations owed to the association once it exists. In other words, the privity arises upon formation of the association.

(d) The deed form (quitclaim, etc.) does not matter.

The superior court and Defendants found relevant that the Association acquired its property with a quitclaim deed. The form of deed, however, merely affects the warranty given in connection with the transfer of title. *See, e.g., SWC Baseline & Crismon Invs., L.L.C. v. Augusta Ranch Ltd. P'ship*, 228 Ariz. 271, 280–81, ¶ 29 (App. 2011) ("'A quit claim deed conveys to the grantee no greater rights to the property conveyed than the grantor possessed . . . .' Such a deed conveys any interest the grantor possesses in the property, but neither warrants nor claims that title is valid." (citation omitted)). But the form of deed has *nothing* to do with any warranties concerning the quality of construction, express or implied. Moreover, a builder-developer may not disclaim the implied warranty in a quitclaim deed or otherwise. *See Zambrano*, 254 Ariz. at 64, ¶ 36 ("[U]nless the legislature enacts a statute that permits the waiver of the implied warranty, our courts will not permit it.").

In this case, the Owners (who Defendants concede hold implied warranty rights) and the Association acquired their ownership rights in substantively identical ways. The Owners received a warranty deed and

purchase agreement, [IR-253 at 16, ¶ 6] whereas the Association received quitclaim deed and the Declaration. [IR-253 at 19 PSOF at ¶ J]. Both acquired ownership rights through a deed and contract, and nothing in the law suggests it matters that the Association acquired its residential property via a quit claim deed.

For all these reasons, Defendants' primary theory—that the implied warranty "claim belonged only to individual purchasers of the units against their builder/vendors, not the Association itself"(Ans. Br. at 2)—is wrong. Anyone with the requisite property rights in a residential development automatically receives an implied warranty, which can be enforced against the builder or developer.

D. Associations may enforce the implied warranty directly or on behalf of their members.

Because the Association acquired property subject to the implied warranty from the builder, and also because it acquired that property from the Developer which imposed upon it maintenance rights and obligations in a contract, the Association holds its own an implied warranty (*see* Argument § I.B). Accordingly, it may file suit in its own name to enforce that implied warranty against the Builder and Developer. Moreover, even if only the

Owners hold the implied warranty there is nothing in the law that *precludes* an association from enforcing rights held by its members. Defendants have made no serious argument to the contrary.

1. No additional statute is needed under the common law.

Some courts (presumably those with stricter standing requirements than Arizona) have found that without a statute like § 33-1242 a condominium association "has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name." (*See* Uniform Condominium Act (1980) at 103, cmt. 3. (AIRE092).) But those courts have done so only "*because [the condominium association] has no ownership interest in the condominium*. . . ." *Id.* In other words, § 33-1242 addresses a problem *unique to condominiums*; the Association here has an ownership interest in the residential construction so there is no need for a statute like § 33-1242.

In addition to the authorization in § 33-2002, § 10-3302(1) authorizes the Association to "[s]ue . . . in its corporate name." Defendants have cited no authority that requires any further statutory authorization before an entity like the Association may pursue a common law implied warranty action in its own name, whether on its own or members' behalf.

2. Enforcing its own right.

Accordingly, as Plaintiff explained in detail in its Opening Brief (at 37-46) and it Reply Brief (at 17-29), the Court may resolve this case on the basis of generic proprietary standing doctrines. Although Defendants dispute whether the Association holds its own implied warranty, they do not dispute that *if* it does, the Association may sue to enforce it.

In this direct capacity, the Association's right to enforce the implied warranty extends to all the property under the Association's control, including the shared maintenance areas. That property qualifies as residential development that comes with an implied warranty. In this direct capacity, the Association would be enforcing this warranty to protect its members' interests—members who consist solely of innocent homeowners who purchased homes that included the common areas. This common law right ensures builder-developer accountability—the touchstone of prior decisions.

3. Enforcing its members rights.

Non-profit organizations and other less formal associations routinely enforce their members rights, and doing so makes it much easier for the judicial system to protect various individual rights. Due to collective action

problems, such rights sometimes only get enforced as a practical matter when individuals band together in a group. This concept of formal and informal associations suing to protect their members rights is not new in the law, and Defendants have given no reason why a straightforward application of associational standing does not resolve the collective action problem they pose here.

Moreover, there are no privity issues under this theory because the Owners hold their own implied warranty rights, a point Defendants concede. All of this is also explained in detail in Plaintiff's Opening Brief at 38-53 and the Reply Brief at 17-23, 30-32.

In this case, the Complaint alleges that "breaches of the implied warranty damaged the Association *and its members* in an amount to be proven at trial." (APP000038 (emphasis added).) Defendants have never cited any authority that *precludes* an association from suing in its own name to enforce its members implied warranty rights. As explained in Argument § I.C, it makes practical sense for associations to pursue dwelling actions concerning shared maintenance areas, and the lack of any authority prohibiting them from doing so should be enough. If Courts begin insisting on express authority to authorize each and every particular type of claim an

association may pursue on its members' behalf, it will effectively destroy associational standing and badly damage the meaningful enforcement of a variety of rights contrary to the primary purpose of the rule of law.

E. Summary

As demonstrated above, Arizona's existing cases teach the following lessons:

1. Just as in non-residential construction, in a residential development an implied warranty arises in connection with all improvements made to the realty by the contractor, including both the homes, townhomes, and shared maintenance areas.

2. In the residential development context, where the developer/vendor has a separate builder act as the contractor as in this case, the implied warranty arises in the original construction contract that gives rise to the residential development (in this case the contract between the Builder and the Developer).

3. A party may enforce the implied warranty notwithstanding the lack of contractual privity with the vendor or builder. Instead, the implied warranty is effectively extended by law to subsequent owners generally, and

in particular to associations given property rights by the developer that include obligations to maintain the residential property.

4. In this case, privity also exists between the Association and the Developer through the Declaration.

III. The same policy considerations that drove *Richards*, *Lofts*, and *Zambrano*, confirm the Association holds its own implied warranty right it may enforce against Defendants.

Whether under A.R.S. § 33-2002(A) in conjunction with the common law or the common law alone, the law will only protect "buyers of newly built homes and successive owners against latent construction defects," and hold "builders accountable for their work," *Zambrano*, 254 Ariz. at 60, ¶ 19, if all associations (directly or indirectly) may enforce the implied warranty. There are numerous sound reasons for allowing associations to enforce this right, nothing unfair in permitting associations to hold builders accountable for code violations that cause latent defects, and no reason for not permitting such actions that doesn't echo the arguments our courts have repeatedly rejected.

Arizona courts have repeatedly rejected efforts to limit the implied warranty where doing so would undermine its two main goals: to (1)

"protect innocent purchasers" and (2) "hold builders accountable for their work." *Lofts*, 218 Ariz. at 576, ¶ 12 (quoting *Richards*, 139 Ariz. at 245).

On the homeowner side, the Warranty "protect[s] . . . successive owners against latent construction defects that were not reasonably discoverable when the home was initially sold." *Zambrano*, 254 Ariz. at 60, ¶ 19. The law commonsensically recognizes "that modern construction is complex and regulated by many governmental codes, and that homebuyers are generally not skilled or knowledgeable in construction, plumbing, or electrical requirements and practices." *Richards*, 139 Ariz. at 245.

On the builder side, builders have the skills necessary to comply with the applicable building standards, and "hold themselves out as skilled in the profession." *Id.* The implied warranty "discourage[s] the unscrupulous, fly-by-night operator and purveyor of shoddy work," *Zambrano*, 254 Ariz. at 61, ¶ 25, and provides incentives for them to avoid shoddy workmanship.

But as soon as the common law recognized the implied warranty, builder-developers looked for ways to escape it. The Supreme Court has consistently rejected these efforts to undermine the implied warranty's goals.

In *Richards*, the Supreme Court considered whether to extend the implied warranty to owners that did not purchase their home from the developer. The Court expressly held that "privity is not required to maintain an action for breach of the implied warranty of workmanship and habitability," and extended this protection to subsequent owners when the builder remains equally responsible for the defects. *See Richards*, 139 Ariz. at 245 ("Home builders should anticipate that the houses they construct will eventually, and perhaps frequently, change ownership."). That rationale applies here.

In *Lofts*, the Supreme Court considered whether the implied warranty can be enforced against a builder when the builder did not sell the home to the initial homeowner (again a privity issue). 218 Ariz. at 576, ¶ 6 ("The issue before us is whether the absence of privity bars the Association's suit on the implied warranty against Reliance."). The Court explained that "[i]nnocent buyers of defectively constructed homes should not be denied redress on the implied warranty simply because of the form of the business deal chosen by the builder and vendor." *Id.* at 577, ¶ 17. Moreover, "the builder will be just as unable to justify improper or substandard work." *Id.* ¶ 16 (quoting *Richards*). That rationale applies here.

And more recently in *Zambrano*, the Supreme Court held that the policy underlying the implied warranty outweighs other considerations, including contractual ones such as the freedom of contract. *Zambrano*, 252 Ariz. at 64, ¶ 36 (the public policy underlying the implied warranty "clearly outweighs enforcement of the disclaimer and waiver of that warranty" included in a purchase contract). That rationale also applies here.

The Court's duty to uphold the law requires doing here exactly what our courts have done when faced with similar situations: construe the common law implied warranty so that it continues "to protect homebuyers and the public at large," *id.* at 61, ¶ 25, and ensure the "homebuyer's ability to hold a builder responsible for latent defects," *id.* at 62, ¶ 27. In this case, that means acknowledging the Association's rights.

Adopting a new rule that bars homebuyers from having their association go to court to hold builders accountable for shoddy workmanship in the shared maintenance areas "would likely spell the end for the implied warranty and eliminate the above-described protections" for those areas. *Id.* at 62, ¶ 26. As a practical matter, it would mean *two* standards now apply to Arizona residential real estate. Property conveyed fee simple to individual buyers would remain subject to the (now

legislatively codified) workmanlike/habitability standard. Property conveyed fee simple to the association of homebuyers purportedly formed to protect their collective interests need no longer be built without defects. This dual standard in residential development would unquestionably invite cutting corners to make the common areas look superficially appealing during the initial home sales but not built to last.

This in turn, could lead to unsafe conditions in the shared maintenance areas, undermining the implied warranty's goal of protecting "the public at large." *Id.* ¶ 61, 25; *see also id.* at 62, ¶ 27 ("Effectively eliminating the implied warranty, in turn, would gut a homebuyer's ability to hold a builder responsible for latent defects, increasing the likelihood that homes would be left unrepaired, to the detriment of homebuyers, their neighbors, and the public generally."). Even though the homeowners (through their association) could be sued for dangerous cracks in the sidewalk, they would have no meaningful recourse against the developer who caused that dangerous situation. *Cf. Trustees of Cambridge Point Condo. Tr. v. Cambridge Point, LLC*, 88 N.E.3d 1142, 1150 (Mass. 2018) (If no implied warranty attaches, developers could escape liability for "improper design, material, or

workmanship that causes a defect in a common area," which in turn "cause[s] units to be uninhabitable or unsafe . . . .").

And it would not stop there. As Arizona's history demonstrates, builder-developers would exploit this new court-created loophole. *Cf. Zambrano*, 254 Ariz. at 62, ¶ 26 (if the Court enforces the builder's disclaimer, "[b]uilders would almost certainly include a disclaimer and waiver in every purchase agreement, and then "record the disclaimer and waiver to provide notice to subsequent homebuyers and prevent them from enforcing the implied warranty."); *Richards*, 139 Ariz. at 245 (limiting the implied warranty to initial owners "might encourage sham first sales to insulate builders from liability.").

For example, builders could sell dirt lots to homeowners and convey the habitable structure to the HOA with the homeowner receiving rights to use the habitable structure. Whether using this particular scheme or some other scheme, builders would try to convey more property first to the homebuyer's association to take advantage of the collective action problem Defendants invented here. That is not something the common law should tolerate.

Other courts have rejected similar efforts to limit an association's enforcement of the implied warranty that attaches to the shared maintenance areas. *See Lakeview Reserve Homeowners v. Maronda Homes Inc.*, 48 So.3d 902, 909 (Fla. App. 2010) ("We reject the Developer's position that the Association cannot bring a claim for implied warranties for defects in the common elements, but rather that the individual homeowners must bring the claims and that such claims can only be for damage to their individual lots or homes."); *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 454 N.E.2d 363, 366 (Ill. App. 1983) ("We are not persuaded that the method of separating the ownership of building and common lands should be allowed to undercut the public policy" of the implied warranty); *cf. Trustees of Cambridge Point Condo. Tr.*, 88 N.E.3d at 1147 (holding CC&R provision void against public policy because it "ma[d]e it extraordinarily difficult for the [Association] to sue the developer for defective construction and design of common areas or facilities.").

Arizonans now rely on the implied warranty. They have purchased homes expecting their associations (condo or otherwise) to hold builders accountable should latent defects arise in their shared maintenance areas. The Court should accordingly do here what our courts have done before,

and follow this line of cases—the only result that is consistent with Arizona's common law. *Cf. Richards*, 139 Ariz. at 245 ("We find the latter group of cases to be more in line with the public policy of this state.").

CONCLUSION

Arizona adopted the implied warranty in response to large-scale planned developments, which often created homeowners' associations. The Legislature and our courts have made clear that all homeowners' associations may enforce the implied warranty on behalf of their members behalf (innocent homebuyers). The Court should not now invent a new rule that precludes associations from enforcing their members' rights. The Court should reverse and remand to permit Plaintiff to have the merits of its implied warranty claim heard.

RESPECTFULLY SUBMITTED this 24th day of January, 2024.

OSBORN MALEDON, P.A.

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APPENDIX
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* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

A.R.S. § 12-1361

§ 12-1361. Definitions

Effective: July 3, 2015

In this article, unless the context otherwise requires:

1. "Association" means either of the following:

(a) The unit owners' association organized under § 33-1241.

(b) A nonprofit corporation or unincorporated association of owners created pursuant to a declaration to own and operate portions of a planned community and which has the power under the declaration to assess association members to pay the costs and expenses incurred in the performance of the association's obligations under the declaration.

2. "Community documents" means the declaration, bylaws, articles of incorporation, if any, and rules, if any.

3. "Construction codes" means the building, plumbing, electrical, fire, mechanical or other codes or ordinances, including the international residential code however denominated, as adopted, amended and enforced by the city, town or county in which the dwelling is located.

4. "Construction defect" means a material deficiency in the design, construction, manufacture, repair, alteration, remodeling or landscaping of a dwelling that is the result of one of the following:

(a) A violation of construction codes applicable to the construction of the dwelling.

(b) The use of defective materials, products, components or equipment in the design, construction, manufacture, repair, alteration, remodeling or landscaping of the dwelling.

(c) The failure to adhere to generally accepted workmanship standards in the community.

5. "Construction professional" means an architect, contractor, subcontractor, developer, builder, builder vendor, supplier, engineer or inspector performing or furnishing the design, supervision, inspection, construction or observation of the construction of any improvement to real property.

6. "Dwelling" means a single or multifamily unit designed for residential use and common areas and improvements that are owned or maintained by an association or by

members of an association. A dwelling includes the systems, other components and improvements that are part of a single or multifamily unit at the time of construction.

7. "Dwelling action" means any action involving a construction defect brought by a purchaser against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.

8. "Material deficiency" means a deficiency that actually impairs the structural integrity, the functionality or the appearance of the dwelling at the time of the claim, or is reasonably likely to actually impair the structural integrity, the functionality or the appearance of the dwelling in the foreseeable future if not repaired or replaced.

9. "Purchaser" means any person or entity who files a dwelling action.

10. "Seller" means any person, firm, partnership, corporation, association or other organization that is engaged in the business of designing, constructing or selling dwellings, including construction professionals. Seller does not include a real estate broker or real estate salesperson as defined in § 32-2101 who provides services in connection with the resale of a dwelling following its initial sale.

A.R.S. § 12-1362

§ 12-1362. Dwelling action; notice of intent to repair or replace; jurisdictional prerequisite; insurance; bifurcated trial; legislative intent

Effective: August 27, 2019

A. Except with respect to claims for alleged construction defects involving an immediate threat to the life or safety of persons occupying or visiting the dwelling, a purchaser must first comply with this article before filing a dwelling action.

B. A seller and the seller's construction professional who receive a written notice of claim pursuant to § 12-1363 have a right pursuant to § 12-1363 to repair or replace any alleged construction defects after sending or delivering to the purchaser a written notice of intent to repair or replace the alleged construction defects. The seller and the seller's construction professional do not need to repair or replace all of the alleged construction defects. A purchaser may not file a dwelling action until the seller and the seller's construction professional have completed all intended repairs and replacements of the alleged construction defects.

C. If a seller or a seller's construction professional presents a notice received pursuant to § 12-1363 to an insurer that has issued an insurance policy to the seller or the seller's construction professional that covers the seller's or the seller's construction professional's liability arising out of a construction defect or the design, construction or sale of the property that is the subject of the notice, the insurer must treat the notice as a notice of a claim subject to the terms and conditions of the policy of insurance. An insurer must work cooperatively and in good faith with the insured seller or the seller's construction professional within the time frames specified in this article to effectuate the purpose of this article. This subsection does not affect the coverage available under the policy of insurance or create a cause of action against an insurer whose actions were reasonable under the circumstances, notwithstanding its inability to comply with the time frames specified in § 12-1363.

D. Subject to Arizona rules of court, the identified construction professionals shall be joined as third-party defendants, if feasible. Subject to Arizona rules of court, for each construction defect found to exist, the trier of fact in any dwelling action filed pursuant to this article shall first determine if a construction defect exists and the amount of damages caused by the defect and identify each seller or construction professional whose conduct, whether by action or omission, may have caused, in whole or in part, any construction defect. The purchaser has the burden of proof to demonstrate the existence of a construction defect and the amount of the damages caused by the construction defect. The trier of fact shall thereafter determine the relative degree of fault of any defendant or third-party defendant. The trier of fact shall allocate the pro rata share of liability based on relative

degree of fault. The seller has the burden to prove the pro rata share of liability of any third-party defendant. The determination of whether a construction defect exists, the amount of damages caused by the construction defect and who may have caused, in whole or in part, the construction defect shall be bifurcated from and take place in a separate phase of the trial or alternative dispute resolution process from the determination of the relative degree of fault of any defendant or third-party defendant, unless the court finds that bifurcation is not appropriate.

E. The legislature finds and determines that given the complexity and multiparty nature of dwelling actions, it is important to provide a streamlined process for the resolution of construction defect claims and indemnification claims between the seller and the construction professionals that is efficient, economical and convenient for the parties involved. The legislature further finds and determines that for the majority of dwelling actions, bifurcation of the issues of the existence of a defect and causation from the issue of apportionment of fault is more efficient, fair and convenient for the parties. It is the legislature's intent that the bifurcation process prescribed in subsection D of this section does not alter the seller's liability under the seller's implied warranty to the purchaser. It is the legislature's intent that the bifurcation process prescribed in subsection D of this section be used and that the issues of existence of a construction defect, damages, causation and apportionment of fault be tried in one trial unless the court finds that the circumstances of the particular case at issue render bifurcation inappropriate.

A.R.S. § 12-1366

§ 12-1366. Applicability; claims and actions

Effective: July 3, 2015

A. This article does not apply:

1. To personal injury claims.
2. To death claims.
3. To claims for damage to property other than a dwelling.
4. To common law fraud claims.
5. To proceedings brought pursuant to title 32, chapter 10.[1]
6. To claims solely seeking recovery of monies expended for repairs to alleged defects that have been repaired by the purchaser.

B. A dwelling action brought by an association is also subject to title 33, chapter 18.[2]

C. After the repair or replacement process has been completed as prescribed by § 12-1363, this article does not affect either party's ability to enforce any commercially reasonable alternative dispute resolution procedures contained in the contract for the sale of the dwelling or an association's community documents. The seller's election to enforce any commercially reasonable alternative dispute resolution procedures contained in the contract for the sale of the dwelling or an association's community documents does not negate, abridge or otherwise reduce the seller's right to repair or replace any alleged construction defects pursuant to § 12-1363. If the contract for the sale of a dwelling contains the procedures, the procedures shall conspicuously appear in the contract in bold and capital letters and a disclosure statement in at least twelve-point font, bold and capital letters shall appear on the face of the contract and shall describe the location of the alternative dispute resolution procedures within the contract.

Credits

Added by Laws 2002, Ch. 281, § 1. Amended by Laws 2003, Ch. 177, § 1; Laws 2015, Ch. 60, § 5.

Footnotes

1 Section 32-1101 et seq.

2 Section 33-2001 et seq.

A. R. S. § 12-1366, AZ ST § 12-1366
Current through legislation of the First Regular Session of the Fifty-Sixth Legislature (2023).

A.R.S. § 33-1242

§ 33-1242. Powers of unit owners' association; notice to unit owner of violation

Effective: August 9, 2017

A. Subject to the provisions of the declaration, the association may:

1. Adopt and amend bylaws and rules.
2. Adopt and amend budgets for revenues, expenditures and reserves and collect assessments for common expenses from unit owners.
3. Hire and discharge managing agents and other employees, agents and independent contractors.
4. Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.
5. Make contracts and incur liabilities.
6. Regulate the use, maintenance, repair, replacement and modification of common elements.
7. Cause additional improvements to be made as a part of the common elements.
8. Acquire, hold, encumber and convey in its own name any right, title or interest to real or personal property, except that common elements may be conveyed or subjected to a security interest only pursuant to § 33-1252.
9. Grant easements, leases, licenses and concessions through or over the common elements.
10. Impose and receive any payments, fees or charges for the use, rental or operation of the common elements other than limited common elements described in § 33-1212, paragraphs 2 and 4 and for services provided to unit owners.
11. Impose charges for late payment of assessments after the association has provided notice that the assessment is overdue or provided notice that the assessment is considered overdue after a certain date and, after notice and an opportunity to be heard, impose reasonable monetary penalties on unit owners for violations of the declaration, bylaws and rules of the association.

12. Impose reasonable charges for the preparation and recordation of amendments to the declaration or statements of unpaid assessments.

13. Provide for the indemnification of its officers and executive board of directors and maintain directors' and officers' liability insurance.

14. Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly provides.

15. Be a member of a master association or other entity owning, maintaining or governing in any respect any portion of the common elements or other property benefitting or related to the condominium or the unit owners in any respect.

16 Exercise any other powers conferred by the declaration or bylaws.

17. Exercise all other powers that may be exercised in this state by legal entities of the same type as the association.

18. Exercise any other powers necessary and proper for the governance and operation of the association.

B. A unit owner who receives a written notice that the condition of the property owned by the unit owner is in violation of a requirement of the condominium documents without regard to whether a monetary penalty is imposed by the notice may provide the association with a written response by sending the response by certified mail within twenty-one calendar days after the date of the notice. The response shall be sent to the address identified in the notice.

C. Within ten business days after receipt of the certified mail containing the response from the unit owner, the association shall respond to the unit owner with a written explanation regarding the notice that shall provide at least the following information unless previously provided in the notice of violation:

1. The provision of the condominium documents that has allegedly been violated.

2. The date of the violation or the date the violation was observed.

3. The first and last name of the person or persons who observed the violation.

4. The process the unit owner must follow to contest the notice.

D. Unless the information required in subsection C, paragraph 4 of this section is provided in the notice of violation, the association shall not proceed with any action to enforce the condominium documents, including the collection of attorney fees, before or during the time prescribed by subsection C of this section regarding the exchange of

information between the association and the unit owner and shall give the unit owner written notice of the unit owner's option to petition for an administrative hearing on the matter in the state real estate department pursuant to § 32-2199.01. At any time before or after completion of the exchange of information pursuant to this section, the unit owner may petition for a hearing pursuant to § 32-2199.01 if the dispute is within the jurisdiction of the state real estate department as prescribed in § 32-2199.01.

Credits

Added by Laws 1985, Ch. 192, § 3, eff. Jan. 1, 1986. Amended by Laws 2006, Ch. 71, § 1; Laws 2006, Ch. 324, § 2; Laws 2015, Ch. 21, § 2; Laws 2016, Ch. 128, § 38, eff. Aug. 6, 2016, retroactively effective to July 1, 2016; Laws 2016, Ch. 172, § 1; Laws 2016, Ch. 230, § 1; Laws 2017, Ch. 77, § 1.

Notes of Decisions (7)

A. R. S. § 33-1242, AZ ST § 33-1242

Current through legislation of the First Regular Session of the Fifty-Sixth Legislature (2023).

A.R.S. § 33-2001

§ 33-2001. Definitions

Effective: July 3, 2015

In this chapter, unless the context otherwise requires:

1. "Community documents" means condominium documents as defined in § 33-1202 or community documents as defined in § 33-1802, including covenants, conditions and restrictions and deed restrictions applicable to the dwelling.

2. "Dwelling" means a newly constructed single family or multifamily unit designed for residential use and property and improvements that are either owned by a homeowners' association or jointly by all of the members of a homeowners' association. Dwelling includes the systems, other components and improvements that are part of a newly constructed single family or multifamily unit at the time of construction.

3. "Good faith" means honesty in fact in the conduct or transaction concerned.

4. "Homeowners' association" means an association as defined in § 33-1202 or 33-1802.

5. "Homeowners' association dwelling action" means any action involving a construction defect as defined in § 12-1361 filed by a homeowners' association against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.

6. "Seller" means any of the following:

   (a) Any person, firm, partnership, corporation, association or other organization that is engaged in the business of building or selling dwellings.

   (b) Any person, firm, partnership, corporation, association or other organization that performs functions relating to or furnishes the design, specifications, surveying, planning, supervising, testing, constructing or observation of the constructing of a dwelling.

   (c) A real estate broker or salesperson as defined in § 32-2101.

Credits

Added as § 33-1901 by Laws 1999, Ch. 72, § 1. Renumbered as § 33-2001. Amended by Laws 2015, Ch. 60, § 6.

Notes of Decisions (1)

A. R. S. § 33-2001, AZ ST § 33-2001
Current through legislation of the First Regular Session of the Fifty-Sixth Legislature (2023).

A.R.S. § 33-2002

§ 33-2002. Homeowners' association dwelling actions; conditions

Effective: July 3, 2015

A. Notwithstanding any provision to the contrary in title 10, chapter 39[1] or chapter 9 or 16 of this title[2] and in addition to any requirements prescribed in the community documents of a homeowners' association, a homeowners' association may file a homeowners' association dwelling action only after all of the following have occurred:

1. The board of directors has provided full disclosure in writing to all members of the association of all material information relating to the filing of the action. The material information shall include a statement that describes the nature of the action and the relief sought including any demands, notices, offers to settle or responses to offers to settle made either by the association or the seller and the expenses and fees that the association anticipates will be incurred, directly or indirectly, in prosecuting the action including attorney fees, consultant fees, expert witness fees, court costs and impacts on the values of the dwellings that are the subject of the action and those that are not. The material information described by this paragraph shall be distributed to all members before the meeting described in paragraph 2 of this subsection occurs.

2. The association has held a meeting of its members and board of directors for which reasonable and adequate notice was provided to all members in the manner prescribed in § 33-1248 or 33-1804, as applicable.

3. The board of directors of the homeowners' association authorizes the filing of the action pursuant to the procedures prescribed in the community documents. At the time of commencing a dwelling action or amending a complaint to add a cause of action for a construction defect, the homeowners' association has an affirmative duty to demonstrate compliance with the procedures prescribed in the community documents and the requirements of this section.

4. The association provides the seller with notice of the alleged construction defects and the right to repair or replace the alleged construction defects pursuant to § 12-1363.

B. If the notice required by subsection A, paragraph 2 of this section is provided to the homeowners' association's members less than sixty days before the expiration of a statute of limitations affecting the right of the association to bring a homeowners' association dwelling action, the statute of limitations is tolled for sixty days. The homeowners' association may meet the remaining requirements of subsection A of this section during the tolling period.

C. Notwithstanding any provision to the contrary in title 10, chapter 39 or in chapter 9 or 16 of this title and in addition to any requirements prescribed in the community documents of a homeowners' association, the board of directors of a homeowners' association or its authorized representative shall disclose in writing to the members of the association a plan that describes the manner in which the proceeds of a homeowners' association dwelling action, whether obtained by way of judgment, settlement or other means, have been or will be allocated. The plan shall be disclosed within thirty days after the association receives the proceeds of any homeowners' association dwelling action. The plan is not binding on the homeowners' association, but the board of directors or its authorized representative must disclose any material changes to the plan to the members of the association within thirty days of making the changes.

D. A homeowners' association shall prepare and preserve for a period of five years records that are adequate to demonstrate its compliance with this section.

E. A director who acts in good faith pursuant to this chapter is not liable for any act or failure to act pursuant to this chapter. In any action filed against a director arising out of any act or failure to act pursuant to this chapter, a director is presumed in all cases to have acted in good faith. The burden is on the party challenging a director's conduct to establish by clear and convincing evidence facts that rebut the good faith presumption.

F. In any contested dwelling action, the seller has standing to assert a failure of the homeowners' association to comply with the procedures prescribed by the community documents and the requirements of this section.

Credits
Added as § 33-1902 by Laws 1999, Ch. 72, § 1. Renumbered as § 33-2002. Amended by Laws 2015, Ch. 60, § 7.

Footnotes

[1] Section 10-11601 et seq.

[2] Sections 33-1201 et seq., 33-1801 et seq.

A. R. S. § 33-2002, AZ ST § 33-2002
Current through legislation of the First Regular Session of the Fifty-Sixth Legislature (2023).

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UNIFORM CONDOMINIUM ACT (1980)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONRS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-NINTH YEAR
ON KAUAI, HAWAII
JULY 26-AUGUST 1, 1960

WITH COMMENTS

August 16, 2021

The Executive Committee approved technical and conforming amendments to the act at its July 13, 2017 meeting.

requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

SECTION 3-102. POWERS AND DUTIES OF UNIT OWNERS' ASSOCIATION.

(a) Except as otherwise provided in subsection (b) and other provisions of [this act], the association:

(1) shall adopt and may amend bylaws and may adopt and amend rules;

(2) shall adopt and may amend budgets under Section 3-123, may collect assessments for common expenses from unit owners, and may invest funds of the association;

(3) may hire and discharge managing agents and other employees, agents, and independent contractors;

(4) may institute, defend, or intervene in litigation or in arbitration, mediation, or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium, subject to Section 3-124;

(5) may make contracts and incur liabilities;

(6) may regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) may cause additional improvements to be made as a part of the common elements;

(8) may acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to Section 3-112;

(9) may grant easements, leases, licenses, and concessions through or over the common elements;

(10) may impose and receive any payments, fees, or charges for:

(A) the use, rental, or operation of the common elements, other than limited common elements described in Sections 2-102(2) and (4); and

(B) services provided to unit owners;

(11) may impose charges for late payment of assessments and, after notice and an opportunity to be heard, may impose reasonable fines for violations of the declaration, bylaws, and rules of the association;

(12) may impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;

(13) may provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance;

(14) except to the extent limited by the declaration, may assign its right to future income, including the right to receive assessments;

(15) may exercise any other powers conferred by the declaration or bylaws;

(16) may exercise all other powers that may be exercised in this state by organizations of the same type as the association;

(17) may exercise any other powers necessary and proper for the governance and operation of the association;

(18) may require that disputes between the association and unit owners or between two or more unit owners regarding the condominium be submitted to nonbinding alternative dispute resolution as a prerequisite to commencement of a judicial proceeding; and

(19) may suspend any right or privilege of a unit owner that fails to pay an

assessment, but may not:

(A) deny a unit owner or other occupant access to the owner's unit;

(B) suspend a unit owner's right to vote;

(C) prevent a unit owner from seeking election as a director or officer of the association; or

(D) withhold services provided to a unit or a unit owner by the association if the effect of withholding the service would be to endanger the health, safety, or property of any person.

(b) The declaration may not limit the power of the association beyond the limit authorized in subsection (a)(18) to:

(1) deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons; or

(2) institute litigation or an arbitration, mediation, or administrative proceeding against any person, subject to the following:

(A) the association shall comply with Section 3-124, if applicable, before instituting any proceeding described in Section 3-124 (a) in connection with construction defects; and

(B) the executive board promptly shall provide notice to the unit owners of any legal proceeding in which the association is a party other than proceedings involving enforcement of rules or to recover unpaid assessments or other sums due the association.

(c) If a tenant of a unit owner violates the declaration, bylaws, or rules of the association, in addition to exercising any of its powers against the unit owner, the association may:

(1) exercise directly against the tenant the powers described in subsection (a)(11);

(2) after giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation; and

(3) enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.

(d) The rights referred to in subsection (c)(3) may be exercised only if the tenant or unit owner fails to cure the violation within 10 days after the association notifies the tenant and unit owner of that violation.

(e) Unless a lease otherwise provides, this section does not:

(1) affect rights that the unit owner has to enforce the lease or that the association has under other law; or

(2) permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or rules.

(f) The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commence an action for a violation of the declaration, bylaws, and rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(1) the association's legal position does not justify taking any or further enforcement action;

(2) the covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with law;

(3) although a violation may exist or may have occurred, it is not so material as to

be objectionable to a reasonable person or to justify expending the association's resources; or

(4) it is not in the association's best interests to pursue an enforcement action.

(g) The executive board's decision under subsection (f) not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

(h) The executive board shall establish a reasonable method for unit owners to communicate among themselves and with the executive board on matters concerning the association.

Comment

1. Subsection (a) permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106.

2. Paragraph (a)(2) is amended expressly to enable the association to "invest funds of the association." However, the investment standards contained in Uniform Prudent Investor Act and similar statutes should not apply to the association's investment of reserves or other funds of the association. Anecdotal evidence suggests that the reserves of most common interest community associations, as a matter of practice, are invested in cash or near-cash (i.e., short term bond fund) equivalents. The UPIA by its terms applies to trust investing. It is the nearly universal practice for associations to be organized as non-stock corporations or other forms of business entities, but rarely as trusts. In the typical association, the business judgment rule rather than the prudence norm of trust law should apply.

Regardless of the form of organization, the drafters concluded that the Act should not make special provision for association investments because actual or contingent liquidity needs will predominate in most circumstances affecting the association. Unlike a family trust, an association board is not meant to be making long-term investment decisions for capital growth;

accordingly, most such investing is appropriately done in interest-bearing cash equivalents.

Finally, because the subject has not been problematic in practice, the drafters saw no need to make special provision for it. Of course, subject to the business judgment rule, in those unusual cases where long-term capital growth might be appropriate, the Act would not bar a board's decision to invest the reserves in suitable vehicles designed to achieve that goal.

3. Many state condominium statutes give the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in paragraph (a)(4), some courts have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (a)(8) refers to the power granted by Section 3-112 to sell or encumber common elements without a termination of the condominium upon a vote of the requisite number of unit owners. Paragraph (a)(9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph (a)(11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. These powers are intended to be in addition to any rights which the association may have under other law.

Under the Act, fines levied by the Association must be "reasonable" and may be imposed only after notice and an opportunity for a hearing. Moreover, in an effort to minimize potential abuse of the association's powers, the Act bars any foreclosure of a unit if the only sums due are fines and related charges. See Section 3-115(p). However, the Act does not codify the precise dollar amount of late charges or fines, or detail the standards for conduct of a hearing. Thus, the Act does not follow the enactments of states such as North Carolina, which impose a default cap on the amount of late fees, N.C. Gen. Stat. § 47F-3-102, and detailed default provisions regarding the conduct of the hearing, N.C. Gen. Stat. § 47F-3-107.1.

6. Under paragraph (a)(14), the declaration may provide for the assignment of income of the association, including assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration—for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow
because of a lack of assets, in spite of its income stream, has been a significant problem.

Amended paragraph (a)(14) reverses the presumption in the original Act as to whether the association may pledge its assessments as security for a loan. Previously, the Act provided that the association could do so only "to the extent the declaration expressly so provides." Because many declarations do not so provide, the prior Act forced the association to amend its declaration

1999 Ariz. Legis. Serv. Ch. 72 (H.B. 2668) (WEST)

ARIZONA 1999 LEGISLATIVE SERVICE

First Regular Session of the Forty-Fourth Legislature

Additions are indicated by <<+ Text +>>; deletions by

<<- Text ->>. Changes in tables are made but not highlighted.

CHAPTER 72

H.B. 2668
PROPERTY—HOMEOWNERS' ASSOCIATION DWELLING ACTIONS

AN ACT AMENDING TITLE 33, ARIZONA REVISED STATUTES, BY ADDING CHAPTER 17; RELATING TO HOMEOWNERS' ASSOCIATION DWELLING ACTIONS.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 33, Arizona Revised Statutes, is amended by adding chapter 17, to read:

<< AZ ST Prec. § 33–1901 >>

<<+CHAPTER 17+>>

<<+HOMEOWNERS' ASSOCIATION DWELLING ACTIONS+>>

<< AZ ST Prec. § 33–1901 >>

<<+ARTICLE 1. GENERAL PROVISIONS+>>

<< AZ ST § 33–1901 >>

§ 33–1901. Definitions

<<+In this chapter, unless the context otherwise requires:+>>
<<+1. “Community documents” means condominium documents as defined in section 33–1202 or community documents as defined in section 33–1802.+>>
<<+2. “Dwelling” means a newly constructed single family or multifamily unit designed for residential use and property and improvements that are either owned by a homeowners' association or jointly by all of the members of a homeowners' association. Dwelling includes the systems, other components and improvements that are part of a newly constructed single family or multifamily unit at the time of construction.+>>
<<+3. “Good faith” means honesty in fact in the conduct or transaction concerned.+>>
<<+4. “Homeowners' association” means an association as defined in section 33–1202 or 33–1802.+>>
<<+5. “Homeowners' association dwelling action” means any action filed by a homeowners' association against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.+>>
<<+6. “Seller” means any of the following:+>>
<<+(a) Any person, firm, partnership, corporation, association or other organization that is engaged in the business of building or selling dwellings.+>>

<<+(b) Any person, firm, partnership, corporation, association or other organization that performs functions relating to or furnishes the design, specifications, surveying, planning, supervising, testing, constructing or observation of the constructing of a dwelling.+>>

<<+(c) A real estate broker or salesperson as defined in section 32–2101.+>>

<< AZ ST § 33–1902 >>

§ 33–1902. Homeowners' association dwelling actions; conditions

<<+**A.** Notwithstanding any provision to the contrary in Title 10, chapter 39 or chapters 9 and 16 of this title and in addition to any requirements prescribed in the community documents of a homeowners' association, a homeowners' association may file a homeowners' association dwelling action only after all of the following have occurred:+>>

<<+1. The board of directors has provided full disclosure in writing to all members of the association of all material information relating to the filing of the action. The material information shall include a statement that describes the manner in which the action will be funded and a statement describing any demands, notices, offers to settle or responses to offers to settle made either by the association or the seller. The material information described by this paragraph shall be distributed to all members before the meeting described in paragraph 2 occurs.+>>

<<+2. The association has held a meeting of its members and board of directors for which reasonable and adequate notice was provided to all members in the manner prescribed in section 33–1248 or 33–1804, as applicable.+>>

<<+3. The board of directors of the homeowners' association authorizes the filing of the action.+>>

<<+**B.** If the notice required by subsection A, paragraph 2 of this section is provided to the homeowners' association's members less than sixty days before the expiration of a statute of limitations affecting the right of the association to bring a homeowners' association dwelling action, the statute of limitations is tolled for sixty days. The homeowners' association may meet the remaining requirements of subsection A of this section during the tolling period.+>>

<<+**C.** Notwithstanding any provision to the contrary in Title 10, chapter 39 or in chapters 9 and 16 of this title and in addition to any requirements prescribed in the community documents of a homeowners' association, the board of directors of a homeowners' association or its authorized representative shall disclose in writing to the members of the association a plan that describes the manner in which the proceeds of a homeowners' association dwelling action, whether obtained by way of judgment, settlement or other means, have been or will be allocated. The plan shall be disclosed within thirty days after the association receives the proceeds of any homeowners' association dwelling action. The plan is not binding on the homeowners' association, but the board of directors or its authorized representative must disclose any material changes to the plan to the members of the association within thirty days of making the changes.+>>

<<+**D.** A homeowners' association shall prepare and preserve for a period of five years records that are adequate to demonstrate its compliance with this section.+>>

<<+**E.** A director who acts in good faith pursuant to this chapter is not liable for any act or failure to act pursuant to this chapter. In any action filed against a director arising out of any act or failure to act pursuant to this chapter, a director is presumed in all cases to have acted in good faith. The burden is on the party challenging a director's conduct to establish by clear and convincing evidence facts that rebut the good faith presumption.+>>

<< AZ ST § 33–1903 >>

§ 33–1903. Applicability of chapter

<<+This chapter applies only to homeowners' association dwelling actions. This chapter does not apply to:+>>

<<+1. Actions filed by individual members of a homeowners' association against a seller.+>>

<<+2. claims for personal injury, death or damage to property other than a dwelling.+>>

<<+3. Common-law fraud claims.+>>

<<+4. Proceedings brought pursuant to title 32, chapter 10, whether filed by a homeowners' association or by individual members of a homeowners' association.+>>

Approved by the Governor, April 26, 1999.

Filed in the Office of the Secretary of State, April 26, 1999.

AZ LEGIS 72 (1999)

End of Document

When recorded, return to:

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DECLARATION OF CONDOMINIUM AND OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR THE LOFTS AT FILLMORE CONDOMINIUMS

MARICOPA COUNTY, ARIZONA

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DECLARATION OF CONDOMINIUM AND OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR THE LOFTS AT FILLMORE CONDOMINIUMS

THIS DECLARATION OF CONDOMINIUM AND OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR THE LOFTS AT FILLMORE CONDOMINIUMS is made this 21st day of July, 1999 by **THE LOFTS AT FILLMORE, LLC,** an Arizona limited liability company (the "Declarant").

ARTICLE I

DEFINITIONS

1.0 General Definitions. Capitalized terms not otherwise defined in this Declaration shall have the meanings specified for such terms in the Arizona Condominium Act, A.R.S. §§33-1201 et seq., as the same may be amended from time to time (the **"Condominium Act"**).

1.1 Defined Terms. The following capitalized terms shall have the general meanings described in the Condominium Act and for purposes of this Declaration shall have the specific meanings set forth below:

(A) "Articles" means the Articles of Incorporation of the Association, as they may be amended from time to time.

(B) "Assessments" means the Common Expense Assessment and Special Assessments levied and assessed against each Unit pursuant to Article 7 of this Declaration.

(C) "Assessment Lien" means the lien granted to the Association by §33-1256 of the Condominium Act to secure the payment of Assessments, monetary penalties and other charges owed to the Association by a Unit Owner.

(D) "Association" means the Arizona nonprofit corporation organized by the Declarant to administer and enforce the Condominium Documents and to exercise the rights, powers and duties set forth therein, and its successors and assigns. The Association shall be organized under the name, **"The Lofts at Fillmore Condominium Association."**

(E) "Board of Directors" means the Board of Directors of the Association.

(F) "Building" means any structure designated as a building on the Plat, including, without limitation, all Buildings containing residential Units and buildings (the **"Garage Buildings"**) containing the Garage parking spaces (the **"Garage Units"**). Garage Units are appurtenant to and inseparable from the residential Unit with the corresponding number and Garage Units are not separately allocated an interest in the Common Elements, voting rights, or Common Expense Liability.

(G) "Bylaws" means the Bylaws of the Association, as they may be amended from time to time.

(H) "Common Elements" means all portions of the Condominium other than the Units, including, without limitation, any structural portions of the residential Building and Garage Buildings not comprising the Units, Garage Buildings, walkway and landscaped areas, carport covers, paved private drive and entryway gates.

(I) "Common Expenses" means expenditures made by, or financial liabilities of, the Association, together with required allocations to reserves.

(J) "Common Expense Assessment" means the assessment levied against the Units pursuant to Section 7.1(A) of this Declaration.

(K) "Common Expense Liability" means the liability for Common Expenses allocated to the Unit in accordance with this Declaration.

(L) "Condominium" means the real property located in Maricopa County, Arizona, which is described in Exhibit A attached to this Declaration and on the Plat, together with all Buildings and other Improvements located thereon and all easements, rights, and appurtenances belonging thereto. **The name of the Condominium created by this Declaration is "The Lofts at Fillmore Condominiums."**

(M) "Condominium Documents" means this Declaration, including the Plat, and the Articles, Bylaws, and Rules.

(N) "Declarant" means **THE LOFTS AT FILLMORE, LLC,** an Arizona limited liability company, and any Person to whom it may transfer any Special Declarant Right.

(O) "Declaration" means this Declaration of Condominium and of Covenants, Conditions and Restrictions for The Lofts at Fillmore Condominiums, as it may be amended from time to time, together with the exhibits, and where appropriate by context, the Plat.

(P) "Development Rights" means any right or combination of rights reserved by or granted to the Declarant in this Declaration to do any of the following:

(i) Create easements, Units, Common Elements or Limited Common Elements within the Condominium;

(ii) Subdivide Units, convert Units into Common Elements or convert Common Elements into Units;

(iii) Amend the Condominium Documents during the Period of Declarant Control to comply with applicable law or to correct any error or inconsistency in the Declaration if the amendment does not adversely affect the rights of any Unit Owner;

(iv) Amend the Condominium Documents during the Period of Declarant Control as provided in Section 10.4(D) below.

(Q) "Eligible Insurer or Guarantor" means an insurer or governmental guarantor of a First Mortgage who has requested notice of certain matters in accordance with Section 9.0 of this Declaration.

(R) "Eligible Mortgage Holder" means a First Mortgagee who has requested notice of certain matters from the Association in accordance with Section 9.0 of this Declaration.

(S) "First Mortgage" means any mortgage or deed of trust on a Unit with first priority over any other mortgage or deed of trust.

(T) "First Mortgagee" means the holder of any First Mortgage.

(U) "Improvement" means all physical structures including, but not limited to, residential Buildings and Garage Buildings, parking areas, private drives, fences and walls, privacy gates, trash receptacles, cluster mailboxes, and all landscaping, including, but not limited to, hedges, plantings, trees and shrubs of every type and kind.

(V) "Limited Common Elements" means a portion of the Common Elements specifically designated in this Declaration as a Limited Common Element and allocated by this Declaration or by operation of the Condominium Act for the exclusive use of one or more, but fewer than all, of the Units.

(W) "Member" means any Person who is or becomes a member of the Association.

(X) "Period of Declarant Control" means the time period commencing on the date this Declaration is recorded in the Official Records of the Maricopa County, Arizona Recorder, and ending on the earlier of:

(i) Ninety (90) days after the conveyance of seventy-five percent (75%) of the Units which may be created in the Condominium to Unit Owners other than the Declarant; or

(ii) Four (4) years after all Declarant has ceased to offer Units for sale in the ordinary course of business.

(Y) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, limited liability company, joint venture, government, government subdivision or agency, or other legal or commercial entity, and in the case of a subdivision trust, means the beneficiary of the trust who holds the right to subdivide, develop or sell the real estate rather than the trust or trustee.

(Z) "Plat" means the condominium plat for The Lofts at Fillmore Condominiums, recorded on July 23, 1999, in Book 508 of Maps, page 17, Official Records of the Maricopa County, Arizona Recorder, a replat of Lot 1, The Lofts at Fillmore, recorded on July

09 , 1999 at Book 507 of Maps, page 15 and any amendments, supplements, or corrections thereto.

(AA) "Purchaser" means any Person, other than the Declarant, who by means of a voluntary transfer becomes a Unit Owner except for (i) a Person who purchases a Unit and then leases it to the Declarant for use as a model, sales or leasing office, fitness facility or business support center in connection with the sale of other Units or (ii) a Person who, in addition to purchasing a Unit, is assigned any Special Declarant Right.

(BB) "Rules" means the rules and regulations adopted by the Association, as they may be amended from time to time.

(CC) "Single Family" means a group of one or more persons each related to the other by blood, marriage or legal adoption, or a group of persons not all so related, together with their domestic servants, who maintain a common household in a Unit.

(DD) "Special Declarant Rights" means any right or combination of rights reserved by or granted to the Declarant in this Declaration or by the Condominium Act to do any of the following:

(i) Construct, reconstruct, alter, renovate and modify Improvements provided for in this Declaration or shown on the Plat;

(ii) Exercise any Development Right;

(iii) Maintain sales offices, management offices, model Units and signs advertising the Condominium;

(iv) Use easements through the Common Elements for the purpose of making Improvements within the Condominium;

(v) Appoint or remove any officer of the Association or any member of the Board of Directors during the Period of Declarant Control.

(EE) "Unit" means a portion of the Condominium as described in this Declaration and as shown on the Plat that is designated for separate ownership and occupancy, and includes both the residential Units and the Garage Units, as the context may require.

(FF) "Unit Owner" means the record owner, whether one or more Persons, of beneficial or equitable title (and legal title if the same has merged with the beneficial or equitable title) to the fee simple interest of a Unit. Unit Owner shall not include (i) Persons having an interest in a Unit merely as security for the performance of an obligation, or (ii) a lessee or tenant of a Unit. Unit Owner shall include a purchaser under a contract for the conveyance of real property, a contract for deed, a contract to convey, an agreement for sale or any similar contract through which a seller has conveyed to a purchaser equitable title to a Unit under which the seller is obligated to convey to the purchaser the remainder of seller's title in the Unit, whether legal or

equitable, upon payment in full of all monies due under the contract. The term "Unit Owner" shall not include a purchaser under a purchase contract and receipt, escrow instructions or similar executory contract which is intended to control the rights and obligations of the parties to the executory contract pending the closing of a sale or purchase transaction. In the case of Units the fee simple title to which is vested in a trustee pursuant to A.R.S., §§33-801 et seq., the Trustor shall be deemed to be the Unit Owner.

ARTICLE 2

SUBMISSION OF PROPERTY; UNIT BOUNDARIES; ALLOCATIONS

2.0 Submission of Property. The real property described on Exhibit A attached to this Declaration and on the Plat, together with all Improvements, easements, rights and appurtenances thereto, is hereby submitted to a Condominium in accordance with the provisions of the Condominium Act. The Identifying Numbers of the residential Units submitted to the Condominium are those Units consecutively numbered and lettered as 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, and 2I, as shown on the Plat. Each residential Unit includes the ownership of a Garage Unit, with the Garage Unit have the designation of "G" and the applicable Unit number or letter as shown on the Plat. A Garage Unit may not be transferred separate and apart from the residential Unit.

2.1 Unit Boundaries.

(A) The physical boundaries of each Unit are the interior unfinished surfaces of the perimeter walls, floors, ceilings, doors and windows of the Unit with: (i) the underside of the finished but undecorated ceiling as the top horizontal boundary; (ii) the top of the finished but undecorated flooring shall be the bottom horizontal boundary; and (iii) the interior of the finished but undecorated walls shall be the vertical boundaries. All lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces are a part of the Unit, and all other portions of the walls, floors or ceilings are a part of the Common Elements. The structural elements of exterior windows and doors shall be Limited Common Elements allocated to that Unit as provided in Section 2.1(D) below.

(B) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, heating or air conditioning unit or apparatus or other fixture lies partially within and partially outside the boundaries of a Unit, any portion serving only that Unit is a Limited Common Element allocated solely to that Unit and any portion serving more than one Unit or any portion of the Common Elements is a part of the Common Elements.

(C) Subject to the provisions of subsection (B) of this section, all spaces, interior partitions and other fixtures and improvements within the boundaries of a Unit are part of the Unit.

(D) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, entryways, or patios, and all exterior doors and glass windows or other fixtures designed to serve

a single Unit, but located outside of the Unit's physical boundaries, are Limited Common Elements allocated exclusively to that Unit. Stairways and entry walks designated for use by a Unit or Units in a Building, but less than all of the Units in the Condominium, and located outside of the physical boundaries of a Unit shall be Limited Common Elements allocated to the Unit or Units in the Building served by such stairways and entry walks.

(E) In the event of an inconsistency or conflict between the provisions of this section and the Plat, this section shall control.

(F) The physical boundaries of a Unit shall be considered to be the proper boundaries regardless of the settling, rising or lateral movement of the Buildings and regardless of any variances between the boundaries shown on the Plat and the actual physical boundaries.

(G) Declarant reserves the right to relocate the boundaries between adjoining Units owned by the Declarant and to reallocate each such Unit's Common Element interest, votes in the Association and Common Expense liabilities subject to and in accordance with A.R.S. §33-1222.

2.2 Allocation of Common Element Interest. The undivided interests in the Common Elements of the Association shall be allocated in the same percentages as the Common Expense Liability set forth below and only among the residential Units.

2.3 Allocation of Common Expense Liability. The undivided interest in the Common Expense Liability of the Association shall be allocated in accordance with the following percentages:

Unit No.:	Percentage:
1A	4.45%
1B	4.81%
1C	6.02%
1D	5.27%
1E	4.31%
1F	4.21%
1G	7.24%
1H	5.87%
1I	5.73%
2A	5.95%
2B	6.50%
2C	6.13%
2D	5.37%
2E	4.41%
2F	4.46%
2G	7.36%
2H	5.96%
2I	5.90%
Total:	100%

2.4 Allocation of Votes in the Association. The votes in the Association shall be allocated equally among all the residential Units with each such Unit having one (1) vote.

2.5 Allocation of Limited Common Elements.

(A) The following portions of the Common Elements are Limited Common Elements and are allocated to the exclusive use of one Unit as follows:

(i) Each first floor Unit is allocated the terrace adjoining or attached to the Unit as shown on the Plat and each second floor Unit is allocated the deck area adjoining or attached to the Unit as shown on the Plat.

(ii) Each Unit (except for Units 1E and 2E) are allocated the carport parking space designated for such Unit on the Plat.

(iii) Any gas, electric or water meter which serves only one Unit is allocated to the Unit it serves.

(iv) Each Unit is allocated those portions of the Common Elements designated as Limited Common Elements in Sections 2.1(B) and (D) of this Declaration that serve the Unit.

(B) A Limited Common Element may be reallocated by an amendment to this Declaration made in accordance with the provisions of §33-1218(B) of the Condominium Act.

(C) The Board of Directors shall have the right, without a vote of the Members, to allocate as a Limited Common Element any portion of the Common Elements not previously allocated as a Limited Common Element. Any such allocation by the Board of Directors shall be made by an amendment to this Declaration and an amendment to the Plat if required by the Condominium Act.

ARTICLE 3

EASEMENTS

3.0 Utility Easements. There is hereby created an easement upon, across, over and under the Common Elements for reasonable ingress, egress, installation, replacing, repairing or maintaining of all utilities, including, but not limited to, gas, water, sewer, telephone, cable television and electricity. By virtue of this easement, it shall be expressly permissible for the providing utility company to erect and maintain the necessary equipment on the Common Elements, but no sewers, electrical lines, water lines, or other utility or service lines may be installed or located on the Common Elements except as initially designed and/or as thereafter approved and constructed by the Board of Directors. This easement shall in no way affect any other recorded easements on the Common Elements.

3.1 Easements for Ingress and Egress. There is 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 Elements. There is also created an easement for ingress and egress for pedestrian and vehicular traffic, including, without limitation, emergency access and utility repair vehicles, over, through and across such driveways and parking areas as from time to time may be paved and intended for such purposes except that such easements shall not extend to any Limited Common Elements parking spaces or Garage Units. Such easements shall run in favor of and be for the benefit of the Unit Owners and occupants of the Units and their guests, families, tenants and invitees.

3.2 Unit Owners' Easements of Enjoyment.

(A) Every Unit Owner shall have a right and easement of enjoyment in and to the Common Elements, except for the Limited Common Elements, which right and easement shall be appurtenant to and shall pass with the title to every Unit, subject to the following provisions:

(i) The right of the Association to adopt reasonable Rules governing the use of the Common Elements;

(ii) The right of the Association to suspend the voting rights of a Unit Owner for any period during which any Assessment against his Unit remains unpaid more than thirty (30) days after its due date and for a period not to exceed sixty (60) days for any other infraction or violation of the Condominium Documents;

(iii) The right of the Association to convey the Common Elements or subject the Common Elements to a mortgage, deed of trust, or other security interest, in the manner and subject to the limitations set forth in the Condominium Act, subject to the vote or written assent of those Unit Owners representing at eighty percent (80%) of the votes in the Association, and with the consent of Declarant during the Period of Declarant Control; and, in all events, subject to a Unit Owner's easement for ingress and egress if access to such Owner's Unit is through the Common Elements to be conveyed or mortgaged.

(iv) All rights and easements set forth in this Declaration, including, but not limited to, the rights and easements granted to the Declarant by Sections 3.3 and 3.4 of this Declaration.

(B) If a Unit is leased or rented, the lessee and the members of his family residing with the lessee shall have the right to use the Common Elements during the term of the lease, and the Unit Owner shall have no right to use the Common Elements until the termination or expiration of the lease.

(C) The guests and invitees of any Member or other person entitled to use the Common Elements pursuant to subsection (A) above or of any lessee who is entitled to use the Common Elements pursuant to subsection (B) above may use the Common Elements provided they are accompanied by a Member, lessee or other person entitled to use the Common Elements pursuant to subsection (A) or (B) above. The Board of Directors shall have the right to limit the

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number of guests and invitees who may use the Common Elements at any one time and may restrict the use of the Common Elements by guests and invitees to specific times.

(D) A Unit Owner's right and easement of enjoyment in and to the Common Elements shall not be conveyed, transferred, alienated or encumbered separate and apart from a Unit. Such right and easement of enjoyment in and to the Common Elements shall be deemed to be conveyed, transferred, alienated or encumbered upon the sale of any Unit, notwithstanding that the description in the instrument of conveyance, transfer, alienation or encumbrance may not refer to such right and easement.

(E) The provisions of this section shall not apply to any of the Limited Common Elements that are allocated to one or more, but less than all, of the Units.

3.3 Declarant's Use for Sales and Leasing Purposes.

(A) Declarant shall have the right and an easement to maintain sales or leasing offices, management offices and model Units throughout the Condominium and to maintain one or more advertising, model and directional signs on the Common Elements while the Declarant is selling or preparing to sell Units in the Condominium. Declarant reserves the right to place models, management offices and sales and leasing offices in any Units owned by Declarant and on any portion of the Common Elements in such number, of such size and in such locations as Declarant deems appropriate. Declarant may from time to time relocate model Units, management offices and sales and leasing offices to different locations within the Condominium.

(B) The Declarant reserves the right to retain all personal property and equipment used in the sales, management, construction and maintenance of the Condominium that has not been represented as property of the Association. The Declarant reserves the right to remove from the Condominium any and all goods and Improvements used in development, marketing and construction, whether or not they have become fixtures.

3.4 Declarant's Easements.

(A) Declarant shall have the right, and an easement on and over the Common Elements, to construct, alter, renovate or improve the Common Elements and the Units shown on the Plat and all other Buildings and Improvements as the Declarant may deem necessary and to use the Common Elements and any Units owned by Declarant for construction or renovation-related purposes, including for the storage of tools, machinery, equipment, building materials, appliances, supplies and fixtures, and for the performance of work respecting the Condominium.

(B) Declarant shall have the right and an easement on, over and under those portions of the Common Elements not located within the Buildings for the purpose of maintaining and collecting drainage of surface, roof or storm water. The easement created by this subsection expressly includes the right to cut any trees, bushes, or shrubbery, to grade the soil or to take any other action reasonably necessary.

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(C) The Declarant shall have an easement through the Units, including Units owned by Purchasers, at reasonable times and upon reasonable notice for any access necessary to complete any renovations, warranty work or modifications or improvements to be performed or constructed by the Declarant.

(D) The Declarant shall have the right and an easement on, over, and through the Common Elements as may be reasonably necessary for the purpose of discharging its obligations and exercising Special Declarant Rights whether arising under the Condominium Act or reserved in this Declaration.

3.5 Easement for Support. To the extent necessary, each Unit shall have an easement for structural support over every other Unit in the Building, the Common Elements and the Limited Common Elements, and each Unit and the Common Elements shall be subject to an easement for structural support in favor of every other Unit in the Building, the Common Elements and the Limited Common Elements.

3.6 Common Elements Easement in Favor of the Association. The Common Elements shall be subject to an easement in favor of the Association, its Board and officers and the agents, employees and independent contractors of the Association for the purpose of the inspection, upkeep, maintenance, repair and replacement of the Common Elements.

3.7 Common Elements Easement in Favor of Unit Owners. The Common Elements shall be subject to the following easements in favor of the Units benefited:

(A) For the installation, repair, maintenance, use, removal or replacement of pipes, ducts, heating and air conditioning systems, electrical, telephone and other communication wiring and cables and all other utility lines and conduits which are a part of or serve any Unit and which pass across or through a portion of the Common Elements.

(B) For the installation, repair, maintenance, use, removal or replacement of lighting fixtures, electrical receptacles, panel boards and other electrical installations which are a part of or serve any Unit but which encroach into a part of a Common Element adjacent to such Unit; provided that the installation, repair, maintenance, use, removal or replacement of any such item does not unreasonably interfere with the common use of any part of the Common Elements, adversely affect either the thermal or acoustical character of the Building or impair or structurally weaken the Building.

(C) For driving and removing nails, screws, bolts and other attachment devices into the Unit side surface of the stone, block, brick or other masonry walls bounding the Unit and the Unit side surface of the studs which support the dry wall or plaster perimeter walls bounding the Unit, the bottom surface of floor joists above the Unit and the top surface of the floor joists below the Unit to the extent such nails, screws, bolts and other attachment devices may encroach into a part of a Common Element adjacent to such Unit; provided that any such action will not unreasonably interfere with the common use of any part of the Common Elements, adversely affect either the thermal or acoustical character of the Building or impair or structurally weaken the Building.

(D) For the maintenance of any lighting devices, outlets, medicine cabinets, exhaust fans, ventilation ducts, registers, grilles and similar fixtures which serve only one Unit but which encroach into any part of the Common Elements.

(E) For the performance of the Unit Owner's obligation to maintain, repair, replace and restore those portions of the Limited Common Elements that the Unit Owner is obligated to maintain under Section 5.1(B) of this Declaration.

3.8 Units and Limited Common Elements Easement in Favor of Association. The Units and the Limited Common Elements are hereby made subject to the following easements of entryway in favor of the Association and its directors, officers, agents, employees and independent contractors:

(A) For inspection of the exterior of the Units and Limited Common Elements in order to verify the performance by Unit Owners of all items of maintenance and repair for which they are responsible.

(B) For inspection, maintenance, repair and replacement of the Common Elements or the Limited Common Elements situated in or accessible from the exterior of Units or Limited Common Elements.

(C) For correction of emergency conditions in one or more Units or Limited Common Elements or casualties to the Common Elements, the Limited Common Elements or the Units.

(D) For the purpose of enabling the Association, the Board of Directors or any committees appointed by the Board of Directors to exercise and discharge their respective rights, powers and duties specifically set forth under the Condominium Documents.

(E) For inspection, at reasonable times and upon reasonable notice to the Unit Owner, of the Units and the Limited Common Elements to verify that the provisions of the Condominium Documents are being complied with by the Unit Owners, their guests, tenants, invitees and the other occupants of the Unit.

3.9 Easement for Unintended Encroachments. To the extent that any Unit or Common Element encroaches on any other Unit or Common Element as a result of original construction, alteration or restoration authorized by this Declaration, settling or shifting, or any reason other than the intentional encroachment on the Common Elements or any Unit by a Unit Owner, a valid easement for the encroachment, and for the maintenance thereof, exists.

ARTICLE 4

USE AND OCCUPANCY RESTRICTIONS

4.0 Single Family Residential Use. All Units and Limited Common Elements shall be used, improved and devoted exclusively to residential use by a Single Family. No gainful

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occupation, profession, trade or other nonresidential use shall be conducted on or in any Unit or Limited Common Element, but a Unit Owner or other resident may conduct a business activity within a Unit so long as: (i) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Unit; (ii) the business activity conforms to all applicable zoning ordinances or requirements for the Condominium; (iii) the business activity does not involve persons coming to the Unit or the door-to-door solicitation of Unit Owners or other residents in the Condominium; (iv) the trade or business conducted by the Unit Owner or resident shall not require more than one (1) employee working in or from such Unit who is not a lawful resident thereof; (v) the volume of vehicular or pedestrian traffic or parking generated by such trade or business does not result in congestion or parking violations; (vi) the trade or business does not use flammable liquids or hazardous materials in quantities not customary for residential use; and (vii) the business activity is consistent with the residential character of the Condominium and does not constitute a nuisance or a hazardous or offensive use or threaten security or safety of Unit Owners or other residents in the Condominium, as may be determined from time to time in the sole discretion of the Board of Directors. The terms "business" and "trade" as used in this section shall be construed to have their ordinary, generally accepted meanings, and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether: (i) such activity is engaged in full or part time; (ii) such activity is intended or does generate a profit; or (iii) a license is required for such activity. The leasing of a Unit by the Unit Owner thereof shall not be considered a trade or business within the meaning of this section.

4.1 Antennas. No Unit Owner may erect, use or maintain any antenna, satellite television dish or other device for the transmission or reception of television or radio signals or any other form of electro-magnetic radiation outside of his Unit or visible from the exterior of his Unit, whether attached to a Building or structure or otherwise, unless approved by the Board.

4.2 Utility Service. Except for lines, wires and devices existing on the Condominium on the date the first Unit is conveyed to a Purchaser and maintenance and replacement of the same, no lines, wires or other devices for the communication or transmission of electric current or power, including telephone, television, and radio signals, shall be erected, placed or maintained anywhere in or upon the Condominium unless they are contained in conduits or cables installed and maintained underground or concealed in, under or on Buildings or other structures approved by the Board. No provision hereof shall be deemed to forbid the erection of temporary power or telephone structures incident to the construction of Buildings or structures approved by the Board. All utilities not separately metered to the Units shall be paid by the Association as a Common Expense.

4.3 Improvements and Alterations.

(A) No Person shall make any structural additions, alterations or improvements within a Unit, unless prior to the commencement of each addition, alteration or improvement, the Unit Owner receives the prior written approval of the Board and the Owner retains an architect or engineer licensed in Arizona who certifies that such addition, alteration or improvement will not

impair the structural integrity of the Building within which such addition, alteration or improvement is to be made. The Unit Owner shall, to the extent, permitted by Arizona law, be responsible for any damage to other Units and to the Common Elements which results from any such additions, alterations or improvements.

(B) Any Unit Owner may make nonstructural additions, alterations and improvements within his Unit without the prior written approval of the Board, but such Unit Owner shall, to the extent permitted under Arizona law, be responsible for any damage to other Units and to the Common Elements which results from any such alterations, additions or improvements.

(C) Notwithstanding the foregoing, no addition, alteration or improvement within a Unit, whether structural or not, which would be visible from the exterior of the Building in which the Unit is located, shall be made without the prior written consent of the Board, which approval shall only be granted if the Board affirmatively finds that the proposed addition, alteration or improvement is aesthetically pleasing and in harmony with the surrounding Improvements.

(D) Irrespective of whether the Period of Declarant Control has expired, Declarant is exempt from the provisions of this Section 4.3 and need not seek nor obtain Board approval of any Improvements constructed on the Condominium by Declarant.

4.4 Trash Containers and Collection. No garbage or trash shall be placed or kept on the Condominium except in the covered containers or dumpsters provided by Declarant or the Board on the Common Elements and designated for such purposes. The Board of Directors shall have the right to subscribe to a private trash service as a Common Expense Liability for the use and benefit of the Association and all Unit Owners, and to adopt and promulgate Rules regarding garbage, trash, trash containers and collection. No incinerators shall be kept or maintained in any Unit.

4.5 Machinery and Equipment. No Unit Owner may place, operate or maintain machinery or equipment of any kind upon the Condominium other than usual and customary machinery and equipment used in connection with the Owner's permitted uses of his Unit and Limited Common Elements. This Section 4.5 shall not apply to any such machinery or equipment which Declarant or the Association may require for the construction, improvement, operation and maintenance of the Common Elements.

4.6 Animals. No animals, birds, fowl, poultry, or livestock, other than a reasonable number of generally recognized house pets, shall be maintained in or on the Condominium and then only if such house pets are kept or raised solely as domestic pets (and not for commercial purposes) within an Owner's Unit and Limited Common Elements allocated thereto. No more than one (1) dog may occupy any Unit regardless of size or weight. No pet or other animal shall be allowed to make an unreasonable amount of noise, cause an odor, or to become a nuisance. All dogs or other house pets permitted hereunder and capable of being walked on a leash shall be kept on a leash not to exceed six (6) feet in length when outside a Unit, and all pets shall be directly under the Unit Owner's control at all times. No Unit Owner or any other lawful resident or guest or invitee thereof shall permit any such pet being kept in the Unit or the Limited Common Elements allocated to the Unit to relieve itself on any portion of the Common

Elements; it being understood that it shall be the responsibility of such person to immediately remove any droppings from pets. No structure for the care, housing, confinement, or training of any animal or pet shall be maintained on any portion of the Common Elements or in any Unit so as to be visible from the exterior of the Building in which the Unit is located. Upon the written request of any Unit Owner, the Board of Directors shall determine whether, for the purposes of this section, a particular animal or bird is a generally recognized house pet, a nuisance, or whether the number of pets in any Unit or the Limited Common Elements allocated thereto is reasonable. The right of Unit Owners and other occupants of Units to maintain a reasonable number of house pets in or on the Condominium pursuant to this section is expressly subject to the right of the Board of Directors to restrict certain house pets to portions of the Condominium and to prospectively further restrict the size and number of dogs or other pets which may be maintained or kept in the Units or the Limited Common Elements allocated thereto.

4.7 Temporary Occupancy. No trailer, tent, shack, garage, barn or other structure, and no temporary Improvement of any kind shall be used at any time for a residence either temporarily or permanently. Temporary buildings or structures used during the construction of Buildings or structures approved by the Board shall be permitted but must be removed promptly upon completion of the construction of the Building or structure.

4.8 Clothes Drying Facilities. No clotheslines or other facilities for drying or airing clothes shall be erected, placed or maintained on the Condominium exterior of any Unit, including, without limitation, on any porches, patios or decks.

4.9 Mineral Exploration. No portion of the Condominium 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.

4.10 Environmental Restrictions. All residents of the Condominium shall be responsible for complying with all federal and state environmental and health laws. Without limiting the foregoing, no Unit Owner or other resident may dispose of, transport, or store "hazardous materials" in his Unit or elsewhere in the Condominium other than small amounts of ordinary household non-combustible cleaning agents maintained in the Owner's residential Unit or Garage Unit. In no event may any Unit Owner or resident dispose of any hazardous materials, including without limitation, motor oil, hydrocarbons, or other petroleum products, in or down a dry well on or adjacent to the Condominium.

4.11 Diseases and Insects. No Unit Owner shall permit any thing or condition to exist upon the Condominium which could induce, breed or harbor infectious plant or animal diseases or noxious insects.

4.12 General Restrictions Regarding Parking of Vehicles. No truck (other than a Family Vehicle truck described below), mobile home, mini or standard size motor home, travel trailer, tent trailer, trailer, all-terrain vehicle, bus, camper shell, detached camper, recreational vehicle, boat, boat trailer, or other similar equipment or vehicle (hereinafter in this Article 4 referred to as **"Commercial Vehicles"**) may be parked, kept, or maintained on any part of the Condominium other than in an enclosed Garage Unit. A **"Family Vehicle"** means any domestic or foreign car,

station wagon, sport wagon, pick-up truck of less than one (1) ton capacity with camper shells not exceeding eight (8) feet in height measured from ground level, mini-van, jeep, sport utility vehicle, motorcycle and similar non-commercial and non-recreational vehicles that are used by the Owner of the Unit or his family members, tenants, guests or invitees for family and domestic purposes and which are used on a regular and recurring basis for basic transportation. The Board may, acting in good faith, designate a Commercial Vehicle as a Family Vehicle, if prior to use, the Unit Owner petitions the Board to classify the same as a Family Vehicle if the Commercial Vehicle is similar in size and appearance to a Family Vehicle and the parking of such Vehicle on the Condominium will not adversely affect the Condominium or the Owners of Units therein. Family Vehicles and Commercial Vehicles are collectively referred to in this Article 4 as **"Vehicles."**

4.13 Garage Unit and Limited Common Element Parking Restrictions. No Garage Unit may be used for storage that interferes with the parking of Vehicles in the Garage Unit. Unit Owners or other lawful residents of a Unit must park their Vehicles overnight in the Garage Units allocated to their Units prior to parking any excess or extra Vehicles in any Carport or any other portion of the Condominium designed for parking. In no event may any Unit Owner or other lawful resident of a Unit or their guests and invitees park a Vehicle in a Garage Unit or Carport Limited Common Element parking space other than the ones specifically appurtenant or allocated to their Unit.

4.14 Motor Vehicle Repair and Towing of Vehicles. Other than temporary emergency repairs, no Vehicle shall be constructed, reconstructed, serviced or repaired, and no inoperable Vehicle may be stored on any portion of the Condominium, other than in an enclosed assigned Garage Unit. The Board of Directors shall have the right to have any Vehicle parked, kept, maintained, constructed, reconstructed or repaired in violation of the Condominium Documents towed away at the sole cost and expense of the owner of the vehicle or equipment. Any expense incurred by the Association in connection with the towing of any vehicle or equipment shall be paid to the Association upon demand by the owner of the vehicle or equipment. If the vehicle or equipment is owned by an Owner, any amounts payable to the Association shall be secured by the Assessment Lien, and the Association may enforce collection of such amounts in the same manner provided for in this Declaration for the collection of Assessments.

4.15 Signs. No emblem, logo, sign or billboard of any kind, including, but not limited to, "For Sale" or "For Rent" signs, (other than a Unit Owner name and address identification sign not exceeding 6 x 12 inches in size on the door of a Unit) shall be displayed so that it is visible from the exterior of any Unit or Building or any other portion of the Condominium without the prior written approval of the Board; except for: (i) signs used by Declarant to advertise the Units for sale or lease; (ii) signs on the Common Elements as may be placed or approved by the Declarant during the Period of Declarant Control, or by the Board, thereafter; (iii) any signs as may be required by legal proceedings; and (iv) such signs as are approved by the Board.

4.16 Lawful Use. No immoral, improper, offensive, or unlawful use shall be made of any part of the Condominium. All valid laws, zoning ordinances, and regulations of all

governmental bodies having jurisdiction over the Condominium shall be observed. Any violation of such laws, zoning ordinances or regulations shall be a violation of this Declaration.

4.17 Nuisances and Offensive Activity. No nuisance shall be permitted to exist or operate upon the Condominium, and no activity shall be conducted upon the Condominium which is offensive or detrimental to any portion of the Condominium or any Unit Owner or other occupant of the Condominium. No exterior speakers, horns, whistles, bells or other sound devices, except security or other emergency devices used exclusively for security or emergency purposes, shall be located, used or placed on the Condominium.

4.18 Window Coverings. No reflective materials, including, without limitation, aluminum foil, reflective screens or glass, mirrors or similar items, shall be installed or placed upon the outside or inside of any windows of a Unit without the prior written approval of the Board. No enclosures, drapes, blinds, shades, screens or other items affecting the exterior appearance of a Unit or any Limited Common Elements allocated to a Unit shall be constructed or installed in any Unit or Limited Common Element without the prior written approval of the Board, unless the items so installed are substantially identical in color, texture and size as previously approved and installed window coverings being so replaced.

4.19 Limitation on Leasing of Units. No Unit Owner may lease less than his entire Unit. Except to the extent required by law, no more than thirty percent (30%) of the Units may be leased at any one time and a Unit Owner shall notify the Board prior to leasing his Unit so that the Board may confirm compliance with this section. All leases shall be in writing and shall provide that the terms of the lease shall be subject in all respects to the provisions of the Condominium Documents, and any failure by the lessee to comply with the terms of the Condominium Documents shall be a default under the lease. Upon leasing his Unit, a Unit Owner shall promptly notify the Association of the commencement date and termination date of the lease and the names of each lessee or other person who will be occupying the Unit during the term of the lease.

4.20 Community Privacy Measures. Each Unit Owner understands and agrees that neither the Association (nor its officers, directors, employees, and agents) nor the Declarant (nor its officers, directors, employees and agents) is responsible for the acts and omissions of any third parties or of any other Owner or Owner's family members, guests, tenants and invitees resulting in damages or injury to person or property. Any entry/privacy gate features or common privacy measures installed by Declarant will be maintained by the Association as a Common Expense Liability. Each Unit Owner understands that any entry/privacy gate features that are in effect at the time he becomes a Unit Owner may be abandoned, terminated and/or modified by a majority vote of the Board. The commencement of any such devices or controls shall not be deemed to be an assumption of any duty on the part of the Association or the Declarant with respect to the Condominium and neither Declarant, the Board (nor any committee thereof) make any representation or warranty concerning the efficacy of such devices relating to security or the ease of entry of fire, police or other emergency personnel onto the Condominium.

4.21 Variances. The Board may authorize a variance from compliance with any of the provisions of this Declaration, including this Article 4, from time to time, when circumstances

such as hardship, aesthetic or environmental considerations may require. Such variances must be evidenced in writing and must be signed by a majority of the Board. If such variance is granted, no violation of the covenants, conditions and restrictions contained in this Declaration shall be deemed to have occurred with respect to the specific matter for which the variance was granted. The granting of such a variance shall not operate to waive any of the terms and provisions of this Declaration for any purpose except as to the particular provision hereof covered by the variance, and only for so long as the special circumstances warranting the variance exist, nor shall it affect in any way the Unit Owner's obligation to comply with all governmental laws and regulations affecting the use of his Unit. The Board shall have the right to condition the granting of a variance as it may determine in the Board's sole discretion, including, without limitation; making a variance temporary or permanent; or requiring the removal or replacement of a non-permanent or semi-permanent structure upon the sale or other conveyance of a Unit. Moreover, because of the unique facts and circumstances surrounding each variance request, the granting of a variance in one instance or under certain terms and conditions does not mandate the granting of a variance under similar or related circumstances, terms or conditions if the experiences of the Association and the Condominium as a whole or the differences in circumstances (however slight) of a variance request from a previously approved variance lead the Board, in good faith, to disapprove a variance request in such instance.

ARTICLE 5

MAINTENANCE AND REPAIR OF COMMON ELEMENTS AND UNITS

5.0 Duties of the Association. The Association shall maintain, repair and make necessary improvements to all Common Elements (including the structural elements of Limited Common Elements), whether located inside or outside the Buildings, except for the specific portions of the Limited Common Elements or Common Elements which the Unit Owners are obligated to maintain pursuant to Section 5.1 of this Declaration. Without limitation, the Association shall be responsible for maintaining:

(i) residential Building exteriors and the roofs thereof;
(ii) Garage Building exteriors and roofs, but not including the Garage Unit doors and any affixed Garage door opening systems, which shall be the sole responsibility of the Owners thereof;
(iii) the private drives, paved carport areas, sidewalks and walkways;
(iv) carport covers;
(v) the entryway gates and related features;
(vi) all Common Elements landscaping and irrigation systems, and
(vii) lighting and light fixtures in the Common Elements.

The cost of all such repairs, maintenance and improvements shall be a Common Expense and shall be paid for by the Association. The Board shall be the sole and absolute judge as to the appropriate maintenance of the Common Elements and the Condominium.

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5.1 Duties of Unit Owners.

(A) Each Unit Owner shall maintain, repair, replace and restore, at his sole cost and expense, all portions of his Unit (including the Garage Unit), subject to the further provisions of the Condominium Documents.

(B) Each Unit Owner, at his sole cost and expense, shall be responsible for the maintenance and repair of the Limited Common Elements allocated to his Unit pursuant to Section 2.5 of this Declaration as Limited Common Elements, including, without limitation: periodic maintenance, painting, and repair of the concrete slabs or finished flooring of, the terrace and/or deck (except for repair to the structural portions thereof); all doors and windows of the Unit (including Garage Unit doors and affixed mechanical opening devices); the air conditioning unit (including compressors and condensers), heater and hot water heater servicing the Unit and, to the extent not included within the categories described in this Section 5.1(B), the Limited Common Elements of the type described in Sections 2.1 (B) and (D) above.

(C) Each Unit Owner shall take all necessary action to keep the Limited Common Elements or Common Elements which he is obligated to maintain under this Section 5.1 clean and free from unsightly accumulations of trash, furniture in weathered or poor condition, and litter. No Unit Owner may paint or change the exterior color scheme or surfacing materials of the Garage Unit door, his patio or balcony or any portion of the Limited Common Elements allocated to his Unit visible from the Common Elements or any other Unit without the prior written consent of the Board.

5.2 Repair or Restoration Necessitated by Unit Owner. Each Unit Owner shall be liable to the Association, to the extent permitted by Arizona law, for any damage to the Common Elements or the Improvements, or equipment thereon, which results from the negligence or willful misconduct or omission of the Unit Owner or that Owner's family members, tenants, guests, invitees and pets. The cost to the Association of any such repair, maintenance or replacement required by such act or omission of a Unit Owner shall be paid by the Unit Owner, upon demand, to the Association. The Association may enforce collection of any such amounts in the same manner and to the same extent as provided for in this Declaration for the collection of Assessments.

5.3 Unit Owner's Failure to Maintain. If a Unit Owner fails to maintain in good condition and repair his Unit or any Common or Limited Common Element which he is obligated to maintain under this Declaration, including the Garage parking space assigned to his Unit and appurtenances thereto, in the manner set forth in this Declaration and the required maintenance, repair or replacement is not performed within thirty (30) days after written notice has been given to the Unit Owner by the Association, the Association shall have the right, but not the obligation, to perform the required maintenance, repair or replacement. The cost of any such maintenance, repair or replacement shall be assessed against the nonperforming Unit Owner pursuant to Section 7.1(E) of this Declaration.

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ARTICLE 6

THE ASSOCIATION; RIGHTS AND DUTIES; MEMBERSHIP

6.0 Rights, Powers and Duties of the Association. No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by law and as are set forth in the Condominium Documents together with such rights, powers and duties as may be reasonably necessary to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act. The Association shall have the right to finance capital Improvements in the Condominium by encumbering future Assessments if such action is approved by the written consent or affirmative vote of Unit Owners representing more than fifty percent (50%) of the votes in the Association and by Declarant during the Period of Declarant Control. Unless the Condominium Documents or the Condominium Act specifically require a vote of the Members, approvals or actions to be given or taken by the Association shall be valid if given or taken by the Board. The Association has the specific duty to make available to the Declarant, Eligible Mortgage Holders, Unit Owners, and Eligible Insurers or Guarantors during normal business hours, current copies of the Condominium Documents and other books, records and financial statements of the Association as may be requested from time to time by such parties. Such requests shall be in writing, and the Association shall have the right to charge for copying expenses and the reasonable cost of postage, shipping or transmission of the information requested.

6.1 Directors and Officers.

(A) During the Period of Declarant Control, the Declarant shall have the right to appoint and remove the members of the Board of Directors and the officers of the Association who do not have to be Unit Owners.

(B) Upon the termination of the Period of Declarant Control, the Unit Owners shall elect the Board of Directors which must consist of at least one (1) member and not more than three (3) members, all of whom must be Unit Owners or spouses of Unit Owners and resident in the Condominium. The Board of Directors elected by the Unit Owners shall then elect the officers of the Association.

(C) The Declarant may voluntarily surrender his right to appoint and remove the members of the Board of Directors and the officers of the Association before termination of the Period of Declarant Control, and in that event, the Declarant may require, for the duration of the Period of Declarant Control, that specified actions of the Association or the Board of Directors, as described in a recorded instrument executed by the Declarant, be approved by the Declarant before they become effective.

6.2 Rules. The Board of Directors, from time to time and subject to the provisions of this Declaration and the Condominium Act, may adopt, amend, and repeal rules and regulations. The Rules may, among other things, restrict and govern the use by any Unit Owner, by the

family of such Unit Owner, or by any invitee, licensee or lessee of such Unit Owner, of any area within the Condominium subject to the Association's jurisdiction and control; provided, however, that the Rules may not unreasonably discriminate among Unit Owners and shall not be inconsistent with the Condominium Act, the applicable federal and state Fair Housing Acts, this Declaration, the Articles or Bylaws. 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 Unit Owner and may be recorded.

6.3 Composition of Members. Each Unit Owner shall be a Member of the Association. The membership of the Association at all times shall consist exclusively of all the Unit Owners. Membership in the Association is mandatory and such Membership and the Allocated Interests thereof are appurtenant thereto, and may not be separated from, ownership of the Unit; provided, however, the Allocated Interests of Units from time to time may be modified or changed as expressly permitted in this Declaration and authorized under the Condominium Act. No Owner during his ownership of a Unit shall have the right to relinquish or terminate his membership in the Association.

6.4 Personal Liability. Neither Declarant nor any member of the Board or of any committee of the Association, any officer of the Association nor any manager or other employee of the Association, shall be personally liable to any Member, or to any other Person, including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error or negligence of the Declarant, the Association, the Board, the managing agent, any representative or employee of the Association, or any committee, committee member or officer of the Association; provided, however, the limitations set forth in this Section 6.5 shall not apply to any Person who has failed to act in good faith or has engaged in willful or intentional misconduct.

6.5 Implied Rights. The Association may exercise any right or privilege given to the Association expressly by the Condominium Documents and every other right or privilege reasonably to be implied from the existence of any right or privilege given to the Association by the Condominium Documents or reasonably necessary to effectuate any such right or privilege.

ARTICLE 7

ASSESSMENTS

7.0 Preparation of Budget.

(A) At least sixty (60) days (or soon thereafter as feasible) before the beginning of the first full fiscal year of the Association after the first Unit is conveyed to a Purchaser and each fiscal year thereafter, the Board of Directors shall adopt a budget for the Association containing an estimate of the total amount of funds which the Board of Directors believes will be required during the ensuing fiscal year to pay all Common Expenses including, but not limited to: (i) the amount required to pay the cost of maintenance, management, operation, repair and replacement of the Common Elements and those parts of the Units, if any, which the Association has the

responsibility of maintaining, repairing and replacing; (ii) the cost of wages, materials, insurance premiums, services, supplies and other expenses required for the administration, operation, maintenance and repair of the Condominium, including, without limitation, the cost of all utility services not separately metered to the Units; (iii) the amount required to render to the Unit Owners all services required to be rendered by the Association under the Condominium Documents; and (iv) such amounts as are necessary to provide general operating reserves and reserves for contingencies and replacements. The budget shall separately reflect any Common Expenses to be assessed against less than all of the Units pursuant to Section 7.1(E) or (F) of this Declaration and must include an adequate allocation to reserves as part of the Common Expense Assessment.

(B) Within thirty (30) days after the adoption of a budget, the Board of Directors shall send to each Unit Owner a summary of the budget and a statement of the amount of the Common Expense Assessment assessed against the Unit of the Unit Owner in accordance with Section 7.1 of this Declaration. The failure or delay of the Board of Directors to prepare or adopt a budget for any fiscal year shall not constitute a waiver or release in any manner of a Unit Owner's obligation to pay his allocable share of the Common Expenses as provided in Section 7.1 of this Declaration and each Unit Owner shall continue to pay the Common Expense Assessment against his Unit as established for the previous fiscal year until notice of the Common Expense Assessment for the new fiscal year has been established by the Board of Directors.

(C) The Board of Directors is expressly authorized to adopt and amend budgets for the Association, and no ratification of any budget by the Unit Owners shall be required.

7.1 Common Expense Assessment.

(A) For each fiscal year of the Association commencing with the fiscal year in which the first Unit is conveyed to a Purchaser, the total amount of the estimated Common Expenses set forth in the budget adopted by the Board of Directors (except for the Common Expenses which are to be assessed against less than all of the Units pursuant to subsections (E) and (F) of this section) shall be assessed against each residential Unit in the proportion to the Unit's Common Expense Liability as set forth in Section 2.3 of this Declaration. The amount of the Common Expense Assessment assessed pursuant to this subsection (A) shall not exceed the maximum Common Expense Assessment for the fiscal year as computed pursuant to subsection (B) of this section. If the Board of Directors determines during any fiscal year that its funds budgeted or available for that fiscal year are, or will, become inadequate to meet all Common Expenses for any reason, including, without limitation, nonpayment of Assessments by Members, it may increase the Common Expense Assessment for that fiscal year and the revised Common Expense Assessment shall commence on the date designated by the Board of Directors, except that no increase in the Common Expense Assessment assessed pursuant to this subsection (A) exceeding the maximum Common Expense Assessment for such fiscal year shall become effective until approved by Members entitled to cast at least two-thirds (2/3) of the votes entitled to be cast by Members who are voting in person or by proxy at a meeting duly called for such purpose.

(B) The maximum Common Expense Assessment for each fiscal year of the Association after the first full or partial fiscal year thereof shall not be greater than an amount equal to one

hundred ten percent of the previous year's Common Expense Assessment established by the Board and assessed against the Units. From and after January 1 of the year immediately following the conveyance of the first Unit to a Purchaser, the Common Expense Assessment for any fiscal year of the Association may be increased by an amount greater than the maximum increase allowed in this Section 7.1(B), only by a vote of Members entitled to cast at least two-thirds (2/3) of the votes entitled to be cast by Members who are voting in person or by proxy at a meeting duly called for such purpose. The maximum Common Expense Assessment limitations herein contained shall apply only to the amount of the Common Expense Assessment assessed pursuant to subsection (A) of this section and shall not apply to the amount of Common Expenses assessed pursuant to subsection (E) or (F) of this section.

(C) The Common Expense Assessments shall commence as to all Units in the Condominium on the first day of the month following the conveyance of the first Unit to a Purchaser. The first Common Expense Assessment shall be adjusted according to the number of months remaining in the fiscal year of the Association. The Board of Directors may require that the Common Expense Assessments or Special Assessments be paid in installments. Unless otherwise directed by the Board, Common Expense Assessments shall be paid in monthly installments and shall be due and payable on the first day of each month.

(D) Except as otherwise expressly provided for in this Declaration, all Common Expenses, including, but not limited to, Common Expenses associated with the maintenance, repair and replacement of Limited Common Elements, and reserves for Common Expenses shall be assessed against all of the Units in accordance with subsection (A) of this section.

(E) If any Common Expense is caused by the negligence, omission or willful misconduct of any Unit Owner, the Association shall assess that Common Expense exclusively against his Unit.

(F) Assessments to pay a judgment against the Association may be made only against the Units in the Condominium at the time the judgment was entered, in proportion to their Common Expense Liability.

(G) The Common Expense Assessment for any Unit in the Condominium on which construction has not been "substantially completed" shall be an amount equal to twenty-five percent (25%) of the Common Expense Assessment for Units which have been substantially completed. So long as any Unit owned by the Declarant qualifies for the reduced Common Expense Assessment provided for in this subsection (G), and, only if Declarant elects to pay such reduced Assessment, the Declarant shall be obligated to pay to the Association any deficiencies in the monies resulting from the Declarant having paid a reduced Common Expense Assessment and necessary for the Association to be able to timely pay all Common Expenses. Without limiting the foregoing, "substantial completion" of a Unit shall mean a Unit that is ready for immediate occupancy by a resident either by sale or lease and contain all ordinary and customary necessary kitchen, bathroom and flooring fixtures for that purpose.

7.2 Special Assessments. In addition to Common Expense Assessments, the Association may levy, in any fiscal year of the Association, a special assessment applicable to that fiscal year

only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair, or replacement of a capital improvement of the Common Elements, including fixtures and personal property related thereto, or for any other lawful Association purpose, provided that any Special Assessment shall have first been approved by Unit Owners representing two-thirds (2/3) of the votes in the Association and who are voting in person or by proxy at a meeting duly called for such purpose and approved by Declarant, during the Period of Declarant Control. Unless otherwise specified by the Board of Directors, Special Assessments shall be due thirty (30) days after they are levied by the Association and notice of the Special Assessment is given to the Unit Owners.

7.3 Notice and Quorum for Any Action Authorized Under Section 7.1 or 7.2. Written notice of any meeting called for the purpose of obtaining the consent of the Members for any action for which the consent of Members is required under Sections 7.1 or 7.2 shall be sent to all Members not less than fifteen (15) days nor more than fifty (50) days in advance of the meeting. At the first such meeting called, the presence of Members or of proxies entitled to cast sixty percent (60%) of all the votes in the Association 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 (1/2) of the required quorum at the preceding meeting. No such subsequent meeting shall be held more than fifty (50) days following the preceding meeting.

7.4 Effect of Nonpayment of Assessments; Remedies of the Association.

(A) Any Assessment, or any installment of an Assessment, which is not paid within thirty (30) days after the Assessment first became due shall be deemed delinquent and shall bear interest from the date of the delinquency at the rate of eighteen percent (18%) per annum. In addition, the Board of Directors may establish a reasonable late fee to be charged to a Unit Owner and assessed against his Unit as part of the Assessment Lien for each installment of an Assessment that is deemed delinquent.

(B) All Assessments, monetary penalties and other fees and charges imposed or levied against any Unit or Unit Owner shall be secured by the Assessment Lien as provided for in the Condominium Act. The recording of this Declaration constitutes record notice and perfection of the Assessment Lien and no further recordation of any claim of lien shall be required. Although not required to perfect the Assessment Lien, the Association shall have the right, but not the obligation, to record a notice setting forth the amount of any delinquent Assessments, monetary penalties or other fees or charges imposed or levied against the Unit or the Unit Owner which are secured by the Assessment Lien.

(C) The Association shall have the right, at its option, to enforce collection of any delinquent Assessments, monetary penalties and all other fees and charges owed to the Association in any manner allowed by law, including, but not limited to (i) bringing an action at law against the Unit Owner personally obligated to pay the delinquent amounts which came due at the time he was the Owner thereof and such action may be brought without waiving the Assessment Lien securing any such delinquent amounts, provided, however, that the personal obligation to pay delinquent Assessments which came due prior to the transfer of ownership

shall not pass to successors in title; (ii) bringing an action to foreclose its Assessment Lien against the Unit in the manner provided by law for the foreclosure of a realty mortgage; and (iii) suspending voting rights as provided in the Bylaws. The Association shall have the power to bid in at any foreclosure sale and to purchase, acquire, hold, lease, mortgage and convey any and all Units purchased at such sale.

7.5 Subordination of Assessment Lien to Mortgages. The Assessment Lien shall be subordinate to the lien of any First Mortgage. Any First Mortgagee or any other party acquiring title or coming into possession of a Unit through foreclosure of a First Mortgage, purchase at a foreclosure sale or trustee sale, or through any equivalent proceedings, such as, but not limited to, the taking of a deed in lieu of foreclosure, shall acquire title free and clear of any claims for unpaid Assessments, monetary penalties and other charges and fees against the Unit which became payable prior to such sale or transfer. Any delinquent Assessments, monetary penalties and other fees and charges which are extinguished pursuant to this section may be reallocated and assessed to all Units as a Common Expense. Any Assessments, monetary penalties and other fees and charges against the Unit which accrue prior to such sale or transfer shall remain the obligation of the defaulting Unit Owner.

7.6 Exemption of Unit Owner. No Unit Owner may exempt himself from liability for payment of Assessments, monetary penalties and other fees and charges levied pursuant to the Condominium Documents by waiver and nonuse of any of the Common Elements and facilities or by the abandonment of his Unit.

7.7 Certificate of Payment. The Association, on written request, shall furnish to a lienholder, Unit Owner or Person designated by a Unit Owner, a recordable statement setting forth the amount of unpaid Assessments against his Unit. The statement shall be furnished within twenty (20) business days after receipt of the request and is binding on the Association, the Board of Directors, and every Unit Owner. The Association may charge a reasonable fee in an amount established by the Board of Directors for each such statement. In addition, the Association shall furnish such statements as may be required under A.R.S. §33-1260 within the time frames set forth therein for compliance.

7.8 No Offsets. All Assessments, monetary penalties and other fees and charges shall be payable in accordance with the provisions of this Declaration, and no offsets against such Assessments, monetary penalties and other fees and charges shall be permitted for any reason, including, without limitation, a claim that the Association is not properly exercising its duties and powers as provided in the Condominium Documents or the Condominium Act.

7.9 Surplus Funds. Surplus funds of the Association remaining after payment of or provisions for Common Expenses and any prepayment of reserves may in the discretion of the Board of Directors either be returned to the Unit Owners pro rata in accordance with each Unit Owner's Common Expense Liability or be credited on a pro rata basis to the Unit Owners to reduce each Unit Owner's future Common Expense Liability.

7.10 Monetary Penalties. In accordance with the procedures set forth in the Bylaws, the Board of Directors shall have the right to levy reasonable monetary penalties against a Unit Owner for violations of the Condominium Documents.

7.11 Working Capital Fund. Upon the closing of the sale of each Unit by the Declarant, the Purchaser shall pay to the Association an amount equal to one-sixth (1/6) of the Common Expense Assessment for the Unit to establish a working capital fund to meet unforeseen expenditures or to purchase any additional equipment or services by or for the Association. Amounts paid to the Association pursuant to this Section 7.11 shall be nonrefundable and shall not be considered as an advance payment of any Assessments levied by the Association pursuant to this Declaration. During the Period of Declarant Control, such funds shall not be used to defray Association expenses, reserve contributions, or construction costs or to make up budget deficits. After the Period of Declarant Control expires or is terminated, the working capital fund shall be transferred to the Association for deposit to a segregated fund and Declarant shall pay to the Association the working capital fund payment required under this Section for each unsold Unit still owned by the Declarant. When such unsold units are conveyed to a Purchaser, Declarant may reimburse itself for funds it paid to the Association for such Units' share of the working capital fund by using funds collected at the closing when the Unit is sold.

ARTICLE 8

INSURANCE

8.0 Scope of Coverage.

(A) Commencing not later than the date of the first conveyance of a Unit to a Purchaser, the Association shall maintain, to the extent reasonably available, the following insurance coverage:

(i) Property insurance on the Common Elements and Units, exclusive of improvements and betterments which were not part of the original construction. The policy is to be issued on a "Special Form" policy or its equivalent in an amount determined by the Board of Directors; provided, however, that the total amount of insurance shall not be less than one hundred percent (100%) of the current replacement cost of the insured property, exclusive of land, excavations, foundations and other items normally excluded from a master or blanket hazard and multi-peril property insurance policy.

(ii) Comprehensive General Liability insurance, for a limit to be determined by the Board, but not less than $1,000,000.00 for any single occurrence and $2,000,000 general aggregate. Such insurance shall cover all occurrences commonly insured against for death, bodily injury and property damage arising out of or in connection with the use, ownership or maintenance of the Common Elements.

(iii) Workmen's compensation insurance to the extent necessary to meet the requirements of the laws of Arizona.

(iv) Directors' and officers' liability insurance covering all the directors and officers of the Association in such limits as the Board of Directors may determine from time to time.

(v) Such other insurance as the Association shall determine from time to time to be appropriate to protect the Association, the members of the Board of Directors, or the Unit Owners.

(B) The insurance policies purchased by the Association shall, to the extent reasonably available, contain the following provisions:

(i) Each Unit Owner shall be an insured under the policy with respect to liability arising out of his ownership of an undivided interest in the Common Elements or his membership in the Association.

(ii) There shall be no subrogation with respect to the Association, its agents, servants, its Board of Directors or officers thereof, and employees against Unit Owners and members of their household.

(iii) No act or omission by any Unit Owner, unless acting within the scope of his authority on behalf of the Association, shall void the policy or be a condition to recovery on the policy.

(iv) The coverage afforded by such policy shall be primary and shall not be brought into contribution or proration with any insurance which may be purchased by Unit Owners or their mortgagees or beneficiaries under deeds of trust.

(v) A "severability of interest" endorsement which shall preclude the insurer from denying the claim of a Unit Owner because of the negligent acts of the Association or other Unit Owners.

(vi) The Association shall be the insured for use and benefit of the individual Unit Owners (designated by name if required by the insurer).

(vii) For policies of hazard insurance, a standard mortgagee clause providing that the insurance carrier shall notify the Association and each First Mortgagee named in the policy at least ten (10) days in advance of the effective date of any substantial change in coverage or cancellation of the policy.

(viii) Any Insurance Trust Agreement will be recognized by the insurer.

(ix) Such coverage shall not be contingent upon action by the insurance carrier's board of directors, policyholders or members or permit claims for contribution or assessments to be made against Unit Owners or their Mortgagees, including Eligible Mortgage Holders, or Eligible Insurers or Guarantors.

(x) If the Condominium is located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards, a "blanket policy" of flood insurance on the Condominium in the lesser of one hundred percent (100%) of the current replacement cost of the Buildings and any other property covered on the required form of policy or the maximum limit of coverage available under the National Insurance Act of 1968, as amended.

(xi) "Agreed Amount," and "Building Ordinance or Law" endorsements, except where expressly not applicable or not available.

8.1 Payment of Premiums. Premiums for all insurance obtained by the Association pursuant to this Article and all deductibles thereunder shall be Common Expenses and shall be paid for by the Association.

8.2 Insurance Obtained by Unit Owners/Non-Liability of Association. The issuance of insurance policies to the Association pursuant to this Article 8 shall not prevent a Unit Owner from obtaining insurance for his own benefit and at his own expense covering his Unit, his personal property and providing personal liability coverage. Notwithstanding the obligation of the Association to obtain insurance coverage as stated in this Declaration, neither the Declarant nor the Association, or their respective officers, directors, employees and agents, shall be liable to any Unit Owner or any other party if any risks or hazards are not covered by the insurance to be maintained by the Association or if the amount of the insurance is not adequate, and it shall be the responsibility of each Unit Owner to ascertain the coverage and protection afforded by the Association's insurance and to procure and pay for any additional insurance coverage and protection that the Unit Owner may desire.

8.3 Payment of Insurance Proceeds. Any loss covered by property insurance obtained by the Association in accordance with this Article 8 shall be adjusted with the Association and the insurance proceeds shall be payable to the Association and not to any mortgagee or beneficiary under a deed of trust. The Association shall hold any insurance proceeds in trust for Unit Owners and lienholders as their interests may appear, and the proceeds shall be disbursed and applied as provided for in §33-1253 of the Condominium Act.

8.4 Certificate of Insurance. An insurer that has issued an insurance policy pursuant to this Article 8 of the Declaration shall issue certificates or memoranda of insurance to the Association and, on written request, to any Unit Owner, mortgagee, or beneficiary under a Deed of Trust. The insurer issuing the policy shall not cancel or refuse to renew it until thirty (30) days after notice of the proposed cancellation or nonrenewal has been mailed to the Association, each Unit Owner, and each mortgagee or beneficiary under a deed of trust to whom a certificate or memorandum of insurance has been issued at their respective last known address.

ARTICLE 9

RIGHTS OF FIRST MORTGAGEES

9.0 Notification to First Mortgagees. Upon receipt by the Association of a written request from a First Mortgagee or insurer or governmental guarantor of a First Mortgage informing the Association of its correct name and mailing address and number or address of the Unit to which the request relates, the Association shall provide such Eligible Mortgage Holder or Eligible Insurer or Guarantor with timely written notice of the following:

(A) Any condemnation loss or any casualty loss which affects a material portion of the Condominium or any Unit on which there is a First Mortgage held, insured or guaranteed by such Eligible Mortgage Holder or Eligible Insurer or Guarantor;

(B) Any delinquency in the payment of Assessments or charges owed by a Unit Owner subject to a First Mortgage held, insured or guaranteed by such Eligible Mortgage Holder or Eligible Insurer or Guarantor or any obligation under the Condominium Documents, which delinquency or default remains uncured for the period of sixty (60) days;

(C) Any lapse, cancellation or material modification of any insurance policy or fidelity bond maintained by the Association;

(D) Any proposed action which requires the consent of a specified percentage of Eligible Mortgage Holders as set forth in Section 9.1 of this Declaration.

9.1 Approval Required for Amendment to Condominium Documents.

(A) The approval of Unit Owners representing at least sixty-seven percent (67%) of the total allocated votes in the Association and of Eligible Mortgage Holders holding First Mortgages on Units the Unit Owners of which have at least fifty-one percent (51%) of the votes in the Association allocated to Unit Owners of all Units subject to First Mortgages held by Eligible Mortgage Holders shall be required to add or amend any material provisions of the Condominium Documents which establish, provide for, govern or regulate any of the following:

(i) Voting rights;

(ii) Assessments, Assessment Liens, or subordination of Assessment Liens;

(iii) Reserves for maintenance, repair and replacement of Common Elements;

(iv) Insurance or fidelity bonds;

(v) Responsibility for maintenance and repairs;

(vi) Expansion or contraction of the Condominium, or the addition of property to

Condominium;

(vii) Boundaries of any Unit;

(viii) Reallocation of interests in the Common Elements or Limited Common Elements or rights to their use;

(ix) Convertibility of Units into Common Elements or of Common Elements into Units;

(x) Leasing of Units;

(xi) Imposition of any restriction on a Unit Owner's right to sell or transfer his Unit;

(xii) A decision by the Association to establish self-management when professional management had been required previously by an Eligible Mortgage Holder;

(xiii) Restoration or repair of the Condominium (after hazard damage or partial condemnation) in a manner other than specified in the Condominium Documents;

(xiv) Any action to terminate the legal status of the Condominium after substantial destruction or condemnation occurs;

(xv) Any provisions which expressly benefit First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors.

(B) Any action to terminate the legal status of the Condominium for reasons other than substantial destruction or condemnation of the Condominium must be approved by Unit Owners representing at least sixty-seven percent (67%) of the total allocated votes in the Association and by Eligible Mortgage Holders holding First Mortgages on Units the Unit Owners of which have at least sixty-seven percent (67%) of the votes in the Association allocated to Unit Owners of all Units subject to First Mortgages held by Eligible Mortgage Holders.

(C) Any First Mortgagee who receives a written request to approve additions or amendments to any of the Condominium Documents, which additions or amendments are not material, who does not deliver or mail to the requesting party a negative response within thirty (30) days shall be deemed to have approved such request. Any addition or amendment to the Condominium Documents shall not be considered material if it is for the purpose of correcting technical errors or for clarification only.

(D) The approvals required by this section shall not apply to amendments that may be executed by the Declarant in the exercise of its Development Rights.

9.2 Prohibition Against Right of First Refusal. The right of a Unit Owner to sell, transfer or otherwise convey his Unit shall not be subject to any right of first refusal or similar restriction. This Section 9.2 may not be amended without the consent of all First Mortgagees then of record.

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9.3 Right of Inspection of Records. Any Unit Owner, First Mortgagee or Eligible Insurer or Guarantor shall, upon written request, be entitled to (i) inspect the current copies of the Condominium Documents and the books, records and financial statements of the Association during normal business hours; (ii) receive within ninety (90) days following the end of any fiscal year of the Association, an audited financial statement of the Association for the immediately preceding fiscal year of the Association, free of charge to the requesting party; and (iii) receive written notice of all meetings of the Members of the Association and be permitted to designate a representative to attend all such meetings. Notwithstanding the foregoing, the Board of Directors may withhold from disclosure such books, records and documents of the Association, or portions thereof, designated under A.R.S. §33-1258 of the Condominium Act.

9.4 Prior Written Approval of First Mortgagees. Except as provided by statute in case of condemnation or substantial loss to the Units or the Common Elements, unless at least two-thirds (2/3) of all First Mortgagees (based upon one vote for each First Mortgage owned) or Unit Owners (other than the Declarant or other sponsor, developer or builder of the Condominium) of the Units have given their prior written approval, the Association shall not be entitled to:

(A) By act or omission, seek to abandon or terminate this Declaration or the Condominium;

(B) Change the pro rata interest or obligations of any individual Unit for the purpose of: (i) levying Assessments or charges or allocating distributions of hazard insurance proceeds or condemnation awards; or (ii) determining the pro rata share of ownership of each Unit in the Common Elements;

(C) Partition or subdivide any Unit;

(D) By act or omission, seek to abandon, partition, subdivide, encumber, sell or transfer the Common Elements. The granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Elements shall not be deemed a transfer within the meaning of this subsection;

(E) Use hazard insurance proceeds for losses to any Units or the Common Elements for any purpose other than the repair, replacement or reconstruction of such Units or the Common Elements.

Nothing contained in this section or any other provision of this Declaration shall be deemed to grant the Association the right to partition any Unit without the consent of the Owners thereof. Any partition of a Unit shall be subject to such limitations and prohibitions as may be set forth elsewhere in this Declaration or as may be provided under Arizona law.

9.5 Liens Prior to First Mortgage. All taxes, assessments, and charges which may become liens prior to the First Mortgage under local law shall relate only to the individual Unit and not to the Condominium as a whole.

9.6 Condemnation or Insurance Proceeds. No Unit Owner, or any other party, shall have priority over any rights of any First Mortgagee of the Unit pursuant to its mortgage in the case of a distribution to such Unit Owner of insurance proceeds or condemnation awards for losses to or a taking of Units and/or Common Elements. Subject to the foregoing, the allocation of awards for the exercise of eminent domain, or deeds in lieu thereof, shall be governed by the provisions of §33-1206 of the Condominium Act.

9.7 Limitation on Partition and Subdivision. No Unit shall be partitioned or subdivided without the prior written approval of any First Mortgagee of that Unit. This Section 9.7 may not be amended without the consent of all First Mortgagees then of record.

9.8 Conflicting Provisions. In the event of any conflict or inconsistency between the provisions of this Article 9 and any other provision of the Condominium Documents, the provisions of this Article 9 shall prevail; provided, however, that in the event of any conflict or inconsistency between the different sections of this Article 9 and any other provision of the Condominium Documents with respect to the number or percentage of Unit Owners, First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors that must consent to (i) an amendment to any of the Condominium Documents; (ii) a termination of the Condominium; or (iii) certain actions of the Association as specified in Sections 9.1 and 9.4 of this Declaration, the provision requiring the consent of the greatest number or percentage of Unit Owners, First Mortgagees, Eligible Mortgage Holders or Eligible Insurers or Guarantors shall prevail; provided, however, that the Declarant, without the consent of any Unit Owner or First Mortgagee being required, shall have the right to amend the Condominium Documents to comply with (i) the Condominium Act; (ii) the requirements or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments, including, without limitation, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, or (iii) the rules or requirements of any federal, state or local governmental agency whose approval of the Condominium or the Condominium Documents is required by law or requested by the Declarant.

ARTICLE 10

GENERAL PROVISIONS

10.0 Enforcement/Professional Management/Contracts with Declarant and Affiliates.

(A) Subject to the further provisions of Sections 10.19, 10.20, 10.21, and 10.22, the Association, or any Unit Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens or charges now or hereafter imposed by the provisions of the Condominium Documents. Failure by the Association or by any Unit Owner to enforce any covenant or restriction contained in the Condominium Documents shall in no event be deemed a waiver of the right to do so thereafter.

(B) To the extent that this Declaration grants Declarant, the Association or any Unit Owner the right to use summary abatement or similar means to enforce the restrictions set forth in this Declaration, judicial proceedings must be instituted before any items of construction can be altered or demolished. Each Unit Owner shall be subject to all rights and duties assigned to Unit Owners under this Declaration.

(C) Any agreement for professional management of the Condominium must provide for termination by either party without cause and without payment of a termination fee upon thirty (30) days' or less written notice. Without limiting the foregoing, all agreements, contracts or leases entered into between affiliates or representatives of Declarant and the Association during the Period of Declarant Control shall be terminable by the vote of the Board at any time after the Period of Declarant Control expires.

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

10.2 Duration. Except as they may be earlier terminated or amended pursuant to Sections 10.3 and 10.4 below, the covenants and restrictions of this Declaration shall run with and bind the Condominium for a term of twenty (20) years from the date this Declaration is recorded after which time they shall be automatically extended for successive periods of ten (10) years.

10.3 Termination of Condominium. Subject to the further provisions of this Declaration regarding Mortgagee notice and consent requirements, the Condominium may be terminated only in the manner provided for in the Condominium Act.

10.4 Amendment.

(A) Except in cases of amendments that may be executed by the Declarant in the exercise of its Development Rights under this Declaration or under §33-1220 of the Condominium Act, by the Association under §§ 33-1206 or 33-1216(D) of the Condominium Act, or by certain Unit Owners under §§ 33-1218(B), 33-1222, 33-1223 or 33-1228(B) of the Condominium Act, and except to the extent permitted or required by other provisions of the Condominium Act, the Declaration, including the Plat, may be amended by vote of the Unit Owners to which at least sixty-seven percent (67%) of the votes in the Association are allocated, at any time during the initial term hereof or any renewal term and without regard to whether such amendment has uniform application to the Units or the Condominium as a whole.

(B) Except to the extent expressly permitted or required by the Condominium Act, an amendment to the Declaration shall not create or increase Special Declarant Rights, increase the number of Units or change the boundaries of any Unit, the allocated interest of a Unit, or the use as to which any Unit is restricted, in the absence of unanimous consent of the Unit Owners.

(C) An amendment to the Declaration shall not terminate or decrease any unexpired Development Right, Special Declarant Right or Period of Declarant Control unless the Declarant approves the amendment in writing.

(D) During the Period of Declarant Control, the Declarant shall have the right to amend the Declaration, including the Plat, to comply with (i) the Condominium Act; (ii) the rules or guidelines in effect from time to time of any governmental or quasi-governmental entity or federal corporation guaranteeing or insuring mortgage loans or governing transactions involving mortgage instruments, including, without limitation, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; or (iii) the rules or requirements of any federal, state or local governmental entity or agency whose approval of the Condominium, the Plat or any other Condominium Document is required by law or requested by the Declarant.

(E) During the Period of Declarant Control, the Declarant shall have the right to amend the Condominium Documents to comply with applicable law or correct any error or inconsistency therein if the amendment does not adversely affect the rights of any Unit Owner or to exercise any Development Right or Special Declarant Right reserved herein in the manner provided in §33-1220 of the Condominium Act.

(F) Any amendment adopted by the Unit Owners pursuant to subsection (A) above shall be signed by the President or vice-president of the Association and shall be recorded in the Official Records of the Maricopa County, Arizona Recorder. Any such amendment shall certify that the amendment has been approved as required by this section. Any amendment made by the Declarant pursuant to subsection (D) or (E) of this section or the Condominium Act shall be executed by the Declarant and shall be recorded in the Official Records of the Maricopa County, Arizona Recorder.

10.5 Remedies Cumulative. Each remedy provided herein is cumulative and not exclusive.

10.6 Notices. All notices, demands, statements or other communications required to be given or served under this Declaration shall be in writing and shall be deemed to have been duly given and served if delivered personally or sent by United States mail, postage prepaid, return receipt requested, addressed as follows: (i) if to a Unit Owner, at the address at which the Unit Owner shall designate in writing and file with the Association or, if no such address is designated, at the address of the Unit of such Unit Owner; or (ii) if to the Association or the Declarant, to 4142 N. 10th Street, Phoenix, Arizona 85014-4730, or such other address as shall be designated by notice in writing to the Unit Owners pursuant to this section. A Unit Owner may change his address on file with the Association for receipt of notices by delivering a written notice of change of address to the Association pursuant to this section. A notice given by mail, whether regular, certified or registered, shall be deemed to have been received by the person to whom the notice was addressed on the earlier of the date the notice is actually received or three days after the notice is mailed. If a Unit is owned by more than one person, notice to one of the Unit Owners shall constitute notice to all Unit Owners of the same Unit. Each Unit Owner shall file his correct mailing address with the Association, and shall promptly notify the Association in writing of any subsequent change of address.

10.7 Binding Effect. By acceptance of a deed or by acquiring any ownership interest in any portion of the Condominium, each Person, for himself, his heirs, personal representatives, successors, transferees and assigns, binds himself, his heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, easements, rules, and regulations now or hereafter imposed by the Condominium Documents and any amendments thereof. In addition, each such Person by so doing thereby acknowledges that the Condominium Documents set forth a general scheme for the improvement and development of the real property covered thereby and hereby evidences his interest that all the restrictions, conditions, covenants, easements, rules, and regulations contained in the Condominium Documents shall run with the land and be binding on all subsequent and future Unit Owners, grantees, purchasers, assignees, and transferees thereof. Furthermore, each such Person fully understands and acknowledges that the Condominium Documents shall be mutually beneficial, prohibitive and enforceable by the various subsequent and future Unit Owners. Declarant, its successors, assigns and grantees, covenants and agrees that the Units and the membership in the Association and the other rights created by the Condominium Documents shall not be separated or separately conveyed and each shall be deemed to be conveyed or encumbered with its respective Unit even though the description in the instrument of conveyance or encumbrance may refer only to the Unit.

10.8 Gender. The singular, wherever used in this Declaration, shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provisions of this Declaration apply to either entities or individuals, or men or women, shall in all cases be assumed as though in each case fully expressed.

10.9 Topic Headings. The marginal or topical headings of the sections contained in this Declaration are for convenience only and do not define, limit or construe the contents of the sections or of this Declaration.

10.10 Survival of Liability. The termination of membership in the Association shall not relieve or release any such former Unit Owner or Member from any liability or obligation incurred under, or in any way connected with, the Association during the period of such ownership or membership, or impair any rights or remedies which the Association may have against such former Owner or Member arising out of, or in any way connected with, such ownership or membership and the covenants and obligations incident thereto.

10.11 Construction. In the event of any discrepancies, inconsistencies or conflicts between the provisions of this Declaration and the Articles, Bylaws, or the Association Rules, the provisions of this Declaration shall prevail.

10.12 Joint and Several Liability. In the case of joint ownership of a Unit, the liabilities and obligations of each of the joint Unit Owners set forth in, or imposed by, the Condominium Documents shall be joint and several.

10.13 Guests and Tenants. Each Unit Owner shall, to the extent permitted by Arizona law, be responsible for compliance by his agents, tenants, guests, invitees, licensees and their

respective servants, agents, and employees with the provisions of the Condominium Documents. A Unit Owner's failure to ensure compliance by such persons shall be grounds for the same action available to the Association or any other Unit Owner by reason of such Unit Owner's own noncompliance.

10.14 Attorneys' Fees. In the event the Declarant, the Association or any Unit Owner employs an attorney or attorneys to enforce an Assessment Lien or to collect any amounts due from a Unit Owner or to enforce compliance with or recover damages for any violation or noncompliance with the Condominium Documents, the prevailing party in any such action shall be entitled to recover from the other party his reasonable attorneys' fees incurred in the action.

10.15 Number of Days. In computing the number of days for purposes of any provision of the Condominium Documents, all days shall be counted including Saturdays, Sundays and holidays; provided, however, that if the final day of any time period falls on a Saturday, Sunday or holiday, then the final day shall be deemed to be the next day which is not a Saturday, Sunday or holiday.

10.16 Notice of Violation. The Association shall have the right to record a written notice of a violation by any Unit Owner of any restriction or provision of the Condominium Documents. The notice shall be executed and acknowledged by an officer of the Association and shall contain substantially the following information: (i) the name of the Unit Owner; (ii) the legal description of the Unit against which the notice is being recorded; (iii) a brief description of the nature of the violation; (iv) a statement that the notice is being recorded by the Association pursuant to this Declaration; and (v) a statement of the specific steps which must be taken by the Unit Owner to cure the violation. Recordation of a Notice of Violation shall serve as a notice to the Unit Owner and to any subsequent purchaser of the Unit that there is a violation of the provisions of the Condominium Documents. If, after the recordation of such Notice, it is determined by the Association that the violation referred to in the Notice has been cured, the Association shall record a notice of compliance which shall state the legal description of the Unit against which the Notice of Violation was recorded, the recording data of the Notice of Violation, and shall state that the violation referred to in the Notice of Violation has been cured, or if such be the case, that it did not exist.

10.17 Declarant's Disclaimer of Representations. While Declarant has no reason to believe that any of the provisions contained in this Declaration are or may be invalid or unenforceable for any reason or to any extent, Declarant makes no warranty or representation as to the present or future validity or enforceability of any provisions of this Declaration. Any Unit Owner acquiring a Unit in reliance on one or more of the provisions in this Declaration shall assume all risks of the validity and enforceability thereof and by acquiring the Unit agrees to hold Declarant harmless therefrom.

10.18 No Absolute Liability. No provision of the Condominium Documents shall be interpreted or construed as imposing on Unit Owners absolute liability for damage to the Common Elements or the Units. Unit Owners shall only be responsible for damage to the Common Elements or Units caused by the Unit Owners' negligence or intentional acts.

10.19 Right to Cure Alleged Defects. It is Declarant's intent that the Common Elements (including the structural portions of each Building and any Limited Common Elements allocated to a Unit or Units), each Unit and all other Improvements constructed within the Condominium be built in compliance with all applicable building codes and ordinances and that they be of a quality that is consistent with good construction and development practices for production housing of this type. Nevertheless, due to the complex nature of construction and the subjectivity involved in evaluating such quality, disputes may arise as to whether a defect exists and Declarant's responsibility therefor. It is Declarant's intent to resolve all disputes and claims regarding "Alleged Defects" (as defined below) amicably, and without the necessity of time-consuming and costly litigation. Accordingly, the Association, Board and all Owners shall be bound by the following claim resolution procedure, subject to any further limitations set forth in any residential contract of purchase and sale agreement between Declarant and any Owners with regard to warranty periods and other limitations set forth therein:

(A) In the event that the Association, Board, or any Owner or Owners (collectively, **"Claimant"**) claim, contend or allege that any portion of the Common Elements, any Unit, and/or any other Improvements constructed within the Condominium are defective, or that Declarant, its agents, consultants, brokers, contractors or subcontractors (collectively, **"Agents"**) were negligent or otherwise violated any contractual, statutory or other obligation imposed by tort, equity or otherwise in the planning, design, engineering, grading, construction, selling or other development thereof (collectively, an **"Alleged Defect"**), Declarant hereby reserves the right for itself to inspect, repair and/or replace such Alleged Defect as set forth herein. In the event that a Claimant discovers any Alleged Defect, Claimant shall notify Declarant in writing within thirty (30) days of discovery of the Alleged Defect of the specific nature of such Alleged Defect (**"Notice of Alleged Defect"**). Within a reasonable time after the receipt by Declarant of a Notice of Alleged Defect, or the independent discovery of any Alleged Defect by Declarant, as part of Declarant's reservation of rights hereunder, Declarant shall have the right, upon reasonable notice to Claimant and during normal business hours, to enter onto or into, as applicable, the Common Elements (including Limited Common Elements) or any Unit for the purposes of inspecting and/or conducting testing and, if deemed necessary by Declarant, repairing and/or replacing such Alleged Defect. In conducting such inspection, testing, repairs and/or replacements, Declarant shall be entitled to take any actions as it shall deem reasonable and necessary under the circumstances.

(B) Nothing set forth in this Section 10.19 shall be construed to impose any obligation on Declarant to inspect, test, repair or replace any item or Alleged Defect for which Declarant is not otherwise obligated under applicable law or any limited warranty provided by Declarant in connection with the sale of Units. The right of Declarant to enter, inspect, test, repair and/or replace reserved hereby shall be irrevocable and may not be waived or otherwise terminated except by a writing, in recordable form, executed and Recorded by Declarant. In no event shall any statute of limitations be tolled during the period in which Declarant conducts any inspection or testing of any Alleged Defects.

10.20 Legal Actions. All legal actions initiated by Claimants (as defined in Section 10.19 above) shall be brought in accordance with and subject to Sections 10.21 and 10.22 below. In the event a Claimant initiates any legal action, cause of action, proceeding, reference or

arbitration against Declarant alleging damages for: (i) an Alleged Defect, (ii) the diminution in value of any real or personal property resulting from such Alleged Defect, or (iii) any consequential damages resulting from such Alleged Defect, any judgment or award in connection therewith shall first be used to correct and/or repair such Alleged Defect or to reimburse the Claimant for any costs actually incurred by such Claimant in correcting and/or repairing the Alleged Defect. In the event the Claimant is the Association, the Association must provide written notice to all Members prior to initiation of any legal action, cause of action, proceeding, or arbitration against Declarant which notice shall (at a minimum) include (i) a description of the Alleged Defect, (ii) a description of the attempts of Declarant to correct such Alleged Defect and the opportunities provided to Declarant to correct such Alleged Defect, (iii) a certification from an engineer licensed in the State of Arizona that such Alleged Defect exists along with a description of the scope of work necessary to cure such Alleged Defect and a resume of such engineer, (iv) the estimated cost to repair such Alleged Defect, (v) the name and professional background of the attorney retained by the Association to pursue the claim against Declarant and a description of the relationship between such attorney and the member(s) of the Board, (vi) a description of the fee arrangement between such attorney and the Association, (vii) the estimated attorneys' fees and expert fees and costs necessary to pursue the claim against Declarant and the source of the funds which will be used to pay such fees and expenses, (viii) the estimated time necessary to conclude the action against Declarant, and (ix) an affirmative statement from the Board that the action is in the best interests of the Association and its Members. In the event the Association recovers any funds from Declarant (or any other Person) to repair an Alleged Defect, any excess funds remaining after repair of such Alleged Defect shall be paid into the Association's reserve fund.

10.21 Approval of Litigation. The Board shall not be authorized to incur legal expenses, including without limitation, attorneys' fees or bring any legal proceeding of a material nature for which the claimed or alleged damages or the current economic value of other available remedies would exceed $25,000 in the aggregate, unless the Association has received the consent of no less than fifty one (51%) of the Membership (other than Declarant) to commence such an action or to incur such expenses. The foregoing restriction shall not apply to: (i) actions to enforce the collection of Assessments or an Assessment Lien; (ii) actions to challenge ad valorem taxation or condemnation proceedings; (iii) actions to defend claims filed against the Association or to assert mandatory counterclaims therein; (iv) actions to enforce any specific covenant hereunder; or (v) or claims brought by an Owner in his individual capacity concerning his Unit and Improvements located solely within his Unit; provided, further that each Unit Owner shall be bound by the mandatory arbitration provisions set forth herein and in any contract of purchase. In the event of any conflict between the arbitration provisions of this Article 10 and the contract of purchase, the contract of purchase shall provide. Otherwise, all provisions of this Article 10 shall be binding upon the Unit Owner. The Association must finance any legal proceeding with monies that are specifically collected for same and may not borrow money or use reserve funds or other monies that are collected for specific Association obligations other than legal fees. In the event that the Association commences any legal proceedings, all Owners must notify prospective purchasers of such legal proceedings and must provide such prospective purchasers with a copy of the notice received from the Declaration in accordance with Section 10.20 above.

10.22 Binding Arbitration. In the event of a dispute between Declarant or its Agents, and any Unit Owner(s) or the Association regarding any controversy or claim, including any claim based on contract, tort or statute, arising out of or in any way related to the rights or duties of the parties under this Declaration, the design or construction of the Condominium, or an Alleged Defect, the matter will be resolved by binding arbitration which shall be conducted in accordance with the following rules:

(A) The arbitration shall be initiated by either party delivering to the other a Notice of Intention to Arbitrate as provided for in the American Arbitration Association (**"AAA"**) Commercial Arbitration Rules, as amended from time to time (the **"AAA Rules"**). The arbitration shall be conducted in accordance with the AAA Rules and A.R.S. §12-1501 et seq. In the event of a conflict between the AAA Rules and this Section 9.9, the provisions of this Section 9.9 shall govern.

(B) The parties shall appoint a single arbitrator by mutual agreement; provided, however, that if the amount of the Alleged Defect exceeds $500,000, then the matter shall be arbitrated by a panel of three arbitrators. If the parties have not agreed within ten (10) days of the date of the Notice of Intention to Arbitrate on the selection of an arbitrator (or arbitrators) willing to serve, the AAA shall appoint a qualified arbitrator or arbitrators to serve. Any arbitrator chosen in accordance with this Section 10.22 is referred to herein as the **"Arbitrator."** The Arbitrator shall be neutral and impartial. The Arbitrator shall be fully active in such Arbitrator's occupation or profession, knowledgeable as to the subject matter involved in the dispute, and experienced in arbitration proceedings. The foregoing shall not preclude otherwise qualified retired lawyers or judges. Any candidate for the role of Arbitrator shall promptly disclose to the parties all actual or perceived conflicts of interest involving the subject matter of the dispute or the parties. If an Arbitrator resigns or becomes unwilling to continue to serve as an Arbitrator, a replacement shall be selected in accordance with the procedure set forth in this Section 10.22. The Arbitrator shall be fully compensated for all time spent in connection with the arbitration proceedings in accordance with the Arbitrator's hourly rate not to exceed Three Hundred Dollars ($300.00) per hour, unless otherwise agreed to by the parties, for all time spent by the Arbitrator in connection with the arbitration proceeding. Pending the final award, the Arbitrator's compensation and expenses shall be advanced equally by the parties.

(C) The Arbitrator shall actively manage the proceedings as the Arbitrator deems best so as to make the proceedings expeditious, economical and less burdensome than litigation. All papers, documents, briefs, written communications, testimony and transcripts, as well as any arbitration decisions, shall be confidential and not disclosed to anyone other than the Arbitrator, the parties or the parties' attorneys and expert witnesses (where applicable to their testimony), except that upon prior written consent of all parties, such information may be divulged to additional third parties. All third parties shall agree in writing to keep such information confidential. Hearings may be held at any place within Maricopa County, Arizona designated by the Arbitrator and mutually agreed to by the parties and, in the case of particular witnesses not subject to subpoena at the usual hearing site, at a place where such witnesses can be compelled to attend. All statutes of limitation applicable to claims which are subject to binding arbitration pursuant to this Section 10.22 shall apply to the commencement of arbitration proceedings under

this Section 10.22. If arbitration proceedings are not initiated within the applicable period, the claim shall forever be barred.

(D) Within thirty (30) days after the Arbitrator has been appointed, a preliminary hearing among the Arbitrator and counsel for the parties shall be held for the purpose of developing a plan for the management of the arbitration, which shall then be memorialized in an appropriate order. The matters which may be addressed include, in addition to those set forth in the AAA Rules, the following: (i) definition of issues, (ii) scope, timing and types of discovery, if any, (iii) schedule and place(s) of hearings, (iv) setting of other timetables, (v) submission of motions and briefs, (vi) whether and to what extent expert testimony will be required, whether the Arbitrator should engage one or more neutral experts, and whether, if this is done, engagement of experts by the parties can be obviated or minimized, (vii) whether and to what extent the direct testimony of witnesses will be received by affidavit or written witness statement; and (viii) any other matters which may promote the efficient, expeditious, and cost-effective conduct of the proceedings.

(E) The Arbitrator shall promptly (within sixty (60) days of the conclusion of the proceedings or such longer period as the parties mutually agree) determine the claims of the parties and render a final award in writing. The Arbitrator shall not award any punitive damages nor any indirect, consequential or special damages regardless of whether the possibility of such damages or loss was disclosed to, or reasonably foreseen by the party against whom the claim is made; provided, however, that such damages may be deemed by the Arbitrator to be direct damages in an award reimbursing payments made by a party therefor to a third party. The Arbitrator shall assess the costs of the proceedings (including, without limitation, the fees of the Arbitrator) against the non-prevailing party, but each party shall bear the cost of its own attorneys' fees and expert witness fees.

IN WITNESS WHEREOF, the Declarant has executed this Declaration on the day and year first above written.

DECLARANT:

THE LOFTS AT FILLMORE, LLC,
an Arizona limited liability company

By: _____
Bill Mahoney, Its Sole Member

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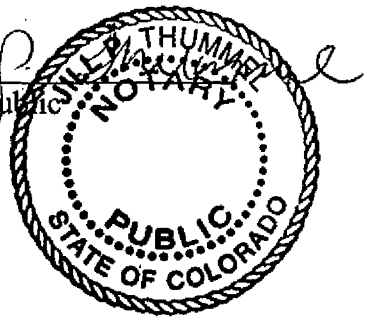
STATE OF COLORADO)
)ss.
COUNTY OF DENVER)

The foregoing instrument was acknowledged before me this 21 day of July, 1999, by BILL MAHONEY, the Sole Member of The Lofts at Fillmore, LLC, an Arizona limited liability company, for and on behalf of said limited liability company.

Notary Public



My Commission Expires:

My Commission Expires Nov. 18, 2002

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EXHIBIT A

Property Subject to the Condominium

Units 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, and 2I, according to the Declaration of Condominium to which this Exhibit is attached and the Plat of THE LOFTS AT FILLMORE CONDOMINIUMS in Book 508 of Maps, page 17, a replat of Lot 1, THE LOFTS AT FILLMORE in Book 507 of Maps, page 15, all of which were recorded in the Official Records of Maricopa County, Arizona;

also formerly legally described as:

Lots 24, 26, 28 and the South 20 feet of Lot 30, a subdivision of Tract "B," Block 2, SEGER'S ADDITION, according to Book 2 of Maps, page 41, records of Maricopa County, Arizona.

Garage Units 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 2A, 2B, 2C, 2D, 2E, 2F, 2G, 2H, and 2I, are respectively owned by the designated Unit Owner and such Garage Units are appurtenant to and ownership may not be separated from the residential Unit.