

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

GORDON GROSS and LILIANA
GROSS, husband and wife; et al.,

Plaintiffs/Appellees/
Cross-Appellants,

vs.

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, an
Arizona nonprofit corporation,

Defendant/Appellant/
Cross-Appellee.

1 CA-CV 23-0394

NAVAJO COUNTY SUPERIOR
COURT

CASE NO. S0900CV202200042

TRIAL JUDGE: The Honorable
Michala M. Ruechel

OPENING BRIEF

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I. INTRODUCTION

This is an appeal from summary judgment involving an amendment to covenants running with the land. The focal issue in the case is whether a planned residential community, following the prescribed supermajority procedure, can amend its Declaration of Covenants, Conditions, and Restrictions ("Declarations")--last amended twenty years before---to reinforce that certain short-term rentals are not exempt from the preexisting definition of prohibited trade or business use and are not consistent in a community where all lots "shall be devoted exclusively to Single Family residential use."

The Shores at Rainbow Lake ("The Shores") is a residential community governed by Arizona's Planned Communities Act.¹ Its Declarations have always:

- a. required the use of its lots to be "devoted exclusively to Single Family residential use;"
- b. prohibited any trade, business, or other nonresidential use of lots for business purposes (with limited exceptions);
- c. carved out a limited exception from the prohibition of business, trades and nonresidential use to allow that the leasing of a lot "shall not be considered a trade or business";
- d. prohibited the lease of less than an entire lot; and
- e. required the reporting of certain information about each lease, including the duration of the lease.

The Declarations have always included an amendment clause that enabled the community to change these provisions, but only by a supermajority vote – 67% or just over two-thirds of the ownership interest of each of the two classes of owners.

¹ Defined at [A.R.S. § 33-1802\(4\)](#) to mean a planned community that owns common areas, maintains roads, requires owners to be members and requires members to pay assessments.

In early 2021 the community, following the procedure specified in its Declaration, amended the existing Declarations' leasing provisions to provide, among other things, that "[a]fter December 31st, 2021, no Lot may be leased for a term less than thirty (30) days."

Seven of the community's owners who were in the vacation rental business first campaigned against the passage of the amendment, and when unsuccessful with that approach, filed their Complaint (RA 1)² against The Shores in the Navajo County Superior Court, seeking to block the enforcement of this amendment. The parties filed cross-motions for partial summary judgment on the issue. The Superior Court granted partial summary judgment to the Plaintiffs, ruling:

Clearly the 2021 declaration addresses the issue of leasing and placed some restrictions on the manner and requirements for leasing. The original declaration did not address any time restriction on leasing. At the time the properties were purchased, the 2001 Amended Declaration allowed all Owners to lease the property for any duration they deemed appropriate. This Court finds that placing term restrictions on leases under these circumstances does create an entirely new and different restriction on the Owners' use of their property in a manner that was unforeseeable at the time the original and 2001 amended declarations were made.

September 14, 2022 ruling, RA 32.

The Shores appealed, contending this ruling was erroneous as a matter of law. If enacted according to the procedure specified in The Shores Declarations, and in compliance with all applicable statutes including statutes specifically governing amendments and allowing lease term limits, this amendment to leasing restrictions is valid and enforceable as a matter of law. The Declarations create a contract and give notice to and constitute the agreement by the owners that the Declarations could be changed; the amendment and its contents were foreseeable as a matter of fact; or

² Owners of an eighth lot were added by an amended complaint. RA 27.

else genuine issues of material fact are presented by this issue. The judgment entered on this ruling by the Superior Court finding one section of the amendment unenforceable must be reversed.

II. STATEMENT OF FACTS AND CASE

1. The Shores at Rainbow Lake ("The Shores") is an Arizona planned residential community of 188 lots in Pinetop-Lakeside, Arizona. RA, 1 (Complaint), para. 11-13.

2. Rainbow Lake has a total of 188 residential units, which includes 164 detached houses and 24 townhouses. RA 1, para. 13, 20 and 21.

3. The owners within Rainbow Lake adopted a set of Covenants, Conditions, and Restrictions to protect and add value to their community. In this action, the Amended and Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at Rainbow Lake was adopted in September 2001 and recorded with the Navajo County Recorder's Office at Instrument Number 2001-17716 (the "[2001 Covenants](#)"). RA 1, para. 14.

4. The stated purpose of the 2001 Covenants is for “protecting the value and desirability” of the Rainbow Lakes community. RA 4, ([2001 Covenants](#)), at [Article 4](#). A copy of the 2001 Covenants is attached as Appendix No. 1 to the Opening Brief. [Article 4](#) (hereafter “Art. 4”) is found at APX 74-76. This and other references to articles of the Declarations will be linked for ease of use.

5. The community's common area is owned by The Shores, which qualifies The Shores under Arizona’s Planned Community Act. As the owner and financially responsible caretaker of the common areas, each owner's use of the entry gate, streets, boat docks, trails, and other common areas has a financial impact on each of the other owners. [Art. 6](#).

6. As for the Declarations’ application to each of the lots, [Art. 2.0](#) of The Shores Declarations provide:

[A]ll of the real property within the Project is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part, subject to this Declaration. . . .

7. The owners within Rainbow Lake elect a five-member Board of Directors and Offices. [2001 Covenants, Art. 4.1](#). The Shores community has an Architectural Committee appointed by the Association's Board of Directors ([Art. 4.9](#)), and provides for extensive control of improvements on the community's individually owned lots ([Art. 2.2](#)):

"[N]o improvements, alterations, repairs, excavation, grading, landscaping, or other work which in any way alters the exterior appearance of any Lot or Parcel, or the improvements located thereon, from its natural or improved state existing on the date this Declaration was first Recorded shall be made or done without the prior written approval of the Architectural Committee. . . ."

8. The community's Declarations have always allowed for amendments. Its amendment provisions have not been neglected. For example, the Declarations were amended in 1987, 1990, 1991, and 1992, and were comprehensively amended and restated in 2001. (*See* [second recital, page 1, of Declarations](#)).

9. An amendment of the Declarations requires a favorable vote of at least 67% of each of the two classes of The Shores ownership. ([Declaration, Art. 9.2\(A\)](#)).

10. There are twenty-four (24) cluster lot owners in Class A and 164 detached lot owners in Class B. ([Declaration, Art. 4.6](#)).

11. If 8 of the cluster lot owners either fail to vote, or vote no, for an amendment to the Declarations, the amendment cannot pass. [Art. 9.2](#).

12. The Shores Declaration has always restricted its lots to be "devoted exclusively Single Family residential use" and has prohibited the use of lots for "gainful occupation, profession, trade, business or other nonresidential use" with well-defined exceptions. [Art. 2.18](#).

13. Because the prohibition of any profession, trade, business, or other nonresidential was broad enough to include an owner's leasing of the property for profit, at [Art. 2.18](#) of the Declarations, The Shores carved out an exception for "leasing of a residence" from its definition of prohibited "trade or business" by providing at [Art. 2.18](#) as follows:

The terms 'gainful occupation,' 'profession,' 'trade,' 'business' and 'residential use' as used in this section shall be construed to have ordinary, generally accepted meanings. . . . The leasing of a residence by the Owner thereof shall not be considered a trade or business within the meaning of this section.

14. Until 2021, the Declaration did not define "leasing," although several of its provisions referred to it. In addition to [Art. 2.18](#), [Art. 2.30](#) provided:

Leasing of Lots. No Owner may lease less than his entire Lot. Upon leasing his Lot, an 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 Lot during the term of the lease.

15. Other references to leasing include [Art. 1.29](#) (defining "lessee" and implying a lease may be either oral or written); [Art. 3.0\(B\)](#) (lessee entitlement to use The Shores common area); [Art. 4.2](#) (application of Association rules to lessees).

16. In 2021 The Shores sought to amend its Declaration to more clearly define what constitutes permitted leasing. After a well-publicized and hotly contested election (*see e.g.*, RA 12, point-counterpoint opinion columns), both classes of The Shores ownership amended [Art. 2.30](#) of their Declaration. The amendment was approved by a greater than a 67% majority, as required by the Declaration's amendment provisions. 2021 Amendment, page 1, found at [APX 99](#).

17. As mandated by [A.R.S. § 33-1817\(A\)\(3\)](#), the Association was compelled to "prepare, execute and record a written instrument setting forth the

amendment,” which it did. A copy of the 2021 Amendment is found in the record at RA 4 and is attached as an appendix to this Opening Brief at [APX 99](#). This and other references to the 2001 Amendment will be linked for ease of use.

18. The amendment, a portion of which explicitly became effective several months after its enactment and recordation:

- a. limited leasing of a lot to no more than four unrelated individuals [[2021 Amendment, Art. 2.30\(B\)](#)];
- b. clarified lessor reporting requirements [[2021 Amendment, Art. 2.30\(C\)](#)];
- c. expressly made leases subject to The Shores' governing documents [[2021 Amendment, Art. 2.30\(D\)](#)];
- d. required lessors to provide the governing documents to lessees [[2021 Amendment, Art. 2.30\(D\)](#)];
- e. expressly made lessors responsible for lessee violations of the governing documents [[2021 Amendment, Art. 2.30\(D\)](#)]; and
- f. provided that "After December 31, 2021, no Lot may be leased for a term less than thirty (30) days([2021 Amendment, Art. 2.30\(A\)](#))).

19. Plaintiffs, through their business partners Airbnb and VRBO, are using their lots to generate income in the vacation rental business. Having lost the election over the amendment, they commenced this action against the Association in the Navajo County Superior Court. In their Complaint they challenged the entirety of the leasing amendment, contending (1) the amendment was improperly enacted and (2) the amendment was invalid and unenforceable against them in their commercial activities. RA 1, RA 27.

20. The Shores agreed to delay enforcement proceedings under the new amendment pending the resolution of this litigation. RA 13, 14.

21. In April 2022 Plaintiffs filed a motion for partial summary judgment,

contending that the amendment to The Shores Declaration [Art. 2.30](#) had been made invalid by [Kalway v. Calabria Ranch HOA, LLC](#), 252 Ariz. 532 (2022). RA 15.

18. In May 2022 The Shores responded by a cross-motion for partial summary judgment, contending that the amendment was entirely valid. RA 20.

22. September 14, 2022, after a hearing on these motions, the Superior Court ruled that amended [Article 2.30](#) was valid and enforceable except for 18 words found in [Article 2.30\(A\)](#); the 30-day-minimum lease term provision. RA 32.

23. For purposes of its ruling, the Superior Court concluded The Shores community had properly enacted the amendment by the supermajority required in its Declaration. Nevertheless, resting its decision on [Kalway](#), the Superior Court held that [section 2.30\(A\)](#) of the Amendment was unenforceable against the Plaintiffs, stating:

[T]he Court grants partial summary judgment . . . in favor of Defendants regarding Section 2.30(B)(C) and (D) of the 2021 amended declaration and grants partial summary judgment . . . in favor of Plaintiffs regarding Section 2.30(A) of the 2021 amended declaration.

RA 32.

24. On December 1, 2022, the trial court entered what was titled a "Final Judgment." RA 46.

25. A timely Notice of Appeal was filed on December 29, 2022. RA 48.

26. At the Association's request, the Court of Appeals determined the December 1, 2022 Final Judgment was not final, resulting in the dismissal for lack of jurisdiction of the appeal. RA 56, 73; *see also* April 5, 2023 Order Dismissing Appeal and Cross-Appeal in Case No. 1 CA-CV 23-0053.

27. On May 17, 2023, the trial court entered an Amended Final Judgment which dismissed with prejudice all of the Plaintiffs' claims not adjudicated in the ruling on cross-motions for partial summary judgment, thereby resolving all claims. RA 71.

28. On June 15, 2023, the Association filed a timely Notice of Appeal. RA 74.

29. On July 5, 2023, Plaintiffs filed a Notice of Cross-Appeal. RA 79.

III. STATEMENT OF ISSUES.

Having noted that Plaintiffs engaged in the short-term rental business using their lots at The Shores and that they had purchased their lots before the effective date of the 2021 amendment to The Shores Declaration -- none of which was controverted by The Shores for purposes of cross-motions for summary judgment -- the Superior Court's summary judgment rests on the following pillars:

- a. quotation of numerous provisions in The Shores Declaration that relate to lot ownership, lot use, leases or leasing, and/or amendment of the Declaration;
- b. quotation of the terms of the 2021 amendment to the Declaration;
- c. two Arizona cases, the circumstances of which have nothing to do with short-term leasing in planned residential communities; and
- d. an apparently intuitive, fact-free conclusion that, of all the changes made by the 2021 amendment to the leasing provisions of the Declaration, the restriction to leases of at least 30 days was unenforceable.

The issue in this appeal is whether the Superior Court properly granted partial summary judgment to Plaintiffs on an amendment to a planned community's declaration that restricts lot leasing to a minimum of 30 days. Specifically:

Did the Superior Court err in ruling that an amendment describing a minimum term for a lot lease, enacted as authorized by Arizona's Planned Communities Act and in accordance with the amendment provisions of a planned community's Declaration of Covenants, Conditions, and Restrictions that contain several provisions referring to and restricting leasing, was invalid as a matter of law and unenforceable

against owners who purchased their lots before the effective date of the amendment?

The amendment specifying a minimum lease term is authorized by Arizona law and is valid and enforceable according to the provisions of the Declaration and statutes governing the planned community.

IV. STANDARD OF REVIEW.

The standard of review is *de novo*. The Court reviews a grant of summary judgment *de novo*, viewing the facts in the light most favorable to the opposing party. [*BMO Harris Bank, N.A. v. Wildwood Creek Ranch, LLC*](#), 236 Ariz. 363, 365 ¶ 7 (2015); [*Orme School v. Reeves*](#), 166 Ariz. 301 (1990).

This Court may also review questions of law, including the interpretation of a planned community's declaration and applicable statutes, *de novo*. [*Powell v. Washburn*](#), 211 Ariz. 553, 555-556, ¶ 8 (2006) (citations omitted) (“A deed containing a restrictive covenant that runs with the land is a contract. The interpretation of a contract is generally a matter of law. . . . [T]herefore, our review is *de novo*.”)

V. LEGAL ANALYSIS

A. Contractual and Statutory Landscape.

1. The Declaration Provisions.

The stated purpose of the 2001 Amended and Restated Declaration of Covenants, Conditions, and Restrictions is to protect the “value and desirability of” the community. [Declaration, p.2. APX 54.](#)

The Declarations, read as a whole, describe The Shores as a mature neighborhood of owners/members, with access to their own recreational areas, including use of Rainbow Lake from common and private docks. The community includes 164 detached residence units and 24 cluster residential units, paved roads, tennis, pickleball, and basketball courts, docks for boating and swimming, and

various paths and forest meadows, collectively called the Common Area.

The CC&Rs mandate that the owner/members meet strict community standards of residence construction ([Art.2.2](#)), lawn and yard maintenance ([Art. 2.4](#)), nuisance abatement ([Art. 2.5](#)), and personal conduct ([Art. 2.5](#) and [2.15](#)). A five-member Board of Directors governs the HOA, administratively assuring the owner/members that the requirements of the CC&Rs are honored. The Board appoints an Architectural Committee to approve all construction plans before exterior repairs, additions, and maintenance of the residences can proceed ([Art.2.2](#)).

The Declarations, by definition, include as they “may be further amended from time to time.” [Art. 1.17](#). To protect a minority group of homeowners from any claim of "tyranny" by the majority, no amendment to the Declaration can be passed without at least 67% of ALL owners--voting or not--of the Detached Residential Units and 67% of ALL owners---voting or not---of Cluster Residential Units. This is all provided at [Art. 9.2](#), which provides in part:

9.2. Amendments.

(A) Except for amendments made under Subsection (B) of this Section, the Declaration or the Project Plat may only be amended by the written approval or the affirmative vote, or any combination thereof, of Owners representing **not less than sixty-seven percent** (67%) of the votes **in each class** of membership.

The mathematical impact of this voting requirement is if as few as 8 owners of the Cluster Residential Units fail or forget to vote, or vote no, a proposed amendment does not pass even if all 180 of the remaining owners submit their affirmative vote approving a proposed amendment.³

³ In paragraphs 53-55 of the Complaint (RA 1), the Plaintiffs claimed their inability to secure eight “no” votes was due to misrepresentations rather than dislike of the business of short-term rentals. The Association denied the allegations. RA 11, para. 39. None of Plaintiffs’ claims of improper campaigning were supported in

The Shores Declarations also authorize the Board to govern personal conduct within the Community and the use of “any area by any Member.” *See* [Art. 4.2](#). Every person who reads the Declaration is on express notice that:

The Board, may from time to time and subject to the provisions of the Declaration, adopt, amend and repeal rules and regulations to be known as the Association Rules. The Association Rules may restrict and govern the use of any area by any Member, Lessee or Resident and by the guests and invitees of the Member, Lessee or Resident; provided however that the Association Rules shall not unreasonably discriminate among Members and shall not be inconsistent with the Declaration, Articles and Bylaws. Upon adoption, the Association Rules shall have the same force and effect as if they were set forth in and were a part of the Declaration.

[Art. 4.2](#).

Thus, every Owner/Member is on notice that the Board has the authority to go beyond the Declaration itself to impose regulations that control how Owner/Members conduct themselves and use their property, and by such regulations, control how each owner’s use impacts the common areas and other owners use of their lots or their financial responsibility for the common areas. Likewise, every owner was on notice that the 2001 Amended and Restated Declarations could be further amended. *See* Complaint, para. 27 (RA 1), acknowledging the amendment procedures found in [Art. 9.2](#).

The Plaintiffs consider the Shores to be a commercial business opportunity to license out their homes to unknown groups of people to enjoy their homes and The Shores' common amenities. *See* Complaint, RA 1, para. 31-35 (Describing how VRBO and Airbnb “revolutionized” their ability to broadly market their property to individuals on a short-term basis).

the record by admissible evidence, and all were dismissed with prejudice. RA 71, paragraph 5.

Since the Shores maintains paved roads, multiple boat docks, tennis and pickleball courts, a basketball court, and trails through the common area—all at the expense of the owner/members, short-term renters will use these areas at the expense of the Association and therefore at the expense of all other owners. None of this fits the core commitment of the Declaration: to maintain the entire Project “devoted exclusively to Single Family residential use,” free of commercial and business presence, as provided in the following sections:

Art.1.47. **“Single Family”** means a group of one or more persons each related to the other by blood, marriage or legal adoptions, or a group of persons not all so related, who maintain a common household in a Residential Unit.

Art. 2.18. **Residential Use.** All Lots and Parcels shall be used, improved and devoted exclusively to Single Family residential use. No gainful occupation, profession, trade, business or other nonresidential use shall be conducted on any Lot or Parcel or in or from any residence, except that an Owner or other resident or a residence may conduct a business activity within a residence 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 residence; (ii) the business activity conforms to all applicable zoning ordinances or requirements for the property; (iii) the business activity does not involve persons coming onto the lot or the door-to-door solicitation of owners or other residents in the property; and (iv) the business activity is consistent with the residential character of the property and does not constitute nuisance or a hazardous or offensive use or threaten security or safety of other residents in the property, as may be determined from time to time in the sole discretion of the board. . .

Plaintiffs would like this Court to be shocked that a community devoted to creating a haven for single families would consider clarifying their Declaration to control and avoid the recent phenomenon of the online marketplace of Airbnb and VRBO organizations that recruit homeowners to rent out their homes for vacation use, usually for a long weekend, but in no event long enough to establish a residence.

The Shores Homeowners Association acted reasonably, foreseeably, and with notice to all owners/members. Instead of using their powers as a Board to make rules authorized by [Art. 4.2](#) or declare nuisances, the Board chose to conduct a straw poll to see if there was interest in clarifying the Declaration.

After the straw poll indicated broad interest, a formal Amendment to the Declarations was posed to the Community which would no longer permit leasing of a lot to a Single Family of less than 30 days as was previously excepted from the existing business and trade prohibition. When 67% of all owners in each class of residential unit returned their ballots in favor of the Amendment, the Board President carried out his contractual and statutory obligation to record the Amendment and authorize enforcement.

The Declarations are a contract. [Powell v. Washburn](#), 211 Ariz 553 (2006). Contract provisions are unenforceable if they violate legislation or other identifiable public policy. See [Webb v. Gittlen](#), 217 Ariz. 363, 366 ¶ 13, 369 ¶ 35, 174 P.3d 275, 278, 281 (2008) (holding that public policy does not bar clients' assignment of negligence claims against their insurance agents); [1800 Ocotillo, LLC v. WLB Group, Inc.](#), 219 Ariz. 200, 202 (2008)(citing [Restatement \(Second\) of Contracts § 178](#) (1981)).

As stated below, the Declaration and the Amendment do not violate legislation or other identifiable public policy. The Declaration and Amendment comply with legislation and the legislature's statement of policy and are therefore enforceable.

2. The Planned Communities Act.

Recently, the Arizona Legislature devoted much of its time and effort to dealing with short-term rentals. Over time, our legislature has established the following policies concerning short-term rentals: cities, towns, and counties have limited control over short-term rentals, but Planned Communities like The Shores retain full control. This is explained below.

Effective 2017, the Arizona State Legislature enacted [A.R.S. §9-500.39](#) which initially eliminated much of cities' and towns' ability to regulate the short-term rental business based solely on their classification or use. Similar statutory handcuffs were placed on counties. *See* [A.R.S. §§11-269.17](#). Consequently, the short-term rental business flourished in cities and towns, added tax dollars to the coffers, but also added problems. After cities and towns lobbied to reacquire control, subsequent amendments allowed cities and towns to impose some limits and regulations. Under the recent statutory amendments, the City of Scottsdale adopted [Sections 18-170 to 18-177](#) to address problems caused by the business of short-term rentals in residential neighborhoods. At [Section 18-175\(a\)](#) of the City of Scottsdale's code, the City determined this was required because:

The health and public safety regulations in this section are for the primary purpose of protecting the health and safety of the public as vacation rentals and short-term rentals create unique public health and safety issues.

The City of Scottsdale also required owners who engage in the business of short-term rental to abide by the cleaning standards found in the Maricopa County Environmental Health Code applicable to Transient Dwelling Establishments. *Id.* at subsection (e). The City of Mesa adopted its short-term rental ordinance to “help mitigate harmful abuses associated with short-term rentals.” *See* Mesa Code of Ordinances [Section 5-15-1\(A\)](#).

Planned communities such as The Shores, like the cities mentioned above, can address the “unique public health and safety issues” created by Airbnb or VRBO’s invasion of residential neighborhoods. Planned communities such as The Shores can “mitigate harmful abuses associated with short-term rentals.” *See* [Art. 2.15](#) (allowing the Board to address any nuisance it deems adversely affects health, safety, or welfare). But unlike cities, the Arizona legislature expressly allows planned communities like The Shores to regulate the duration of a rental, define what length of rental is allowed and prohibit rentals that do not conform with the planned community.

Rainbow Lake is a “planned community” as defined by [A.R.S. § 33-1802\(4\)](#) and was created to manage, maintain or improve the property. *Id.* The Association’s members are the owners of the lots within the community. Within the long list of statutory restrictions and requirements placed upon planned communities and the Associations that manage them, the Legislature authorized planned communities like The Shores to avoid the unique issues caused by short-term rentals by not allowing rentals of certain durations. The Arizona legislature defines public policy by stating an owner in a planned community can use their property as follows:

A. A member may use the member’s property as a rental property unless prohibited in the declaration and shall use it in accordance with the declaration’s rental time period restrictions.

[A.R.S. § 33-1806.01\(A\)](#). The term “declaration” as used in this statute is understood to include, by definition, “any amendments.” [A.R.S. § 33-1802\(3\)](#).

For years, the Declarations at The Shores required owners who rented their lot to report to the Association the duration of every lease. *See* [Art. 2.30](#). When the revolution caused by billion-dollar companies like Airbnb or VRBO broadened the pool of available tenants for short-term rentals, causing the same harmful abuses and health and safety concerns recognized by the cities of Scottsdale and Mesa, the

owners within The Shores had, by their written agreement, a method to address the issue They held a contested election. The election to pass the 2021 Amendment satisfied the requirements of [A.R.S. § 33-1817](#). The election resulted in an Amendment to the Declarations that achieved the statutorily allowed purpose under [A.R.S. § 33-1806.01\(A\)](#).

Under [A.R.S. § 33-1806.01](#) an Association can also require an owner to provide for each period of rental, the name and contact information for each adult occupying the property, the time period of the lease, including the beginning and ending dates of the tenancy, and a description and license plate numbers of the tenants' vehicles. The 2021 Amendment requires owners leasing property to provide similar information to the Association as specified in [A.R.S. § 33-1806.01](#).

3. Short Term Rentals are commercial business activity.

As recognized by the Cities of Scottsdale and Mesa, “short-term rentals create unique public health and safety issues” and “harmful abuses.” Scottsdale Ordinance [Section 18.175](#); Mesa Ordinance [Section 5-15-1\(A\)](#). This view is shared by other cities. For example, the City of Santa Monica recently found:

WHEREAS, operations of vacation rentals, where residents rent entire units to visitors and are not present during the visitors' stays, frequently disrupt the quietude and residential character of the neighborhoods and adversely impact the community.

See [Santa Monica Ordinance No. 2616](#) (passed for "preventing home-shares from turning into *de facto* hostels and hotels.) These unsavory characteristics that disrupt the quietude and residential character are not desired in neighborhoods like The Shores, which are “devoted to Single Family residential use.”

The Arizona legislature follows suit and defines a short-term rental, not as a "residence", but as a "hotel or motel" or tourist home for transients:

A. The transient lodging classification is comprised of the business of operating, for occupancy by transients, a hotel or motel, including an inn, tourist home or house, . . .

[A.R.S. § 42-5070](#). The statute does not qualify a short-term renter as a “lessee”, but as a “transient”:

F. For the purposes of this section, "transient" means any person who either at the person's own expense or at the expense of another obtains lodging space or the use of lodging space on a daily or weekly basis, or on any other basis for less than thirty consecutive days.

Leasing for transient occupancy is not regulated by the Arizona Residential Landlord Tenant Act. [A.R.S. § 33-1308\(4\)](#). An online lodging operator or short-term/vacation property may not offer lodging accommodation for rent without first obtaining a current ‘transaction privilege tax’ TPT license. The TPT must be paid by the owner of the home to the Arizona Department of Revenue. *Id.*

From these ordinances and statutes alone, there can be no question that a short-term rental is both nonresidential in nature and pure commercial business activity. *See also McEwan v. Bd. of Supervisors of the Cty. of Fairfax Va.*, 103 Va. Cir. 238 (Cir. Ct 2019) (“The Court agrees that a house rented through Airbnb for less than 30 days is excluded from the definition of ‘dwelling’ because it is an ‘accommodation used for more or less transient occupancy.’”)

The Shores’ 2001 Declaration asserted the authority to regulate any business activity on the premises. [Art. 2.18](#). Although the 2001 Declarations carved out an exception to prohibited trade or business activity to allow leasing (*Id.*), that defined carve out can be refined to eliminate “the business of operating, for occupancy by transients” a short-term rental. *See* A.R.S. §§ [33-1806.01\(A\)](#) and [42-5070\(A\)](#).

Recognizing the public policy, the Arizona legislature adopted a public policy of separating transient lodging from residential use through a month-to-month lease or yearly lease, The Shores passed an amendment that met the requirements of

Arizona law and policy, and properly clarified its continued support of leasing for 30 days or more. The Amendment prohibits rentals of less than thirty (30) days, a period designated and denominated as “transient lodging” by the legislature. By removing leases to transients, under the 2021 Amendment all permitted leases at The Shores are now fully regulated by Arizona’s Residential Landlord Tenant Act.

Plaintiffs claim the 2021 Amendment was not foreseeable to anyone. However, every purchaser at The Shores agreed to be governed by the 2001 Amended and Restated Declarations. There are specific covenants, conditions, and restrictions set forth in the 2001 Declaration that either permit or prohibit the following:

- a. that each lot be “devoted exclusively to Single Family residential use:”
- b. commercial or business activity or other nonresidential use;
- c. leasing;
- d. restrictions on leasing; and
- e. nuisances.

The Board of Directors, in addition to the powers granted to it through the Declaration, is authorized to create, amend, and repeal rules and regulations on the use of property and personal conduct through Association Rules and the Bylaws. Every purchaser of a property in The Shores is on notice that any covenant, condition, or restriction can be amended in whole or in part by a community vote that meets the requirements of Declaration [Art. 9.2](#) and that also meets the requirements of the Arizona Planned Communities Act.

The 2001 Declaration restricts what owners/members can do if they took advantage of the leasing exception before the 2021 Amendment. While leasing was an exception to the strict prohibition on commercial or business activity, it was never an exception to prohibited nonresidential use or to the requirement that each lot be “devoted to Single Family residential use.” Furthermore, under [Art. 2.30](#), no one

could lease less than the entire lot for any period. This means no owner/member can rent out a room, a guest house, or other part of a lot. All owners were on notice that the Declarations regulate leasing, and are also on notice these regulations can by amendment be modified, clarified or changed in a particular way by the amendment procedure specified in the Declarations.

4. The Amendment's Compliance with Contract and Statutes.

In the statutes listed above, the Arizona legislature established public policy concerning how Planned Communities like The Shores at Rainbow Lake should operate. The 2001 Declaration was the contract that the members agreed would control their relationships regarding the use of their lots and homes, and the burden they would put on the common areas and their neighbors.

The 2001 Declaration and the 2021 Amendments are compliant with the contractual and statutory obligations imposed on the Association. The Declaration as amended continues to regulate leasing, clarifies the type of leasing that is not a prohibited business, continues to require that leasing be consistent with the Single-Family residential nature of the community, and now identifies rental of less than thirty days to be a prohibited commercial or nonresidential activity, consistent with the Arizona statutes that regulate and tax transient lodging.

The 2021 Amendments are entirely consistent with the 2001 Declaration. The Declaration specifies that the community will regulate commercial or business activity and will decide what activity did or did not constitute an exception to the prohibition. Had there been a groundswell to eliminate the 2001 Declaration exception for ALL leasing, could anyone reasonably claim that they were not placed on notice by the amendment clause that the exception could be eliminated by a community vote?

Any purchaser applying basic due diligence and viewing the Declaration as a whole in an objective fashion could see that the covenant that excepted leasing from

prohibited trade, commercial or nonresidential use could be amended if some leases appeared not to be devoted exclusively to Single Family residential use.

In the “real world of The Shores”, and any other Planned Community considering clarifying what length of rental should fall within “commercial or business activity”, there is bound to be discussion and the likelihood of searching for a middle ground. Choosing to prohibit rentals that the legislature has declared will be taxed and regulated as commercial activity and adopting that policy in accordance with The Shores Declaration and the Planned Community Act, satisfies all legal requirements.

A North Carolina court commented on how the “real world” works:

[Running a large community]”. . . can raise problems that must be resolved in some orderly and binding way if the enjoyment and tranquility of the occupants is to be secured and promoted, and the foregoing statutes were enacted to serve that purpose. For they authorize the amending of condominium declarations when the designated percentage of owners sees fit and make such amendments binding upon all unit owners without regard to when the units were acquired. Plaintiff having acquired her units subject to the right of the other owners to restrict their occupancy and that right having been exercised, she is bound thereby. The amendment does not infringe upon any legal right of the plaintiff's; for she had notice before the units were bought that the declaration was changeable and the changes made, no more stringent than the conditions required of many apartment renters, are reasonably related to the common good of all unit owners.

[*McElween-Hunter v. Fountain Manor Ass'n*](#), 386 S.E.2d 435,436-437 (N.C. Ct. App. 1989) (Emphasis added.)

The Association followed the Covenants, and the Amendment passed in accordance with the procedure the members agreed to follow. Each of the applicable statutes was followed. This is how the owners promised each other they would act and “[o]ur law generally presumes . . . that private parties are best able to determine

if particular contractual terms serve their interests.” [*1800 Ocotillo, LLC v. WLB Group, Inc.*](#), 219 Ariz. 200, 202 ¶ 8 (2008).

The societal benefits arising from the freedom of parties to contract are substantial. The Arizona Supreme Court warned that courts must therefore be "hesitant to declare contractual provisions invalid on public policy grounds." *Id.*

In this case, there is no legislation specifying that leasing or rental covenant cannot be amended to clarify the lease term of a permissible lease. The Arizona legislature expressly allows Associations of planned communities to provide in their Declarations a limit on the duration of a rental. See [A.R.S. § 33-1806.01\(A\)](#). The Arizona legislature endorsed as good public policy that amendments be adopted “by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration” ([A.R.S. § 33-1817 \(A\)\(1\)](#)) and requires Associations to record Amendments if the Amendment has received the required number of consents. *Id.* at (A)(3).

Rainbow Lake followed the policy the legislature adopted for planned communities. [*Achen-Gardner, Inc. v. Superior Court*](#), 173 Ariz. 48, 54 (1992). (“We also construe a statute in a manner that ‘will best serve the legislature's purposes, policies, and goals’ apparent from the whole body of relevant law. [*Tracy v. Superior Court*](#), 168 Ariz. 23, 31, 810 P.2d 1030, 1038 (1991).”)

B. The 2021 Amendments to the 2001 Covenants Are Enforceable.

1. The 2021 Amendment Was Adopted In Accordance with the Declaration.

Plaintiffs agree with the Shores that the 2001 Amended and Restated Declaration governs the lots and common areas within the gated community. Complaint, ¶ 14. Every lot purchaser reading page 1 of the Declaration is placed on notice that it had “been approved by the written approval or the affirmative vote,

or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership.” This clear, unambiguous language means what it says. See [*Duffy v. Sunburst Farms E. Mut. Water & Agric. Co., Inc.*](#), 124 Ariz. 413, 416 (1979)(“ We also determine that the phrase used in Article IV Section 3 of the Declaration is clear, unambiguous and means exactly what it says; the restrictions embodied within the Declaration may be revoked or amended by vote of a majority of the then owners of lots.”).

The 2021 Amendments followed the same contractual and statutory procedure as the 2001 Declaration. Both the 2001 Declarations and the 2021 Amendment state on their face how owners representing not less than sixty-seven (67%) of the Owners of each class provided their written consent to the 2021 Amendment. See [2001 Declaration, p. 8 of 56 \(Appx. 00\)](#) and [2021 Amendment, p. 1 \(Appx. 00\)](#). Plaintiffs must concede that the 2021 Amendments successfully passed through the same procedure as the 2001 process, and Plaintiffs should not claim one is valid and the other is not. [*Miles v. Franz Lumber Co.*](#), 14 Ariz. 455, 457 (1913) (“[A party] should not be permitted to 'blow hot and cold' with reference to the same transaction or insist at different times on the truth of each of two conflicting allegations according to the promptings of his private interest.”)

Florida has upheld amendments that completely banned leasing after an owner purchased property at a time when the declaration permitted the right to lease. [*Flagler Fed. Sav & Loan Ass’n of Miami v. Crestview Towers Condo*](#), 595 S.2d 198, 199-200 (Fla. Dist. Ct. App. (1992)); see also [*Kroop v. Caravelle Condo. Ass’n.*](#), 323 So.2d 307, 309 (Fla. App. 1975).

The Florida Supreme Court also upheld an amendment that restricted leasing to a minimum of nine months, even though the original Declaration permitted leasing of any length. [*Woodside Village Condo. Ass’n v. Jahren*](#), 806 So.2d 452, 461-462 (Fla, 2002).

Georgia allowed an amendment banning leasing even though the owner bought in reliance on the previous version that allowed leasing. [*Pasha v. Battle Creek Homeowners Ass'n.*](#), 829 SE 2d 618, 619 (Ga. Ct. App 2019).

The Texas Court of Appeals ruled in favor of an amendment that is directly on point with The Shores Amendment. In [*Poole Pointe v. DeGon*](#), No. 03-20-00618-CV, 2022 WL 869809 (Tex App.—Austin, March 24, 2022, the original Declaration allowed leasing and required that the properties be “devoted, improved and occupied exclusively to Single Family Residential Use”). Applying these facts that are also present in The Shores’ appeal, the Texas Court of Appeals stated:

For example, the Restrictions provide that “[a]ll property [] shall be used, devoted, improved and occupied exclusively for Single Family Residential Use.” The Restrictions also prohibit business or commercial activity within the subdivision with the exception of “the leasing of a single family dwelling by the Owner thereof, subject to all the provisions” of the Restrictions. “[R]estrictions placed upon lots for the purpose of prescribing and preserving the residential character thereof are looked upon with favor by the courts.” [*Wald v. West MacGregor Protective Ass'n*](#), 332 S.W.2d 338, 343 (Tex. App-Houston 1960, writ ref’d n.r.e.). The minimum duration requirement created by the Amendment reinforced the existing residential use and occupancy restriction and the prohibition against commercial activities. Furthermore, the Texas Supreme Court has indicated that amending deed restrictions is an appropriate method for specifying a minimum duration for leases in a residential subdivision. See [*Tarr v. Timberwood Park Owners Ass'n*](#), 556 S.W.3d 274, 277 (Tex. 2018).

One year later [*Angelwylde HOA v. Fournier*](#), No. 03-21-00269-CV, 2023 WL 2542339 (Tex. App.—Austin, Mar. 17, 2023) was decided in favor of an amendment that banned all leases less than twelve months, after the original Declaration permitted leasing of any length. Again, the original Declaration required that properties be restricted to “Single Family Residential Use”. Again, the Court

approved the amendment because it reinforced existing residential use and restrictions.

Kentucky's Supreme Court has also specifically approved an amendment to a declaration that prohibited short-term rental. Kentucky has a transient lodging code and tax similar to Arizona:

“In analyzing the restrictions and the facts of this case, we agree with the trial court and with Hensley that one-night, two-night, weekend, weekly inhabitants cannot be considered "residents" within the commonly understood meaning of that word, or the use by such persons as constituting "residential" Gadd's use of the property meets the very statutory definition of hotel: a "building or structure kept, used, maintained, advertised, or held out to the public as a place where sleeping accommodations are furnished to the public." KRS 219.011(3). Interpreting every provision of the Deed of Restrictions, as we are required to do, leads to the inescapable conclusion that Gadd is operating a hotel on his property, *Id.* at 524.

[*Hensley v. Gadd*](#), 560 S.W.3d 516 (Ky. 2018). Note that the Arizona transient lodging statute [A.R.S. § 42-5070](#) specifies that a short-term rental is treated the same as a hotel or motel.

The discussion of how other courts in other states resolved the issue of homeowner associations regulating short-term rentals by amending their declarations is helpful, but as discussed below, the Arizona Court of Appeals already reached the same conclusion.

2. Arizona Case Law.

“Courts. . .are hesitant to declare contractual provisions invalid on public policy grounds.” See [1800 Ocotillo, LLC v. WLB Group, Inc.](#), 219 Ariz. 200, 202, ¶ 8 (2008). “Our law generally presumes, especially in commercial contexts, that private parties are best able to determine if particular contractual terms serve their interests. *Id.*, citing [Salt River Project Agric. Improvement & Power Dist. v.](#)

[*Westinghouse Elec. Corp.*](#), 143 Ariz. 368, 375, 383 (1984). Society broadly benefits from the prospect that bargains struck between competent parties will be enforced. See [Restatement \(Second\) of Contracts § 178 cmt. b](#) (“[T]he law[has a] traditional interest in protecting the expectations of the parties.”). “Accordingly, absent legislation specifying that a contractual term is unenforceable, courts should rely on public policy to displace the private ordering of relationships only when the term is contrary to an otherwise identifiable public policy that clearly outweighs any interests in the term's enforcement. Id. § 178 [citing Restatement (Second) of Contracts § 178 cmt. B]” [*1800 Ocotillo, LLC v. WLB Group, Inc.*](#), 219 Ariz. at 202, ¶ 8.

As demonstrated in the discussion of the legislature’s careful and continued review of the short-term rental phenomenon in the years since Airbnb and VRBO types of online marketplaces have bloomed, it is the Arizona legislature, elected by the voters of Arizona who decide public policy, not the courts. [*Collier v. O’Neil*](#), 63 Ariz. 320, 322-23 (1945). The Planned Community Act defines a highly regulated type of development that meets specific requirements and must be governed by a Declaration that has enforcement powers. [A.R.S. § 33-1802\(4\)](#).

All developments are not the same. Not all developments are “Planned Communities” that own common areas as defined in [A.R.S. § 33-1801](#), et seq.

[*Dreamland Villa Cmty. v. Raimey*](#), 224 Ariz. 42 (App. 2010) presents a very different factual setting than The Shores community, its Declaration, and the circumstances of its residents. As the Court of Appeals found “noteworthy,” the Dreamland Villa community did not meet the definition of “Planned Community.” [*Dreamland*](#), 224 Ariz. at 49, ¶ 30 (“In this case, it is noteworthy that there were no common areas within Dreamland Villa.”

The Dreamland community consisted of several different separate housing developments, each with its own Declaration of Covenants dealing with the homes

in their development. There was a Dreamland Villa Country Club (DVCC) with voluntary membership of residents who wanted to use the recreational facilities. Home ownership did not provide homeowners with membership in DVCC (as contrasted with The Shores, where all owners of lots are members of the Association. None of the separate areas owned or controlled any common area and there were no assessments. At the Dreamland neighborhoods, ownership sought to organize all the homeowners under the DVCC umbrella, brought in a common area where none had existed before, and required mandatory membership and assessments. Based on this set of facts, the *Dreamland* Court framed the issue presented in its 2010 appeal as follows:

The question here is whether deed restrictions for a community *without common areas*, containing only restrictive covenants pertaining to each lot owner's personal residence, can be amended by a majority vote of lot owners to require membership in an association and the imposition of assessments.

Dreamland, 224 Ariz at 42, ¶ 30 (App. 2010).

The unsurprising answer is “No.” Altogether new and entirely different covenants cannot be imposed “nonconsensually” by exercising the general amendment power of a Declaration.

A Planned Community like The Shores requires a “common area” to be managed under the Declarations, with the owners assessed the expense of such management. That was missing in *Dreamland*. The only “membership” was a voluntary one involving the use of clubhouse facilities that were not part of the residents' ownership. No dues or mandatory membership had been required when the residents bought their property.

The Shores Amendment survives any *Dreamland* analysis. The Shores requires mandatory membership in its Association and consent comes from the

acceptance of the Deed by the owner. The Declaration has been in place for 22 years, replacing a similar Declaration that had been in place from the inception of the Project. Assessments are called for in the Declaration. The covenants and servitudes in which owner/member duties were clarified are all in writing, as is the means of bringing about an amendment to the Declaration. There are no new servitudes imposed in The Shores amendment, only previous ones that were modified. In The Shores, the Association owns the streets, paths, boat docks, and other common areas and is obligated to charge all the owners with the expenses of maintaining and repairing the common areas. Each owner's use of their lot and their use of the streets and other common areas directly impacts all other owners. These important facts differentiate and distinguish The Shores at Rainbow Lake from [*Dreamland*](#).

[*Dreamland*](#) is contrasted with [*Nicdon v. Desert Mountain*](#), 1 CA-CV20-0129, 2021 WL 1691532 (App. Div. 1, 2021), in which the Court considered a “Planned Community” where an identical Amendment to the existing covenants was challenged:

[A]doption of the Amendment complied with the statutory scheme set forth in the Arizona Planned Communities Act. A.R.S. §§ 33-1801 to 1818. Those provisions allow members of a planned community to rent their property "unless prohibited in the declaration" and subject to "the declaration's rental time period restrictions." § [33-1806.01](#); see § [33-1802\(3\)](#) (defining "declaration" to include any amendments). In general, the statutory framework defers to the requirements of a community's governing documents: A declaration may be amended by the "number of . . . eligible voters specified in the declaration." § [33-1817\(A\)\(1\)](#).

[*Desert Mountain*](#), at ¶20.

Like *Desert Mountain*, The Shores has “Existing limits on renting property”—the renter must meet the definition of “Single Family residential use”;

The Shores does not allow leasing “less than the whole Lot”, while Desert Mountain required that the “whole dwelling” had to be rented, meaning that room rental and guesthouse rental are not permitted. Further, Desert Mountain’s Board of Directors can "amend, repeal or add to" property use restrictions in its Sections 4.2 and 5.20 like The Shores board "may restrict and govern the use of any area by any Member, Lessee or Resident in its [Section 4.2](#) and adopt and publish rules governing the use of any area in the Project" under Bylaw 3.9 (g).

Like Plaintiffs here, Nicdon claimed it had no notice that rental time restrictions could be added to the Declaration:

Nicdon argues it lacked notice Desert Mountain might add rental time restrictions. Although no such restrictions explicitly appeared in the Declaration when Nicdon's principals purchased their home, they could have reasonably anticipated further restriction or expansion on matters within the scope of the Declaration's regulation. *See, e.g., Sunburst Farms E., Inc. v. Braden*, No. 1 CA-CV 19-0144, 2020 WL 1952458, at *5, ¶ 28 (Ariz. Ct. App. Apr. 23, 2020) (finding amendment, based on the majority-vote clause in the declaration, that required mandatory payment obligations was not "unforeseeable or unfair" when community historically had common areas and assessments).

Id. at ¶25. [Desert Mountain](#) also carries out our Supreme Court’s holding in [Powell v. Washburn](#), 211 Ariz 553, 554, ¶ 1 (2006), in which the Arizona Supreme Court states:

This case requires us to interpret real property restrictive covenants. One approach has been to construe such covenants narrowly to favor the free use of land. We today adopt the approach of the Restatement (Third) of Property Servitudes (“Restatement”) and hold that restrictive covenants should be interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created. *Powell* at 533.

In [Desert Mountain](#), the Court correctly applied [Powell v. Washburn](#) and stated:

A restrictive covenant is generally valid unless it is illegal, unconstitutional, or violates public policy. Restatement § 3.1; *see Powell*, 211 Ariz. at 557, ¶ 14 (adopting Restatement). As explained in the comments to § 3.1 the Restatement, this concept "applies the modern principle of freedom to contract," which generally means that courts will enforce parties' agreements "without passing on their substance." As such, the party claiming invalidity of a restrictive covenant carries the burden of proof.

[*Desert Mountain*](#), at ¶27.

Our Supreme Court decided [*Powell v. Washburn*](#) in 2006. The decision, entered without dissent, very clearly adopted the Restatement as the new standard in Arizona for reviewing restrictive covenants:

[T]he doctrine of strict construction has been criticized as being too restrictive. *See Restatement § 4.1* cmt. a (2000). Rather, 'the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements.'

The [*Powell v Washburn*](#) Court explained:

We adopt the Restatement approach for interpreting restrictive covenants for three reasons. First, § 4.1 of the Restatement is consistent with long-standing Arizona case law holding that enforcing the intent of the parties is the "cardinal principle" in interpreting restrictive covenants. * * *

Second, although Arizona decisions have referred to the policy of construing restrictive covenants strictly and in favor of free use of land, these references have occurred exclusively in *dicta*. * * *

Third, the Restatement's approach mirrors the contemporary judicial trend of recognizing the benefits of restrictive covenants. * * *

[Citations omitted] [Powell](#) at 557, ¶ 14-16.

In the [Powell](#) Court of Appeals decision from which the Supreme Court granted review, the Court of Appeals stated: “if there is any ‘wiggle’ in determining the intended meaning of a restrictive covenant, the outcome should favor free use of the property.” *Id.* at ¶ 17. The Court of Appeals had applied the rule of finding that any doubts should be resolved against the restriction’s validity. The Arizona Supreme Court applied the Restatement’s less restrictive rule of construction and reached the opposite conclusion and therefore reversed the Court of Appeals.

Applying the correct standard Restatement (Third) of Servitudes the Arizona Supreme Court stated:

Applying the principles of the Restatement, we conclude that although the CC & Rs neither expressly prohibit nor permit RVs as residences, the plain intent and purpose of the restrictions was to limit residences in the Airpark to mobile or manufactured homes, constructed homes, or hangar-homes. We base this conclusion on the language used in the CC & Rs and the purpose for which the restrictions were created.

[Powell v. Washburn](#), 211 Ariz. at 558, ¶ 18.

Although the [Powell v. Washburn](#) decision was rendered before the Planned Communities Act was passed, the Airpark meets the definition of a Planned Community, in that Association membership was mandatory, all residents became members when they received the Deed and the Declaration that had to be accepted with the Deed and the Association controlled and governed large common areas.

[Powell v. Washburn](#) remains the strong holding that restrictive covenants, at least in the context of Planned Communities, should be measured by the test set forth in [Powell v. Washburn](#), 211 Ariz. at 557, ¶ 14-16.

Plaintiffs particularly rely on [Kalway v. Calabria Ranch HOA, LLC](#), 252 Ariz. 532 (2022). The [Kalway](#) opinion considered a residential subdivision consisting of five parcels involving many acres in a rural area east of Tucson. Mr.

Kalway, the plaintiff, owned the largest lot at 23 acres. The other four lots ranged in size from 3.3 acres to 6.6 acres and were owned by four of the defendants (defined in the opinion as the “Other Owners”).

The four Other Owners met without notice to Mr. Kalway, without obtaining his consent, and amended the CC&Rs, imposing new definitions, new restrictions, and new enforcement measures. If the Planned Community Act applied, the secret meeting and voting on an amendment without notice would have violated the open meeting requirement described at [A.R.S. 33-1804](#), and for that reason alone could have been held invalid.

The *Kalway* court relied on a North Carolina case--[Armstrong v. Lodges Homeowners Ass’n](#), 633 S.E.2d 78, 85 (N.C.2006) which held any doubts about the meaning of the restriction required application of the ‘strict construction’ test--resolved against the restriction. That was the test that the same Supreme Court replaced with the more flexible Restatement analysis requiring ascertaining the intent of the parties in [Powell v. Washburn](#). The defendants in *Kalway* failed to cite [Powell v. Washburn](#) in their [Answering Brief](#) or argue in their Answering Brief the proper rule was found in the Restatement, as adopted [in Powell v. Washburn](#).

The *Kalway* decision also refers to [A.R.S. § 33-1817](#) which is definitionally only applicable to Planned Communities, not a residential subdivision. This anomaly grew out of a stipulation entered by the attorneys for both sides at the trial court level wherein they agreed that [A.R.S. § 33-1817](#) applied. *See* [2019 Ariz. Super. LEXIS 433](#) (Superior Court, April 12, 2019) (“In their supplemental briefing, the parties essentially agree that retroactivity is not an issue and that the 2016 amendment to [A.R.S. § 33-1817](#) does not supersede common law. The parties agree that *Dreamland* remains valid law but differ as to whether it is applicable in the present case.”)

The only brief discussion in [Kalway](#) regarding [A.R.S. § 33-1817](#) simply states this statute “does not displace the common law, which prohibits some amendments even if passed by a majority vote.” But that issue was not placed squarely before the Court. Every opinion of the Arizona Supreme Court or Court of Appeals is limited by the factual and legal issues presented. [Swenson v. Cty. of Pinal](#), 243 Ariz. 122, 126 (App. 2017)(“A court's statement on a question not necessarily involved in the case before it is *dictum*.”) Moreover, in The Shores, a mere majority vote would never be enough to pass an amendment.

In this action, this Court is asked to apply the express, on-point Arizona opinion in [Powell v. Washburn](#), which has never been overruled.

Factually, [Kalway](#) did not involve a Board elected by the members and did not involve an open campaign. In [Kalway](#) the owners met secretly and amended the Covenants without telling Mr. Kalway. At The Shores at Rainbow Lake, the Board runs meetings that are open as required by the Arizona legislature, and the proposed amendment was vigorously discussed and debated by the owners during a campaign conducted before and during the voting period. [Kalway](#) also dealt with a variety of new affirmative obligations that appeared to target one owners, Mr. Kalway.

After [Dreamland](#), the Arizona legislature amended [A.R.S. § 33-1817](#), which now specifies an amendment is valid if passed “by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration, including the assent of any individuals or entities that are specified in the declaration.” As long as the legislature acts within its constitutional boundaries, the legislature may modify or abrogate court-made common law. See, e.g., [Young v. Beck](#), 227 Ariz. 1, 7–8 ¶ 26 (2011). There is no question the legislature acted within its constitutional boundaries in amending [A.R.S. § 33-1817](#). This Court should

apply the unanimous decision in [Powell](#) to analyze The Shores' specific sections to which the Amendment is "tethered", not the discarded North Carolina test.

In [Powell v Washburn](#) *supra*, the Court recognized the benefits restrictive covenants provide to the neighborhood. The trial court does not explain its decision concluding that the Amendment lacked foreseeability. The trial court erred in failing to consider the context of the Amendment as it related to the intent of the parties in banning commercial and other nonresidential activity in the community and the existing requirement that any use of a lot “shall be devoted exclusively to Single Family residential use.”

The 2021 Amendment passed by an affirmative vote or written consent of the number of owners specified in the declaration, in this case, more than 67% of each class of ownership. That triggered the statutory obligation of the Association to “prepare, execute and record a written instrument setting forth the amendment.” [A.R.S. § 33-1817 \(A\)\(3\)](#). The Association had no choice but to comply with this statutory obligation. Under the presumption that equity follows the law, the passage and recording of the Amendment satisfied all equitable requirements a Court can impose. [Goodman v. Newzona Inv. Co.](#), 101 Ariz. 470, 474 (1966) (“It is the rule in equity that a valid contract must be given full force and effect even though the contract is unwise or improvident or its enforcement is harsh.”)

In [Powell v Washburn](#), *supra*, the Court recognized the benefits restrictive covenants provide to the neighborhood. The Supreme Court required the lower courts to follow the cardinal principle of interpretation, which is to enforce the stated intent of the parties. Here, the owners in The Shores at Rainbow Lake clearly and unambiguously agreed to a method by which Amendments can be passed. That method complies with the other state court opinions discussed at pages 27-29, above and the Arizona Court of Appeals in [Desert Mountain](#), which approved amendments

imposing duration restrictions on leases in communities devoted exclusively to Single Family residential use.

3. The Shores Amendment meets and passes the *Kalway* test.

Setting aside any procedural missteps in the *Kalway* opinion, Section 2.30 (A) of the 2021 Amendment is obviously an amendment tethered to several sections, and restrictions, found in the 2001 Declarations. The Declarations, when “interpreted to give effect to the intention of the parties as determined from the language of the document in its entirety and the purpose for which the covenants were created”⁴ provides ample notice that additional restrictions to those already present can be foreseen by persons of ordinary intelligence. No reasonable prospective purchaser of a property in a community subject to 44 pages of Declarations and the comprehensive Arizona Planned Community Act would fail to recognize that a covenant that grants owners the ability to lease their property exclusively for Single Family residential use can be clarified or modified by a proper amendment.

Kalway describes that the “restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen.” *Kalway* 252 Ariz. at 539. There are four separate ways *Kalway* permits amendments: refining an existing covenant; correcting an existing covenant; filling a gap in the covenants or changing the restriction in some way. *Kalway*, at ¶ 17 (the existing covenants “must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap or change it in a particular way.”) .Any one of the four is sufficient to pass the test.

The task at hand is to find out if there is an original covenant to which the Amendment is tethered. There are at least four:

⁴ *Powell v. Washburn*, 211 Ariz. 553 at 554, ¶ 1 (2006).

- a. existing restrictions on leasing.
- b. existing definition of leasing;
- c. restriction on commercial or business activity; and
- d. nuisance.

a. *Existing restrictions on leasing:*

1. Under [Art. 2.30](#), no owner can lease less than a full lot. This owners from generating business income by taking in boarders or operating a bed and breakfast by leasing a room or a guest house. Excluding the business of operating transient housing is no different in its limiting effect.
2. No one is permitted to camp, even on a fully leased lot.
3. A property can be leased exclusively for Single Family residential use. Numerous cases from throughout the country conclude that short-term rental is not for the purpose of residential use and is not restricted to single family use.

b. *Existing definition applying to leasing:*

- 1 At [Art. 2.18](#) of the 2001 Declaration, the Declarant created an exception from prohibited ‘commercial or business activity’ for leasing. There was no exception created for leasing from the prohibited “other nonresidential use.” Likewise, there was no exception from each lot being “devoted exclusively to Single Family residential use.” When a Single Family is renting a home for a residence, it is reasonable to expect it to become part of the neighborhood and to join in the mutual respect neighbors have for each other as the regulations require. Plaintiffs admit their short-term rental business brings in visitors to the community,

and thereby increases neighborhood traffic and exacerbates wear and tear on the community amenities and common area. Plaintiffs would have to concede that ALL leasing could have been discontinued by amending out the exception from commercial or business activity. Instead, the definition is, in effect, modified to continue to except long-term rentals, and eliminate only those rentals that qualify as transient lodging--a commercial and nonresidential activity.

c. *Restriction on commercial or business activity:*

1. The Community always banned commercial or business activity that is visible or otherwise not “consistent with the residential character of the property.” [Art. 2.18](#). To protect long-term leasing, the exception must be changed in a particular way to target the short-term activity that may disturb the neighborhood and which does not meet the requirement of Single Family residential use.

d. *Nuisance:*

1. The community has a right to insist on its Board carrying out its obligation to identify activity that constitutes a nuisance through noise, firecrackers, dangerous activities, and potential threats to the health, safety, and welfare of the community. The Board is authorized to take remedial steps that could include a rule penalizing owners who allow their renters to create disturbances of the peace. The Declaration also permits the Board to have a community discussion on conditions and circumstances that may lead to a vote to declare a nuisance. [Art. 2.18](#) prohibits business activity that could “constitute nuisance or a

hazardous or offensive use.” Amending the Declaration through an open, transparent process that permitted all members of the community to state their position, rally support, and then vote, is the reasonable and democratic way of solving a dispute. Courts support such private resolution of disputes as long as it satisfies legal requirements.

Here, The Shores followed the process specified by the Arizona legislature and followed the procedures required under the Declarations for approving an amendment. All owners had notice of the amendment procedure and the opportunity to participate in the debate. The Amendment is securely tethered to the existing covenants. The trial court erred by finding [Section 2.30\(A\)](#) of the 2021 Amendment invalid.

The trial court must have accepted the Plaintiffs' argument that any amendment introducing a temporal limitation to the definition of leasing was unforeseeable. But two aspects of renting are the same in all circumstances: First, money is exchanged to obtain lodging. Second, the lodging in a rental is always temporal. It is an element of the rental experience. Any rules or regulations (or Declarations) impacting the act of leasing are bound to impact the temporal or monetary aspects of leasing.

There was never an expectation of the Declarations remaining status quo. It is reasonably foreseeable to expect Amendments supporting the core value of a community devoted exclusively to single-family residential use, free of commercial activity. [Section 2.30\(A\)](#) of the 2021 Amendment does nothing more than refine the definition of prohibited commercial activity to include short-term rentals that are legislatively defined as commercial activity and are no longer considered a use devoted exclusively to Single Family residential use. The restriction is uniform on all owners/members and fully satisfies the Declarations and the Planned Community Act.

The people who rent by the night do not consider The Shores Rainbow Lake as their residence. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214 (11th Cir. 2008) (defining “residence” as an “abode or habitation to which one intends to return as distinguished from a place of temporary sojourn or a transient visit.”); *see also Schneider v. County of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002) (holding that a bed-and-breakfast is not a "dwelling").

The 2021 Amendment refines, corrects, fills in a gap, or changes the 2001 Declaration in a particular way. The 2001 Covenants restricted leasing. All leases must be "devoted exclusively to Single Family residential use". *See Section 2.18*. For purposes of *Section 2.18*, the 2001 Covenants created an exception for leasing and provided that "[t]he leasing of a residence by the Owner thereof shall not be considered a trade or business within the meaning of this section." However, the leasing of a residence for nonresidential use was and still is prohibited. Under the 2021 Amendment, the owners provided clarity, and properly determined short-term leases of less than 30 days will no longer be exempted from the prohibited trade, business, or other nonresidential use.

VI. ATTORNEY FEES

The Association seeks to recover its costs and attorney fees pursuant to the terms of the 2001 Covenants as amended by the 2021 Amendment as well as under [A.R.S. 12-341.01](#).

VII. CONCLUSION

Although the owners in other communities or other states litigated the issue of whether a community "devoted exclusively to Single Family residential use" allows Airbnb, VRBO, and other corporations to recruit owners to operate hotel-like operations, the Association did not want this issue left for strangers (or judges) to decide. Even if courts in other states would conclude the business of short-term

rental is incongruent with living in a neighborhood "devoted exclusively to Single Family residential use," the Association allowed all 188 owners to decide what type of leasing is or should be part of a community "devoted exclusively to Single Family residential use."

The Association and its 188 owners engaged in the election process and complied with all requirements of the Declarations and all statutory requirements. The Association then followed the statutory mandate of recording the Amendment after the Amendment received the required 67% affirmative vote from both classes of ownership. If the 2021 Amendment prevents the rapid coming and going of weekend occupants, then the Amendment also reduces the use of everything from the guard gate to the roads, docks, and trails, thus lessening the financial impact each owner faces.

The Shores protects minority opinions among the owner/members, almost at the cost of ensuring no amendments will ever pass. Imagine the state of our democracy if the minimum number of votes to pass a measure required 67 % of **all** registered voters. Even if the voter turnout was 80%, a small minority of 13.1% voting "no" could defeat a measure that all other actual votes approved.

In this case, if the court were to rule for the Plaintiffs and require an amendment to the definition of business or exception to business be passed by 100% of ALL owners/members, any change to this community's governance would be unreasonably remote and in direct conflict with Plaintiffs' (and other owners') agreement set forth in the Declarations. At The Shores, if a small minority of owners fail to vote or vote no, an Amendment does not pass.

Hundreds of planned communities used the same or similar language as The Shores used before 2001. Affirming the trial court's judgment that prohibits a reasoned distinction between short-term vacation rentals and leasing a home as a

single-family residence will upend established single-family residential communities that have protected thousands of residents for decades.

This Court must determine, like the Arizona legislature has, that it is good public policy to allow owners in a Planned Community to follow their agreement on how Declarations may be amended. The Shores' Declarations and the amendment procedure contained therein created a valid and enforceable agreement and are not subject to a post-vote challenge by owners of 7 of the 188 lots. When The Shores' Amendment was approved under the Declarations' strict requirement of obtaining 67% or more affirmative votes from both classes of ownership, good policy dictates the Amendment be recorded and found valid and enforceable. There is nothing inherently evil about restricting the duration of a lease to thirty days or more in a community devoted exclusively to Single Family residential use. Instead, the Arizona legislature approves such restriction.

The Association respectfully requests the Court to find [Section 2.30\(A\)](#) of the 2021 Amendment to be valid and enforceable, reverse the trial court's finding to the contrary, remand for a re-determination of attorney fees at the trial court level, and award attorney fees on appeal.

Dated this 18th day of September, 2023.

JENNINGS, HAUG & CUNNINGHAM, LLP

By /s/ James L. Csontos

Jack R. Cunningham (No. 004961)

James L. Csontos (No. 010823)

Attorneys for Appellant/Cross-Appellee

The Shores At Rainbow Lake Community
Association

.

Exhibit 1

WHEN RECORDED RETURN TO:

Michael G. Galloway
Quarles & Brady Streich Lang LLP
Two North Central Avenue
Phoenix, AZ 85004-2391

AMENDED AND RESTATED

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

FOR

THE SHORES AT RAINBOW LAKE

AMENDED AND RESTATED
DECLARATION OF COVENANTS, CONDITIONS
AND RESTRICTIONS
FOR
THE SHORES AT RAINBOW LAKE

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AMENDED AND RESTATED
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS
FOR THE SHORES AT RAINBOW LAKE

This Amended and Restated Declaration of Covenants, Conditions, and Restrictions (the "Declaration") is made this ___ day of August, 2001, by The Shores At Rainbow Lake Community Association, an Arizona non-profit corporation (the "Association").

WITNESSETH:

WHEREAS, the real property described on Exhibit A attached hereto and improvements, and the appurtenances, easements and rights appurtenant thereto (collectively referred to herein as the "Property") has previously been submitted and subject to a Declaration of Covenants, Conditions and Restrictions; which instrument was recorded in Docket 825, pages 248 through 309, inclusive, records of Navajo County, Arizona, imposing certain covenants, conditions and restrictions upon the real property located in Navajo County, Arizona, described in the Declaration.

WHEREAS, the Declaration of Covenants, Conditions and Restrictions for the Shores at Rainbow Lake was amended by (i) instrument dated May 8, 1987 and recorded on May 15, 1987 in Docket 868 at Pages 832-845, inclusive, (ii) instrument dated May 15, 1990 and recorded May 24, 1990 in Docket 995, Pages 149-152, inclusive, (iii) instrument dated January 7, 1991 and recorded January 16, 1991 in Docket 1019, Pages 436 through 439, inclusive, and (iv) instrument dated February 26, 1992 and recorded February 28, 1992 in Docket 1068, Pages 99-104, inclusive.

WHEREAS, the Declaration of Covenants, Conditions and Restrictions for the Shores at Rainbow Lake, as previously amended, shall be referred to herein as the "Initial Declaration."

WHEREAS, the Initial Declaration provides that it may be amended by the written approval or of the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership in the Association and that this Amended and Restated Declaration of Covenants, Conditions and Restrictions for the Shores at Rainbow Lake has been approved by the written approval or the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership.

WHEREAS, the Initial Declaration provides that any amendment approved by the Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership shall be signed by the President or Vice President of the Association and shall certify that the amendment has been approved as required by the Initial Declaration.

WHEREAS, the Association now desires to amend and restate the Declaration of Covenants, Conditions and Restrictions in its entirety.

NOW, THEREFORE, the Association hereby declares that all of the said real property described on Exhibit A attached hereto (hereinafter sometimes referred to as the Shores at Rainbow Lake) shall be held, sold, and conveyed subject to the easements, restrictions, covenants, and conditions contained in this Declaration which are for the purpose of protecting the value and desirability of, and which shall run with said real property, and be binding on all parties having any right, title or interest in said real property or any part thereof, their heirs, successors, and assigns, and shall inure to the benefit of each owner thereof.

ARTICLE 1

DEFINITIONS

- 1.0. "**Annual Assessment**" means the assessments levied against each Lot and Parcel, and the Owner thereof, pursuant to Section 5.1 of this Declaration.
- 1.1. "**Architectural Committee**" means the committee of the Association to be created pursuant to Section 4.9 of this Declaration.
- 1.2. "**Architectural Committee Rules**" means the rules and guidelines adopted by the Architectural Committee pursuant to Section 4.9 of this Declaration, as they may from time to time be amended or supplemented.
- 1.3. "**Articles**" means the Articles of Incorporation of the Association, as they may from time to time be amended.
- 1.4. "**Assessable Property**" means each Lot or Parcel.
- 1.5. "**Assessment**" means an Annual Assessment, Special Assessment or Extraordinary Assessment.
- 1.6. "**Assessment Lien**" means the lien created and imposed by Article 5 of this Declaration.
- 1.7. "**Assessment Period**" means the period set forth in Section 5.4 of this Declaration.
- 1.8. "**Association**" means The Shores At Rainbow Lake Community Association, an Arizona non-profit corporation.
- 1.9. "**Association Rules**" means the rules adopted by the Board pursuant to Section 4.2 of this Declaration, as they may from time to time be amended.
- 1.10. "**Board**" means the Board of Directors of the Association.
- 1.11. "**Bylaws**" means the Bylaws of the Association, as they may from time to time be amended.
- 1.12. "**Cluster Residential Common Area**" means the real property, together with all improvements situated thereon, designated on the Project Plat as Tracts F and U and the real property, together with all improvements situated thereon, owned or leased by the Association and restricted by this Declaration or any Tract Declaration to the exclusive use of the Owners, Residents and Lessees of Cluster Residential Units.

1.13. "**Cluster Residential Unit**" means a portion of a building located within the Project intended for independent ownership for use and occupancy as a residence by a Single Family and which is attached by a common wall to one or more other portions of the same building which are also intended for independent ownership for use and occupancy as a residence by a Single Family. By way of illustration, the term "Cluster Residential Unit" shall include condominium units and attached townhouse units but shall not include single family houses situated on separately platted lots or rental apartments.

1.14. "**Cluster Residential Use**" means the use of a portion of the Project for the construction, development, sale, lease and use of Cluster Residential Units together with related areas intended for the use and enjoyment of the Owners, Lessees and Residents of the Cluster Residential Units.

1.15. "**Common Area**" means all real property together with the buildings, structures and improvements thereon, which is owned or leased by the Association for the use and benefit of all or less than all of the members of the Association, and shall include the Cluster Residential Common Area and the Detached Residential Common Area. With respect to Tracts L and M, "Common Area" shall mean the land underlying the Lake and shall not include the water in the Lake which is owned by the Show Low Irrigation District. The Common Area to be owned by the Association at the time of the conveyance of the first Lot or Parcel to a Purchaser is Tracts A, F, G, H, J, K, L, M, N and P as shown on the Project Plat.

1.16. "**Common Expenses**" means expenditures made by or financial liabilities of the Association, together with any allocations to reserves.

1.17. "**Declaration**" means this Amended and Restated Declaration of Covenants, Conditions, and Restrictions, as it may be further amended from time to time.

1.18. "**Detached Residential Common Area**" means the real property, together with all improvements situated thereon, designated on the Project Plat as Tracts G, H, I, N and P, and all other real property, together with all improvements situated thereon, owned or leased by the Association and restricted by this Declaration or any Tract Declaration to the exclusive use of the Owners of Detached Residential Units.

1.19. "**Detached Residential Unit**" means a building situated upon a Lot intended for independent ownership for use and occupancy as a residence by a Single Family.

1.20. "**Detached Residential Use**" means the use of a portion of the Project for the construction, development, sale, lease and use of Detached Residential Units together with related areas intended for the use and enjoyment of the Owners, Residents and Lessees of the Detached Residential Units.

1.21. "**Extraordinary Assessments**" means any assessment levied pursuant to Section 5.3 of this Declaration.

1.22. "Lake" means Rainbow Lake, portions of which are designated on the Project Plat as Tracts L and M.

1.23. "Lake Areas" means the Lake and the Lakefront Easement Areas.

1.24. "Lakefront Easement Area" means, with respect to all Lakefront Lots and Lakefront Parcels other than Lots 120-127, inclusive, those portions of the Lakefront and Lakefront Parcels which lie within twenty feet (20') of the Lake and, with respect to Lots 120-127, inclusive, means the portions of those Lakefront Lots which lie within forty feet (40') of the Lake, and any other portions of Lakefront Lots or Lakefront Parcels which are subject to easements, as shown on or created by the Project Plat or any other recorded plat of dedication or subdivision plat or by this Declaration or any Tract Declaration, for the purpose of providing access to and for the construction, use, maintenance and operation of the Lake.

1.25. "Lakefront Facilities" means docks, wharves, floats, slips, ramps, piers, landings and other structures or equipment designed for use with, and for access to, the Lake.

1.26. "Lakefront Lot" means a Lot, all or a portion of which is contiguous to a Lake.

1.27. "Lakefront Parcel" means a Parcel, all or a portion of which is contiguous to a Lake.

1.28. "Land Use Classification" means the classification established by this Declaration or any Tract Declaration which designates the type of improvements which may be constructed on a Lot or Parcel and the purposes for which such Lot or Parcel, and the improvements situated thereon, may be utilized.

1.29. "Lessee" means the lessee or tenant under a lease, oral or written, of any Lot or Parcel including an assignee of a lease.

1.30. "Lot" means a portion of the Project intended for independent ownership and use and designated as a lot or as a condominium unit on the Project Plat or on any Neighborhood Plat and, where the context indicates or requires, shall include any Residential Unit, building, structure or other improvements situated on the Lot.

1.31. "Member" means any Person who is a Member of the Association.

1.32. "Neighborhood Association" means any homeowners association or similar association formed or organized pursuant to any Neighborhood Declaration.

1.33. "Neighborhood Common Area" means all real property, and all improvements located "hereon, owned or leased by a Neighborhood Association for the common use and benefit of the members of the Neighborhood Association.

1.34. "**Neighborhood Declaration**" means any declaration of covenants, conditions and restrictions, condominium declaration or similar instrument, other than this Declaration or a Tract Declaration, recorded against any part of the Project.

1.35. "**Neighborhood Plat**" means any subdivision plat or condominium plat recorded against any part of " the Project, and all amendments, supplements and corrections thereto.

1.36. "**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 Lot or Parcel. Owner shall not include (i) Persons having an interest in a Lot or Parcel merely as security for the performance of an obligation, or (ii) a lessee or tenant of a Lot or Parcel. 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 in a Lot or Parcel under which the seller is obligated to convey to the purchaser the remainder of seller's title in the Lot or Parcel, whether legal or equitable, on payment in full of all monies due under the contract. Owner shall not include a purchaser under a purchase contract and receipt, escrow instructions or similar executory contracts which are intended to control the rights and obligations of the parties to the executory contracts pending the closing of a sale or purchase transaction. In the case of Lots or Parcels the fee simple title to which is vested in a trustee pursuant to Arizona Revised Statutes, Section 33-801, et seq., the Trustor shall be deemed to be the Owner. In the case of the Lots or Parcels the fee simple title to which is vested in a trustee pursuant to a subdivision trust agreement or similar agreement the beneficiary of any such trust who is entitled to Possession of the trust property shall be deemed to be the Owner.

1.37. "**Parcel**" means any real property, and all buildings, structures and improvements situated thereon, restricted by this Declaration or a Tract Declaration to Detached Residential Use or Cluster Residential Use except for (i) Lots, (ii) Common Area, (iii) Neighborhood Common Area and (iv) any real property owned by or dedicated to the United States, the State of Arizona, Navajo County, any municipality having jurisdiction over the Project, or any part thereof, or I any political subdivisions thereof, for as long as any such entity or political subdivision is the owner thereof or for so long as said dedication remains effective.

1.38. "**Person**" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency or other legal or commercial entity.

1.39. "**Primary Roadway**" means the roadway designated on the Project Plat as Rainbow View Drive and that portion of the roadway designated on the Project Plat as Shoreline Circle which is south of Rainbow View Drive, together with all improvements situated thereon.

1.40. "**Project**" means the real property described on Exhibit A attached to this Declaration, together with all improvements situated thereon.

1.41. "**Project Documents**" means this Declaration, the Articles, the Bylaws, the Association Rules and the Architectural Committee Rules.

1.42. "**Project Plat**" means the plat for The Shores At Rainbow Lake recorded in Book 16 of Maps, page 21-27, records of Navajo County, Arizona, and all amendments, supplements and corrections thereto.

1.43. "**Purchaser**" means any Person who by means of a voluntary transfer becomes the Owner of a Lot or Parcel.

1.44. "**Recording**" means placing an instrument of public record in the office of the County Recorder of Navajo County, Arizona, and "Recorded" means having been so placed of public record.

1.45. "**Resident**" means each Owner or Lessee residing in any Residential Unit, the members of the immediate family of such Owner or Lessee residing with such Owner or Lessee, and any other person residing with such Owner or Lessee.

1.46. "**Residential Unit**" means a Cluster Residential Unit or a Detached Residential Unit.

1.47. "**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, who maintain a common household in a Residential Unit.

1.48. "**Special Assessment**" means any assessment levied and assessed pursuant to Section 5.2 of this Declaration.

1.49. "**Tract Declaration**" means a declaration recorded pursuant to Section 2.0 of this Declaration.

1.50. "**Visible From Neighboring Property**" means, with respect to any given object, that such object is or would be visible to a person six feet tall, standing at ground level on any part of such neighboring property.

ARTICLE 2

LAND USE CLASSIFICATIONS, PERMITTED USES AND RESTRICTIONS

2.0. Tract Declarations. The Association shall have the right, but not the obligation, to record one or more Tract Declarations with respect to particular property designating Common Areas, establishing the Land Use Classification for the property if the Land Use Classification has not been established by Section 2.1 of this Declaration or if the Association desires to change the Land Use Classification established by Section 2.1 and establishing such additional covenants, conditions, and restrictions as may be appropriate for that property. A Tract Declaration may be only amended by a written instrument executed by (i) the Owners of all of the property subject to the Tract Declaration and (ii) the Association. The Association hereby declares that all of the real property within the Project is and shall be held, conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred, in whole or in part subject to this Declaration, any Recorded Tract Declaration and any Recorded Neighborhood Declaration applicable thereto, as such instruments may be amended or modified from time to time; provided, however, property which is dedicated to the public or a governmental entity for public purposes shall not be subject to this Declaration while owned by the public or the governmental entity, although restrictions imposed in this Declaration upon the Owners, Lessees and Residents concerning the use and maintenance of such public areas shall at all times apply to the Owners, Lessees and Residents. This Declaration and the Tract Declarations are declared and agreed to be in furtherance of a general plan for the subdivision, improvement, sale and lease of the Project and are established for the purpose of enhancing and protecting the value, desirability and attractiveness of the Project. This Declaration shall run with all Lots, Parcels and other property in the Project for all purposes and shall be binding upon and inure to the benefit of the Association, all Owners, Lessees and Residents and their successors in interest, and all other persons having a Recorded interest in all or any part of the Project.

2.1. Land Use Classifications. The Land Use Classification for the Lots designated on the Project Plat as Lots 1 through 136, inclusive, and for the real property designated on the Project Plat as Tract B, D AND E shall be Detached Residential Use. The Land Use Classification for the Real property designated on the Project Plat as Tract C shall be Cluster Residential Use. The real property designated on the Project Plat as Tracts F and U shall be Cluster Residential Common Area. The real property designated on the Project Plat as Tracts G, H, I, N and P shall be Detached Residential Common Area. The Land Use Classifications for all other property within the Project shall be fixed by The Association in a Tract Declaration Recorded for that portion of the Project pursuant to Section 2.0 of this Declaration. A Tract Declaration may also change the Land Use Classification established by this Section for Lots 1 through 136, inclusive, and Tracts B, C, D, E, F, G, H, I, N, P and U. The Tract Declarations shall be construed as a supplement to this Declaration and fully a part hereof for all purposes to the same extent as if all of the provisions thereof were set forth in this Declaration. The Land Use Classifications for Lots and Parcels established by this Declaration or by a Tract Declaration shall not be changed except as specifically permitted by this Declaration, and no Lot or Parcel shall be used for any use other than a use allowed under the established Land Use Classification for such Lot or Parcel. Except as specifically provided in this Declaration, the definitions and

characteristics of the Land Use Classifications, and specific permitted and prohibited uses in such classifications, shall be determined in the Tract Declarations.

2.2. Architectural Control. Except as otherwise expressly provided in this Declaration, no improvements, alterations, repairs, excavation, grading, landscaping or other work which in any way alters the exterior appearance of any Lot or Parcel, or the improvements located thereon, from its natural or improved state existing on the date this Declaration was first Recorded shall be made or done without the prior written approval of the Architectural Committee, and no such work shall be commenced until a site plan for the Lot or Parcel upon which the work is to be performed has been approved in writing by the Architectural Committee. The site plan shall show the location of all Residential Units, buildings or other structures to be constructed on the Lot or Parcel. The Architectural Committee shall not approve the construction of any Detached Residential Unit unless the plans and specifications for the Detached Residential Unit provide for the construction of a garage containing adequate space for the parking of at least two (2) automobiles. No building, fence, wall, Residential Unit or other structure shall be commenced, erected, maintained, improved, altered, or made without the prior written approval of the Architectural Committee. All subsequent additions to or changes or alterations in any Residential Unit, building, fence, wall or other structure, including exterior color scheme, and all changes in the grade of Lots or Parcels, shall be subject to the prior written approval of the Architectural Committee. No changes or deviations in or from the plans and specifications once approved by the Architectural Committee shall be made without the prior written approval of the Architectural Committee.

2.3. Temporary Occupancy and Temporary Buildings. No trailer, basement of any incomplete building, tent, shack, garage or barn, and no temporary buildings or structures of any kind, shall be used at any time for a residence, either temporary or permanent. Temporary buildings, trailers or other structures used during the construction of a Residential Unit shall be removed immediately after the completion of construction, and in no event shall any such buildings, trailer or other structures be maintained or kept on any property for a period in excess of twelve months without the prior written approval of the Architectural Committee.

2.4. Maintenance of Lawns and Plantings. Each Owner of a Lot or Parcel shall keep all shrubs, trees, hedges, grass and plantings of every kind located on (i) his Lot or Parcel, (ii) planted public right-of-way areas between sidewalks (or bikepaths) and the street curb in front of his Lot or Parcel (iii) any other public right-of-way or easement area which abuts the Owner's Lot or Parcel and which is located between the boundary line of his Lot or Parcel and the paved area of any street, sidewalk, bikepath or similar area, and (iv) any non-street public right-of-way or easement area adjacent to his Lot or Parcel, neatly trimmed, and shall keep all such areas properly cultivated and free of trash, weeds and other unsightly material; provided, however, that such Owner shall not be responsible for maintenance of any area over which (i) the Association assumes the responsibility in writing; (ii) the Association has been given such responsibility by a Recorded instrument as provided in Section 6.0 of this Declaration; or (iii) Navajo County or any municipality having jurisdiction over such property assumes responsibility, for so long as the Association, Navajo County or such municipality assumes or has responsibility.

2.5. Nuisances; Construction Activities. No rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any Lot, Parcel or other property, and no odors or loud noises shall be permitted to arise or emit therefrom, so as to render any such property or any portion thereof, or activity thereon, unsanitary, unsightly, offensive or detrimental to any other property in the vicinity thereof or to the occupants of such other property. No other nuisance shall be permitted to exist or operate upon any Lot, Parcel or other property so as to be offensive or detrimental to any other property in the vicinity thereof or to its occupants. Without limiting the generality of any of the foregoing provisions, no exterior speakers, horns, whistles, firecrackers, bells or other sound devices, except security devices used exclusively for security purposes, shall be located, used or placed on any Lot, Parcel or other property. Normal construction activities and parking in connection with the building of improvements on a Lot, Parcel or other property shall not be considered a nuisance or otherwise prohibited by this Declaration, but Lots, Parcels and other property shall be kept in a neat and tidy condition during construction periods, trash and debris shall not be permitted to accumulate, and supplies of brick, block, lumber and other building materials will be piled only in such areas as may be approved in writing by the Architectural Committee. In addition, any construction equipment and building materials stored or kept on any Lot, Parcel or other property during the construction of improvements may be kept only in areas approved in writing by the Architectural Committee, which may also require screening of the storage areas. The Architectural Committee in its sole discretion shall have the right to determine the existence of any such nuisance.

2.6. Diseases and Insects. No Person shall permit any thing or condition to exist upon any Lot, Parcel or other property which shall induce, breed or harbor infectious plant diseases or noxious insects.

2.7. Repair of Building. No Residential Unit, building or structure on any Lot, Parcel or other property shall be permitted to fall into disrepair and each such Residential Unit, building and structure shall at all times be kept in good condition and repair and adequately painted or otherwise finished. In the event any Residential Unit, building or structure is damaged or destroyed, then, subject to the approvals required by Section 2.2 of this Declaration, such Residential Unit, building or structure shall be immediately repaired or rebuilt or shall be demolished.

2.8. Antennas. No antenna or other device for the transmission or reception of television or radio signals or any other form of electromagnetic radiation including, without limitation, satellite or microwave dishes, shall be erected, used or maintained outdoors on any Lot, Parcel or other property, whether attached to a Residential Unit, building or structure or otherwise, unless the antenna or device is a direct broadcast satellite (DBS) antenna less than one meter in diameter, a multi-point distribution service (MDS) antenna less than one meter in diameter, an antenna designed to receive television broadcast signals, or any other type of antenna which the association must allow pursuant to rules promulgated by the Federal Communications Commission ("FCC") (hereinafter referred to as "Permitted Antennas"). If an Owner wishes to install a Permitted Antenna, the Owner must apply to and comply with all rules and guidelines established by the Architectural Committee.

2.9. **Mineral Exploration.** No Lot, Parcel or other property shall be used in any manner to explore for or to remove any water, oil or other hydrocarbons, minerals of any kind, gravel, earth or any earth substance of any kind.

2.10. **Trash Containers and Collection.** No garbage or trash shall be placed or kept on any Lot, Parcel or other property, except in covered containers of a type, size and style which are approved by the Architectural Committee. In no event shall such containers be maintained so as to be Visible From Neighboring Property except to make the same available for collection and then only for the shortest time reasonably necessary to effect such collection. All rubbish, trash, or garbage shall be removed from Lots, Parcels and other property and shall not be allowed to accumulate thereon. No outdoor incinerators shall be kept or maintained on any Lot, Parcel or other property.

2.11. **Clothes Drying Facilities.** No outside clotheslines or other outside facilities for drying or airing clothes shall be erected, placed or maintained on any Lot, Parcel or other property so as to be Visible From Neighboring Property.

2.12. **Party Walls.** No walls or fences shall be constructed on the boundary line between Lots or Parcels or for the purpose of acting as a divider between Lots or Parcels.

2.13. **Utility Service.** 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 any Lot, Parcel or other property unless the same shall be contained in conduits or cables installed and maintained underground or concealed in, under or on buildings or other structures approved by the Architectural Committee. No provision of this Declaration shall be deemed to forbid the erection of temporary power or telephone structures incident to the construction of buildings or structures approved by the Architectural Committee.

2.14. **Overhead Encroachments.** No tree, shrub, or planting of any kind on any Lot, Parcel or other property shall be allowed to overhang or otherwise to encroach upon any sidewalk, street, pedestrian way or other area from ground level to a height of eight (8) feet without the prior approval of the Architectural Committee.

2.15. **Health, Safety and Welfare.** In the event additional uses, activities, and facilities are deemed by the Board to be a nuisance or to adversely affect the health, safety or welfare of Owners, Lessees and Residents, the Board may make rules restricting or regulating their presence in the Project as part of the Association Rules or may direct the Architectural Committee to make rules governing their presence on Lots, Parcels or other property as part of the Architectural Committee Rules.

2.16. **Model Homes.** The provisions of this Declaration, Tract Declarations or Neighborhood Declarations which prohibit non-residential use of Lots and Parcels and regulate parking of vehicles shall not prohibit the construction and maintenance of model homes by persons engaged in the construction of Residential Units in the Project and parking incidental to the visiting of such model homes so long as the location of such model homes and the opening

and closing hours is approved in writing by the Architectural Committee, and the construction, operation and maintenance of such model homes otherwise comply with all of the provisions of this Declaration. The Architectural Committee may also permit Lots and other areas to be used for parking in connection with the showing of model homes so long as such parking and parking areas are in compliance with the ordinances of Navajo County, any municipality having jurisdiction over the Project and the Architectural Committee Rules. Any homes constructed as model homes shall cease to be used as model homes at any time the Owner thereof is not actively engaged in the construction and sale of Residential Units in the Project, and no home shall be used as a model home for the sale of homes not located in the Project.

2.17. Incidental Uses. The Architectural Committee may approve uses of property within a Land Use Classification which are incidental to the full enjoyment by the Owners of the property within the Land Use Classification. Such approval may be subject to such regulations, limitations and restrictions, including termination of the use, as the Architectural Committee may wish to impose, in its sole discretion, for the benefit of the Project as a whole. By way of example and not of limitation, the uses which the Architectural Committee may permit are private roadways and streets within an area having a land use classification of Cluster Residential Use or Detached Residential Use, tennis clubs and/or swimming clubs intended primarily for the benefit of all or certain Owners and Residents within areas having a Land Use Classification of Cluster Residential Use or Detached Residential Use, and tennis courts, swimming pools, and other recreational facilities intended for usage by the Residents or owners of more than one Lot or Parcel within any area classified for residential use.

2.18. Residential Use. All Lots and Parcels shall be used, improved and devoted exclusively to Single Family residential use. No gainful occupation, profession, trade, business or other nonresidential use shall be conducted on any Lot or Parcel or in or from any residence, except that an Owner or other resident or a residence may conduct a business activity within a residence 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 residence; (ii) the business activity conforms to all applicable zoning ordinances or requirements for the property; (iii) the business activity does not involve persons coming onto the lot or the door-to-door solicitation of owners or other residents in the property; and (iv) the business activity is consistent with the residential character of the property and does not constitute nuisance or a hazardous or offensive use or threaten security or safety of other residents in the property, as may be determined from time to time in the sole discretion of the board. The terms "gainful occupation," "profession," "trade," "business" and "nonresidential use" as used in this section shall be construed to have ordinary, generally accepted meanings, and shall include, without limitation, any occupation, work or activity undertaken on an ongoing basis which involves the provision of goods or services to persons other than the provider's family and for which the provider receives a fee, compensation or other form of consideration, regardless of whether: (a) such activity is engaged in full or part time; (b) such activity is intended or does generate a profit; or (c) a license is required for such activity. The leasing of a residence by the Owner thereof shall not be considered a trade or business within the meaning of this section. Property classified as "Detached Residential Use" under this Declaration or a Tract Declaration may be used only for the construction and occupancy of Detached Residential Units and typical residential activities incidental thereto, such as the construction and use of a family swimming pool, and no structure whatever, other than one

private Detached Residential Unit, together with a private garage for not more than three (3) cars, a guest house or servant quarters, shall be erected, placed or permitted to remain on any such Lot.

2.19. Animals. No animal, bird, fowl, poultry or livestock other than two dogs, cats, parakeets or similar household birds shall be maintained on any Lot or Parcel and then only if they are kept, bred or raised thereon solely as domestic pets and not for commercial purposes. No animal, bird, fowl, poultry or livestock shall be allowed to make an unreasonable amount of noise or to become a nuisance. No structure for the care, housing or confinement of any animal, bird, fowl, poultry, or livestock shall be maintained so as to be Visible From Neighboring Property. Upon the written request of any Owner, Lessee or Resident, the Architectural Committee shall conclusively determine, in its sole and absolute discretion, whether, for the purposes of this Section, a particular animal, bird, fowl, poultry, or livestock is a nuisance or making an unreasonable amount of noise. Any decision rendered by the Architectural Committee shall be enforceable in the same manner as other restrictions set forth in this Declaration.

2.20. Machinery and Equipment. No machinery or equipment of any kind shall be placed, operated or maintained upon or adjacent to any Lot or Parcel except (i) such machinery or equipment as is usual and customary in connection with the use, maintenance or construction (during the period of construction) of a building, appurtenant structures, or other improvements; (ii) that which the Association may require for the operation and maintenance of the Project.

2.21. Signs. No signs whatsoever (including, but not limited to, commercial, political, "for sale," "for rent" and similar signs) which are Visible From Neighboring Property shall be erected or maintained on any Lot or Parcel except:

(i) Signs required by legal proceedings.

(ii) Two (2) identification signs for each Residential Unit provided the size, color, content and location of such signs have been approved in writing by the Architectural Committee.

(iii) One (1) "for sale" sign may be maintained on a Lot which is available for sale to the public but such sign may be displayed only during such time as an "open house" is being held on such Lot and the Residential Unit located upon such Lot is available for inspection by the general public, provided the size, color, content and location of the sign has been approved in writing by the Architectural Committee.

(iv) Signs of builders of Residential Units or other improvements on any Lot or Parcel approved from time to time by the Architectural Committee as to number, size, colors, design, message content, location and type.

(v) Such construction job identification signs, business identification signs and subdivision identification signs which are in conformance with the requirements of Navajo County or any municipality having jurisdiction over the property and which have been approved

in writing by the Architectural Committee as to size, colors, design, message content and location.

2.22. Restriction on Further Subdivision. No Lot shall be further subdivided or separated into smaller Lots or Parcels by any Owner, and no portion of less than all of any such Lot shall be conveyed or transferred by any Owner; provided, however, that neither the provisions of this Section nor any other provision of this Declaration shall prevent an Owner from creating, selling or leasing timeshare estates, timeshare uses, timeshare intervals or fractional interests in a Lot or from selling or leasing a license or contractual right of occupancy in a Lot which is not coupled with an ownership interest in the Lot; and further provided, however, that the Owner is in compliance with all local zoning ordinances. No further covenants, conditions, restrictions or easements shall be recorded by any Owner, Lessee, or other person against any Lot, Parcel or Neighborhood Common Area without the provisions thereof having been first approved in writing by the Architectural Committee and any covenants, conditions, restrictions or easements recorded without such approval being evidenced thereon shall be null and void. No application for rezoning of any Lot, Parcel or Neighborhood Common Area and no application for variances or use permits, shall be filed with any governmental authority unless the proposed use of the Lot, Parcel or Neighborhood Common Area has been approved by the Architectural Committee and the proposed use otherwise complies with this Declaration and any applicable Tract Declaration.

2.23. Trucks, Trailers, Campers and Boats. No truck, mobile home, travel trailer, tent trailer, trailer camper shell, recreational vehicle, detached camper, boat, boat trailer, or other similar equipment or vehicle may be parked, maintained, constructed, reconstructed or repaired on any Lot or Parcel or on any street in the Project so as to be Visible from Neighboring Property, the Common Area, the Neighborhood Common Area or the streets without the prior written approval of the Architectural Committee; provided, however, that the provisions of this Section shall not apply to (i) temporary construction shelters or facilities maintained during, and used exclusively in connection with, the construction of any improvement approved by the Architectural Committee; vehicles parked in garages on Lots or Parcels so long as such vehicles are in good operating condition and appearance and are not under repair, (ii) the storage of such vehicles in any area designated for such purposes in a Tract Declaration, Neighborhood Declaration or on a site plan approved by the Architectural Committee, or (iii) boats and boat trailers if the boats are of a size and type that are permitted to be used on the Lake under the rules and regulations governing the use of the Lake, and the boat and boat trailer are kept and maintained only in the back yard of the Lot.

2.24. Motor Vehicles.

(A) Except for emergency vehicle repairs, no automobile or other motor vehicle shall be constructed, reconstructed or repaired upon any Lot, Parcel, or other property in the Project, and no inoperable vehicle may be stored or parked on any such Lot, Parcel or other property, so as to be Visible From Neighboring Property or to be visible from any Common Area, any Neighborhood Common Area or any streets.

(B) No motorcycle, motorbike, all terrain vehicle, off road vehicle or any similar vehicle shall be parked, maintained or operated on any portion of the Project.

2.25. Parking. Vehicles of all Owners, Lessees and Residents, and of their employees, guests and invitees, are to be kept in garages, carports, residential driveways of the Owner, and other designated parking areas; provided, however, this Section shall not be construed to permit the parking in the above described areas of any vehicle whose parking in the Project is otherwise prohibited or the parking of any inoperable vehicle. No automobile or other motor vehicle shall be parked or maintained on any street in the Project.

2.26. Towing of Vehicles. The Board shall have the right to have any truck, mobile home, travel trailer, tent trailer, trailer, camper shell, detached camper, recreational vehicle, boat, boat trailer or similar equipment or vehicle or any automobile, motorcycle, motorbike, or other motor vehicle which is parked, kept, maintained, constructed, reconstructed or repaired in violation of the Project 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, the cost of the towing of the vehicle or equipment shall be assessed against the Owner, and his Lot or Parcel, as an Extraordinary Assessment pursuant to Section 5.3 of this Declaration.

2.27. Lake Maintenance Easement. An easement is hereby created in favor of the Association and the Show Low Irrigation District or any other Person who may own all or any part of the Lake over, under and across the Lakefront Easement Areas for the purpose of construction, maintenance and repair of the Lake and for the construction, installation, maintenance, repair and replacement of such equipment and machinery as may be necessary for the proper construction, maintenance and repair of the Lake. The Association, the Show Low Irrigation District and any other Person who may own all or any part of the Lake shall also have an easement over, under and across each Lakefront Lot and Lakefront Parcel for access to the Lakefront Easement Areas and the Lake.

2.28. Lakefront Facilities. No Owner of any Lakefront Lot or Lakefront Parcel shall locate, construct, maintain, or operate any Lakefront Facility except within the limits of the Lakefront Easement area of the Owner's Lot or Parcel. Each conveyance or transfer of a Lot or Parcel containing a Lakefront Easement Area shall include all right, title, interest and estate of the Owner in the Lakefront Easement Area and the Lakefront Facilities thereon. No Lakefront Facilities shall be constructed, erected, installed, placed, altered, or maintained without the prior written consent of the Architectural Committee. Each Owner of any Lakefront Easement Area shall, at his sole cost and expense, keep and maintain all such Lakefront Facilities shall be used except by the Owner of the Lot or Parcel to which the Lakefront Facilities are appurtenant and said Owner's and Lessee's family, guests, visitors or tenants. No structures, facilities or other improvements shall be located, constructed, maintained or operated in, upon or under any Lakefront Easement Area or in the Lake except for Lakefront Facilities and other structures and improvements approved in writing by the Architectural Committee. No Person shall make any alteration or improvement to the shoreline of the Lake without the prior written approval of the Architectural Committee. The Owner of a Lakefront Lot or Parcel shall, at his sole cost and

expense, keep and maintain the lakefront adjoining his Lot or Parcel (whether or not the edge of the Lake is at any given time within the boundaries of his Lot or Parcel) clear and free of trash and debris.

2.29. Use of Lakefront Easement Area. The Lakefront Easement Areas shall be used only for the construction and operation thereon of Lakefront Facilities for the accommodation of private boats or watercraft owned by the Owner or Residents of a Lot or Parcel containing the Lakefront Easement Areas and only for non-commercial, recreational purposes. No houseboat may be used or stored in the Lakefront Easement Area, and no boat or watercraft shall be used as a residence. Nothing shall be done or kept in the Lakefront Easement Area or on the Lake which would be a violation of any provisions of this Declaration, any Tract Declaration, the Architectural Committee Rules or the Association Rules.

2.30. Leasing of Lots. No Owner may lease less than his entire Lot. Upon leasing his Lot, an 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 Lot during the term of the lease.

2.31. Variances. The Architectural Committee may, at its option and in extenuating circumstances, grant variances from the restrictions set forth in this Article 2 or in any Tract Declaration if the Architectural Committee determines in its discretion that (i) a restriction would create an unreasonable hardship or burden on an Owner, Lessee or Resident or a change of circumstances since the recordation of this Declaration has rendered such restriction obsolete and (ii) that the activity permitted under the variance will not have any substantial adverse effect on the Owners, Lessees and Residents of the Project and is consistent with the high quality of life intended for residents of the Project.

2.32. Change of Use of Common Area. Upon (i) adoption of a resolution by the Board stating that in the Board's opinion the then present use of a designated part of the Common Area is no longer in the best interests of the Owners and (ii) the approval of such resolution by Members casting more than fifty percent (50%) of the votes entitled to be cast by Members who are present in person or by proxy at a meeting duly called for such purpose and who are entitled to use such Common Area under the terms of this Declaration or any Tract Declaration, the Board shall have the power and right to change the use thereof (and in connection therewith, construct, reconstruct, alter or change the buildings, structures and improvements thereon in any manner deemed necessary by the Board to accommodate the new use), provided such new use shall be for the benefit of the Owners and shall be consistent with any deed restrictions (or zoning regulations) restricting or limiting the use of the Common Area.

2.33. Drainage. No Residential Unit, structure, building, landscaping, fence, wall or other Improvement shall be constructed, installed, placed or maintained in any manner that would obstruct, interfere with or change the direction or flow of water in accordance with the drainage plans for the Project or for any Lot or Parcel as shown on the drainage plans on file with the county or municipality in which the Project is located.

2.34. **Bald Eagle Perching Sites.** No Person shall cut down or remove any established bald eagle perching site.

ARTICLE 3

EASEMENTS

3.0. Owners' Easements of Enjoyment.

(A) Subject to Subsection (D) and (E) of this Section and Section 3.2(B) of this Declaration, every Member, and any person residing with such Member, shall have a right and easement of enjoyment in and to the Common Area which shall be appurtenant to and shall pass with the title to every Lot and Parcel, subject to the following provisions:

(i) The right of the Association to charge reasonable admission and other fees for the use of any recreational or other facility situated upon the Common Area, including, but not limited to, any recreational vehicle storage area located upon the Common Area. If a recreational vehicle storage area is located upon the Common Area, the Association shall also have the right to restrict the use of such recreational vehicle storage area to only those Owners, Lessees or Residents who do not have such a recreational vehicle storage area available to them through a Neighborhood Association. The Association may permit the use of any recreational vehicle storage area situated upon the Common Area by persons who are not Members of the Association provided the Association charges such persons a reasonable admission fee or user fee for the use of such recreational vehicle storage area.

(ii) The right of the Association to suspend the voting rights and right to the use of the recreational facilities, if any, located upon Common Area by any Member (a) for any period during which any Assessment against his Lot or Parcel remains delinquent; (b) for a period not to exceed 60 days for any other infraction of the Project Documents, and (c) for successive 60-day periods if any such infraction is not corrected during any prior 60-day suspension period.

(iii) The right of the Association to dedicate or transfer all or any part of the Common Area to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the Board. Unless otherwise required by zoning stipulations or agreements with Navajo County or any municipality having jurisdiction over the Project, or any part thereof, effective prior to the date hereof or specified on a Recorded subdivision plat, no such dedication or transfer shall be effective unless an instrument signed by the Owners representing three-fourths (3/4) of the total votes in the Association agreeing to such dedication or transfer has been recorded, except that the Board shall have authority to transfer to such public agencies, authorities or utilities easements and rights-of-way which are intended to benefit the Project and which do not have any substantial adverse effect on the enjoyment of the Common Area by the Members.

(iv) The right of the Association to regulate the use of the Common Area through the Association Rules and to prohibit access to such portions of the Common Area, such as landscaped right-of-ways, not intended for use by the Owners, Lessees or Residents.

(B) If a Lot or Parcel is leased or rented by the Owner thereof, the Lessee and the members of his family residing with such Lessee shall have the right to use the Common Area during the term of the lease, and the Owner of such Lot or Parcel shall have no right to use the Common Area until the termination or expiration of such lease.

(C) The guest and invitees of any Member or other person entitled to use the Common Area pursuant to this Declaration may use the Common Area provided they are accompanied by a Member or other person entitled to use the Common Area pursuant to this Declaration. The Board shall have the right to limit the number of guests and invitees who may use the Common Area at any one time and may restrict the use of the Common Area by guests and invitees to certain specified times.

(D) Notwithstanding the provisions of Subsections (A) (B) or (C) of this Section, the Cluster Residential Common Area is hereby reserved to the exclusive use of the Owners of Cluster Residential Units or Parcels restricted by this Declaration or a Tract Declaration to Cluster Residential Use and the members of their families, their guests and tenants, and no other person shall have a right and easement of enjoyment in and to the Cluster Residential Common Area; provided, however, that the Owners of Detached Residential Units or Parcels, and their families, tenants, guests and invitees, shall have the right to use such walks and paths as may from time to time exist on the Cluster Residential Common Area. The right of the owners of the Cluster Residential Units or Parcels restricted by this Declaration or a Tract Declaration to Cluster Residential Use to use the Cluster Residential Common Area shall be subject to the provisions of Subsections (A), (B) and (C) of this Section and all references in such Subsections to the "Common Area" shall be deemed to refer to the "Cluster Residential Common Area."

(E) Notwithstanding the provisions of Subsections (A), (B) or (C) of this Section, the Detached Residential Common Area is hereby reserved to the exclusive use of the Owners of Detached Residential Units or Parcels restricted by this Declaration or a Tract Declaration to Detached Residential Use and the members of their families, their guests and tenants, and no other person shall have a right and easement of enjoyment in and to the Detached Residential Common Area; provided, however, that the Owners of Cluster Residential Lots or Parcels and their families, tenants, guests and invitees, shall have the right to use such walks and paths as may from time to time exist on the Detached Residential Common Area. The right of the Owners of the Detached Residential Units or Parcels restricted by this Declaration or a Tract Declaration to Detached Residential Use to use the Detached Residential Common Area shall be subject to the provisions of Subsections (A), (B) and (C) of this Section and all references in such Subsections to the "Common Area" shall be deemed to refer to the "Detached Residential Common Area."

(F) Erwin H. Hansen, E. Roger Hansen, Connie Marie Holbert Hansen, James L. Hansen, Janette Pearl Prizer Hansen, Don L. Hansen, Susan Denise Rupert Hansen, Hans V. Hansen, Karen Marcia Jeppesen Hansen, David S. Hansen and Mary Ann Gray Hansen (collectively, the "Hansens") shall have the right to use the Common Area to the same extent as though they were a Member of the Association. The use of the Common Area by the Hansens shall be subject to the same conditions, restrictions, rules and regulations as the use of the

Common Area by any other Member of the Association. None of the Hansens shall be required to pay any Assessment, fee or other compensation in order to make use of the Common Area unless one or more of the Hansens also is the Owner of a Lot or Parcel within the Project in which case they shall be subject to all of the covenants, conditions and restrictions of this Declaration including the obligation to pay Assessments. The rights granted to the Hansens pursuant to this Subsection shall not include the right to use any Neighborhood Common Area. The rights granted to the Hansens by this Subsection shall be personal to the Hansens and may not be assigned, devised or otherwise transferred, and such rights shall cease upon the deaths of the respective members of the Hansens. Any attempted assignment, devise or other transfer of such rights shall be null and void. The Hansens shall also have a non-exclusive easement across and over all streets, roads, alleys, walkways, sidewalks and other pedestrian or vehicle streets or rights-of-way which are part of the Common Area to the extent necessary to exercise the rights granted to the Hansens by this Subsection.

3.1. Utility Easement. There is hereby created an easement upon, across, over and under the Common Area, Lots, Parcels and other property 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 Area, Lots, Parcels and other property but no sewers, electrical lines, water lines, or other utility or service lines may be installed or located on the Common Area, Lots, Parcels and other property except as approved by the Board.

3.2. Easements for Ingress and Egress.

(A) Subject to Subsection (B) of this Section, 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 Area. There is also created an easement for ingress and egress for pedestrian and vehicular traffic over, through and across such driveways and parking areas as from time to time may be paved and intended for such purposes. Such easements shall run in favor of and be for the benefit of the Owners and occupants of the Lots and Parcels and their guests, families, tenants and invitees.

(B) If the Association constructs a guard house, guard gate or other device on the Primary Roadway to restrict or prohibit the use of a portion of the Primary Roadway by persons other than the Owners, Residents and Lessees of Detached Residential Units, then no person other than the Owners, Residents and Lessees of Detached Residential Units shall have an easement for vehicular traffic over the restricted portion of the Primary Roadway but all persons who have the right to use the Common Area pursuant to Subsection (A), (B) or (C) of Section 3.1 of this Declaration shall have an easement for pedestrian traffic over the restricted portion of the Primary Roadway.

3.3. Easement in Favor of Association. The Lots, Parcels and Neighborhood Common Area are hereby made subject to the following easements in favor of the Association and its directors, officers, agents, employees and independent contractors:

(A) For inspection of the Lots, Parcels and Neighborhood Common Area in order to verify the performance by Owners of all items of maintenance and repair for which they are responsible;

(B) For inspection, maintenance, repair and replacement of the Common Area accessible only from such Lots, Parcels or Neighborhood Common Area;

(C) For correction of emergency conditions in one or more Lots, Parcels or Neighborhood Common Area or casualties to the Common Area;

(D) For the purpose of enabling the Association, the Board, the Architectural Committee or any other committees appointed by the Board to exercise and discharge their respective rights, powers and duties under the Project Documents;

(E) For inspection of the Lots, Parcels and Neighborhood Common Area in order to verify that the provisions of the Project Documents are being complied with by the Owners, their guests, tenants, invitees and the other occupants of the Lot, Parcel or Neighborhood Common Area.

ARTICLE 4

THE ASSOCIATION; ORGANIZATION; MEMBERSHIP AND VOTING RIGHTS

4.0. **Formation of Association.** The Association shall be a nonprofit Arizona corporation charged with the duties and invested with the powers prescribed by law and set forth in the Articles, Bylaws, and this Declaration. In the event of any conflict or inconsistency between this Declaration and the Articles, Bylaws, Association Rules or Architectural Rules, this Declaration shall control.

4.1. **Board of Directors and Officers.** The affairs of the Association shall be conducted by the Board and such officers as the Board may elect or appoint in accordance with the Articles and the Bylaws. The Board shall consist of five (5) Owners elected by the members of the Association.

4.2. **The Association Rules.** The Board may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal rules and regulations to be known as the Association Rules. The Association Rules may restrict and govern the use of any area by any Member, Lessee or Resident, by the family of such Member, Lessee or Resident and by the guests and invitees of a Member, Lessee or Resident; provided, however, that the Association Rules shall not unreasonably discriminate among Members and shall not be inconsistent with this Declaration, the Articles and Bylaws. Upon adoption, the Association Rules shall have the same force and effect as if they were set forth in and were a part of this Declaration.

4.3. **Personal Liability.** No member of the Board or of any committee of the Association, no officer of the Association, and no manager or other employee of the Association shall be personally liable to any Member, or to any other person or entity, including the Association, for any damage, loss or prejudice suffered or claimed on account of any act, omission, error, or negligence of the Association, the Board, the manager, 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 shall not apply to any person who has failed to act in good faith or has engaged in wilful or intentional misconduct.

4.4. **Neighborhood Declarations and Associations.** Any Neighborhood Declaration recorded by any person and the articles of incorporation, bylaws or other governing documents for any Neighborhood Association shall not be effective unless the contents thereof have been approved in writing by the Board, and such documents specify that such Neighborhood Association and the rights of its members are subject and subordinate to the provisions of the Project Documents.

4.5. **Members.** Every Owner of a Lot or Parcel shall automatically be a Member of the Association.

4.6. **Voting Rights.** The Association shall have two classes of Members:

Class A. Class A Members shall be all Owners of Lots or Parcels restricted by this Declaration or a Tract Declaration to Cluster Residential Use. Each Class A Member shall be entitled to the following votes:

(i) One vote for each Lot owned by the Member which is restricted to Cluster Residential Use;

(ii) In the case of a Parcel restricted to Cluster Residential Use, one vote for each Residential Unit permitted upon the Parcel under the zoning ordinances of Navajo County or the municipality having jurisdiction over such Parcel, the number of such Residential Units to be determined on the assumption that the number of Residential Units within the density classification under the zoning ordinances will be spread evenly over all land within the density classification. If a plat, condominium map or other instrument creating Lots is recorded covering less than all of the Parcel, the number of votes attributable to such Parcel shall be reduced by the number equal to the number of Lots shown on the recorded plat.

Class B. Class B Members shall be all Owners of Lots or Parcels restricted by this Declaration or a Tract Declaration to Detached Residential Use. Each Class B Member shall be entitled to the following votes:

(i) One vote for each Lot owned by the Member which is restricted to Detached Residential Use;

(ii) In the case of a Parcel restricted to Detached Residential Use, one vote for each Residential Unit permitted upon the Parcel under the zoning ordinances of Navajo County or any municipality having jurisdiction over such Parcel, the number of such Residential Units to be determined on the assumption that the number of Residential Units within the density classification under the zoning ordinances will be spread evenly over all land within the density classification. If a plat, condominium map or other instrument creating Lots is recorded covering less than all of the Parcel, the number of votes attributable to such Parcel shall be reduced by the number equal to the number of Lots shown on the recorded plat.

4.7. Voting Procedures. No change in the ownership of a Lot or Parcel shall be effective for voting purposes unless and until the Board is given actual written notice of such change and is provided satisfactory proof thereof. The vote for each such Lot or Parcel must be cast as a unit, and fractional votes shall not be allowed. In the event that a Lot or Parcel is owned by more than one person or entity and such Owners are unable to agree among themselves as to how their vote or votes shall be cast, they shall lose their right to vote on the matter in question. If any Member casts a vote representing a certain Lot or Parcel, it will thereafter be conclusively presumed for all purposes that he was acting with the authority and consent of all other owners of the same Lot or Parcel unless objection thereto is made at the time the vote is cast. In the event

more than one vote is cast by a Class A Member for a particular Lot or Parcel, none of the votes shall be counted and all of the votes shall be deemed void.

4.8. Transfer of Membership. The rights and obligations of a Class A Member in the Association shall not be assigned, transferred, pledged, conveyed or alienated in any way except upon transfer of ownership of an Owner's Lot or Parcel, and then only to the transferee of ownership to the Lot or Parcel. A transfer of ownership to a Lot or Parcel may be effected by deed, intestate succession, testamentary disposition, foreclosure of a mortgage of record, or such other legal process as now in effect or as may hereafter be established under or pursuant to the laws of the State of Arizona. Any attempt to make a prohibited transfer shall be void. Any transfer of ownership to a Lot or Parcel shall operate to transfer the Membership appurtenant to said Lot or Parcel to the new Owner thereof. Each Purchaser of a Lot or Parcel shall notify the Association of his purchase within ten (10) days after he becomes the Owner of a Lot or Parcel. The Association may require the Purchaser of a Lot or Parcel to pay to the Association a transfer fee in an amount to be set by the Board, and the transfer fee shall be secured by the Assessment Lien.

4.9. Architectural Committee. The Association shall have an Architectural Committee to perform the functions of the Architectural Committee set forth in this Declaration. The Architectural Committee shall consist of such number of regular members and alternate members as may be provided for in the Bylaws. The members of the Architectural Committee shall be appointed by the Board. The Architectural Committee shall promulgate architectural guidelines and standards to be used in rendering its decisions. The decision of the Architectural Committee shall be final on all matters submitted to it pursuant to this Declaration. The Architectural Committee may establish a reasonable processing fee to defer the costs of the Association in considering any requests for approvals submitted to the Architectural Committee, which fee shall be paid at the time the request for approval is submitted.

ARTICLE 5

COVENANT FOR ASSESSMENTS AND CREATION OF LIEN

5.0 Creation of Lien and Personal Obligation of Assessments. Each Owner, by becoming the Owner of a Lot or Parcel, is deemed to covenant and agree to pay to the Association the following assessments and charges: (i) Annual Assessments, (ii) Special Assessments, and (iii) Extraordinary Assessments. All Assessments shall be established and collected as provided in this Declaration. The Assessments, together with interest, late charges and all costs, including but not limited to reasonable attorneys' fees, incurred by the Association in collecting or attempting to collect delinquent Assessments, whether or not suit is filed, shall be a charge on the Lot or Parcel and shall be a continuing lien upon the Lot or Parcel against which each such Assessment is made. Each Assessment, together with interest and all costs, including but not limited to reasonable attorneys' fees, incurred by the Association and collecting or attempting to collect delinquent Assessments, whether or not suit is filed, shall also be the personal obligation of the person who is the Owner of the Lot or Parcel at the time when the Assessment became due. The personal obligation for delinquent Assessments shall not pass to successors in title of the Owner unless expressly assumed by them.

5.1 Annual Assessments.

(A) In order to provide for the operation and management of the Association and to provide funds for the Association to perform its duties and obligations under the Project Documents, including the establishment of replacement and maintenance reserves, the Board, for each Assessment Period shall assess against each Lot and Parcel an Annual Assessment. The amount of the Annual Assessment shall be in the sole discretion of the Board except that the Annual Assessment shall not exceed the maximum annual assessment for the Assessment Period as computed pursuant to the Subsection (C) of this Section and that the percentage of change in the annual assessment shall be the same for each class of members. The Annual Assessment to be levied against each Lot and Parcel shall be determined as provided in Subsection (C) of this section.

(B) The Board shall give notice of the Annual Assessment to each Owner at least thirty (30) days prior to the beginning of each Assessment Period, but the failure to give such notice shall not affect the validity of the Annual Assessment established by the Board nor relieve any Owner from his obligation to pay the Annual Assessment. If the Board determines during any Assessment Period that its funds budgeted or available for that Assessment Period are, or will, become inadequate to meet all expenses of the Association for any reason, including, without limitation, nonpayment of Assessments by Members, it may increase the Annual Assessment for that Assessment Period, and the revised Annual Assessment shall commence on the date designated by the Board. Any increased Annual Assessment shall be levied in the manner provided for Subsection (A) of this Section. No increase in the Annual Assessment for any Assessment Period which would result in the Annual Assessment exceeding the maximum Annual Assessment for such Assessment Period shall become effective until approved by Members entitled to cast at least two-third (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.

(C) The maximum Annual Assessment for each Assessment Period shall be as follows:

(i) Until January 1 of the year immediately following the conveyance of the first Lot to a Purchaser, the maximum annual Cluster Residential Lot Assessment shall be \$216.00 and the maximum annual Detached Residential Lot Assessment shall be \$384.00.

(ii) From and after January 1 of the year immediately following the conveyance of the first Lot to a Purchaser, the Board may, without a vote of the membership, increase the maximum Annual Assessment during each Assessment Period by an amount proportional to the amount of increase during the prior fiscal year in the Consumer Price Index for All Urban Consumers (All Items), U. S.

(iii) From and after January 1 of the year immediately following the conveyance of the first Lot to a Purchaser, the maximum Annual Assessment may be increased by an amount greater than the maximum increase allowed pursuant to (ii) above, 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.

(iv) The increase in the maximum Annual Assessment pursuant to Subsection (C) (ii) of this Section shall be calculated without considering the portion of the immediately preceding maximum Annual Assessment applicable to the payment of utility charges or insurance premiums by the Association. In addition to the increase in the maximum Annual Assessment pursuant to Subsection (ii) above, the maximum Annual Assessment shall be increased for each Assessment Period from and after January 1 of the year immediately following the conveyance of the first Lot to a Purchaser by an amount equal to the amount in the Association budget for the prior Assessment Period applicable to utility charges and insurance premiums during the prior Assessment Period, whichever is greater.

5.2 Special Assessment. The Association may levy, in any Assessment Period, a Special Assessment applicable to that Assessment Period only for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Association Land, including fixtures and personal property related thereto, provided that any Special Assessment shall have the assent of two-thirds (2/3) of the votes of each class of Members who are voting in person or by proxy at a meeting duly called for such purpose. Any Special Assessment with respect to the cost of any construction or replacement (other than due to destruction or governmental taking) of a described capital improvement upon the Restricted Common Area shall be levied only against the Lot and Parcels restricted to Cluster Residential Use and not against any other Lot or Parcel in the Project. The amount of any Special Assessment to be levied against any Lot or Parcel shall be computed in the same manner as Annual Assessment levied pursuant to Section 5.1(A) of this Declaration.

5.3. Extraordinary Assessments. The Association may levy an assessment against an Owner, and such Owner's Lot or Parcel, for the following expenses:

- (i) Any expenses caused by the misconduct of such Owner;
- (ii) Any expense incurred by the Association pursuant to Section 6.2 of this Declaration as a result of the Owner's failure to maintain his Lot or Parcel, and the Improvements located thereon, in accordance with the terms of this Declaration;
- (iii) Any expense incurred by the Association pursuant to Section 6.1 of this Declaration as a result of repairs, maintenance or replacements to the Common Area or to portions of the Lots and Parcels the Association is obligated to maintain which is caused by the willful or negligent act of an Owner, his family, guests, invitees or animals.
- (iv) Any expense incurred by the Association in towing any vehicle or equipment of an Owner pursuant to Section 2.26 of this Declaration.

5.4. Assessment Period. The period for which the Annual Assessment is to be levied (the "Assessment Period") shall be the calendar year, except that the first Assessment Period, and the obligation of the Owners to pay Annual Assessments, shall commence upon the conveyance of the first Lot to a Purchaser and terminate on December 31 of such year. The Board in its sole discretion from time to time may change the Assessment Period.

5.5. Notice and Quorum for Any Action Authorized Under Section 5.1 or 5.2. Written notice of any meeting called for the purpose of taking any action authorized under Section 5.1 or 5.2 of this Declaration shall be sent to all Members no less than thirty (30) days nor more than sixty (60) 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 of each class of Membership shall constitute a quorum. If the required quorum is not present, another meeting may be called subject to the same notice requirement, and the required quorum at the subsequent meeting shall be one-half (½) of the required quorum at the preceding meeting. No such subsequent meeting shall be held more than sixty (60) days following the preceding meeting.

5.6. Rules Regarding Billing and Collection Procedures. Annual Assessments shall be collected on a semi-annual basis or such other basis as may be selected by the Board. Special Assessments may be collected as specified by the Board. The Board shall have the right to adopt rules and regulations setting forth procedures for the purpose of making Assessments and for the billing and collection of the Assessments provided that the procedures are not inconsistent with the provisions of this Declaration. The failure of the Association to send a bill to a Member shall not relieve any Member of his liability for any Assessment or charge under this Declaration, but the Assessment Lien therefor shall not be foreclosed or otherwise enforced until the Member has been given not less than thirty (30) days written notice prior to such foreclosure or enforcement that the Assessment or any installation thereof is or will be due and of

the amount owing. Such notice may be given at any time prior to or after delinquency of such payment. The Association shall be under no duty to refund any payments received by it even though the ownership of a Lot or Parcel changes during an Assessment Period; successor Owners of Lots or Parcels shall be given credit for prepayments, on a prorated basis, made by prior Owners.

5.7. Collection Costs, Interest and Fees on Delinquent Assessments. Any Assessment or installment thereof not paid when due shall be deemed delinquent and shall bear interest from five (5) days after the due date until paid at the rate of twelve percent (12%) per annum or the then prevailing VA/FHA interest rate for new home loans, whichever is greater. At the option of the Board, a fee may be assessed in lieu of interest. The Member shall also be liable for all costs, including but not limited to attorneys' fees, which may be incurred by the Association in collection or attempting to collect the Assessments or other charges whether or not suit is filed. The Board may also record a Notice of Lien for Delinquent Assessment against any Lot or Parcel as to which an Assessment is delinquent and may establish a late fee to reimburse the Association for the Association's cost in recording the notice, processing the delinquency and Recording a notice of payment, which late fee shall be treated as a collection cost of the Association secured by the Assessment Lien.

5.8. Evidence of Payment of Assessments. Upon receipt of a written request by a Member or any other Person, the Association, within a reasonable period of time thereafter, shall issue to such Member or other Person a written certificate stating (i) that all Assessments (including interest, costs and attorneys' fees, if any, as provided in Section 5.7 above) have been paid with respect to any specified Lot or Parcel as of the date of such certificate, or (ii) if all Assessments have not been paid, the amount of such Assessments (including interest, costs and attorneys' fees, if any) due and payable as of such date. The Association may make a reasonable charge for the issuance of such certificates, which charges must be paid at the time the request for any such certificate is made. Any such certificate, when duly issued as herein provided, shall be conclusive and binding with respect to any matters therein stated as against any bona fide Purchaser of, or lender on, the lot or Parcel in question.

5.9. Association's Remedies to Enforce Payment of Assessments. If any Member fails to pay the assessments, or any installment thereof, or other charges due to the Association, when due, the Association may enforce the payment of the Assessments or other charges by taking either or both of the following actions, concurrently or separately (and, by exercising either of the remedies hereinafter set forth, the Association does not prejudice or waive its right to exercise the other remedy):

(i) Bring an action at law and recover a judgment against the Member personally obligated to pay the Assessments or other charges;

(ii) Foreclose the Assessment Lien against the Lot or Parcel in accordance with the then prevailing Arizona law relating to the foreclosure of realty mortgages (including the right to recover any deficiency unless prohibited by law).

5.10. Subordination of Assessment Lien to First Mortgage or Deed of Trust; Priority of Lien. The Assessment Lien shall be subordinate to the lien of any first mortgage held by, or deed of trust of which the beneficiary is, a lender who has loaned funds with the Lot or Parcel as security, or held by the lender's successors and assigns, and shall also be subject and subordinate to liens for taxes and other public charges which by applicable law are expressly made superior. Any sale or transfer of a Lot or Parcel shall not affect the Assessment Lien. However, the sale or transfer of any Lot or Parcel pursuant to judicial or nonjudicial foreclosure or trustee's sale or any proceeding or deed in lieu thereof, shall extinguish the Assessment Lien with respect to payments which became due prior to such sale or transfer, but any Assessments or other charges against the Lot or Parcel which accrued prior to such sale or transfer shall remain the obligation of the Owner of the Lot or parcel at the time when such Assessments and charges became due and payable. No sale or transfer shall relieve such Lot or Parcel from liability for any Assessments thereafter become due or from the Assessment Lien thereof.

5.11. Costs to be Borne by Member in Connection with Enforcement of Payment of Assessments. In any action taken pursuant to Section 5.9 of this Declaration, the Member shall be personally liable for, and the Assessment Lien shall be deemed to secure the amount of, the Assessments together with interest, late charges and the Association's collection costs and attorney's fees, including those costs and fees specified in Section 5.7 of this Declaration.

5.12. Purposes for which Association's Funds May be Used. The Association shall apply all funds and property collected and received by it (including the Assessments, fees, loan proceeds, surplus funds and all funds and property received by it from any other source) for the common good and benefit of the Project and the Owners and Residents by devoting said funds and property, among other things, to the acquisition, construction, alteration, maintenance, provision and operation, by any manner or method whatsoever, of any and all land, properties, improvements, facilities, services, projects, programs, studies and systems, within or without the Project, which may be necessary, desirable or beneficial to the general common interests of the Project, the Owners and the Residents. The following are some, but not all, of the areas in which the Association may seek to aid, promote and provide for such common benefit: social interaction among Members and Residents, maintenance of landscaping on common Areas and public right-of-way and drainage areas within the Project, recreation, liability insurance, communication, ownership and operation of vehicle storage areas, education, transportation, health, utilities, public services, safety and indemnification of officers and directors of the Association. In addition, the Association may make such payments as it deems necessary to the Show Low Irrigation District or any other owner of the water in the Lake to compensate the Show Low Irrigation District of the use of the Lake by member of the Association and their families, guests, tenants and invitees or for the repair or maintenance of the Lake. The Association shall assume and perform the obligations of, and abide by, the provisions of the Agreement dated May 6, 1986, between The Shores at Rainbow Lake Development Co. and the Show Low Irrigation District with respect to use and maintenance and funds may be expended by the Association for such purpose. The Association may also expend its funds for any purpose permitted under the laws of the State of Arizona.

5.13. Surplus Funds. The Association shall not be obligated to spend in any year all the sums received by it in such year (whether by way of Assessments, fees or otherwise), and

may carry forward as surplus any balances remaining. The Association shall not be obligated to reduce the amount of the Annual Assessment in the succeeding year if a surplus exists from a prior year, and the Association may carry forward from year to year such surplus as the Board in its discretion may determine to be desirable for the greater financial security of the Association and the accomplishment of its purposes.

ARTICLE 6

MAINTENANCE

6.0. Common Areas and Public Right of Way.

(A) The Association, or its duly delegated representative, shall manage, maintain, repair and replace the Common Area, and all improvements located thereon, including, but not limited to, the landscaping, walkways, riding paths, parking areas, drives and recreational facilities; provided however, the Association shall not be responsible for providing or maintaining the landscaping or structures on any Common Area which is part of Lots or Parcels unless (i) such landscaping or structures are available for use by all Owners and Residents or are within easements intended for the general benefit of the Project and (ii) the Association assumes in writing the responsibility for such maintenance or such responsibility is set forth in a recorded instrument. The Association shall also maintain any landscaping and other improvements not on Lots and Parcels which are within the exterior boundaries of the Project, which are within areas shown on a subdivision plat or other plat of dedication for the Project or covered by a Tract Declaration, and which are intended for the general benefit of the Owners and Residents of the Project, except the Association shall not maintain areas which (i) any governmental entity is maintaining or (ii) are to be maintained by the Owners of a Lot or Parcel pursuant to Section 2.4 of this Declaration unless the Association elects to maintain such areas and as to which the Association has made such an election to maintain. Specific areas to be maintained by the Association may be identified on recorded subdivision plats, in Tract Declarations and in deeds to a transferee of a Lot or Parcel, but the failure to so identify such areas shall not affect the Association's rights or responsibilities with respect to such Common Areas and other areas intended for the general benefit of the Project.

(B) The Board shall be the sole judge as to the appropriate maintenance of all Common Areas and other properties maintained by the Association. Any cooperative action necessary or appropriate to the proper maintenance and upkeep of said properties shall be taken by the Board or by its duly delegated representative.

(C) In the event any subdivision plat, Tract Declaration, deed restriction or this Declaration permits the Board to determine whether or not Owners of certain Lots or Parcels will be responsible for maintenance of certain Common Areas or public right-of-way areas, the Board shall have the sole discretion to determine whether or not it would be in the best interest of the Owners and Residents of the Project for the Association or an individual Owner to be responsible for such maintenance, considering cost, uniformity of appearance, location and other factors deemed relevant by the Board. The Board may cause the Association to contract to provide maintenance services to Owners of Lots and Parcels having such responsibilities in exchange for the payment of such fees as the Association and Owner may agree upon.

6.1. Assessment of Certain Costs of Maintenance and Repair. In the event that the need for maintenance or repair of the Common Area or any other area maintained by the Association is caused through the willful or negligent act of any Member, his family, tenants, guests or invitees, the cost of such maintenance or repairs shall, to the extent of such person's

liability therefor under Arizona law, be added to and become a part of the Assessment to which such Member and the Member's Lot or Parcel is subject and shall be secured by the Assessment Lien. Any charges or fees to be paid by the Owner of a Lot or Parcel pursuant to this Section in connection with a contract entered into by the Association with an Owner for the performance of an Owner's maintenance responsibilities shall also become a part of such Assessment and shall be secured by the Assessment Lien.

6.2. Improper Maintenance and Use of Lots and Parcels. In the event any portion of any Lot or Parcel is so maintained as to present a public or private nuisance, or as to substantially detract from the appearance or quality of the surrounding Lots and Parcels or other areas of the Project which are substantially affected thereby or related thereto, or in the event any portion of a Lot or Parcel is being used in a manner which violates this Declaration or any Tract Declaration or Neighborhood Declaration applicable thereto; or in the event the Owner of any Lot or Parcel is failing to perform any of its obligations under the Project Documents or any Tract Declaration or Neighborhood Declaration applicable thereto, the Board may make a finding to such effect, specifying the particular condition or conditions which exist, and pursuant thereto give notice thereof to the offending Owner that unless corrective action is taken within fourteen (14) days, the Board may cause such action to be taken at said Owner's cost. If at the expiration of said fourteen day period of time the requisite corrective action has not been taken, the Board shall be authorized and empowered to cause such action to be taken and the cost thereof shall be added to and become a part of the Assessment to which the offending Owner and the Owner's Lot or Parcel is subject and shall be secured by the Assessment Lien.

ARTICLE 7

INSURANCE

7.1. **Scope of Coverage.** Commencing not later than the time of the first conveyance of a Lot or Parcel to a Purchaser, the Association shall maintain, to the extent reasonably available, the following insurance coverage:

(A) Property insurance on the Common Area insuring against all risk of direct physical loss, insured against in an amount equal to the maximum insurable replacement value of the Common Area, as determined by the Board; provided however, that the total amount of insurance after application of any deductibles 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 property policy;

(B) Comprehensive general liability insurance, including medical payments insurance, in an amount determined by the Board, but not less than \$1,000,000. 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 Area and all other portions of the Project which the Association is obligated to maintain under this Declaration, and shall also include hired automobile and non-owned automobile coverages with cost liability endorsements to cover liabilities of the Owners as a group to an Owner;

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

(D) Such other insurance as the Association shall determine from time to time to be appropriate to protect the Association or the Owners;

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

(1) That there shall be no subrogation with respect to the Association, its agents, servants, and employees, with respect to Owners and members of their household;

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

(3) That the coverage afforded by such policy shall not be brought into contribution or proration with any insurance which may be purchased by Owners or their mortgagees or beneficiaries under deeds of trust;

(4) A "severability of interest" endorsement which shall preclude the insurer from denying the claim of an Owner because of the negligent acts of the Association or other Owners;

(5) Statement of the name of the insured as the Association;

(6) For policies of hazard insurance, a standard mortgagee clause providing that the insurance carrier shall notify the first mortgagee named in the policy at least ten (10) days in advance of the effective date of any substantial modification, reduction or cancellation of the policy;

(F) If there is a steam boiler in connection with the Common Area, boiler explosion insurance evidenced by the standard form of boiler machinery insurance policy and providing for coverage in the minimum amount of \$50,000.00 per accident per location;

(G) If the Property is located in an area identified by the Secretary of Housing & Urban Development as an area having special flood hazards, a policy of flood insurance on the Common Area must be maintained in the lesser of one hundred percent (100%) of the current replacement cost of the buildings and any other property covered by the required form of policy or the maximum limit of coverage available under the National Insurance Act of 1968, as amended;

(H) "Agreed Amount" and "Inflation Guard" endorsements.

7.2. **Certificates of Insurance.** An insurer that has issued an insurance policy under this Article shall issue a certificate or a memorandum of insurance to the Association and, upon request, to any Owner, mortgagee or beneficiary under a deed of trust. Any insurance obtained pursuant to this Article may not be canceled until thirty (30) days after notice of the proposed cancellation has been mailed to the Association, each Owner and each mortgagee or beneficiary under deed of trust to whom certificates of insurance have been issued.

7.3. **Fidelity Bonds.**

(A) The Association shall maintain blanket fidelity bonds for all officers, directors, trustees and employees of the Association and all other persons handling or responsible for funds of or administered by the Association, including, without limitation, officers, directors and employees of any management agent of the Association, whether or not they receive compensation for their services. The total amount of fidelity bond coverage shall be based upon the best business judgment of the Board, and shall not be less than the greater of (i) the estimated maximum amount of funds, including reserve funds, in the custody of the Association or the management agent, as the case may be, at any given time during the term of each bond, or (ii) the sum equal to three months Annual Assessments on all Lots and Parcels plus adequate reserve funds. Fidelity bonds obtained by the Association must also meet the following requirements:

(i) The fidelity bonds shall name the Association as an obligee;

(ii) The bonds shall contain waivers by the issuers of the bonds of all defenses based upon the exclusion of persons serving without compensation from the definition of "employees" or similar terms or expressions;

(iii) The bonds shall provide that they may not be canceled or substantially modified (including cancellation from non-payment of premium) without at least ten (10) days prior written notice to the Association and each first mortgagee.

(B) The Association shall require any management agent of the Association to maintain its own fidelity bond in an amount equal to or greater than the amount of the fidelity bond to be maintained by the Association pursuant to Subsection (a) of this Section. The fidelity bond maintained by the management agent shall cover funds maintained in bank accounts of the management agent and need not name the Association as an obligee.

7.4. Payment of Premiums. The premiums for any insurance obtained by the Association pursuant to Section 7.1 of this Declaration shall be included in the budget of the Association and shall be paid by the Association.

7.5. Insurance Obtained by Owners. Each Owner shall be responsible for obtaining insurance for his own benefit and at his own expense covering his Lot or Parcel, and the Improvements located thereon, and his personal property and fixtures located on his Lot or Parcel and providing personal liability coverage to the extent such insurance is not obtained by the Association.

7.6. Payment of Insurance Proceeds. With respect to any loss to the Common Area covered by property insurance obtained by the Association in accordance with this Article, the loss 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. Subject to the provisions of Section 7.7 of this Declaration, the proceeds shall be disbursed for the repair or restoration of the damage to the Common Area.

7.7. Repair and Replacement of Damaged or Destroyed Property. Any portion of the Common Area which is damaged or destroyed shall be repaired or replaced promptly by the Association unless (i) repair or replacement would be illegal under any state or local health or safety statute or ordinance, or (ii) Owners representing at least eighty percent (80%) of the total authorized votes in the Association vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves shall be paid by the Association. If the entire Common Area is not repaired or replaced, insurance proceeds attributable to the damaged Common Area shall be used to restore the damaged area to a condition which is not in violation of any state or local health or safety statute or ordinance and the remainder of the proceeds shall be distributed to the Owners on the basis of an equal share for each Lot and for each acre, or part thereof, of a Parcel.

ARTICLE 8

RIGHTS OF FIRST MORTGAGEES

8.1. 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 the Lot number or address 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 Project or any Lot 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 an Owner of a Lot subject to a First Mortgage held, insured or guaranteed by such Eligible Mortgage Holder or Eligible Insurer Or Guarantor or any other default in the performance by the Owner of any obligation under the Project Documents, which delinquency 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 will require the consent of a specified percentage of Eligible Mortgage Holders as set forth in Sections 8.2 or 8.3 of this Declaration.

8.2. Approval Required to Terminate Project. Any termination of the legal status of the Project for reasons other than the substantial destruction or a substantial taking in condemnation of the Project shall not be effective unless approved by Eligible Mortgage Holders holding First Mortgages on Lots the Owners of which have at least sixty-seven percent (67%) of the votes in the Association allocated to Owners of all Lots subject to First Mortgages held by Eligible Mortgage Holders.

8.3. Approval Required for Amendment to Declaration, Articles or Bylaws. The approval of Eligible Mortgage Holders holding First Mortgages on Lots the Owners of which have at least fifty-one percent (51%) of the votes in the Association allocated to Owners of all Lots subject to First mortgages held by Eligible Mortgage Holders shall be required to add or amend any material provisions of the Declaration, Articles or Bylaws which establish, provide for, govern or regulate any of the following:

1. Voting rights;
2. Assessments, assessment liens or subordination of assessment liens;
3. Reserves for maintenance, repair and replacement of Common Areas;

4. Insurance or fidelity bonds;
5. Responsibility for maintenance and repairs;
6. Expansion or contraction of the Project, or the addition, annexation or withdrawal of property to or from the Project;
7. Boundaries of any Lot;
8. Reallocation of interests in the Common Areas or the rights to their use;
9. Convertibility of Lots into Common Areas or of Common Areas into Lots;
10. Leasing of Lots;
11. Imposition of any restrictions on an Owner's right to sell or transfer his Lot;
12. A decision by the Association to establish self-management when professional management had been required previously by an Eligible Mortgage Holder;
13. Restoration or repair of the Project (after a hazard damage or partial condemnation) in a manner other than that specified in the Project Documents;
14. Any action to terminate the legal status of the Project after substantial destruction or condemnation occurs;
15. Any provisions which expressly benefit First Mortgagees, Eligible Mortgage Holders or Eligible Insurers Or Guarantors.

Any addition or amendment to the Declaration, Articles or Bylaws shall not be considered material if it is for the purpose of correcting technical errors or for clarification only. Any First Mortgagee who receives a written request to approve additions or amendments to the Declaration, Articles or Bylaws which 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.

8.4. First Mortgagee Not Liable for Prior Assessments. Any First Mortgagee or any other party acquiring title or coming into possession of a Lot through foreclosure of the 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 and charges against the Lot which became payable prior to the acquisition of such Lot by the First Mortgagee or other party. Any Assessments and charges against the Lot which accrue prior to such sale or transfer shall remain the obligation of the defaulting Owner of the Lot.

8.5. First Mortgagee's Right of Inspection of Records. Any First Mortgagee will, upon written request, be entitled to (i) inspect the books and records of the Association during normal business hours, (ii) receive within ninety (90) days following the end of any fiscal year of the Association, a 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.

8.6. Limitation on Partition and Subdivision. No Lot shall be partitioned or subdivided without the prior written approval of the holder of any First Mortgage on such Lot.

8.7. Prior Written Approval of First Mortgagees. Unless at least two-thirds (2/3) of the First Mortgagees (based upon one vote for each First Mortgage owned) or Owners (other than the sponsor, developer or builder) of the individual Lots have given their prior written approval, the Association shall not be entitled to:

(i) By act or omission seek to abandon, partition, subdivide, sell or transfer the Common Area owned, directly or indirectly, by the Association for the benefit of the Lots (the granting of easements for public utilities or for other public purposes consistent with the intended use of such Common Area shall not be deemed a transfer within the meaning of this subsection);

(ii) Change the method of determining the obligations, assessments, dues or other charges which may be levied against a Lot Owner;

(iii) By act or omission change, waive or abandon any scheme or regulations, or enforcement thereof, pertaining to the architectural design or the exterior appearance of Lots, the exterior maintenance of Lots, and the improvements located thereon, the maintenance of the Common Area, party walks or fences and driveways, or the upkeep of lawns and plantings in the Project;

(iv) Use hazard insurance proceeds for losses to any Common Area, other than the repair, replacement or reconstruction of such Common Area.

8.8. Conflicting Provisions. In the event of any conflict or inconsistency between the provisions of this Article and any other provision of the Project Documents, the provisions of this Article shall prevail; provided, however, that in the event of any conflict or inconsistency between the different Sections of this Article or between the provisions of this Article and any other provision of the Project Documents with respect to the number or percentage of Owners, First Mortgagees, Eligible Mortgage Holders or Eligible Insurers Or Guarantors that must consent to (i) an amendment of the Declaration, Articles or Bylaws, (ii) a termination of the Project, or (iii) certain actions of the Association as specified in Sections 8.2, 8.3 and 8.7 of this Declaration, the provision requiring the consent of the greatest number or percentage of Owners, First Mortgagees, Eligible mortgage Holders or Eligible Insurers Or Guarantors shall prevail; provided, however, that the Board, without the consent of any Owner or First Mortgagee being required, shall have the right to amend this Declaration, the Articles or the Bylaws in order to conform this Declaration, the Articles or the Bylaws to the requirements or guidelines of the

Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, the Veterans Administration or any federal, state or local governmental agency whose approval of the Project, the Plat or the Project Documents is required by law or is requested by the Association.

ARTICLE 9

GENERAL PROVISIONS

9.0. **Enforcement.** The Association or any Owner shall have the right to enforce the Project Documents and/or any and all covenants, restrictions, reservations, charges, servitudes, assessments, conditions, liens or easements provided for in any contract, deed, declaration or other instrument which (i) shall have been executed pursuant to, or subject to, the provisions of this Declaration, or (ii) otherwise shall indicate that the provisions of such instrument were intended to be enforced by the Association.

9.1. **Term; Method of Termination.** This Declaration shall be effective upon the date of recordation hereof and, as amended from time to time, shall continue in full force and effect for a term of twenty (20) years from the date this Declaration is recorded. From and after said date, this Declaration, as amended, shall be automatically extended for successive periods of ten (10) years each. This Declaration may be terminated at any time if such termination is approved in writing by the Owners representing ninety percent (90%) or more of the votes in each class of membership or if the Owners representing ninety percent (90%) or more of the votes in each class of membership vote in favor of such termination at a meeting of the Members duly called for such purpose and such termination is also approved in writing by the holders or recorded first mortgages or deeds of trust on Lots and Parcels, the Owners of which have seventy-five percent (75%) or more of the votes in the Association. If the necessary votes and consents are obtained, the Board shall cause to be recorded with the County Recorder of Navajo County, Arizona, a Certificate of Termination, duly signed by the President or Vice President and attested by the Secretary or Assistant Secretary of the Association, with their signatures acknowledged. Thereupon this Declaration shall have no further force and effect, and the Association shall be dissolved pursuant to the terms set forth in its Articles.

9.2. **Amendments.**

(A) Except for amendments made pursuant to Subsection (B) of this Section, the Declaration or the Project Plat may only be amended by the written approval or the affirmative vote, or any combination thereof, of Owners representing not less than sixty-seven percent (67%) of the votes in each class of membership.

(B) The Board may amend this Declaration or the Project Plat, without obtaining the approval or consent of any Owner or First Mortgagee, in order to conform this Declaration or the Project Plat to the requirements or guidelines of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, the Veterans Administration or any federal, state or local governmental agency whose approval of the Project, the Project Plat or the Project Documents is required by law or requested by the Board.

(C) Any amendment approved pursuant to Subsection (A) above or by the Board pursuant to Subsection (B) above shall be signed by the President or Vice President of the Association and shall be recorded with the County Recorder of Navajo County, Arizona. Any

such amendment shall certify that the amendment has been approved as required by this Section.

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

9.4. Severability. Any determination by any court of competent jurisdiction that any provision of this Declaration is invalid or unenforceable shall not affect the validity or enforceability of any of the other provisions hereof.

9.5. Rule Against Perpetuities. If any interest purported to be created by this Declaration is challenged under the Rule against Perpetuities or any related rule, the interest shall be construed as becoming void and of no effect as of the end of the applicable period of perpetuities computed from the date when the period of perpetuities starts to run on the challenged interest; the "lives in being" for computing the period of perpetuities shall be (a) those which would be used in determining the validity of the challenged interest, plus (b) those of the issue of the Board who are living at the time the period of perpetuities starts to run on the challenged interest.

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

9.7. Rules and Regulations. In addition to the right to adopt rules and regulations on the matters expressly mentioned elsewhere in this Declaration, the Association shall have the right to adopt rules and regulations with respect to all other aspects of the Association's rights, activities and duties, provided said rules and regulations are not inconsistent with the provisions of this Declaration.

9.8. Laws, Ordinances and Regulations.

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

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

9.9. **References to this Declaration in Deeds.** Deeds to and instruments affecting any Lot or Parcel or any part of the Project may contain the covenants, conditions and restrictions herein set forth by reference to this Declaration; but regardless of whether any such reference is made in any Deed or instrument, each and all of the provisions of this Declaration shall be binding upon the grantee-Owner or other person claiming through any instrument and his heirs, executors, administrators, successors and assignees.

9.10. **Gender and Number.** Wherever the context of this Declaration so requires, words used in the masculine gender shall include the feminine and neuter genders; words used in the neuter gender shall include the masculine and feminine genders; words in the singular shall include the plural; and words in the plural shall include the singular.

9.11. **Captions and Titles.** All captions, titles or headings of the Articles and Sections in this Declaration are for the purpose of reference and convenience only and are not to be deemed to limit, modify or otherwise affect any of the provisions hereof or to be used in determining the intent of context thereof.

9.12. **Notices.** If notice of any action or proposed action by the Board or any committee or of any meeting is required by applicable law, this Declaration or resolution of the Board to be given to any Owner, Lessee or Resident then, unless otherwise specified herein or in the resolution of the Board, such notice requirement shall be deemed, satisfied if notice of such action or meeting is published once in any newspaper in general circulation within Navajo County. This Section shall not be construed to require that any notice be given if not otherwise required and shall not prohibit satisfaction of any notice requirement in any other manner.

ARTICLE 10

AMENDED AND RESTATED DECLARATION

10.0 Certification of Approval by Owners. The officer of the Association signing this Declaration certifies that this Declaration has been approved by Owners representing not less than sixty-seven percent (67%) of the votes of each class of members in the Association and has otherwise been adopted and approved in accordance with Section 8.7(ii) and 9.2(a) of the requirements of the Initial Declaration.

10.1 Initial Declaration Superseded. This Declaration shall supersede and replace the Initial Declaration in its entirety. Upon the recording of this Declaration, the Initial Declaration shall be of no further force and effect.

IN WITNESS WHEREOF, the Association has executed this amended and restated Declaration as of the day and year first above written.

THE SHORES AT RAINBOW LAKE
COMMUNITY ASSOCIATION, an Arizona non-profit corporation

By *Rick Husk*
RICK HUSK
Its President

STATE OF ARIZONA)
) ss.
County of Navajo)

Acknowledged before me this 14th day of August, 2001, by RICK HUSK, the President of THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, an Arizona non-profit corporation, on behalf of the corporation.

Tonie Mondragon
Notary Public

My Commission Expires

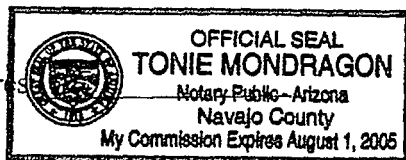


EXHIBIT A

Lots 1 through 136, inclusive, and Tracts A through P, inclusive, and U, the Shores at Rainbow Lake, according to the plat recorded in Book 16 of Maps, page 21-27 records of Navajo County, Arizona.

Exhibit 2

2021-04383
Page 1 of 4
Requested By: LAWYERS TITLE PINETOP - 230 E
WHITE
Navajo County Recorder - Michael Sample
03-03-2021 08:07 AM Recording Fee \$30.00

RECORDED AT THE REQUEST OF:

Frank M. Smith & Associates, Inc.

WHEN RECORDED MAIL TO:

**The Shores at Rainbow Lake
c/o Frank M. Smith & Associates
4756 Buck Springs Road
Pinetop, AZ 85935**

DO NOT REMOVE THIS COVER SHEET. IT IS NOW PART OF THE RECORDED DOCUMENT.

DOCUMENT TO BE RECORDED:

Covenants, Conditions and Restrictions Amendment

recvr

**FIRST AMENDMENT
TO AMENDED AND RESTATED DECLARATION
OF COVENANTS, CONDITIONS AND RESTRICTIONS
FOR
THE SHORES AT RAINBOW LAKE**

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**FIRST AMENDMENT TO
AMENDED AND RESTATED DECLARATION
OF COVENANTS, CONDITIONS AND RESTRICTIONS
FOR
THE SHORES AT RAINBOW LAKE**

WHEREAS, that certain Amended and Restated Declaration of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake recorded on September 6, 2001 at Document No. 2001-17716 in the official records of Navajo County, Arizona ("Declaration"), in Article 9, Section 9.2, provides that its terms and conditions may be amended by Owners representing not less than sixty-seven percent (67%) of the total votes in each class of membership;

NOW, THEREFORE, Owners representing not less than sixty-seven percent (67%) of the total votes in the Class A Membership and Owners representing at least sixty-seven percent (67%) of the total votes in the Class B Membership have provided their written consent to adopt the following amendment to the Declaration:

1. Article 2, Section 2.30 shall be deleted in its entirety and replaced with the following:

2.30. Leasing of Lots.

(A) After December 31st, 2021, no Lot may be leased for a term of less than thirty (30) days.

(B) No portion of a Lot may be leased, other than the entire Lot, and then only to a Single Family. For purposes of this Section 2.30, a Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption.

(C) An Owner who leases his Lot shall provide the following information to the Association at least ten (10) days before the commencement of the lease term:

(i) the commencement date and expiration date of the lease term;
(ii) the names and contact information of any adults occupying the Lot during the lease term; and

Page 2 of 3

(iii) the address and telephone number at which the Owner (or Owner's agent) can be contacted by the Association during the lease term.

(D) Any agreement for the lease of a Lot shall provide that the terms of such lease shall be subject in all respects to the provisions of the Project Documents and that any failure by the Lessee to comply with the terms of the Project Documents shall be a default under the lease. Any Owner who leases a Lot must provide the Lessee with copies of this Declaration, the Architectural Committee Rules and the Association Rules and is responsible for assuring the Lessee's compliance therewith. The Owner shall be liable for any violation of this Declaration, the Architectural Committee Rules or the Association Rules by the Lessees or other persons residing in the Lot and their guests or invitees and, in the event of any such violation, the Owner, upon demand of the Association, shall immediately take all necessary actions to correct any such violations.

2. Except as amended by this instrument, the Declaration shall remain in full force and effect.

The undersigned certifies that this First Amendment to the Declaration was duly adopted by the written consent of Owners representing at least sixty-seven percent (67%) of the total votes in each class of membership on the 26th day of February, 2021.

THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, an Arizona nonprofit corporation

By: [Signature]
Its: President

STATE OF ARIZONA)
) ss.
COUNTY OF NAVAJO)

This instrument was acknowledged before me this 26th day of February, 2021, by Richard C. Whipple in his capacity as President of The Shores at Rainbow Lake Community Association for the purposes stated herein.

Victoria M. Heuett
Notary Public
My Commission Expires: May 18, 2022

