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Homeowners Association*

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R.L. WHITMER,

Plaintiff,

vs.

HILTON CASITAS HOMEOWNERS
ASSOCIATION, also known as HILTON
CASITAS COUNCIL OF
HOMEOWNERS, also known as HILTON
CASITAS COUNCIL OF CO-OWNERS,

Defendant.

Case No. CV2021-050888

**OPPOSITION TO PLAINTIFF’S RULE 59
MOTION TO ALTER THE FINAL
JUDGMENT**

(Assigned to Honorable Sara Agne)

Pursuant to the Arizona Rules of Civil Procedure 59 and 7.1, Defendant Hilton Casitas Homeowners Association (“Association”) hereby responds in opposition to Plaintiff’s Rule 59 Motion to Alter the October 5, 2021 Final Judgment (the “Rule 59 Motion”). As an initial consideration, the Rule 59 Motion is an attempt to expand the principle argument that Plaintiff raised in Plaintiff’s Objection to Defendants’ Application for an Award of Attorney Fees and Costs (“Plaintiff’s Objection”)—specifically Plaintiff contends that this action did not arise

1 out of contract. This Court has already considered this issue and denied Plaintiff’s contention
2 by entering the Judgment granting the Association its attorneys’ fees.

3 To the extent Plaintiff seeks to introduce arguments and case law to support his central
4 premise, the time to raise any such arguments was in his Objection, not as a part of a Rule 59
5 motion. *See Allied Van Lines v. Parsons*, 80 Ariz. 88, 98, 293 P.2d 430, 436 (1956) (“Belated
6 objections which might have been met if timely made during the trial may not be raised for
7 the first time in a motion for new trial, and a fortiori not during the oral argument of such a
8 motion.”). Far from promoting efficiency and saving judicial resources as Plaintiff contends,
9 the Rule 59 Motion is a repeated effort in futility which the Court should summarily deny.
10 Notwithstanding, out of an abundance of caution and to avoid any argument of waiver, the
11 Association addresses Plaintiff’s arguments below.

12 In his Rule 59 Motion, Plaintiff advances the following arguments as to why fees
13 should not be awarded: 1) the Complaint did not specifically allege a claim for breach of
14 contract, 2) the Declaration was only a factual predicate and not an essential basis of the
15 claims, and 3) the Declaration lacks a provision for an award of attorneys’ fees. None of these
16 arguments have merit.

17 **I. A.R.S. § 12-341.01 Does Not Require a Claim for Breach of Contract.**

18 By its plain language, A.R.S. § 12-341.01 applies to “any contested action arising out
19 of a contract, express or implied...” This does not require a specific claim for breach of
20 contract as Plaintiff suggests. To the contrary, actions for declaratory judgment and injunctive
21 relief are within the purview of actions which may arise out of a contract. *See Piccioli v. City*
22 *of Phoenix*, 249 Ariz. 113, 116, ¶ 7, 466 P.3d 1166, 1169 (2020) (granting an award of
23 attorneys’ fees under A.R.S. § 12-341.01 in an action seeking declaratory, injunctive, and
24 mandamus relief); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. 757BD, LLC*, 560 Fed.
25 Appx. 657 (9th Cir. 2014) (holding that a declaratory judgment action in federal court was a

1 “contested action,” as required for award of attorney fees to successful party under A.R.S. §
2 12-341.01).

3 Plaintiff’s argument regarding the need for a specific “breach of contract” claim
4 appears to stem from a misunderstanding of the Court’s reference to *Swain v. Bixby Village*
5 *Golf Course, Inc.*, 247 Ariz. 405 (Appl. 2019). Plaintiff states that, “The Judgment uses *Swain*
6 as the legal authority to claim that this action was brought under the Declaration...” Rule 59
7 Motion at 5:12-16 (internal quotations omitted). However, Plaintiff’s position misstates the
8 Judgment which actually cites to *Swain* for the singular proposition that, “the Declaration is a
9 contract.” Judgment at 2:2-5. Plaintiff does not dispute the fact that the Declaration is a
10 contract, and any such dispute would be irrelevant because this fact is well supported by
11 Arizona law. *Swain*, 247 Ariz. at 410, ¶ 19, 450 P.3d at 275 (App. 2019), *review denied* (Apr.
12 3, 2020), *cert. denied sub nom. ALCR, LLC v. Swain*, 141 S. Ct. 817, 208 L. Ed. 2d 399
13 (2020); *see also Powell v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006) (“A
14 deed containing a restrictive covenant that runs with the land is a contract.”). Thus, the
15 entirety of Plaintiff’s analysis and discussion of *Swain* is irrelevant. Plaintiff cites to no other
16 authority for the position that A.R.S. § 12-341.01 requires a breach of contract claim because
17 no such authority exists.

18 **II. The Complaint Arises Out of Contract.**

19 Plaintiff next argues that the Complaint was purely a matter of statutory enforcement
20 with the Declaration serving only to establish that the Association is subject to A.R.S. § 33-
21 1201 *et seq.* Rule 59 Motion at 17-20. Initially, Plaintiff is incorrect in asserting that “the *only*
22 *mention* of the Declaration was as a predicate to establish that the HOA, as a creature of
23 statute, is subject to A.R.S. § 33-1201 *et seq.* ...” *Id.* at 5:18-19 (emphasis added). Plaintiff
24 also explicitly references the Declaration in Count One of his Complaint where he asserts,
25 “There is no provision in the Declaration that expressly authorizes the board of directors on its

1 own to adopt or amend budgets.” Complaint ¶ 13. Plaintiff also implicitly references the
2 Declaration and other governing documents of the Association in Counts Two and Three. *See*
3 Complaint ¶¶ 17, 24-25 (referencing the Association’s fiscal year which is set under the
4 Articles of Incorporation—attached hereto as Exhibit 1—and financial records which are
5 governed under Article V, Sections 7 and 8 of the Bylaws—attached hereto as Exhibit 2).

6 Indeed, Plaintiff’s references to the Declaration are essential to his Complaint because
7 the Uniform Condominium Act incorporates the Declaration into the relevant statutes. *See*
8 A.R.S. § 33-1243(D, J) (“Except as provided in the declaration, within thirty days after
9 adoption of any proposed budget for the condominium...”), (“Unless any provision in the
10 condominium documents requires an annual audit by a certified public accountant...”). That
11 is, the statutory provisions provide a default rule but the default rule is subject to modification
12 by the Declaration. Thus, a full analysis of these statutes would require that the Court examine
13 the Declaration to exclude the possibility that the Declaration changed the default rule under
14 statute. Here, however, the Court did not ultimately need to perform a complete review of the
15 Declaration because the legal deficiencies in the Complaint were apparent on the face of the
16 Complaint itself.

17 In support of his position, Plaintiff cites to several non-analogous cases and cherry
18 picks specific holdings out of these cases without drawing the connection of how these
19 holdings apply to the current matter. For example, Plaintiff cites to both *Keystone Floor &*
20 *More, LLC v. Arizona Registrar of Contractors*, 223 Ariz. 27, 219 P.3d 237 (App. 2009) and
21 *Hanley v. Pearson*, 204 Ariz. 147, 151, ¶ 17, 61 P.3d 29, 33 (App. 2003) for the general
22 holding that A.R.S. § 12-341.01 does not apply when a contract is a factual predicate but not
23 the essential basis for a claim. *See* Rule 59 Motion at 4:5-13¹. *Keystone Floor* involved an
24

25 ¹ Plaintiff also provides a lengthy quote from *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175
Ariz. 323, 325, 856 P.2d 1201, 1203 (App. 1993), but again provides no commentary or

1 appeal from a Registrar of Contractor (“ROC”) administrative dispute process and the
2 superior court’s review of whether the sanctions issued by the ROC, pursuant to its regulatory
3 authority, was contrary to law, arbitrary and capricious, or an abuse of discretion. *See*
4 *Keystone Floor*, 223 Ariz. at 30, ¶ 12, 219 P.3d at 240. Notably, the ROC was a party to the
5 appeal. *Id.* at 29, ¶ 4, 219 P.3d at 239 (“Keystone filed a complaint against the ROC and Kang
6 in superior court seeking judicial review of the ROC decision...”). Thus, the underlying
7 contracts between the real parties in interest was too remote because the actual issue on appeal
8 was the ROC’s regulatory authority and the ROC did not have a contract with either of the
9 real parties in interest.

10 Similarly, in *Hanley*, there was an underlying Deed of Trust which served as a contract
11 between a lender and borrower, neither of which were parties to the litigation. *Hanley*, 204
12 Ariz. at 148, ¶ 2, 61 P.3d at 30. Following default by the borrower, litigation commenced
13 between two lien holders over the manner in which excess proceeds should be applied. *Id.* at
14 148, ¶ 4, 61 P.3d at 30. The lienholders did not have contracts with each other, and the *Hanley*
15 court found the contract between the non-parties to be too remote to form an essential basis of
16 the dispute. Importantly, the *Hanley* decision strongly implies that a case arises out of contract
17 when the legal relationship between the parties exists because of contract. *See id.* at 151, ¶¶
18 16, 19, 61 P.3d at 33 (App. 2003) (overruling the trial court’s conclusion that the contract
19 created the legal relationship between the parties on the factual basis that neither lienholder
20 was a party to the deed of trust but not overruling the trial court’s legal rationale).

21 Here, the contract is essential to the relationship between the parties and the nature of
22 the Complaint itself. The legal relationship between Plaintiff and the Association is based
23 solely on the Declaration. Moreover, Plaintiff would not have standing to bring the Complaint
24 unless he was a member of the Association through the Declaration. Further, as expressed

25 analysis as to how the *Kennedy* case should apply here. The *Kennedy* case dealt with Arizona’s
“Lemon Law” and has no factual or legal similarities to the instant dispute.

1 above, the statutory provision upon which Plaintiff bases his claims incorporate the
2 Declaration through reference that the general rule expressed in the statute is subject to
3 modification by the Declaration.

4 The Complaint’s reference to the Declaration and other governing documents, the fact
5 that the Declaration serves as the basis for the legal relationship between Plaintiff and the
6 Association, and the inextricable relationship between the Declaration and statutory
7 provisions individually and/or collectively are sufficient to establish that Plaintiff’s claims
8 arise out of contract such that award of fees under A.R.S. § 12-341.01 is appropriate.

9 **III. A.R.S. § 12-341.01 Is an Independent Basis for Award of Attorneys’ Fees.**

10 Finally, Plaintiff argues that the lack of a fee provision in the Declaration prevents this
11 matter from being construed as arising out of contract. Rule 59 Motion at 5:21-23. Plaintiff’s
12 argument defies common sense and well established law. A.R.S. § 12-341.01 would be
13 rendered superfluous if a contract had to include a fee provision in order to fall within its
14 purview. Arizona courts acknowledge that § 12-341.01 applies in situations where the contract
15 does not include a fee provision. *See Sullivan v. State Land Dept. of State of Ariz.*, 172 Ariz.
16 599, 601, 838 P.2d 1360, 1362 (App. 1992) (“The statute applies in contract actions when the
17 contract has not provided for the payment of fees; it does not govern when the contract
18 expressly provides for them.”)

19 Moreover, Plaintiff’s argument that the Court should look to the Declaration on the
20 issue of attorneys’ fees implicitly acknowledges that the Declaration governs the dispute.
21 Because the Declaration governs the dispute, the matter arises out of contract and the award of
22 fees under A.R.S. § 12-341.01 is appropriate.

23 **IV. Conclusion**

24 For all the reasons set forth above, this matter is one which arises out of contract, and
25 the Court’s award of fees under A.R.S. § 12-341.01 is appropriate. The Association

1 respectfully requests the Court deny the Rule 59 Motion. Moreover, for all the reasons stated
2 in the Application for Attorneys’ Fees and Costs—which are incorporated herein by
3 reference—the Association is entitled to and requests a supplemental award for those
4 additional fees and costs incurred in responding to the Rule 59 Motion and any other relief
5 which the Court finds just and proper.

6 RESPECTFULLY SUBMITTED this 8th day of November, 2021.

7 **CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP**

8
9 By: s/Edith R. Rudder, Esq.
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14 *Attorneys for Defendant*

13 **ORIGINAL** of the foregoing e-filed
14 this 8th day of November, 2021.

15 **COPY** of the foregoing mailed/e-mailed
16 this 8th day of November, 2021, to:

17 R.L. Whitmer
18 6333 N. Scottsdale Road, Casita 21
19 Scottsdale, Arizona 85250
20 rlw@fulcrumgroup.biz

21 *Pro Per*

22 By: s/ Suzanne Hilborn

Exhibit 1



MARCIA WEEKS
CHAIRMAN

RENZ D. JENNINGS
COMMISSIONER

DALE H. MORGAN
COMMISSIONER



JAMES MATTHEWS
EXECUTIVE SECRETARY

ARIZONA CORPORATION COMMISSION

August 12, 1994

Hilton Casitas Council of Homeowners

We are pleased to notify you that your Articles of Incorporation were filed on August 11, 1994.

You must publish a copy of your Articles of Incorporation WITHIN SIXTY (60) DAYS from the File Date. The publication must be in a newspaper of general circulation in Maricopa County, for three (3) consecutive publications. An affidavit from the newspaper, evidencing such publication, must be delivered to the Commission for filing WITHIN NINETY (90) DAYS from the File Date.

All corporations transacting business in Arizona are required to file an Annual Report with the Commission, no later than the 15th day of the fourth (4th) month following the close of each fiscal year. Your fiscal year end is December 31, 1994. Each year, a preprinted Annual Report Form will be mailed to you during that month.

Your first annual report will be due April 15, 1995.

If you have any questions or need further information, please contact us at (602) 542-3135 or Toll Free (Arizona residents only) at 1-800-345-5819.

Very truly yours,

Sonia Greer

Examiner
Corporations Division
Arizona Corporation Commission

AUG 11 1994

APPR. Donald Sills
TERM _____
DATE 8/11/94

0724099-7

ARTICLES OF INCORPORATION
OF
HILTON CASITAS COUNCIL OF HOMEOWNERS

In compliance with the requirements of Arizona Revised Statutes Section 10-1001, et seq., as they may be amended from time to time, the undersigned, who is of legal age, and for the purpose of forming a nonprofit corporation, hereby certifies as follows:

ARTICLE I

NAME

The name of the corporation is HILTON CASITAS COUNCIL OF HOMEOWNERS (the "Association").

ARTICLE II

DEFINED TERMS/CONFLICTING PROVISIONS

Capitalized terms used in these Articles of Incorporation without definition shall have the meanings ascribed to such terms in that certain Declaration of Horizontal Property Regime for Hilton Casitas recorded in the Office of the County Recorder of Maricopa County, Arizona on May 22, 1972, page 790 (the "Declaration"), the terms and provisions of which are hereby incorporated by reference into these Articles of Incorporation as if set forth herein. In the event of any conflict or inconsistency between the terms or provisions of the Declaration and those of these Articles, the terms and provisions of the Declaration shall control.

ARTICLE III

PRINCIPAL OFFICE

The principal office of the Association shall be located at 6333 North Scottsdale Road, #10, Scottsdale, Arizona 85253.

ARTICLE IV

STATUTORY AGENT

Gallagher & Kennedy Service Corporation, which has a business address of 2600 North Central Avenue, Phoenix, Arizona 85004-3020, is the initial statutory agent for the Association.

ARTICLE V

PURPOSE OF THE ASSOCIATION

The object and purpose for which the Association is organized is to provide for the management, maintenance, and care of the Common Elements and to perform such other duties as are imposed upon the Association under the Declaration. In furtherance of, and in order to accomplish the foregoing object and purpose, the Association may and is authorized to transact any and all lawful business for which nonprofit corporations may be organized under the laws of the State of Arizona, as they may be amended from time to time.

ARTICLE VI

INITIAL BUSINESS

The character of the business that the Association initially intends to conduct in Arizona is to provide for the management, maintenance, and care of the Common Elements and to exercise and perform such other powers and duties as are imposed upon or granted to the Association under the Declaration.

ARTICLE VII

MEMBERS

The Association shall have one class of Members. The designation of the class of membership, the manner of election or appointment of Members and the qualifications and rights of Members shall be as set forth in the Bylaws and Declaration.

ARTICLE VIII

BOARD OF DIRECTORS

The number of directors constituting the initial Board of Directors is five (5). The names and addresses of the directors of the Association, who shall serve as directors until the first annual meeting of the Members or until their successors are elected and qualified, are as follows:

<u>Name</u>	<u>Mailing Address</u>
Robert Karatz	6333 North Scottsdale Road, #10 Scottsdale, Arizona 85253
Arnold Horwitch	6333 North Scottsdale Road, #16 Scottsdale, Arizona 85253

<u>Name</u>	<u>Address</u>
Robert Karatz	6333 North Scottsdale Road, #10 Scottsdale, Arizona 85253

ARTICLE XIII

LIABILITY OF DIRECTORS

In accordance with the provisions of Arizona Revised Statutes Section 10-1029, as the same may be amended from time to time, the directors of the Association shall not be liable for monetary damages to the Association or to its Members for breach of fiduciary duty as a director, except as follows:

- (a) Any breach of the director's duty of loyalty to the Association or its Members;
- (b) Acts or omissions which are not in good faith or which involve intentional misconduct or a knowing violation of law;
- (c) Any violation of Arizona Revised Statutes Section 10-1026;
- (d) Any transaction from which the director derived an improper personal benefit; or
- (e) Any violation of Arizona Revised Statutes Section 10-1097.

ARTICLE XIV

INDEMNIFICATION

The Association shall indemnify, to the fullest extent allowed by Arizona law, any person who incurs liability or expense by reason of such person acting as an officer, director, employee or agent of the Association. This indemnification shall be mandatory in all circumstances in which indemnification is permitted by Arizona law.

DATED: June 20, 1994.

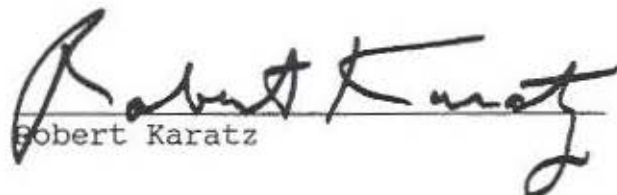

Robert Karatz

Exhibit 2



BYLAWS
OF
HILTON CASITAS COUNCIL OF CO-OWNERS

ARTICLE I

NAME AND LOCATION OF COUNCIL OF CO-OWNERS

Section 1. Name and Location. The name of this Council of Co-owners is HILTON CASITAS COUNCIL OF CO-OWNERS (hereinafter called the "Council"). Its principal place of business shall be located in the City of Scottsdale, Maricopa County, Arizona.

ARTICLE II

REFERENCE TO DECLARATION

Section 1. Reference. Reference is made to that certain Declaration of Horizontal Property Regime, recorded on May 22, 1972, in Docket 9448, pages 790 to 846 inclusive, records of Maricopa County, Arizona (hereinafter called the "Declaration"). The Declaration, as amended and supplemented from time to time as therein provided, is incorporated herein by reference. The Declaration covers Hilton Casitas (hereinafter called the "Property" or "Hilton Casitas"), as described in the Declaration.

ARTICLE III

MEMBERSHIP

Section 1. Qualification. Membership shall be limited to Owners (as said term is defined in the Declaration) of the

Casitas (as said term is defined in the Declaration). An owner will be deemed a member upon recordation, in the public records of Maricopa County, Arizona, of a Sublease and/or other instrument establishing a record title to the Casita. An owner shall remain a member of this Council until such member's death, or until such time as such member's Sublease is assigned or is terminated for any reason, or until such time as such member's right of occupancy of the Casita under the Sublease is terminated for any reason, at which time such member's membership in this Council shall automatically cease and terminate. No certificates of membership shall be issued, and membership shall be evidenced by an official list of said members, which list shall be kept by the Secretary of the Council.

Section 2. Place of Meetings. Meetings of the members of the Council shall be held at the Property or such other suitable place convenient to the members as may be designated by the Board of Directors.

Section 3. Annual Meetings. The first annual meeting of the members of this Council shall be held within one year after completion and occupancy by owners of seventy-five percent (75%) of the total number of Casitas to be constructed upon the Property, or at such earlier time as the initial Board of Directors shall designate, whichever is sooner. Thereafter the annual

meetings of the Council shall be held within three months after the end of each accounting year.

Section 4. Special Meetings. Special meetings of the Council may be held at any time upon the call of the President or a petition signed by at least twenty-five per cent (25%) of the members and presented to the Secretary.

Section 5. Notice of Meetings. The Secretary shall give written notice of each annual and special meeting to every member according to the Council's record of ownership, at least five days before the date set for such meeting, stating whether it is an annual or special meeting, the authority for the call thereof, the place, day and hour of such meeting and the purpose therefor, in any of the following ways: (a) by delivering it to him personally, or (b) by leaving it at his Casita in the Property or at his usual residence or place of business, or (c) by mailing it, postage prepaid, addressed to him at his address as it appears on the Council's records of ownership. If notice is given, pursuant to the provisions of this section, the failure of any members to receive actual notice of any meeting shall in no way invalidate such meeting or any proceedings thereat. The presence of any member in person or by proxy at any meeting shall be deemed a waiver of any required notice to such member unless he shall at the opening thereof object to the holding of such meeting

because of the failure to give notice in accordance with the provisions hereof.

Section 6. Quorum. The presence at any meeting in person or by proxy of a majority of members shall constitute a quorum, and the acts of a majority of the members at any meeting at which a quorum is present shall be the acts of the Council except as otherwise provided herein. The quorum percentage requirement shall be reduced by fifteen percent (15%) for each meeting which follows any prior meeting in which a sufficient number of members to constitute a quorum were not present in person or by proxy.

Section 7. Voting. A member shall be entitled to one vote for each Casita subleased (hereinafter referred to in the context of "owned") by such member. In the event any Casita is owned by two or more persons, by a corporation, partnership or other entity having more than one person as a member, whether by joint tenancy, tenancy in common, community property, or otherwise, the membership as to such Casita shall be joint and a single membership for such Casita shall be issued in the names of all, and they shall designate to this Council, in writing, at the time of issuance, one of their number who shall have the power to vote said membership, and, in the absence of such designation and until such designation is made, the Board of Directors of the Council shall make such designation.

Votes may be cast in person or by proxy by the respective members as shown in the records of ownership of the Council. An executor, administrator, guardian or trustee may vote in person or by proxy the vote for any Casita owned or controlled by him in such capacity, whether or not the same shall have been transferred to his name in the Council's records of ownership, provided that he shall first present evidence satisfactory to the Secretary of the Council that he owns or controls such Casita in such capacity.

Section 8. Proxies and Pledges. The authority given by any member to another person to represent him at meetings of the Council shall be in writing, signed by such owner and filed with the Secretary, and unless limited by its terms shall continue until revoked by writing filed with the Secretary or by the death or incapacity of such member.

Section 9. Adjournment. Any meeting of the Council may be adjourned from time to time to such place and time as may be determined by majority vote of the members present, whether or not a quorum be present, without notice other than the announcement at such meeting. At any such adjourned meeting at which a quorum is present, any business may be transacted which might have been transacted by a quorum at the meetings as originally called.

Section 10. Order of Business. The order of business (if the subjects are appropriate) at all meetings of the Council shall be as follows:

- (a) Roll call;
- (b) Proof of notice of meeting;
- (c) Reading of minutes of preceding meeting;
- (d) Report of officers;
- (e) Report of committees;
- (f) Election of directors;
- (g) Unfinished business;
- (h) New business.

ARTICLE IV

BOARD OF DIRECTORS

Section 1. Number and Qualifications. The business and affairs of the Council shall be governed by a Board of Directors composed of not less than three (3) nor more than five (5) persons, who shall serve without compensation. The initial Board shall be composed of five members, and the number of members on the Board thereafter shall be established from time to time by the Board. No person shall be eligible for election as a director who is not at the time of election a member of this Council (except such persons who may serve as directors during the period from the date of recordation of the Declaration until the first annual meeting of the members).

Section 2. Powers. The Board of Directors shall have all powers necessary for the administration of the affairs of the Council and may do all such acts and things therefor as are not by law, the Declaration or these Bylaws directed to be exercised or done only by the members.

Section 3. Election and Term. The Board of Directors shall be elected annually by the members at the annual meeting of the members of the Council, or at any special meeting called for the purpose of such election, for a term of one year, and each member shall be entitled to one vote for each Casita owned by him.

Section 4. Vacancies. Vacancies in the Board of Directors caused by any reason other than removal of a director by the Council shall be filled by vote of a majority of the remaining directors, even though they may constitute less than a quorum, and each person so elected shall be a director until his successor is elected at the next annual meeting of the Council. Ceasing to be a member of the Council, death, incapacity or resignation of any director shall cause his office to become vacant.

Section 5. Removal of Directors. At any regular or special meeting of the Council duly called, any one or more of the directors may be removed with or without cause by vote of a majority of members and a successor may then and there be elected to fill the vacancy thus created. Any director

whose removal has been proposed by the members shall be given at least five days notice of such proposed action and an opportunity to be heard at such meeting.

Section 6. Annual Meeting. An organizational meeting of the Board of Directors shall be held at the place of, and immediately following, each annual meeting of the Council, and it shall not be necessary to give any notice to any directors in order for there to be a valid meeting, provided that a majority of the whole Board shall be present. At such meeting the Board shall elect the officers of the Council for the ensuing year.

Section 7. Regular Meetings. Regular meetings of the Board of Directors may be held at such time and place as shall be determined from time to time by a majority of the Directors. Notice of regular meetings of the Board shall be given to each director, personally or by mail, telephone or telegraph, at least one day prior to the date of such meeting.

Section 8. Special Meetings. Special meetings of the Board of Directors may be called by the President on at least one day's notice to each director, given personally or by telephone or telegraph, which notice shall state the time, place and purpose of such meeting. Special meetings of the Board shall be called by the President or Secretary in like manner and with like notice on the written request of at least two directors.

Section 9. Waiver of Notice. Before or at any meeting of the Board of Directors any director may in writing waive notice of such meeting, and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a director at any meeting of the Board shall be a waiver of notice to him of such meeting. If all the directors are present at any meeting of the Board, no notice thereof shall be required, and any business may be transacted at such meeting.

Section 10. Quorum of Board. At all meetings of the Board of Directors a majority of the total number of directors established by these Bylaws shall constitute a quorum for the transaction of business, and the acts of a majority of the directors present at any meeting at which a quorum is present shall be the acts of the Board. If less than a quorum shall be present at any meeting of the Board, a majority of those present may adjourn the meeting from time to time. At any such adjourned meeting at which a quorum is present, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section 11. Fidelity Bonds. The Board of Directors may require that all officers, employees and agents of the Council handling or responsible for its funds, shall furnish adequate fidelity bonds. The premiums on such bonds shall be paid by the Council.

Section 12. First Board of Directors. The members of the first Board of Directors shall be George Palē, Gerald Hirt, Norman Grossman, Norman D. Levitt and Robert H. Karatz.

ARTICLE V
OFFICERS

Section 1. Designation. The principal officers of the Council shall be a President, a Vice President, a Secretary and a Treasurer, all of whom shall be elected by, and in the case of the President from, the Board of Directors. The Board may appoint an assistant treasurer, an assistant secretary and such other officers as in its judgment may be necessary.

Section 2. Election and Term. The officers of the Council shall be elected annually by the Board of Directors at the Board's annual meetings and shall hold office at the pleasure of the Board. The officers elected shall hold office for a period of one (1) year, or until their successors are elected and qualified. No person shall be eligible for election as an officer who has not, at the time of election, fulfilled the membership requirements set forth in Article III hereof.

Section 3. Removal. Any officer may be removed either with or without cause by vote of a majority of the members of the Board of Directors and his successor elected, at any

regular meeting of the Board or any special meeting called for such purpose.

Section 4. President. The President shall be the chief executive officer of the Council and shall preside at all meetings of the Council and of the Board of Directors. Subject to the control of the Board he shall exercise general supervision and direction over the management and conduct of the business and affairs of the Council. He shall also have such other powers and duties as may be provided by these Bylaws or assigned to him from time to time by the Board.

Section 5. Vice President. The Vice President shall assume and perform the duties of the President in the absence or disability of the President or whenever the office of President is vacant. He shall also have such other powers and duties as may be assigned to him from time to time by the Board.

Section 6. Secretary. The Secretary shall attend and keep the minutes of all meetings of the Council and of the Board of Directors, give all notices thereof as provided by these Bylaws, maintain and keep a continuous and accurate record of ownership of all Casitas, have charge of such books, documents and records of the Council as the Board may direct, and in general perform all the duties incident to the office of Secretary.

Section 7. Treasurer. The Treasurer shall keep and maintain the books and financial records of the Council, and shall prepare regular reports thereof and be responsible for the proper deposit and custody in the name of the Council of all its funds and securities.

Section 8. Auditor. The Council may appoint annually an independent public accountant or accounting firm as auditor to audit the books and financial records of the Council.

ARTICLE VI

ADMINISTRATION

Section 1. Management. The Board of Directors shall at all times manage and operate the Property and have such powers and duties as are granted the Board by the Declaration and these Bylaws.

ARTICLE VII *

COVENANTS AND RESTRICTIONS AS TO SALE, LEASING AND OTHER ALIENATION

Section 1. Sale or Lease. Except for any leasing of a Casita for a period of not in excess of 60 days (which shall require no notice to or approval by the Corporation, as said term is defined in the Declaration, or the Council), any owner who wishes to sell or lease his Casita (or any lessee of any Casita wishing to assign or sublease such Casita) to any person not related by blood or marriage to the owner shall give to the Corporation and the Council no less than fifteen (15)

days' prior written notice of the terms of any contemplated sale or lease, together with the name and address of the proposed purchaser or lessee. The Corporation shall at all times have the first right and option to purchase or lease such Casita upon the same terms, which option shall be exercisable for a period of fifteen (15) days following the date of receipt of such notice. If said option is not exercised by the Corporation within said fifteen (15) days, the Council shall have the second right and option to purchase such Casita upon the same terms, which option shall be exercisable for a period of five (5) days following the expiration of the Corporation's option period. If said option is not exercised by the Council within said five (5) days, the owner (or lessee) may, at the expiration of said period and at any time within sixty (60) days after the expiration of the last option period, contract to sell or lease (or sublease or assign) such Casita to the proposed purchaser or lessee named in such notice upon the terms specified therein.

Section 2. Gift. Any owner who wishes to make a gift of his Casita or any interest therein to any person or persons who would not be heirs at law of the owner under the laws of intestate succession of this state, shall give to the Corporation and the Council not less than fifteen (15) days'

written notice of his or her intent to make such gift prior to the contemplated date thereof, together with the name and address of the intended donee and the contemplated date of such gift. The Corporation shall at all times have the first right and option, and if it fails to exercise such right the Council shall have the second right and option, to purchase such Casita or interest therein for cash at fair market value to be determined by arbitration as herein provided. The Corporation's option shall be exercisable until the expiration of forty-five (45) days after receipt by it of the written notice, and the Council's option shall be exercisable until the expiration of five (5) days after expiration of the Corporation's option period. Within five (5) days after receipt of said written notice by the Corporation and the Council, the Corporation and the owner desiring to make such gift shall each appoint a qualified real estate appraiser to act as arbitrators. The two arbitrators so appointed shall, within ten (10) days after their appointment, appoint another qualified real estate appraiser to act as the third arbitrator. Within ten (10) days after the appointment of said arbitrator, the three arbitrators shall determine, by majority vote, the fair market value of the Casita or interest therein which the owner contemplates conveying by gift, and shall thereupon give written notice of

such determination to the owner, the Corporation and the Council. The Corporation's and Council's respective options to purchase the Casita or interest therein shall expire within the time periods set forth above.

Section 3. Devise. In the event any owner dies leaving a will devising his Casita or any interest therein to any person or persons not his heirs at law under the laws of interstate succession of this state, and said will is admitted to probate, the Corporation shall have the first option and the Council shall have the second option (to be exercised in the manner hereinafter set forth) to purchase said Casita or interest therein either from the devisee or devisees thereof named in said will or, if a power of sale is conferred by said will upon the personal representative named therein, from the personal representative acting pursuant to said power, for cash at fair market value which is to be determined by arbitration. Within twenty (20) days after the appointment of a personal representative for the estate of the deceased owner, the Corporation shall appoint a qualified real estate appraiser to act as an arbitrator, and shall thereupon give written notice of such appointment to the said devisee or devisees or personal representative as the case may be. Within twenty (20) days thereafter said devisee or devisees, or personal representative, as the case may be, shall appoint a qualified

real estate appraiser to act as an arbitrator. Within ten (10) days after the appointment of said arbitrator, the two so appointed shall appoint another qualified real estate appraiser to act as the third arbitrator. Within ten (10) days thereafter, the three arbitrators shall determine, by majority vote, the fair market value of the Casita or interest therein, and shall thereupon give written notice of such determination to the devisee or devisees (or personal representative), the Corporation and the Council. The Corporation's option to purchase the Casita or interest therein shall expire thirty (30) days after the arbitrators' written determination is delivered to the Corporation and the Council, and if the Corporation fails to exercise the option, the Council's option shall expire fifteen (15) days after the Corporation's option period.

Section 4. Consent of Voting Members. The Council shall not exercise any option hereinabove set forth to purchase any Casita or interest therein without the prior written consent of two-thirds of the voting members. The Council may bid to purchase at any sale of a Casita or any interest therein of any deceased owner which is held pursuant to an order or direction of a court upon the prior written consent of two-thirds of the voting members of the Council, which consent

shall set forth a maximum price which the Council is authorized to bid and pay for said Casita or interest therein.

Section 5. Release or Waiver of Options. The Corporation may, by written consent to be given within ten (10) days after application for such consent is received by the Corporation, release or waive any of the options given to it (for the particular transaction under consideration) in this Article. If the Corporation so releases or waives its options, then upon the written consent of a majority of the Board of Directors, such consent to be given within ten (10) days after application for such consent is received by the Board, and upon the written consent of two-thirds of the members of the Council, such consent to be given at the first meeting of the members after application for such consent is received by the Secretary, any of the options contained in this Article (with respect to the particular transaction at hand or the particular owner so applying) may be released or waived by the Council, and the Casita or any interest therein may be sold, conveyed, leased, assigned, given or devised free and clear (for that particular transaction) of the provisions of this Article.

Section 6. Proof of Termination of Option. A certificate executed and acknowledged by the respective secretaries of the Corporation and the Council stating that the provisions of

this Article as hereinabove set forth have been met by an Owner, or duly waived by the Corporation and the Council, and that the rights of the Corporation and the Council hereunder have terminated, shall be conclusive upon the Corporation, the Council and the owners in favor of all persons who rely thereon in good faith, and such certificate shall be furnished upon request to any owner who has in fact complied with the provisions of this section or in respect to whom the provisions of this section have been waived.

Section 7. Nonapplicability. The provisions applicable to (or obligations imposed upon) an owner in this Article shall not apply to the Corporation in its capacity as the owner of any Casita.

ARTICLE VIII

MANAGING AGENT AND EXECUTION OF INSTRUMENTS

Section 1. Managing Agent. The Board of Directors may annually employ a responsible corporation, partnership, individual or other entity, as Managing Agent to manage and control the Property, subject at all times to direction by the Board, with all the administrative functions set forth elsewhere in these Bylaws and such other powers and duties and at such compensation as the Board may establish.

Section 2. Execution of Instruments. All checks, drafts, notes, acceptances, conveyances, contracts and other

instruments shall be signed on behalf of the Council by such person or persons as shall be provided by general or special resolution of the Board of Directors, or, in the absence of any such resolution applicable to such instrument, by the President or Vice President and by the Treasurer or Secretary.

ARTICLE IX

OBLIGATIONS OF MEMBERS

Section 1. Assessments. All members shall pay to the Council or its Managing Agent in advance on the first day of each and every month the monthly installments of assessments against their respective Casitas for common expenses of the Property in accordance with the operating budget which shall be prepared thirty (30) days prior to the beginning of each fiscal year. In the event any member is delinquent in the payment of any monthly assessment for a period in excess of thirty (30) days, the Board of Directors may take any and all necessary action, pursuant to its powers set forth in the Declaration, including at its discretion and without limitation, sever or disconnect any or all utility connections to his Casita after five (5) days written notice.

Section 2. House Rules. The Board of Directors, upon giving notice to all members in the same manner as herein provided for notice of meetings of the Council, may adopt, amend or repeal any supplemental rules and regulations governing

details of the operation and use of the Property not inconsistent with any provision of law, the Declaration or these Bylaws.

Section 3. Record of Ownership. Every Casita owner shall promptly cause to be duly recorded or filed of record the Sublease, deed or other instrument establishing a record title to the Casita in the Property and deliver to the Secretary of the Council a certified copy of such instrument. The Secretary shall maintain all such information in the Council's records of ownership of the Casitas.

Section 4. Mortgages. Any Casita owner who mortgages his Casita or any interest therein shall notify the Corporation and the Board of Directors of the name and address of his mortgagee, and also of the release of such mortgage, and the Secretary shall maintain all such information in the Council's records of ownership. The Board of Directors at the request of any mortgagee or prospective purchaser of any Casita shall report to such person the amount of any assessments against such Casita then due and unpaid.

ARTICLE X

AMENDMENTS

Section 1. Procedure. These Bylaws may be amended by fifty-one percent (51%) of the members at a meeting of the members specially held for such purpose; provided, however,

that no amendment shall be valid and effective unless it bears the signed and acknowledged concurrence of the Corporation (as said term is used in the Declaration).

ARTICLE XI

CONFLICTS

Section 1. Control. These Bylaws are set forth to comply with the provisions set forth in the Declaration. In case any of the provisions of these Bylaws conflict with the provisions of said Declaration, the provisions of said Declaration shall control.

PROPOSED AMENDMENT TO
BYLAWS OF
HILTON CASITAS COUNCIL OF CO-OWNERS

ARTICLE VII

COVENANTS AND RESTRICTIONS AS TO SALE,
LEASING AND OTHER ALIENATION

Section 1. Sale or Lease. Except for any leasing of a Casita for a period of not in excess of 60 days (which shall require no notice to or approval by the Corporation, as said term is defined in the Declaration, or the Council), any owner who wishes to sell or lease any interest in his Casita (or any lessee of any Casita wishing to assign or sublease any interest in such Casita) to any person not related by blood or marriage to the owner shall deliver to the Corporation and the Council no less than fifteen (15) days' prior written notice of the terms of any contemplated sale or lease, together with the name and address of the proposed purchaser or lessee and such other information as the Corporation or Council may reasonably require. The giving of such notice shall constitute a warranty and representation by the owner to the Corporation and Council and any purchaser or lessee produced by the Corporation or Council as hereinafter provided, that the proposal is bona fide in all respects. Such warranty, notice and the time periods relating thereto shall

hereinafter be referred to in this Article VII and its Sections as "Notice". The Corporation, or a purchaser or lessee furnished by it, shall at all times have the first right and option to purchase or lease such Casita upon the same terms, which option shall be exercisable for a period ending fifteen (15) days following the date of receipt of such Notice. If said option is not exercised by the Corporation within such period, a purchaser or lessee furnished by the Board of Directors of the Council (the "Board"), shall have the second right and option to purchase such Casita upon the same terms, which option shall be exercisable for a period ending five (5) days following the scheduled expiration of the Corporation's option period. If said option is not exercised by the Board within such period, the owner may, at any time within sixty (60) days after its expiration, contract to sell or lease (or sublease or assign) such Casita to the proposed purchaser or lessee named in such Notice upon the terms specified therein, but none other.

Section 2. Gift. Any owner who wishes to make a gift of his Casita or any interest therein to any person or persons who would not be heirs at law of the owner under the laws of intestate succession of this state, shall give Notice to the Corporation and the Council of his or her intent to make such gift prior to the contemplated date thereof, together with the name and address of the intended donee, the contemplated date of such gift and its terms. The Corporation, or

a purchaser furnished by it, shall at all times have the first right and option, and if it fails to exercise such right, a purchaser furnished by the Board shall have the second right and option, to purchase such Casita or interest therein for cash at fair market value to be determined by arbitration as herein provided, unless such purchase price can be determined by prior agreement. The Corporation's option shall be exercisable until the expiration of forty-five (45) days after receipt by it of the written Notice, and the Board's option shall be exercisable until the expiration of five (5) days after scheduled expiration of the Corporation's option period. Within five (5) days after receipt of said written Notice by the Corporation and the Board, the Corporation and the owner desiring to make such gift shall each appoint a qualified real estate appraiser to act as arbitrators. The two arbitrators so appointed shall, within ten (10) days after their appointment, appoint another qualified real estate appraiser to act as the third arbitrator. Within ten (10) days after the appointment of said arbitrator, the three arbitrators shall determine, by majority vote, the fair market value of the Casita or interest therein which the owner contemplates conveying by gift, and shall thereupon give written notice of such determination to the owner, the Corporation and the Board. The Corporation's and Board's respective options to purchase the Casita or interest therein shall expire as set forth above.

Section 3. Devise. In the event any owner dies leaving a will devising his Casita or any interest therein to any person or persons not his heirs at law under the laws of intestate succession of this state, and said will is admitted to probate, the Corporation, or a purchaser furnished by it, shall have the first option and a purchaser furnished by the Board shall have the second option (to be exercised in the manner hereinafter set forth) to purchase said Casita or interest therein either from the devisee or devisees thereof named in said will or, if a power of sale is conferred by said will upon the personal representative named therein, from the personal representative acting pursuant to said power, for cash at fair market value which is to be determined by arbitration. Within twenty (20) days after actual notice of the appointment of a personal representative for the estate of the deceased owner, the Corporation shall appoint a qualified real estate appraiser to act as an arbitrator, and shall thereupon give written notice of such appointment to the personal representative. Within twenty (20) days thereafter said personal representative shall appoint a qualified real estate appraiser to act as an arbitrator. Within ten (10) days after the appointment of said arbitrator, the two so appointed shall appoint another qualified real estate appraiser to act as the third arbitrator. Within ten (10) days thereafter, the three arbitrators shall determine, by majority vote, the fair market value of the

Casita or interest therein, and shall thereupon give written notice of such determination to the personal representative, the Corporation and the Board. The Corporation's option to purchase the Casita or interest therein shall expire twenty (20) days after the arbitrators' written determination is delivered to the Corporation and the Board, and if the Corporation fails to exercise the option, the Board's option shall expire five (5) days after the Corporation's option period.

Section 4. Consent of Voting Members. Any written notice given pursuant to this Article VII shall be (i) delivered to the Corporation at:

P. O. Box 1989
Scottsdale, Arizona 85252

to the Council at:

6333 North Scottsdale Road
Scottsdale, Arizona 85252

Attention: Secretary,
Hilton Casitas Council of
Co-Owners

and to the owner at the address furnished by him in his Notice (if none, to his Casita), or the address of the personal representative; the noticing party obtaining a signed, dated receipt therefor, or (ii) sent by United States mail, postage prepaid, certified, return receipt requested, and the postmark or date of delivery shown on such return receipt shall be conclusive as to the date of such delivery.

Section 5. Release or Waiver of Options. The Corporation or the Board may, in writing at any time, waive any of the options given to it (for the particular transaction under consideration only) in this Article. If such waivers are obtained from both the Corporation and the Board, the Casita or any interest therein may be sold, conveyed, leased, assigned, given or devised free and clear (for that particular transaction only) of the provisions of this Article, provided that the transaction is consummated within sixty (60) days thereafter.

Section 6. Proof of Termination of Option. For any action pursuant to this Article, a certificate executed and acknowledged by the President or the Secretary of the Corporation and executed and acknowledged by the President or Secretary of the Council stating the action taken, or that the provisions of this Article as hereinabove set forth have been met by an owner or duly waived by the Corporation and the Board, or that the rights of the Corporation and the Board hereunder have terminated, shall be conclusive upon the Corporation, the Council and the owners in favor of all persons who rely thereon in good faith, and such certificate shall be furnished upon request to any owner who has in fact complied with the provisions of this Section or in respect to whom the provisions of this Section have been waived.

Section 7. Nonapplicability. The provisions applicable to (or obligations imposed upon) an owner in this Article shall not apply to the Corporation in its capacity as the owner of any Casita.