

2016

**Criterion, LLC, a Utah Limited Liability : Company, Plaintiff /  
Appellant, v. Homeowners Association of Rockwell Square, Inc., a  
Utah Nonprofit Corporation; Et Al., Defendants / Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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CRITERIUM, LLC, a Utah limited liability  
company,

Plaintiff / Appellant,

v.

HOMEOWNERS ASSOCIATION OF  
ROCKWELL SQUARE, INC., a Utah  
nonprofit corporation; et al.,

Defendants / Appellees.

---

HOMEOWNERS ASSOCIATION OF  
ROCKWELL SQUARE, INC., a Utah  
nonprofit corporation; et al.,

Counterclaimants,

v.

CRITERIUM, LLC, a Utah limited liability  
company,

Counterclaim Defendant.

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BRIEF OF APPELLANT

No. 20150833-CA

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Appeal from a Final Order of the Third Judicial District Court,  
Salt Lake County, State of Utah  
Honorable Royal I. Hansen

---

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Homeowners Association of Rockwell Square, Inc  
GR Mac Properties LLC  
James Bo and Jada Bo, trustees of the James and Jada Bo Family Trust dated February 1,  
2012  
Lemon Tree Enterprises, LLC  
Corner Canyon Properties LLC  
Nolberto Lachaga and B. Teresita Lachaga  
Brandon Basset and Samantha Weber  
Gregory D. Boyle and Ashley Boyle, trustees of the Gregory and Ashley Boyle Family  
Trust dated the 20<sup>th</sup> day of January, 2005  
Jill Daniels and Gavin Rice  
Donald V. Horrocks. and Lila Jean G. Horrocks  
Justin Hill  
Elfriede L. Schoenrock, as trustee of The Schoenrock Family Living Trust, dated August  
4, 1999  
Jordan H. and Jason M. Gleave  
Karol Anderson  
Jennifer Lund  
Reid Cram and Kauionalani Cram  
Paul Chapman and Casey Chapman  
Toni Lee Peterson  
Janae Blank  
Julie M. Wilson  
Margaret Candaleria  
Deon L. Morlock; as trustee of the Deon L. Morlock Family Trust dated September 17,  
2009  
Elias S. Murphy and Roma J. H. Murphy, as trustees of the Smith and Roma Jean  
Murphy Family Living Trust, dated September 22, 2011  
Greg Nielsen and Emily Nielsen  
Matthew Hender  
Pamela E. Powers  
Bryce Caldwell and Danna Caldwell  
Larry D. Lofthouse and Evy B. Lofthouse, as trustees of the Larry D. Lofthouse and Evy  
B. Lofthouse Family Trust dated January 3, 2002  
Tracy Listul  
David Colby and Shirley Colby Brian Shaw  
Darci R. Anderson  
Ryan Miller and Whitney Miller  
Jake Nackos and Ashley Nackos  
Jessica D. Burton



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## STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to UTAH CODE section 78A-4-103(2)(j) (2016).

## STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

**ISSUE NO. 1: DO 2016 REVISIONS OF THE UTAH CONDOMINIUM OWNERSHIP ACT ENTITLE CRITERIUM TO THE DECLARATORY RELIEF IT SOUGHT BEFORE THE DISTRICT COURT?**

**STANDARD OF REVIEW:** On an issue such as this, when the Court does not have a district court opinion on an issue that arose for the first time after the appeal was underway, the appellate court is not presented with a decision to affirm or reverse, and traditional standards of review do not apply. Therefore, the Court answers the legal questions presented *de novo*, as the district court did not consider, and, as explained in the discussion of Point I, *infra*, could not have considered, this issue.<sup>1</sup> The proper interpretation and application of a statute is a question of law.<sup>2</sup>

**PRESERVATION:** Criterium did not preserve and could not have preserved this issue before the district court because the 2016 revisions to the Utah Condominium Ownership Act (the “**2016 Revisions**”) did not exist until months after the September 3,

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<sup>1</sup> See, e.g., *Trans-Western Petroleum, Inc., v. United States Gypsum Co.*, 2016 UT 27, ¶ 6.

<sup>2</sup> See, e.g., *Clearwater Farms LLC v. Giles*, 2016 UT App 126, ¶ 7; *Child v. Newsom*, 892 P.2d 9, 9-10 (Utah 1995)

2015 filing of Criterium's Notice of Appeal in this case. Because the 2016 Revisions had not occurred when the district court entered its orders appealed from, Criterium could not argue to the district court the effects of the 2016 Revisions.

Criterium acknowledges that this Court has consistently and repeatedly refused to consider arguments that were not first presented to the district court (the "**Preservation Rule**"), and that the Preservation Rule would ordinarily bar consideration of an argument that an appellant did not make before the district court.<sup>3</sup>

There are, however, exceptions to the general Preservation Rule. This Court has recently described one – the "exceptional circumstances" exception:

Exceptional circumstances is a descriptive term used to memorialize an appellate court's judgment that even though an issue was not raised below and even though the plain error doctrine does not apply, unique procedural circumstances nonetheless permit consideration of the merits of the issue on appeal. Utah appellate courts have employed the exceptional circumstances rubric where a change in law or the settled interpretation of law colored the failure to have raised an issue at trial.<sup>[4]</sup>

This Court's description of the "exceptional circumstances" exception is consistent with the Utah Supreme Court's articulation of the exception: "The rule that

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<sup>3</sup> See, e.g., *Sandy City v. Lawless*, 2016 UT App 63, ¶ 5, 810 Utah Adv. Rep. 32 (summarily declining to address an argument because "the district court did not have the opportunity to give full consideration to the issues at that time, and we therefore have no district court decision to review, . . .").

<sup>4</sup> *State v. Jaramillo*, 2016 UT App 70, ¶ 37 & n.6, 810 Utah Adv. Rep. 27 (citation and internal quotation marks omitted); see also, *State ex rel. T.M.*, 2003 UT App 191, ¶ 16, 73 P.3d 959 ("The 'exceptional circumstances' rubric may be employed where a change in law or the settled interpretation of law colors the failure to have raised an issue at trial.) (citation and internal quotation marks omitted).



questions should be raised at the first opportunity, and that contentions must be raised below in order to be available on appeal, does not apply where the question did not exist or could not be raised below.”<sup>5</sup>

This Court has also recently acknowledged that a second rationale permits an appellate court to consider an argument not preserved before the district court: “Appellate courts will routinely consider new authority relevant to issues that have properly been preserved and will not disregard controlling authority that bears upon the ultimate resolution of a case solely because the parties did not raise it below.”<sup>6</sup>

Whether this Court views the enactment of the 2016 Revisions as (a) a new matter that did not exist or that Criterium could not raise before the district court, or (b) a “new authority relevant to the issues that have been properly preserved” before the district court, the Preservation Rule does not apply to arguments that Criterium now raises arising out of the 2016 Revisions.

**ISSUE NO. 2: ARE THE RELEVANT PROVISIONS OF THE 2016 REVISIONS TO THE ACT RETROACTIVE?**

**STANDARD OF REVIEW:** On an issue such as this, when the Court does not have a district court opinion on an issue that arose for the first time after the appeal was underway, the appellate court is not presented with a decision to affirm or reverse, and

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<sup>5</sup> *State in Interest of D.B.*, 2012 UT 65, ¶ 34, 289 P.3d 459.

<sup>6</sup> *Hollenbach v. Salt Lake City Corp.*, 2016 UT App 64, ¶ 8, 810 Utah Adv. Rep. 24 (citation and internal quotation marks omitted).

traditional standards of review do not apply. Therefore, the Court answers the legal questions presented *de novo*, as the district court did not consider, and, as explained in the discussion of Point I, *infra*, could not have considered this issue.<sup>7</sup> The issue of a statute's retroactivity presents a *question of law*.<sup>8</sup>

**PRESERVATION:** The preceding discussion of preservation of Issue No. 1 applies as well to Issue No. 2.

**ISSUE NO. 3: DID THE DISTRICT COURT ERR IN CONCLUDING THAT CONTROLLING PRECEDENT UNDER THE PRE-2016 ACT REQUIRED SOMETHING TO BE CONSTRUCTED TO QUALIFY AS A "UNIT"?**

**STANDARD OF REVIEW:** The proper interpretation and application of a statute is a question of law that an appellate court reviews for *correctness*, affording no deference to the district court's legal conclusions.<sup>9</sup> An appellate court reviews a trial court's legal conclusions and ultimate grant of summary judgment "for *correctness* and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party."<sup>10</sup>

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<sup>7</sup> See, e.g., *Trans-Western Petroleum*, 2016 UT 27, ¶ 6.

<sup>8</sup> See, e.g., *Soriano v. Graul*, 2008 UT App 188, ¶ 4, 186 P.3d 960; *Johansen v. Johansen*, 2002 UT App 75, ¶ 4, 45 P.3d 520 ("Whether a statute operates retroactively is a question of law, . . .")

<sup>9</sup> See, e.g., *Clearwater Farms*, 2016 UT App 126, ¶ 7; *Child*, 892 P.2d at 9-10.

<sup>10</sup> *Jones & Trevor Marketing, Inc. v. Lowry*, 2012 UT 39, ¶ 9, 284 P.3d 630 (emphasis added).

PRESERVATION: R. 852-871, 880-882, 934-946.

**ISSUE NO. 4: DID THE DISTRICT COURT ERR IN DENYING CRITERIUM'S AND GRANTING DEFENDANTS' SUMMARY JUDGMENT MOTIONS?**

**STANDARD OF REVIEW:** An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for *correctness*.<sup>11</sup> Whether a contract is ambiguous is a question of law, which Utah appellate courts review for *correctness*.<sup>12</sup> If there is ambiguity "the intent of the parties becomes a question of fact, and a motion for summary judgment may not be granted if there is a factual issue as to what the parties intended."<sup>13</sup>

PRESERVATION: R. 390-402, 558-567, 719-742, 852-871, 880-882, 934-946.

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<sup>11</sup> See *id.*; see also, e.g., *Highlands at Jordanelle LLC v. Wasatch County*, 2015 UT App 173, ¶ 9, 355 P.3d 1047

<sup>12</sup> See, e.g., *Judge v. Saltz Plastic Surgery, P.C.*, 2016 UT 7, ¶ 24, 367 P.3d 1006 ("Whether a contract is ambiguous is a question of law, which we review for correctness."; *Utah Dep't of Transp. v. Boggess-Draper Co. LLC*, 2016 UT App. 93, ¶ 13, 812 Utah Adv. Rep. 29 ("Whether the terms of a contract are ambiguous is a question of law.")).

<sup>13</sup> *Judge*, 2016 UT 7, ¶ 24 (citations and internal quotation marks omitted).



**ISSUE NO. 5: IS CRITERIUM RATHER THAN DEFENDANTS THE PREVAILING PARTY, ENTITLED TO ITS COSTS, FEES AND DISBURSEMENTS BOTH BEFORE THE TRIAL COURT AND ON APPEAL?**

**STANDARD OF REVIEW:** Whether attorney fees are recoverable in an action is a question of law that the appellate court reviews for *correctness*.<sup>14</sup>

**PRESERVATION:** Through this express reference and its argument in Point V of this brief, Criterium has preserved its request for attorney fees on appeal as required by UTAH RULE OF APPELLATE PROCEDURE 24(a)(9). Because the district court concluded that Defendants – not Criterium – were the prevailing party below, it was not possible for Criterium to preserve an attorney fee request before the district court.

**DETERMINATIVE STATUTORY PROVISIONS**

**UTAH CODE SECTION 57-8-3(36) (2016):**

“Unconstructed unit” means a unit that:

- (a) is intended, as depicted in the condominium plat, to be fully or partially contained in a building; and
- (b) is not constructed.

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<sup>14</sup> See, e.g., *Federated Capital Corp. v. Haner*, 2015 UT App 132, ¶ 9, 351 P.3d 816; *4447 Associates v. First Sec. Fin.*, 1999 UT App 13, ¶ 20, 973 P.2d 992, *cert. denied sub nom. Zions First Nat. v. First Sec. Fin.* 982 P.2d 89 (Utah 1999).

UTAH CODE SECTION 57-8-3(37) (2016):

- (a) "Unit" means a separate part of the property intended for any type of independent use, which is created by the recording of a declaration and a condominium plat that describes the unit boundaries.
- (b) "Unit" includes one or more rooms or spaces located in one or more floors or a portion of a floor in a building.
- (c) "Unit" includes a convertible space, in accordance with Subsection 57-8-13.4

UTAH CODE SECTION 57-8-24 (2016):

**Common profits, common expenses, and voting rights -- Unit -- Unconstructed unit.**

- (1) A unit is created by the recording of the declaration and a condominium plat that describes the unit.
- (2) An association of unit owners shall, according to each unit owner's respective percentage or fractional undivided interests in the common areas and facilities:
  - (a) distribute the property's common profits among the unit owners;
  - (b) except as otherwise provided in the declaration for unconstructed units, assess the unit owners the property's common expenses; and
  - (c) make voting rights available to the unit owners.
- (3) (a) After the recording of a condominium project's declaration, an unconstructed unit is a unit for the purposes of the declaration and this chapter, including:
  - (i) allocation of undivided interests in the common areas and facilities in accordance with Subsection 57-8-7(2); and
  - (ii) voting rights in accordance with Section 57-8-24.(b) Subsection (3)(a) applies to a condominium project regardless of when the condominium project's initial declaration was recorded.

## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

This is a statutory-interpretation and application action. In its Complaint (Record (“R.”) 1-117) appellant, Criterium, LLC (“**Criterium**”), sought a declaration of its statutory rights as an owner of unconstructed condominium units in the Rockwell Square Condominiums (“**Rockwell Square**”), including judgment that Criterium was entitled to an allocation of 80% of the undivided interests in the common areas, together with corresponding voting rights and membership in the Homeowners Association of Rockwell Square, Inc. (the “**Association**”). Criterium also sought damages against the Association and its management committee, as well as reimbursement of property taxes assessed to Criterium’s units that Criterium had paid since the purchase of those units by an affiliate of Criterium in 2012 if the district court found that Criterium was not entitled to the declarations that Criterium requested. In this brief, Criterium sometimes refers to the Association, its management committee and the individual defendants collectively as the “**Defendants**” or “**Appellees**”, as the context requires.

### B. COURSE OF THE PROCEEDINGS AND DISPOSITION AT TRIAL COURT

In lieu of answering Criterium’s Complaint, Defendants filed a Motion to Dismiss Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure (R. 269) and a supporting memorandum (R. 270-287). The district court denied that motion, (R. 457-461; Addendum (“**Add.**”) B), and Defendants Answered and Counterclaimed. (R. 462-479)

After discovery, Criterium filed a Motion for Partial Summary Judgment (R. 556-57) and a supporting memorandum. (R. 558-677). Then Defendants filed their Alternative Cross Motion for Partial Summary Judgment (R. 689-90) and a Consolidated Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Defendant's [sic.] Alternative Cross Motion for Partial Summary Judgment. (R. 691-708) to which Criterium filed an opposition along with its reply to Defendants' opposition to Criterium's motion. (R. 719-753). Defendants then filed a reply to Criterium's opposition to Defendants' cross motion. (R. 769-787).

After a hearing on these competing motions, Criterium filed its Objection to New Arguments Asserted in Oral Arguments (R. 796-798), to which Defendants objected (R. 796-798) and Criterium replied (R. 804-808). The district court then issued its Ruling and Order (R. 814-819, Add. C) denying both motions. Defendants then filed their Motion for Summary Judgment as to Plaintiff's First and Second Causes of Action (R. 828-829), along with a supporting memoranda (R. 820-827; 842-846).

In its Ruling and Order (R. 814-819, Add. C) the district court relied on authorities that no parties had addressed in their motion papers, and Criterium filed its Motion for Reconsideration (R. 880-882), along with a supporting declaration (R. 872-874) and memorandum (R. 852-871), which also opposed Defendants' summary judgment motion. Defendants opposed Criterium's reconsideration motion (R. 900-926), and replied (R.

934-946) in support of Defendants' summary judgment motion. Criterium filed its reply in support of its Motion for Reconsideration (R. 934-946).

The district court entered its Ruling and Order (R. 955-962, Add. D), which was final on all matters except Defendants' attorney-fee request. After resolving the attorney-fee issue the district court entered its Ruling and Order (R. 1074-1081) and on August 31, 2015 final Judgment (R. 1097-1098), from which Criterium timely appealed on September 3, 2015 (R. 1104-1106)

**C. STATEMENTS OF FACTS RELEVANT TO ISSUES PRESENTED**

1. Rockwell Square is a Utah condominium project located in Draper, Utah. Rockwell Square was created by an Amended and Restated Declaration of Condominium and Declaration of Covenants, Conditions, and Restrictions for Rockwell Square Condominiums, recorded on January 11, 2011 (as subsequently amended, the "**Rockwell Square Declaration**") (R. 5, ¶ 39, 15-113 Add. A, 466, ¶ 39) and a condominium plat recorded on July 2, 2008, as amended by an amended plat recorded on October 1, 2008 (as so amended, the "**Plat**").

2. The Rockwell Square Declaration and Plat, as amended, created 168 condominium units in five buildings. (R. 45, § 3.02(a), Add. A). Each of the units created by the Rockwell Square Declaration and the Plat is a legally subdivided parcel of real property, the boundaries and area of which are described and depicted in the Rockwell Square Declaration and the Plat. The boundaries of each unit can be located

and determined, and each is capable of being separately conveyed and separately owned. (R. 45, §3.02(a)). Building 1, containing 34 units, has been constructed, while Buildings 2 through 5, containing 134 units (the “**Criterion Units**”), have not been constructed. (R. 5, ¶39, 466, ¶ 39). The square footage of the Criterion Units constitutes approximately 80% of the total square footage of all units described in the Rockwell Square Declaration and the Plat. (R. 110-113; Add. A).

3. Criterion is the owner of the Criterion Units. (R. 655-668).

4. Pursuant to a recorded assignment, Criterion is the successor to all the rights of the Declarant under the Rockwell Square Declaration, including but not limited to the right to vote as long as the Declarant owns any unit in Rockwell Square. (R. 859)

5. The Association is the condominium owners association governing Rockwell Square. (R. 467, ¶ 41).

6. The Association acts through its management committee (the “**Management Committee**”). (R. 467, ¶ 41).

7. Each of the Defendants (other than the Association) is the owner of a condominium unit in Building 1 of Rockwell Square. (R. 467, ¶ 42).

8. Section 3.03 of the Rockwell Square Declaration states that undivided interests in the common areas of Rockwell Square are allocated *only* to constructed units. (R. 46-47).

9. Section 5.01 of the Rockwell Square Declaration states that "Memberships [in the Association] shall only be allocated to constructed Units, and no Membership shall be allocated to a Unit prior to construction." (R. 53)

10. Section 5.02 of the Rockwell Square Declaration provides, among other things, that "[a]t any meeting of the Association, the [undivided interests in the common areas] allocated to a Unit may be voted in connection with issues presented to the owners for vote." (R. 53-54).

11. After acquiring the Criterium Units, Criterium requested that the Association and the Management Committee Defendants recognize Criterium's rights to an allocation of common area interests and corresponding voting rights.

12. The Association and the Management Committee Defendants refused to recognize Criterium's rights. Among other things, they (a) took the position that no undivided interests in the common areas would be allocated to Criterium until the Criterium Units have been constructed (R. 467-468, ¶ 45), (b) refused to recognize Criterium as a member of the Association (R. 468, ¶ 53), and (c) refused to allow Criterium to exercise voting rights in the Association (R. 281, 414-417, 478 ¶ 53).

### **SUMMARY OF ARGUMENT**

The district court erred in determining that, because the Criterium Units have not yet been constructed, they do not constitute condominium units. Under both the Rockwell Square Declaration and the Act as it existed at the time of the district court



decision, each of the Criterium Units existed as a unit the moment of recordation of the Rockwell Square Declaration and the Plat.

As an owner of condominium units, Criterium is entitled under the Act to an allocation of common area interests, together with corresponding voting rights. Provisions to the contrary in the Rockwell Square Declaration conflict with mandatory provisions of the Act and are therefore invalid.

The district court relied on two cases, *Country Oaks Condo. Mgmt. Comm. v. Jones*<sup>15</sup> and *B. Investment LC v. Anderson*<sup>16</sup>, in reaching the conclusion that a condominium unit cannot exist until it has been enclosed in a building.

The court's conclusion was based on a misreading of the cases and was incorrect as a matter of law. The *Country Oaks* decision relied on specific language in a different declaration, language that is not found in the Rockwell Square Declaration. And in *B. Investment*, this Court held that a vacant lot could constitute a condominium unit.

The treatment of unconstructed units as condominium units, with the corresponding rights, is supported by long-standing real estate practices in accordance with the provisions of the Act. County recorders and assessors, developers, construction lenders, and title companies have all relied on the existence of unconstructed units as separately subdivided parcels of real property, with all the attributes of condominium

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<sup>15</sup> 851 P.2d 640 (Utah 1993)

<sup>16</sup> 2012 UT App 24, 270 P.3d 548.

units. The district court's ruling, if upheld, would create serious problems in the real estate industry.

As a direct response to the district court's ruling, the Utah Legislature, in its 2016 session, enacted the 2016 Revisions for the purpose of clarifying that a unit is created by the recording of a declaration and a plat submitting the condominium property to the provisions of the Act, and that, once created, a unit is entitled to an allocation of common area interests and corresponding voting rights as provided in the Act. The 2016 Revisions are retroactive and apply to Rockwell Square. This Court should review the 2016 Revisions and their application to this case *de novo*, because they were not enacted until after the district court's ruling and thus could not have been raised by Criterium or considered by the court in the district court action.

Even if the district court did not err in its interpretation of Country Oaks and *B. Investment*, it erred in not concluding that the Rockwell Square Declaration unambiguously defined "Unit" to include unconstructed units. And if this Court disagrees with that conclusion, it should find that the district court erred in granting summary judgment without affording Criterium the opportunity to present evidence of the intent of the parties regarding the definition of a "Unit" in the Rockwell Square Declaration, a definition that at the least is ambiguous. And finally, this Court should find that the 2016 Revisions apply to Rockwell Square and require the Defendants to

allocate common area interests and voting rights to Criterium in proportion to the relative square footages of the Criterium Units.

For these reasons, and as further explained below, this Court should reverse the district court's ruling.

## ARGUMENT

### I. 2016 REVISIONS TO THE UTAH CONDOMINIUM OWNERSHIP ACT ENTITLE CRITERIUM TO THE DECLARATORY RELIEF IT SOUGHT BEFORE THE DISTRICT COURT.

A condominium project is a statutory creation; the condominium form of subdivision and ownership can be created only by submitting the project to the applicable statutes. In Utah, the Act provides that “[t]his act shall be applicable only to property which the sole owner or all the owners submit to the provisions of the act by duly executing and recording a declaration as provided in the act.”<sup>17</sup> The Act further requires that each “declaration shall contain a statement of intention that this chapter applies to the property.”<sup>18</sup>

The district court concluded that *Country Oaks* and *B. Investment LC* were determinative of the degree to which a declaration may deviate from the definition of a “unit” contained in the Act.

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<sup>17</sup> UTAH CODE section 57-8-2 (2016).

<sup>18</sup> UTAH CODE section 57-8-10(2)(d)(vi).

The *Country Oaks* court described the issue: “When a condominium declaration is filed, all interest owners in a condominium project become subject to the Act.”<sup>19</sup> In *B. Investment* this Court concluded that the definition of a “unit” in the declaration it was considering was “*sufficiently consistent with the Act’s definitions* to meet the standard set in *Country Oaks*.”<sup>20</sup>

In *B Investments*, this court explained that although there was “a measure of latitude” in drafting a declaration that deviated from the Act, a declaration cannot contradict the Act:

We read *Country Oaks* as allowing declarants a measure of latitude in defining a unit. The court concluded that the *Country Oaks* declarations’ definition of unit as an “enclosed space” found *sufficient support in a provision of the Act* providing that a unit be “physical.” *See id.* This *statutory definition gives limited support* to the proposition that a unit must be an enclosed space, although the opinion does not explain why a vacant lot does not also qualify as “physical.” Nevertheless, even where “the Act anticipates that a condominium project may contain proposed units that are not yet constructed,” *id.*, this reference to a “physical unit” offered *sufficient statutory support for the court to apply the Country Oaks declarations’ definition of “unit.”*<sup>[21]</sup>

The clear implication of this language is that if a declaration contains provisions that cannot be reconciled with the Act, those provisions are invalid.

UTAH CODE section 57-8-24(3) (2016) reads:

(a) After the recording of a condominium project’s declaration, an

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<sup>19</sup> *Country Oaks*, 851 P.2d at p. 642.

<sup>20</sup> *B. Investment*, 2012 UT App 24, ¶ 22 (emphasis added).

<sup>21</sup> *Id.*, ¶ 19 (emphasis added).

unconstructed unit is a unit for the purposes of the declaration and this chapter, including:

- (i) allocation of undivided interests in the common areas and facilities in accordance with Subsection 57-8-7(2); and
- (ii) voting rights in accordance with Section 57-8-24.

The holdings of both *Country Oaks* and *B. Investment* reflect the Act's requirement that condominium declarations must "submit" themselves to the Act's provisions. The statutory definition of a "declaration" reflects this same requirement: "Declaration" means the instrument by which the property is submitted to the provisions of this act, as it from time to time may be lawfully amended."<sup>22</sup>

The Rockwell Square Declaration expressly recites its compliance with this requirement:

Submission.

The Property is hereby submitted to the provisions of the Act as the Land associated with the Rockwell Square Condominium Project.

TOGETHER WITH: (i) all buildings, if any, improvements, and structures situated on or comprising a part of the above-described parcel of real property, *whether now existing or hereafter construed*; (ii) all easements, rights-of-way, and other appurtenances and rights incident to, appurtenant to, or accompanying said parcel; and (iii) all articles of personal property intended for use in connection with said parcel. . . .

(R. 43-44) (emphasis added)

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<sup>22</sup> UTAH CODE section 57-8-3(17) (2016)

Section 2.03 of the Rockwell Square Declaration further provides that “[t]he condominium project to be created on the Land is hereby created pursuant to and shall be governed by the provisions of the Act.” (R. 44, Add. A)

The current version of the Act prohibits the exclusion of unconstructed units from a declaration’s definition of a “Unit”. The Rockwell Square Declaration expressly “submits” itself to the Act, compelling the conclusion that under applicable law Criterium owns 134 “Units” (R. 477, ¶ 44; 502, ¶ 4), and is therefore entitled to, among other things, an allocation of approximately 80% of the undivided interests in the Rockwell Square common areas, together with corresponding voting rights and membership in the Association. (R. 478, ¶ 48-53; 502-503, ¶¶ 7-10).

**II. THE 2016 ACT REVISIONS ARE RETROACTIVE, EXPRESSLY APPLY TO THE ROCKWELL SQUARE DECLARATION, AND COMPEL REVERSAL OF THE DISTRICT COURT**

The Utah Legislature enacted Utah Code sections 57-8-3(36) and 57-8-24(3), and renumbered and clarified section 57-8-3(37) in 2016 – five years after the 2011 recording of the Rockwell Square Declaration.

Notwithstanding the fact that the Rockwell Square Declaration expressly “submits” itself to the Act as discussed above, there are two statutes, one general and the other specific, that under circumstances different than exist in this appeal could support an argument that the 2016 changes to the Act do not apply retroactively to the 2011 Rockwell Square Declaration.

The general statute reads: "A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive."<sup>23</sup> The Act-specific statute reads:

**Amending the declaration to make provisions of this chapter applicable.**

(1) An association of unit owners may amend the declaration to make applicable to the association of unit owners a provision of this chapter that is enacted after the creation of the association of unit owners, by complying with:

- (a) the amendment procedures and requirements specified in the declaration and applicable provisions of this chapter; or
- (b) the amendment procedures and requirements of this chapter, if the declaration being amended does not contain amendment procedures and requirements.

(2) If an amendment under Subsection (1) adopts a specific section of this chapter:

- (a) the amendment grants a right, power, or privilege permitted by that specific section; and
- (b) all correlative obligations, liabilities, and restrictions in that section also apply.<sup>24</sup>

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<sup>23</sup> UTAH CODE § 68-3-3 (2016). This prohibition is statutory, not constitutional; except for *ex post facto* laws, which are not involved in this appeal, nothing in the Utah Constitution prohibits retroactive legislation. See *Garrett Freight Lines v. State Tax Comm'n.*, 103 Utah 390, 135 P.2d 523, 526-27 (Utah 1943).

<sup>24</sup> UTAH CODE § 57-8-10.5 (2016).



In determining whether statutory language “expressly declares” retroactivity, Utah appellate courts apply the plain meaning of the statute.<sup>25</sup>

The 2016 General Session of the Utah Legislature’s expressly declared the Act’s definition of a “Unit” to be retroactive:

**Common profits, common expenses, and voting rights – Unit – Unconstructed unit.**

(1) A unit is created by the recording of the declaration and a condominium plat that describes the unit.

(2) An association of unit owners shall, according to each unit owner’s respective percentage or fractional undivided interests in the common areas and facilities:

- (a) distribute the property’s common profits among the unit owners;
- (b) except as otherwise provided in the declaration for unconstructed units, assess the unit owners the property’s common expenses; and
- (c) make voting rights available to the unit owners.

(3) (a) After the recording of a condominium project’s declaration, an unconstructed unit is a unit for the purposes of the declaration and this chapter, including:

- (i) allocation of undivided interests in the common areas and facilities in accordance with Subsection 57-8-7(2); and
- (ii) voting rights in accordance with Section 57-8-24.

***(b) Subsection (3)(a) applies to a condominium project regardless of when the condominium project’s initial declaration was recorded.***

UTAH CODE section 57-8-24 (2016) (emphasis added).

The absence of the word “retroactive” from section 57-8-24 does not compel the conclusion that it is not retroactive. In 2004 the Utah Legislature amended a statute that exempted agreements “executed or renewed before May 3, 1999” from application of the

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<sup>25</sup> See, e.g., *Soriano v. Graul*, 2008 UT App 188, ¶ 6, 186 P.3d 960.

2004 amendment. The district court concluded this language made the 2004 statutory amendment retroactive to May 3, 1999. In appealing that conclusion, the defendant argued that the 2004 amendment was not retroactive because it did not contain the word “retroactive”.<sup>26</sup>

In rejecting this argument, this court concluded that “the inclusion of the language ‘after May 2, 1999,’ clearly establishes the legislature’s intent that the 2004 Amendments are to apply retroactively to all medical arbitration agreements entered into after that date.”<sup>27</sup>

This language is functionally identical to the language of UTAH CODE section 57-8-24(3)(b) that “Subsection (3)(a) applies to a condominium project regardless of when the condominium project’s initial declaration was recorded.” In both cases, the statute related back to agreements dated before the enactment of the statute, and as a consequence were retroactive as a matter of law.

The context of the 2016 Revisions helps to explain the rationale for making the amendments retroactive. The legislative history of 2016 House Bill 255 (“**H.B. 255**”) makes it clear that the amendments were a direct legislative response to the rulings that the district court made in this case (together, the “**Rulings**”).

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<sup>26</sup> See *id.*, 2008 UT App 188, ¶ 8.

<sup>27</sup> *Id.*; see also *id.* at ¶¶ 10 n.4 & 14.

In introducing the bill to the Utah House of Representatives, Representative Mike Schultz, the chief sponsor of H.B. 255, explained its origin:

This summer there was a court ruling that was detrimental to this industry on the development side and basically what happened was a judge – a lower court judge ruled that in order for a condominium unit to be in unit to actually exist, that it has to be constructed . . . therefore, bringing up a whole host of problems. (1) they wouldn't have voting rights inside the association; (2) if you're a banker, you don't have anything to lien on; (3) title companies, similar. The developer wouldn't have anything to sell and the title companies wouldn't have anything to insure and same thing with the county. The counties wouldn't have anything to assess taxes on.<sup>28</sup>

The amendments were supported by a broad range of stakeholders, including developers, lenders, title companies, and counties.<sup>29</sup> Their concerns were not just for

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<sup>28</sup> Recording of *Utah House Floor Debate*, H.B. 255, 61st Leg. Gen. Sess. (February 23, 2016) (statement of H.B. 255 Chief Sponsor, Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=19905&meta\\_id=620284](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19905&meta_id=620284); see also, *Hearing on H.B. 255 Before the House Business and Labor Standing Committee*, 61st Leg. Gen. Sess. (Feb. 11, 2016) (statement of Chris Gamvroulas during presentation of H.B. 255 Chief Sponsor Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=19738&meta\\_id=616917](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19738&meta_id=616917) (“Well, a recent court ruling suggested that – a recent lower court ruling suggested that those units do not have voting rights until they are actually physically constructed. And so the H.B. 255 attempts to address that . . . .”); Recording of *Hearing on H.B. 255 Before the Senate Revenue and Taxation Committee*, 61st Leg. Gen. Sess. (March 1, 2016) (Statement of H.B. 255 Chief Sponsor, Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=20028&meta\\_id=623545](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=20028&meta_id=623545) (“[T]here was a recent court ruling that said that the a unit on a condominium association plat is not actually a unit until that unit is constructed.”).

<sup>29</sup> See, Recording of *Utah House Floor Debate*, H.B. 255, 61st Leg. Gen. Sess. (February 23, 2016) (statement of H.B. 255 Chief Sponsor, Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=19905&meta\\_id=620284](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19905&meta_id=620284) (“[HB 255] is supported by the Property Rights Coalition, the Homebuilders Associations, the Realtors Association, the counties, the title companies, as well as the banks”); Recording of *Hearing on H.B. 255 Before the Senate Revenue and Taxation*

future development, because the potential adverse effects of the Ruling would have applied to existing condominium projects as well as those that had not yet been created.

In Utah, unconstructed units have long been treated as separate parcels of real property. They have been conveyed by deed, indexed as separate parcels by county recorders, assessed by county assessors for property tax purposes, encumbered by deeds of trust as security for construction financing, and insured as real property interests in title insurance policies. If units, expressly created by recorded declarations and plats, do not exist until they have been constructed, the customary practices on which the real estate industry has relied are invalid. For this reason, the district court's Ruling caused real concern in the real estate industry in Utah.<sup>30</sup> As more particularly explained below,

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*Committee*, 61st Leg. Gen. Sess. (March 1, 2016) (Statement of H.B. 255 Chief Sponsor, Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=20028&meta\\_id=623545](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=20028&meta_id=623545) (“[H.B. 255] has broad support – there’s nobody opposing this”).

<sup>30</sup> See Recording of *Hearing on H.B. 255 Before the House Business and Labor Standing Committee*, 61st Leg. Gen. Sess. (Utah Feb. 11, 2016) (statement of Chris Gamvroulas president of Ivory Development, the land acquisition development arm for Ivory Homes and president of Utah Property Rights Coalition during presentation of H.B. 255 Chief Sponsor Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=19738&meta\\_id=616917](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19738&meta_id=616917) (“And in this case – and we’re concerned about future cases that could rely on this ruling as a precedent where – to have a condominium plat recorded, the air space subdivided, and then to be – to have your voting rights withheld, as the builder, as the developer, as a declarant, as a successor-in-interest, or a successors assigns-in-interest of that asset. So this bill seeks to clarify that, that a unit, a subdivided unit, is a unit for all intents and purposes. It doesn’t have to be actually constructed because in fact, the air space is subdivided. Now who would also be concerned about this. Well, lenders would be concerned about this. If I have a subdivision plat map and I’ve recorded that and I seek to get a loan on that to finance the construction of it, under this problematic ruling, I have

(a) county recorders and assessors would be unable to comply with their constitutional and statutory obligations, (b) title insurers could be faced with claims under existing title policies, (c) construction lenders could have deeds of trust invalidated, and (d) developers might be unable to obtain new condominium construction loans.

In a new condominium project, which is the scenario envisioned by the Act, a declaration and plat must be recorded prior to construction of any unit, because the declaration and plat are part of the municipal approval process required to obtain a building permit. The Act requires that the declaration allocate 100% of the undivided interests in the common areas to the units before a single unit has been constructed.<sup>31</sup> The allocation must be based on one of three methods specified in the Act: (1) proportionate to the relative sizes of the units, (2) proportionate to the relative par values of the units, or (3) an equal allocation to each unit.<sup>32</sup> The land itself no longer constitutes a parcel of real property, because the land has now been subdivided into units and common areas. The common areas are thereafter owned by the unit owners as tenants in common, with each unit owner owning an undivided interest in the percentage allocated to the owner's unit(s).

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nothing – I basically have no – I've got no asset that I'm mortgaging. So it's important for lenders, it's important for title companies, it's important for county assessors, and it's an important property rights issue.”)

<sup>31</sup> UTAH CODE §§57-8-10(2)(d) and 57-8-7(2) (2016).

<sup>32</sup> See UTAH CODE §57-8-7(2) (2016).

Once a declaration and plat have been recorded, the property can be assessed for tax purposes only by assessing units, together with the undivided interests in the common areas appurtenant to each.<sup>33</sup> The common areas, which include the land on which the project will be built, can never be assessed except by including their value in the value of the units. If a unit does not exist until it has been constructed, a county cannot assess the value of the portion of the common areas that are allocated to that unit until construction of the unit has been completed. The resulting failure to tax a portion of the common areas would violate Article XIII § 2(1) of the Utah Constitution, which requires that “all tangible property in the state . . . be taxed.”

County recorders would also be affected. UTAH CODE § 57-8-12(2) (2016) requires the creation by the recorder of a tract index for each condominium unit, and UTAH CODE § 17-21-22(a) (2016) requires the recorder to report all parcels of real property to the assessor annually. If condominium units do not exist until they have been constructed, recorders will not be able to comply with these provisions without frequently identifying and conducting on-the-ground inspections of uncompleted condominium projects to determine which units have been constructed, a process which is impractical, at best, and for which recorders do not have the resources.

Developers, lenders, and title insurers would also be exposed to adverse consequences if the 2016 Revisions were not retroactive. When a developer wants to

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<sup>33</sup> See UTAH CODE § 57-8-27 (2016).

build a new condominium project, it generally needs a construction loan. A construction lender requires that the loan be secured. With respect to liens, the Act provides, in relevant part, as follows:

Subsequent to recording the declaration as provided in this act, and while the property remains subject to this act, *no lien shall thereafter arise or be effective against the property. During such period liens or encumbrances shall arise or be created only against each unit and the percentage of undivided interest in the common areas and facilities appurtenant to such unit* in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership.<sup>34</sup>

If units do not exist until they have been constructed, a construction lender has no real property interest to lien at the time the loan is needed, which is, of course, prior to construction. The Act prohibits any new lien on the undeveloped property itself, and provides that existing liens no longer encumber the property, and that the liens can instead encumber only the units and common areas that declarations and plats create.<sup>35</sup> As a result, existing deeds of trust made to secure construction loans for condominium projects under construction would be invalidated, because those deeds of trust, of necessity, encumber unconstructed units. In addition, title insurance companies that insured the validity of those deeds of trust would be placed at risk. Title companies also directly insure fee title to unconstructed condominium units. A ruling that units do not exist until they have been constructed exposes those title insurers to claims, because units

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<sup>34</sup> UTAH CODE §57-8-19(1) (2016) (emphasis added).

<sup>35</sup> See *id.*



that do not yet exist do not constitute real property as to which fee title can be conveyed by deed.<sup>36</sup>

The 2016 amendments would not adequately address the risks to lenders and title insurers described above without retroactivity.

Just as the 2004 amendment to the medical arbitration statute nullified an arbitration agreement entered into after May 2, 1999, after its March 23, 2016 effective date, UTAH CODE section 57-8-24 controls the date units come into existence and the rights of unit owners. And, because section 57-8-24 affords Criterium all the rights it sought before the district court, this court should reverse the district court's Judgment and instruct the district court on remand that Criterium is the prevailing party on all issues Criterium is appealing.

**III. THE DISTRICT COURT MISREAD THE *COUNTRY OAKS* AND *B INVESTMENT LC* OPINIONS; NOTHING IN THOSE OPINIONS HOLDS THAT THE PRE-2016 ACT REQUIRED A PLATTED UNIT TO BE CONSTRUCTED TO QUALIFY AS A "UNIT".**

In its initial Ruling & Order (R. 814-819; Add. C), the district court *sua sponte* identified, discussed and applied the *County Oaks* and *B. Investment* decisions:

In examining the Act, courts have reasoned "the Act anticipates that a condominium project may contain proposed units that are not yet constructed. However, this does not undermine [the] conclusion that for a unit to actually exist, it must be within a physically enclosed space."

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<sup>36</sup> The *Country Oaks* court appears to recognize the fact that its decision removes an unconstructed unit from the category of real property. "We do not need to determine the question of precisely what sort of interests appellees may own, beyond saying that their interests are not units." *Country Oaks*, 851 P.2d at p. 643.

(R. 816, Add. C). The district court then characterized this Court's *B. Investments* opinion as "Recognizing a 'definition of unit as an enclosed space.'" (R. 816, Add. C). Based on its reading of these two opinions, the district court concluded that a condominium unit cannot exist under the Act until it is physically enclosed. (R. 816-817, Add. C; 957, Add. D).

Because none of the parties had discussed these two decisions in their summary judgment papers, Criterium filed a Motion for Reconsideration (R. 880-882) along with a supporting memorandum (R. 852-871) and reply (R. 934-946), arguing that the district court had misapplied those two opinions.

In its Ruling & Order denying Criterium's reconsideration motion, the district court repeated the above quotation from *Country Oaks*, adding only this introductory language before that quotation: "The Court therefore concludes the reasoning set forth in *Country Oaks* and *B. Inv. LC v. Anderson* remains applicable here. In *Country Oaks* the Utah Supreme Court clarified . . ." (R. 957; Add. D) The district court then included language from *B. Investments* that it did not include in its initial order denying Criterium's summary judgment motion: "Moreover, in *B. Inv.* – decided well after the 1994 amendment<sup>37</sup> – the Utah Court of Appeals "allow[ed] declarants a measure of latitude in defining a unit." (R. 957; Add. D). Based on these quoted passages, the

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<sup>37</sup> In its Motion for Reconsideration Criterium made an argument based on 1994 amendments to the Act that Criterium does not raise on appeal.

district court concluded: “Accordingly, the Court remains convinced that the Act does not preclude the definition of a unit to include only constructed units . . .”

These *Country Oaks* and *B. Investment* passages – along with the district court’s characterizations of those passages in its two Rulings – announce two contrary principles:

The *first* principle is that the Act is flexible enough to permit unconstructed units to constitute “Units” under a declaration: “[T]he Act anticipates that a condominium project may contain proposed units that are not yet constructed. . . .”<sup>38</sup>, and “We read *Country Oaks* as allowing declarants a measure of latitude in defining a unit.”<sup>39</sup> Indeed, the *B. Investments* decision, in a passage that the district court did not cite, observed that Act “definitions cannot reasonably be read to categorically exclude a vacant lot . . . from the definition of ‘unit.’”<sup>40</sup>

The language providing that “the Act anticipates that a condominium project may contain proposed units that are not yet constructed”, coupled with the fact that declarants have “a measure of latitude in defining a unit” is permissive, not mandatory. Each of them, including the district court’s sentence beginning “Accordingly . . .” makes clear that nothing in the Act prevented the Rockwell Square Declaration from defining “Units” to include unconstructed units.

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<sup>38</sup> *Country Oaks*, 851 P.2d at p. 642.

<sup>39</sup> *B. Investment*, 2012 UT App 24, ¶ 19

<sup>40</sup> *Id.*, ¶ 22.

This brings this brief to the *second Country Oaks* principle. Both the district court's initial ruling and its refusal to reconsider that ruling were necessarily based on a second contradictory principle contained in the *Country Oaks* excerpt the district court cited in both its Rulings: "[F]or a unit to actually exist, it must be within a *physically enclosed* space." (R. 816, Add. C; R. 957, Add. D)

To put this sentence in context, it is important to understand the role that two words – "enclose" and "physical" played in the *Country Oaks* opinion, because that opinion, which is not a model of clarity, invited the confusion exhibited in the district court's Rulings.

**A. THE WORD "ENCLOSE" WAS IN THE COUNTRY OAKS DECLARATIONS ONLY; IT IS NOT IN THE ACT OR IN THE ROCKWELL SQUARE DECLARATION.**

In *Country Oaks*, the developer of an expandable condominium project recorded a supplemental plat and declaration to include additional land in the condominium project and to create new units on that land. The condominium owners association wanted to assess common expenses to the platted units, which the developer had not yet constructed. The developer, to avoid payment of such assessments, argued that it did not own "units" until the buildings containing those units had been constructed.

In resolving the parties' contentions, the *Country Oaks* Court looked to the definition of "unit" appearing *in the Country Oaks declaration*, focusing in particular on the portion of the declaration defining a "unit" as "[t]he space *enclosed* within the

undecorated and interior surface of its perimeter walls, floors, and ceilings . . . to form a complete *enclosure* of space (emphasis added)".<sup>41</sup>

The *Country Oaks* opinion characterizes the declaration at issue in that case:

For example, the declaration further describes a unit as

[t]he space *enclosed* within the undecorated interior surface of its perimeter walls, floors and ceilings (being in appropriate cases the inner surfaces parallel to the roof plane of the roof rafters, and the projections thereof) projected, where appropriate, to form a complete *enclosure* of space.

Taken as a whole, these provisions indicate that a unit exists only when a structure provides an *enclosed* area for the exclusive use and possession of the owner.<sup>[42]</sup>

The district court then characterized this Court's *B. Investments* opinion as "Recognizing a 'definition of unit as an enclosed space.'" (R. 816, Add. C). That characterization exhibits a critical misreading of this Court's *B. Investments* opinion.

The question before this Court in *B. Investment* was whether vacant lots could qualify as "units" *under the Act*. This Court in *B Investment* acknowledged the plaintiffs' argument that the Act prohibited the treatment as "units" of vacant lots with nothing yet constructed on them:

The Condo Owners . . . contend that the Utah Supreme Court has held, and the Act itself provides, that the term "unit" is limited to an area "within a physically enclosed space." Thus, they reason, the owner of a single family

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<sup>41</sup> *Country Oaks*, 851 P.2d at p. 642.

<sup>42</sup> *Id.* at pp. 641-42 (emphasis added).

dwelling lot or a lot without a building on it cannot be a “unit owner” as that term is used in the Amended Declaration and the Act.<sup>[43]</sup>

This Court began its analysis with an acknowledgment that “[t]his argument finds support in *Country Oaks* . . .”<sup>44</sup> Having made that acknowledgement, however, this Court proceeded to explain why nothing in the Act requires a “unit” to be within “enclosed” space. It first (a) pointed out that although the *Country Oaks* declaration repeatedly used words like “enclose” and “enclosure”, no portion of the Act did, and (b) emphasized that the *Country Oaks* opinion “applied the *declarations*’ definition of “unit” as an enclosed space.”<sup>45</sup>

After flatly rejecting the argument that *the Act* required an enclosure, the *B. Investment* opinion next proceeded to explain why the Act permitted vacant lots to be “Units”:

These [enumerated Act] definitions cannot reasonably be read to categorically exclude a vacant lot or a single family dwelling from the definition of “unit.” Each lot designated by the Spinnaker Point Amended Declaration is “a separate physical part of the property intended for any type of independent use,” *especially where the statutory definition of “property” includes land without a building on it.* Each such lot, moreover, is a “unit not contained . . . in a building.” Thus, the Amended Declaration’s definition of “unit” is sufficiently consistent with the Act’s definitions to meet the standard set in *Country Oaks*.<sup>[46]</sup>

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<sup>43</sup> *B. Investment*, ¶ 16.

<sup>44</sup> *Id.*, ¶ 17.

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> *B. Investment*, ¶ 22 (emphasis added).

As was the case with the *B. Investments* declaration, the Rockwell Square Declaration (R. 43; Add. A) makes no mention of “enclose” or of an “enclosure” in its definition of “Unit”. In fact, the Rockwell Square Declaration uses a word beginning “encl” exactly once – in a prohibition of “pet enclosures” on any portion of the “Common Elements”.<sup>47</sup>

So, nothing in *Country Oaks*, including the passages the district court twice relied on, supports the purely legal conclusion that a “unit” can exist under the Act only if it is “within a physically enclosed space”. It was inappropriate for the district court to rely on the mere appearance of the word “enclosed” in the *Country Oaks* opinion because that word existed in the *Country Oaks* declarations, not in the Act; and the *Country Oaks* court was merely applying the word “enclose” to the specific dispute it was resolving, not announcing a principle the Act required.

Because the word “enclose” was irrelevant to the district court’s analysis, the only remaining *Country Oaks* term that could support the district court’s legal ruling is “physical”, which Criterium addresses in the immediately following discussion.

**B. THIS COURT HAS RIGHTLY HELD THAT THE WORD “PHYSICAL” DOES NOT NECESSARILY MEAN “CONSTRUCTED”.**

Unlike the phrase “enclosed space”, which does not appear in the Act, the word “physical” did appear in the version of the Act contrued in the *Country Oaks* opinion.<sup>48</sup>

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<sup>47</sup> Rockwell Square Declaration, § 10.14 (R. 71, Add. A)

The statutory analysis in the *Country Oaks* opinion essentially began and ended with its acknowledgement of that word – “physical”.

The *Country Oaks* opinion first examined the 1990 statutory definition of “Unit”:

The declaration’s requirement for “independent use” tracks the Act’s definition of “unit,” which is “a separate *physical* part of the property intended for any type of independent use, including one or more rooms or spaces located in one or more floors or part or parts of floors in a building....” Utah Code Ann. § 57-8-3(26). The Act’s use of “separate *physical* part” further supports appellees’ position.<sup>[49]</sup>

The *Country Oaks* opinion returned to the word “physical” a second time:

This conclusion [that for a unit to actually exist, it must be within a physically enclosed space] is buttressed by section 57-8-3(8), which states:

“Condominium unit” means a unit together with the undivided interest in the common areas and facilities appertaining to that unit. Any reference in this chapter to a condominium unit includes both a *physical* unit together with its appurtenant undivided interest in the common areas and facilities.<sup>50</sup>

Consistent with the concept that declarations must “submit” themselves to the Act discussed in Point I, *supra*, Section 101(ppp) of the Rockwell Square Declaration includes the word “physical” in its definition of a “Unit”: “‘Unit’ means a physical portion of the Condominium Project, including one or more rooms situated in a

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<sup>48</sup> See UTAH CODE § 57-8-3(7) (Michie 1990).

<sup>49</sup> *Country Oaks*, 851 P.2d at 641, n.4 (emphasis added).

<sup>50</sup> *Id.* at 642 (emphasis added).



Building comprising part of the Condominium Project designated for separate ownership . . .” (R. 43, Add. A)<sup>51</sup>

Nearly thirty years after *Country Oaks*, this Court in *B. Investment* analyzed what the *Country Oaks* opinion did and did not hold, and discussed its analytical limitations:

We read *Country Oaks* as allowing declarants a measure of latitude in defining a unit. The court concluded that the *Country Oaks declarations’ definition of unit* as an “*enclosed space*” *found sufficient support in a provision of the Act* providing that a unit be “physical.” See *id.* This statutory definition gives *limited support* to the proposition that a unit must be an enclosed space, *although the opinion does not explain why a vacant lot does not also qualify as “physical.”* Nevertheless, even where “the Act anticipates that a condominium project may contain proposed units that are not yet constructed,” *id.*, this reference to a “physical unit” offered *sufficient statutory support for the court to apply the Country Oaks declarations’ definition* of “unit.”<sup>[52]</sup>

Indeed, the *B. Investments* decision, in a passage that the district court did not cite, observed that in the Act, “definitions cannot reasonably be read to categorically exclude a vacant lot . . . from the definition of ‘unit.’”<sup>53</sup> Thus, in its holding that the Act permits vacant lots to be “units”, this Court held that the *Country Oaks* opinion did not make “physically *enclosed* space” a generally applicable principle under the Act.

Then, after holding that vacant lots can be “units” and that the Act does not require “units” to be “enclosed”, this Court took direct issue with a passing reference to the word

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<sup>51</sup> Criterim will include all of subsection 1.1(ppp) and discuss it in more detail in Point IV of this brief, along with a discussion of the definition of “Building” and other related provisions.

<sup>52</sup> *B. Investment*, 2012 UT App 24, ¶ 19 (emphasis added).

“physical” in the *Country Oaks* opinion: “[T]he opinion does not explain why a vacant lot does not also qualify as “physical . . .”<sup>54</sup> And this Court continued: “This definition of “unit” finds at least as much support in the Act as the definition in *Country Oaks*.”<sup>55</sup>

Appellate courts across the country would share this Court’s expressed skepticism over *Country Oaks*’ restrictive interpretation of the word “physical” because courts have long recognized that a plat’s depictions of unconstructed items are indeed “physical”.<sup>56</sup> Similarly, boundary lines and metes and bounds descriptions are “physical” attributes of a parcel of property even though they are never constructed, erected or even visible at the property site.<sup>57</sup>

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<sup>53</sup> *Id.*, ¶ 22.

<sup>54</sup> *Id.*, ¶ 19.

<sup>55</sup> *Id.*, ¶ 20.

<sup>56</sup> See, e.g., *Tomecek v. Bavas*, 759 N.W.2d 178, 186 (Mich. 2008) (“A plat is a description of the **physical** property interests on a particular area of land”); *Lewis v. S & T Anchorage, Inc.*, 616 So.2d 478, 479 (Fla. Ct. App.), review denied, 626 So.2d 207 (Fla. 1993) (common area boundaries on a plat are “**physical** boundaries”); *Kesselman v. Goldsten*, 27 N.W.2d 692, 695 (Neb. 1947) (cemetery burial plot lines constitute “**physical** boundaries”); *Williams v. Kirby Lumber Corp.*, 355 S.W.2d 761, 769 (Tex. Ct. App. 1962) (boundary lines of tract are “**physical** lines”); *Putnam v. Carroll*, 534 P.2d 132, 134 (Wash. Ct. App. 1975) (plat establishes “**physical** boundaries”) (all emphasis added).

<sup>57</sup> See, e.g., *State v. Town of Altoona*, 76 So. 444, 445 (Ala. 1917) (township lines constituted “**physical** facts”; *S & T Anchorage, Inc.*, 616 So.2d at 479 (common area boundaries are “**physical** boundaries”; *Kirkley v. Jones*, 550 S.E.2d 686, 691 (Ga. Ct. App. 2001) (metes and bounds property description is a “**physical** description”; *Schaer v. Webster County*, 644 N.W.2d 327, 331 (Iowa 2002) (same) (all emphasis added).

Utah recognizes that an easement, which is nothing more than a nonpossessory right to pass over another's land<sup>58</sup>, has "*physical* boundaries".<sup>59</sup>

Similarly, the physical space occupied by an unconstructed condominium unit can be identified by the information in the declaration and plat creating the unit. Its size and location are known, and its boundaries can be located and identified. The physical space comprising the unit exists as a separately subdivided parcel of real property, with or without an actual enclosure.

It is instructive that the Act expressly contemplates condominium units that will never be contained in buildings at all, or that will not have constructed boundaries. For example, UTAH CODE section 57-8-13(1)(a)(iv) (2016) refers to units "not contained or

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<sup>58</sup> See *Marchant v. Park City*, 771 P.2d 677, 681 (Utah Ct. App. 1989), *aff'd.*, 788 P.2d 520 (Utah 1990) (easement "allows only use of property belonging to another for a limited purpose"); see also, Jon W. Bruce and James W. Ely, Jr., *THE LAW OF EASEMENTS AND LICENSES IN LAND*, § 1:1 (2016) ("[T]he holder of an affirmative easement may only use the land burdened by the easement; the holder may not occupy and possess the realty as does an estate owner.")¶

<sup>59</sup> See *Clearwater Farms*, 2016 UT App 126, ¶ 27 (easements have "*physical* boundaries"); *Stern v. Metropolitan Water Dist. of Salt Lake & Sandy*, 2012 UT 16, ¶ 69, n. 39, 274 P.3d 935 (same). And, although easements are nothing more than a nonpossessory right to pass over property of another, other jurisdictions similarly recognize that easements nevertheless are "*physical*". See, e.g., *Kahn v. Cherry*, 198 S.W. 266, 268 (Ark. 1917) (easement was a "*physical* encumbrance"); *Wilann Properties I, LLC v. Georgia Power Company*, 740 S.E.2d 386, 391 (Ga. Ct. App. 2013) (easement has "*physical* boundaries"); *Manning v. Campbell*, 268 P.3d 1184, 1188 (Idaho 2012) (selection of easement fixes its "*physical* location"); *O'Brien v. Murphy*, 75 N.E. 700, 701 (Mass. 1905) (easement has "*physical* location"); *Nielsen v. Hornsteiner*, 277 P.3d 1241, 1243 (Mont. 2012) (easement has "*physical* dimensions"); *Spearman v. Am. Elec. Power Co., Inc.* 30 N.E.3d 204, 212 (Ohio Ct. App) 2015) (same); *Burkhart v. Jacob*, 976 P.2d 1046, 1050 (Okla. 1999) (easement has "*physical* character" (all emphasis added)).

to be contained in a building or whose boundaries are not to be coextensive with walls, ceilings, or floors within a building”. UTAH CODE section 57-8-35(1)(b) (2016) refers to units “which are not contained in existing or proposed buildings” In describing the requirements for a condominium plat, UTAH CODE section 57-8-13(1)(a)(v) (2016), requires that each plat contain “a distinguishing number or other symbol for every *physical unit* identified on the condominium plat” (emphasis added). That requirement for a “distinguishing number” necessarily includes units that will not be contained in a building. Accordingly, the naked term “physical unit” cannot reasonably be construed to require an enclosed space, the reading the district court made of *Country Oaks*.

Simply stated, nothing in the *Act* prevents unenclosed and unconstructed units described in a declaration and shown on a plat from being “Units” under the declaration and for the purposes of the Act. In fact, even before the 2016 Revisions, the legislative understanding and intent of the Act was that a unit would be deemed to exist from the date of recordation of the declaration and plat creating the unit. The legislative history of the 2016 Revisions demonstrates that they were intended to reiterate the existing intent, and the existing practice, that an unconstructed unit is a unit entitled to the rights afforded a unit owner under the Act.<sup>60</sup>

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<sup>60</sup> Recording of *Utah House Concurrence Debate*, H.B. 255S-1, 61st Leg. Gen. Sess. (March 10, 2016) (statement of H.B. 255 Chief Sponsor, Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=20221&meta\\_id=629773](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=20221&meta_id=629773) (“[W]e’re not changing anything that’s happening in practice; we’re just codifying it into law . . . .”); see also Recording of *Utah House Floor Debate*, H.B. 255, 61st Leg. Gen.

Section 57-8-27 (2016) of the Act, discussed above, provides that once a declaration and plat have been recorded, a lien may attach (or continue in effect) only upon the units and their appurtenant undivided interests in the common areas. The undeveloped land itself can no longer be considered a lienable parcel, because the property has now been legally subdivided into units and common areas. The clear intent of the Legislature in enacting this section is that each unit exists immediately upon recordation, before any construction has occurred.

Likewise, the Act requires that a declaration allocate all the undivided interests in the common areas to the units when the declaration is recorded, again, prior to any construction. UTAH CODE section 57-8-10(2)(d)(i) (2016) provides: "The declaration shall include the percentage or fraction of undivided interest in the common areas and facilities appurtenant to each unit and the unit owner for all purposes, including voting, derived and allocated in accordance with Subsection 57-8-7(2)." Subsection 57-8-7(2) (2016) provides:

Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the percentages or fractions expressed in the declaration. The declaration may allocate to each unit an undivided interest in the common areas and facilities proportionate to either the size or par value of the unit. Otherwise, the declaration shall allocate to each unit an equal undivided interest in the common areas and facilities. . . . The

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Sess. (February 23, 2016) (statement of H.B. 255 Chief Sponsor, Rep. Mike Schultz) available at

[http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=19905&meta\\_id=620284](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19905&meta_id=620284), ("There is some serious concern with how that lower court ruled and so this bill addressed that. Just clarifies it. ***Basically allows what has been happening for decades to continue to happen***, so it has strong support as I mentioned") (emphasis added).

undivided interest in the common areas and facilities allocated in accordance with this Subsection (2) shall add up to one if stated as fractions or to 100% if stated as percentages.

Allocation to each unit is mandatory, not permissive. The only choice afforded the declarant is which of the three methods of allocation prescribed by the statute it will use.

The district court erred when it concluded that the Act prevented the Criterium Units from being "Units", and this Court should reverse that ruling as a matter of law because nothing in the Act required the result the district court attributed to the Act.

That, however, does not dispose of this appeal because the district court also concluded that the Rockwell Square Declaration defined "Unit" in a way that excluded unconstructed units. Criterium shows in Point IV, *infra*, that the Rockwell Square Declaration included unconstructed units in its definition of "Unit".

#### **IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ROCKWELL SQUARE DECLARATION DEFINED "UNIT" IN A WAY THAT EXCLUDED CRITERIUM'S 134 UNCONSTRUCTED UNITS**

This Court should reverse the district court's grant of Defendants' summary judgment motion (R. 960, Add. D) for one of two reasons. *First*, this Court can and should conclude from language of the Rockwell Square Declaration that the Criterium Units are "Units" giving Criterium all rights the Act affords an owner of units in a condominium development. *Second*, if the Court finds the Rockwell Square Declaration to be ambiguous or otherwise the subject of extrinsic evidence, the district court's Rulings improperly precluded the introduction of that evidence. In either event, the

district court erred in granting Defendants' summary judgment motion and this Court should reverse that ruling.

**A. THE ROCKWELL SQUARE DECLARATION UNAMBIGUOUSLY PROVIDES THAT CRITERIUM'S 134 UNCONSTRUCTED UNITS ARE "UNITS".**

Section 3.02(a) of the Rockwell Square Declaration (R. 45, Add. A) states:

Declarant hereby creates one hundred fifty Residential Units and eighteen (18) Retail Units within the Condominium Project. The Plat shows the Unit number of each Unit, its location, dimensions from which its Area may be determined . . . . Each Unit shall be capable of being separately owned, encumbered, and conveyed."

By the express statement in the Declaration, all the units in Rockwell Square were created, as separately subdivided condominium units, upon recordation of the Rockwell Square Declaration and the Plat.

The Rockwell Square Declaration itself refers to unconstructed Units, not as "proposed Units" or "potential Units", but simply as "Units". When the declarant intends to refer to constructed Units, as opposed to all Units, it does so expressly. For example, in subsection 3.03(a), the Rockwell Square Declaration refers both to "constructed Units" and to "Units that have not yet been constructed."<sup>61</sup> (R. 46, Add. A). And Section 5.01 refers both to "constructed Units" and to "a Unit prior to construction."<sup>62</sup> (R. 53, Add. A). Because the language of the Rockwell Square Declaration distinguishes a

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<sup>61</sup> Section 3.03(a) of the Declaration provides: "Units that have not yet been constructed shall not be allocated any interest in the Common Elements".

<sup>62</sup> Section 5.01 of the Declaration provides: "Memberships shall only be allocated to constructed Units, and no Membership shall be allocated to a Unit prior to construction."

constructed Unit from an unconstructed Unit when that was the declarant's intent, all references to a Unit without those distinctions must be construed to refer to both constructed and unconstructed units. Any other interpretation impermissibly renders meaningless the textual distinctions in the Rockwell Square Declaration.

There is no ambiguity in the use of the word "Unit" in the Rockwell Square Declaration. It quite clearly refers to both constructed and unconstructed units. Even in those provisions of the Rockwell Square Declaration that purport to deny to the owners of unconstructed units the allocation of common area interests and voting rights to which every unit owner is entitled under the Act, the declarant refers to the unconstructed units as "Units".

In its Ruling, the district court emphasized subsection 1.01(ppp) of the Rockwell Square Declaration (R. 43, Add. A), which defines a "Unit" as:

a physical portion of the Condominium Project, *including* one or more rooms situated in a Building comprising part of the Condominium Project designated for separate ownership and is designated as a Retail or a Residential Unit in Exhibit E attached to this Declaration and incorporated herein and on the Plat, *and includes*, lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and other material constituting part of the finished surface of a wall, floor or ceiling, spaces, interior partitions, fixtures, and improvements (emphasis added).

Under the district court's reasoning, a "Unit" *must* have rooms situated in a constructed building. This reasoning misconstrues the word "including". In fact, the



words “including” and “include” are words of example, not of limitation.<sup>63</sup> By the court’s reasoning, a Unit must also have each of the enumerated finishes, and in the absence of any enumerated item, such as paneling, lath, plaster, tiles and wallpaper, there can be no “Unit”. The district court erred in this reading.

The owner of a condominium unit in a traditional multi-unit building owns nothing more than airspace and the items inside that airspace. The building itself, including the unfinished walls and ceilings that surround the airspace, is common area. The words “includes, lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and other material constituting part of the finished surface”, as used in the definition of Unit, are examples of finish materials, not requirements. This language cannot reasonably be construed to mean that those elements have to be inside a Unit for the Unit to exist. For example, lath and plaster are rarely used in modern construction, and wallpaper, paneling, and tile are design choices, not required elements of a Unit. These items, if they are inside a Unit, are part of the Unit only because they are located inside the boundaries of the Unit and are not part of the common areas. The list of finish materials merely provides a series of non-exclusive and

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<sup>63</sup> See, e.g., UTAH CODE § 68-3-12(1)(f) (2016) (“‘Include,’ ‘includes,’ or ‘including’ means that the items listed are not an exclusive list, unless the word ‘only’ or similar language is used to expressly indicate that the list is an exclusive list.”); *Asset Acceptance LLC v. Utah State Treasurer*, 2016 UT App. 25, ¶21, n.10, 367 P.3d 1019 (“‘Including’ or ‘includes’ is a somewhat unique word in the English language, particularly with regard to its legal usage, because it has long been held to unambiguously indicate a non-

non-mandatory examples. Nothing in subsection 1.01(ppp) actually requires that a unit be constructed or enclosed by walls and ceilings to exist.

Moreover, subsection 1.01(i) of the Rockwell Square Declaration (R. 36, Add. A) defines the term “Building” in relevant part, as “the structures constructed, *or to be constructed*, within the Project . . . .” (emphasis added). By applying section 1.01(ppp) as it has, the district court has impermissibly written the words “or to be constructed” out of the Rockwell Square Declaration’s definition of “Building”, and erred in construing the words “including one or more rooms situated in a Building” to mean that a *constructed* building is necessary, when Section 1.01(i) explicitly includes in the definition of a “Building” any unconstructed building shown on the Plat.

Again, the word “Unit” as used in the Rockwell Square Declaration unambiguously includes unconstructed units. Under both the Rockwell Square Declaration and the Act, Criterium owns Condominium Units and is entitled to an allocation of common area interests proportionate to the relative square footages of its Units and the corresponding voting rights in the Association.

**B. IF THIS COURT CANNOT CONCLUDE THAT THE ROCKWELL SQUARE DECLARATION IS UNAMBIGUOUS, IT SHOULD REVERSE THE DISTRICT COURT DUE TO ITS FAILURE TO ADMIT EXTRINSIC EVIDENCE OF INTENT.**

Criterium and Defendants both moved for summary judgment on the question of whether Criterium is entitled to an allocation of common area interests and the

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exhaustive list.”); *Mallory v. Brigham Young University*, 2014 UT 27, ¶14, 332 P.3d 922

corresponding voting rights (R. 556-557, 689-690), each contending that the Rockwell Square Declaration unambiguously required the district court to rule in their favor. The district court expressly found that “the language within the four corners of the Declaration is unambiguous, and therefore the Declaration may be interpreted as a matter of law.” (R. 959, Add. D). The district court then explained its conclusion that the definition of a “Unit” was facially unambiguous:

The Declaration unambiguously defines “Unit” to mean “a *physical* portion of the Condominium Project, including one or more rooms situated in a Building.” Defendants [sic.]<sup>[64]</sup> argue the definition of “Building” to include “structures constructed, or to be constructed” establishes an ambiguity with regard to the inclusion of unconstructed units within the definition of “units” in the Declaration. However, the Declaration further clarifies a “unit *includes* lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, interior partitions, fixtures and improvements.” While not all these elements need to be included in a unit, the list clarifies the *unambiguous intent* of the original parties *to limit the definition of a “unit” to constructed units*.

(R. 959, Add. D) (citations and internal quotations omitted) (emphasis added).

The district court erred in this conclusion because, at a minimum, the Rockwell Square Declaration was facially ambiguous regarding what is and is not a “Unit”.

Facial ambiguity exists if the parties’ intentions cannot be determined from the face of a contract.<sup>65</sup> A contract is facially ambiguous if its terms are “capable of more

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(“When ‘including’ precedes a list, its common usage is to indicate a partial list.”).

<sup>64</sup> The district court’s Ruling and Order reads “Defendants”, but it was in fact Criterium that made this argument. (R. 734, 866-67)

<sup>65</sup> *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 24, 367 P.3d 994.

than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.”<sup>66</sup> For ambiguity to exist, proffered alternative interpretations “must be plausible and reasonable in light of the language used.”<sup>67</sup>

Whether a contract is ambiguous is a question of law, which appellate courts review for correctness.<sup>68</sup> When determining whether a contract is ambiguous, “any relevant evidence must be considered and the better-reasoned approach is to consider the writing in light of the surrounding circumstances.”<sup>69</sup> Utah appellate courts “allow the introduction of relevant evidence regarding the existence of a potential ambiguity to prevent an inherently one-sided analysis based solely on the extrinsic evidence of the judge’s own linguistic education and experience. In this way, [courts] can interpret a contract and any potential ambiguity in light of the parties’ intentions.”<sup>70</sup>

The district court based its conclusion on two words: “physical” and “including”. Criterium has shown in Point III, *supra*, that the mere use of the word “physical” does not require something to be constructed to qualify as a “unit”. Indeed, that was the express holding of this Court in *B. Investments*. Similarly, Criterium has shown in Point IV, A, *supra*, that the words “include” and “including” are non-exhaustive and require no specific “physical” component or characteristic. .

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See, e.g., *Watkins v. Henry Day Ford*, 2013 UT 31, 304 P.3d 841.

<sup>69</sup> *Id.* ¶ 26 (citation and internal quotation omitted).

The Rockwell Square Declaration, in Article 1, defines “Unit”, in relevant part, as “a physical portion of the Condominium Project, including one or more rooms situated in a Building comprising part of the Condominium Project . . .” (R. 43, § 1.01(ppp), Add. A). It defines “Building” as “the structures constructed, *or to be constructed*, within the Project . . . .” (R. 36, § 1.01(i), Add. A) (emphasis added). If the use of the defined term “Building” in the definition of “Unit” does not unambiguously show that unconstructed units are included in the definition of “Unit” in the Rockwell Square Declaration, it at the very least creates ambiguity as to the meaning of “Unit”.

Similarly, section 5.01 of the Rockwell Square Declaration (R. 53, § 5.01, Add. A) provides that “Declarant shall be a Member [of the Association] so long as Declarant owns any Units within the Project.” This statement is meaningless if it refers only to constructed Units, because the Rockwell Square Declaration already provides membership in the Association and voting rights for constructed Units. In addition, it would be against a declarant’s interests to deliberately create a situation in which it could lose its voting rights prior to completion of a project. As a witness expressing his support for H.B. 255 explained at February 11, 2016 hearing before the Utah House Business and Labor Standing Committee:

And in this case – and we’re concerned about future cases that could rely on this ruling as a precedent where – to have a condominium plat recorded, the air space subdivided, and then to be – to have your voting rights withheld, as the builder, as the developer, as a declarant, as a successor-in-

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<sup>70</sup> *Id.* (citation and internal quotation omitted).

interest, or a successors assigns-in-interest of that asset. So this bill seeks to clarify that, that a unit, a subdivided unit, is a unit for all intents and purposes. It doesn't have to be actually constructed because in fact, the air space is subdivided. Now who would also be concerned about this. Well, lenders would be concerned about this. If I have a subdivision plat map and I've recorded that and I seek to get a loan on that to finance the construction of it, under this problematic ruling, I have nothing – I basically have no – I've got no asset that I'm mortgaging. So it's important for lenders, it's important for title companies, it's important for county assessors, and it's an important property rights issue.<sup>71</sup>

Accordingly, the intent of this provision must be to provide to the declarant (which is now Criterium) membership in the Association and voting rights for units owned by the declarant that have not yet been constructed. That intent, however, appears to conflict with other provisions of the Rockwell Square Declaration denying membership and voting rights with respect to unconstructed Units, creating another ambiguity in the documents.

If this Court is not willing to reverse the district court with instructions that unconstructed units are "Units" under the Rockwell Square Declaration and the Act, at a minimum this Court should declare the Rockwell Square Declaration to be ambiguous as to the intent of the declarant with respect to unconstructed Units and direct the district

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<sup>71</sup> See Recording of *Hearing on H.B. 255 Before the House Business and Labor Standing Committee*, 61st Leg. Gen. Sess. (Utah Feb. 11, 2016) (statement of Chris Gamvroulas president of Ivory Development, the land acquisition development arm for Ivory Homes and president of Utah Property Rights Coalition during presentation of H.B. 255 Chief Sponsor Rep. Mike Schultz) available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=19738&meta\\_id=616917](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=19738&meta_id=616917)

court to take evidence of the contracting parties' intentions and to enter appropriate findings of fact that support whatever ruling the district court enters on remand.

**V. THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS' FEES TO DEFENDANTS; THIS COURT SHOULD DECLARE CRITERIUM THE PREVAILING PARTY AND DIRECT THE DISTRICT COURT TO DETERMINE AND AWARD CRITERIUM'S FEES AND COSTS, BOTH BELOW AND ON APPEAL.**

Paragraph 17.02 of the Rockwell Square Declaration provides:

Attorneys' Fees.

In the event of any dispute under or with respect to this Declaration or any other Association Document, the prevailing party shall be entitled to recover from the non-prevailing party all of its costs and expenses in connection therewith, including, without limitation, the fees and disbursements of any attorneys, accountants, engineers, appraisers or other professionals engaged by the prevailing party. (R. 90)

For the foregoing reasons, this Court should conclude that Criterium has prevailed on the parties' dispute "under or with respect to" the Rockwell Square Declaration. As a result, it is appropriate for this Court on remand to instruct the district court to determine (i) "all of" Criterium's costs and expenses in connection with the parties' dispute before the district court, "including without limitation,<sup>[72]</sup> the fees and disbursements of any attorneys, accountants, engineers, appraisers or other professionals" that Criterium engaged, along with (ii) all of Criterium's costs and expenses incurred on appeal to

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<sup>72</sup> This Court has recently made clear that this list of costs and expenses for which Criterium is entitled to reimbursement is non-exhaustive: *See, e.g., Asset Acceptance*, 2016 UT App. 25, ¶ 21 ("Including' or 'includes' is a somewhat unique word in the English language, particularly with regard to its legal usage, because it has long been held to unambiguously indicate a non-exhaustive list.").

obtain reversal of the district court's erroneous ruling that as a matter of law Criterium was not entitled to fees under the Rockwell Square Declaration.<sup>73</sup>

### CONCLUSION

For the foregoing reasons this Court should REVERSE the judgment of the district court and instruct the district court (i) that the Criterium Units are "Units" under both the Act and the Rockwell Square Declaration; (ii) that Criterium is entitled to an allocation of undivided interests in the common areas proportionate to the relative sizes of the Criterium Units, together with corresponding voting rights and membership in the Association; (iii) that Criterium was the prevailing party in the district court on the issues presented in this appeal; and (iv) that Criterium was the prevailing party on appeal; and (v) to determine Criterium's reasonable attorney fees incurred in the district court action and this appeal.

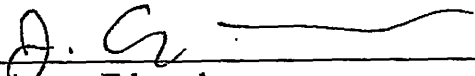
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<sup>73</sup> See, e.g., *Reeve & Assocs.*, 2015 UT App 166, ¶ 39, 355 P.3d 232 (awarding appellant's attorney fees on appeal and "directing" district court on remand to calculate appellant's attorney fees incurred on appeal); *Olsen v. Lund*, 2010 UT App 353, ¶¶ 12, 16, 246 P.3d 521 (appellate court can award fees on appeal at the same time it instructs district court to award fees on remand).



DATED: June 20, 2016

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

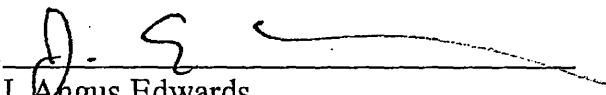
By:   
J. Angus Edwards  
Susan B. Peterson  
*Attorneys for Plaintiff/Appellant, R. Scott Criterium*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the word processing system used to prepare the foregoing Brief of Appellant indicates that it contains 10,776 words in the proportionately spaced Times New Roman font, exclusive of (i) cover text, (ii) the table of contents, (iii) the table of citations, (iv) this certificate of compliance, (v) the certificate of service and (vi) the addenda. That word count complies with the 14,000 word type-volume limitation of UTAH RULE OF APPELLATE PROCEDURE 24(f)(1)(A).

DATED: June 20, 2016

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

By:   
J. Angus Edwards  
Susan B. Peterson  
*Attorneys for Plaintiff/Appellant, R. Scott Criterium*

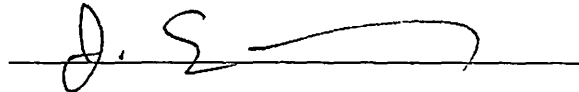
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 20, 2016 I caused two true and correct copies of the foregoing to be mailed, postage prepaid, to:

Cory B. Mattson  
Thor Roundy  
801 North 500 West, Suite 150  
Bountiful, UY 84010  
*Attorneys for Defendants*

Kevin P. Dwyer  
KEVIN P. DWYER, ATTORNEY AT LAW  
1411 South Utah Street, Suite 3  
Salt Lake City, UT 84104  
*Attorney for Defendant Corner Canyon Properties, LLC*

Kelly W. Wright  
Timothy A. Bodily  
Deputy Salt Lake District Attorneys  
2001 South State Street, S-3600  
Salt Lake City, Utah 84190-1210  
*Attorney for Utah Association of Counties*



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# ADDENDUM

Tab A

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WHEN RECORDED, PLEASE MAIL TO:  
Kimberly K. Chytraus  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111

11114070  
01/11/2011 09:42 AM \$16.00  
Book - 9897 Pg - 5023-5031  
GARY W. OTT  
RECORDER, SALT LAKE COUNTY, UTAH  
PARSONS, BEHLE & LATIMER  
ATTN: KIMBERLY K. CHYTRAUS  
201 S MAIN ST STE. 1800  
SLC UT 84145-0898  
BY: JCR, DEPUTY - WI 4 P.

**SUPPLEMENTAL DECLARATION NO. 1  
TO AMENDED AND RESTATED DECLARATION OF CONDOMINIUM  
AND DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR  
ROCKWELL SQUARE CONDOMINIUMS**

**(EXERCISE OF OPTION TO WITHDRAW LAND)**

THIS SUPPLEMENTAL DECLARATION NO. 1 TO AMENDED AND RESTATED DECLARATION OF CONDOMINIUM AND DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR ROCKWELL SQUARE CONDOMINIUMS (EXERCISE OF OPTION TO WITHDRAW LAND) (this "Supplemental Declaration") is made as of January 7, 2011, by ROCKWELL HOUSING, LLC, a Utah limited liability company ("Declarant").

This Supplemental Declaration supplements that certain Amended and Restated Declaration of Condominium and Declaration of Covenants, Conditions, and Restrictions for Rockwell Square Condominiums dated January 7, 2011 (the "Original Declaration"). The Original Declaration, as supplemented pursuant to this Supplemental Declaration, is collectively referred to herein as the "Declaration," which term, shall for all purposes thereof or of any related document, mean and refer to the Declaration as so amended, supplemented, or otherwise modified. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Declaration.

A. The Declarant previously subjected to the Declaration certain real property located in Salt Lake County, Utah.

B. Pursuant to Section 3.08 of the Declaration, Declarant reserved the Option to Withdraw Land, which is the right and option to withdraw some or all of the Withdrawable Land from the Project, subject to the terms of the Declaration, effective upon recording a Supplemental Declaration in the Office of the Recorder of Salt Lake County, Utah.

C. Declarant now desires to exercise its Option to Withdraw Land and withdraw the Withdrawable Land, more particularly described on Exhibit A attached hereto and incorporated herein.

D. Declarant is executing and delivering this Supplemental Declaration for the purpose of withdrawing the Withdrawable Land from the Project and the Declaration.

NOW, THEREFORE, in consideration of the foregoing premises, Declarant hereby declares and states as follows:

1. Declarant hereby withdraws the Withdrawable Land from the terms and conditions of the Declaration and from the Project.

2. The Declaration, subject to this Supplemental Declaration, is hereby ratified, approved, and confirmed and shall remain unmodified in all other respects and in full force and effect.

3. The recitals set forth above and the exhibits attached to this Supplemental Declaration are each incorporated into this Supplemental Declaration as if set forth in full herein.

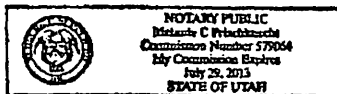
4. This Supplemental Declaration shall be effective as of the date of its recordation in the Office of the Recorder of Salt Lake County, Utah.

IN WITNESS WHEREOF, Declarant has executed and delivered this Supplemental Declaration as of the date and year first above written.

ROCKWELL HOUSING, LLC,  
a Utah limited liability company  
*By HOUSING PLUS a Utah nonprofit corporation,*  
*MANAGER*  
By: [Signature]  
Name: MICHAEL PLAIZIER  
Title: SECRETARY

STATE OF UTAH )  
: ss.  
COUNTY OF SALT LAKE )

On this 11<sup>th</sup> day of January, 2011, before me personally appeared MICHAEL PLAIZIER, who acknowledged himself to be the SECRETARY OF HOUSING PLUS, MANAGER of ROCKWELL HOUSING, LLC, a Utah limited liability company, and being authorized to do so, he executed the foregoing instrument for the purpose therein contained, by signing the name of the company, by himself or such officer.



[Signature]  
NOTARY PUBLIC  
Residing at: Salt Lake, UT

My Commission Expires:

July 29, 2013



**EXHIBIT A  
TO  
SUPPLEMENTAL DECLARATION NO. 1  
TO AMENDED AND RESTATED DECLARATION  
OF CONDOMINIUMS AND DECLARATION OF COVENANTS,  
CONDITIONS, AND RESTRICTIONS OF  
ROCKWELL SQUARE CONDOMINIUMS**

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Legal Description of Withdrawable Land

Located in the Southwest Quarter of Section 6,  
Township 4 South, Range 1 East,  
Salt Lake Base and Meridian.

Beginning at a point at the Southeast corner of the Cutler Subdivision as found on file at the Salt Lake County Recorder's Office said point being West 512.00 feet along the center line of said 13800 South Street and South 200.00 feet from a found Street Monument at the Intersection of 13800 South Street and 300 East Street, said monument also being used as the Center of Section, Township 4 South, Range 1 East, Salt Lake Base and Meridian in some surveys, and running:

thence South 00°57'29" East 263.39 feet;

thence Southwesterly 34.61 feet along the arc of a 49.50 foot radius curve to the left (center bears South 18°22'16" East and the chord bears South 51°35'45" West 33.91 feet with a central angle of 40°03'57");

thence Southwesterly 9.18 feet along the arc of a 9.00 foot radius curve to the right (center bears North 58°26'13" West and the chord bears South 60°46'42" West 8.79 feet with a central angle of 58°25'50");

thence South 38.58 feet;

thence Southeasterly 9.18 feet along the arc of a 9.00 foot radius curve to the right (center bears South 00°00'23" West and the chord bears South 60°46'42" East 8.79 feet with a central angle of 58°25'50");

thence Southeasterly 31.52 feet along the arc of a 49.50 foot radius curve to the left (center bears North 58°26'13" East and the chord bears South 49°48'19" East 30.99 feet with a central angle of 36°29'05");

thence South 246.42 feet;

thence West 322.50 feet to the east line of Bangerter Parkway;

thence North 290.00 feet along the east line of said Bangerter Parkway;

thence East 14.18 feet along the east line of said Bangerter Parkway;

thence North 00°15'30" West 33.00 feet along the east line of said Bangerter Parkway;

thence South 89°45'37" West 6.00 feet along the east line of said Bangerter Parkway;

thence North 45°13'01" West 11.31 feet along the east line of said Bangerter Parkway;

A-1

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00017



thence North 35.84 feet along the east line of said Bangerter Parkway;  
thence Northeasterly 78.71 feet along the arc of a 555.00 foot radius curve to the right (center bears South 89°59'59" East and the chord bears North 04°03'46" East 78.64 feet with a central angle of 08°07'31") along the east line of said Bangerter Parkway;  
thence North 12°01'21" East 109.97 feet along the east line of said Bangerter Parkway;

thence Northeasterly 43.50 feet along the arc of a 652.48 foot radius curve to the left (center bears North 77°45'25" West and the chord bears North 10°20'00" East 43.49 feet with a central angle of 03°49'11") along the east line of said Bangerter Parkway;

thence Northeasterly 2.44 feet along the arc of a 655.00 foot radius curve to the left (center bears North 85°04'10" West and the chord bears North 04°49'25" East 2.44 feet with a central angle of 00°12'49") along the east line of said Bangerter Parkway to the Southwest corner of the Cutler Subdivision as found on file at the Salt Lake County Recorder's Office;

thence East 284.51 feet along the south line of said Cutler Subdivision to the point of beginning.

Contains 187,075 Square Feet or 4.29 Acres

WHEN RECORDED, PLEASE MAIL TO:

Rockwell Housing, LLC  
124 South 600 East  
Salt Lake City, Utah 84102

11484496  
10/3/2012 11:44:00 AM \$191.00  
Book - 10062 Pg - 8241-8248  
Gary W. Ott  
Recorder, Salt Lake County, UT  
INTEGRATED TITLE INS. SERVICES  
BY: eCASH, DEPUTY - EF 8 P.

**AMENDMENT NO. 2  
TO AMENDED AND RESTATED DECLARATION OF CONDOMINIUM  
AND DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR  
ROCKWELL SQUARE CONDOMINIUMS**

THIS AMENDMENT NO. 2 TO AMENDED AND RESTATED DECLARATION OF CONDOMINIUM AND DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR ROCKWELL SQUARE CONDOMINIUMS (this "Amendment") is made as of October 1, 2012, by ROCKWELL HOUSING, LLC, a Utah limited liability company ("Declarant").

This Amendment amends that certain Amended and Restated Declaration of Condominium and Declaration of Covenants, Conditions, and Restrictions for Rockwell Square Condominiums dated January 7, 2011 and recorded January 11, 2011, as Entry No. 11114069, in Book No. 9897, on Page Nos. 4942-5027 in the Official Records of the Salt Lake County Recorder's Office, as amended by that Supplemental Declaration No. 1 to Amended and Restated Declaration of Condominium and Declaration of Covenants, Conditions, and Restrictions for Rockwell Square Condominiums, recorded January 11, 2011, as Entry No. 11114070, in Book No. 9897, on Page Nos. 5028-5031, and that certain Amendment No. 1 to Amended and Restated Declaration of Condominium and Declaration of Covenants, Conditions, and Restrictions for Rockwell Square Condominiums, recorded August 3, 2011, as Entry No. 11222809, in Book 9941, on Page Nos. 1090-1098 (collectively, the "Original Declaration"). The Original Declaration, as amended pursuant to this Amendment, is collectively referred to herein as the "Declaration," which term, shall for all purposes thereof or of any related document, mean and refer to the Declaration as so amended, supplemented, or otherwise modified. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Declaration.

A. The Declarant previously subjected to the Declaration certain real property located in Salt Lake County, Utah, more particularly described on Exhibit A attached hereto and incorporated herein.

B. Declarant hereby desires to amend certain terms of the Declaration, upon the terms and conditions provided herein.

NOW, THEREFORE, in consideration of the foregoing premises, Declarant hereby amends and restates the following provisions of the Declaration,

1. Addition of Section 2.04. Article II is hereby amended by adding the following entirely new Section 2.04

2.04 Affordable Housing Covenants.

A. Definitions:

"Homebuyer" means the person who purchases a Residential Property from the Declarant for use as a single family residence who qualifies as a Low-, Moderate-, and Middle Income Household.

"Low, Moderate and Medium Income Household" means a Household with an income of not greater than one hundred twenty percent (120%) of the AMI.

"Other Purchaser" means the purchaser of a Retail Unit or any portion of the Excess Residential Property or any portion of the Convertible Land. An Other Purchaser is not required to qualify as a member of a Low, Moderate and Medium Income Household.

"Property" means the property more particularly defined in Exhibit A attached hereto.

"Residential Property" means that portion of the Property listed in Exhibit A attached hereto under the heading "Residential Units 20 through 49, inclusive in Building 1."

"Retail Units" means that portion of the Property listed in Exhibit A attached hereto under the heading "Retail Units 2 through 4, inclusive, in Building 1."

B. Residential Property. The Residential Property has been acquired for the specific purposes of rehabilitation and resale to a Low-, Moderate-, and Middle Income Household. Declarant will rehabilitate or has rehabilitated that portion of the Property constituting Residential Property and the Retail Units and shall re-sell the Residential Property to Homebuyers who are living in Low-, Moderate-, and Middle Income Households (as such terms are more particularly defined below). The Residential Property is subject to requirements for the initial sale of the Residential Property by Declarant as housing for Low-, Moderate-, and Middle Income Households.

C. Affordability. Affordability will be maintained for the Property, as an NSP funded project, in accordance with HOME regulation at 24 CFR Part 92.254, and as may be amended. The Utah Department of Housing and Community Development, as the Participating Jurisdiction, has chosen the recapture option based upon HUD HOMEfires - Vol. 5 No.5, November, 2003 which states:

"The recapture option for HOME-assisted homebuyer units is described at 24 CFR 92.254(a)(5)(ii) and as may be amended. Under the recapture option, the Participating Jurisdiction recovers all or a portion of the HOME assistance to the homebuyers, if the housing does not continue to be the principal residence of the qualified low-income family that purchased the unit for the duration of the period of affordability."

D. Release. Each Residential Property shall be deemed automatically released from the covenants and terms of this Section 2.04 in the event that the Residential Property is fully and completely released from any and all liens and encumbrances that secure or include any portion of Neighborhood Stabilization Program funding. Each Retail Unit shall be deemed automatically released from these covenants upon the sale of a Retail Unit to an Other Purchaser.

2. Amendment to Section 10.16(c). Section 10.16(c) is hereby deleted in its entirety and replaced with the following:

10.16(c) Use of Residential Units. Any Residential Unit subject to affordable housing requirements, including Neighborhood Stabilization Program grants or HUD financing (collectively, "Affordable Housing Requirements") must comply with the Affordable Housing Requirements, including, but not limited to, occupying the Residential Unit as a primary residence.

3. Amendment to Section 10.16. Section 10.16 is hereby amended to include the following provision:

10.16(d) Rental Cap; Lease Requirements. Notwithstanding Section 10.16(c), no more than twenty percent (20%) of the total Residential Units within the Condominium Project may be rented or leased at any given time. Prior to the rental of a Residential Unit, a written request shall be made to the Management Committee, which shall approve or disapprove the request to lease or rent the Residential Unit based on its determination that (i) the lease or rental will not exceed the twenty percent (20%) maximum percentage of rentals of Residential Units allowed and; (ii) the request to for a rental or lease does not violate the restrictions contained in the Declaration. The minimum term for all lease agreements shall be for one (1) year, and shall state that the lease agreement is subject to the Declaration, and any rules applicable to the Residential Unit. No Owner shall be permitted to lease his/her Residential Unit for transient, hotel, or timeshare purposes, and no Owner may lease less than the entire Residential Unit. The Management Committee shall have the authority to create and enforce reasonable rules related to non-Owners and tenants occupying Residential Units.

4. Full Force and Effect; Defined Terms. The Declaration, subject to this Amendment, is hereby ratified, approved, and confirmed and shall remain unmodified in all other respects and in full force and effect. Any capitalized term not otherwise defined herein shall have the meaning given it in the Declaration.

5. Incorporation. The recitals set forth above and the exhibits attached to this Amendment are each incorporated into this Amendment as if set forth in full herein.

6. Effective Date. This Amendment shall be effective as of the date of its recordation in the Office of the Recorder of Salt Lake County, Utah.

[SIGNATURE PAGE FOLLOWS]

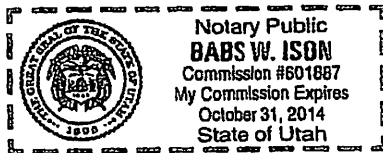
IN WITNESS WHEREOF, Declarant has executed and delivered this Amendment as of the date and year first above written.

ROCKWELL HOUSING, LLC,  
a Utah limited liability company

By: [Signature]  
Name: MARK B COHEN  
Title: DIRECTOR OF GENERAL PARTNER

STATE OF UTAH                    )  
                                          : ss.  
COUNTY OF SALT LAKE        )

On this 12<sup>th</sup> day of OCTOBER, 2012, before me personally appeared MARK B. COHEN, who acknowledged himself to be the DIRECTOR OF GENERAL PARTNER of ROCKWELL HOUSING, LLC, a Utah limited liability company, and being authorized to do so, he executed the foregoing instrument for the purpose therein contained, by signing the name of the company, by himself or such officer.



My Commission Expires:

10-31-14

[Signature]  
NOTARY PUBLIC  
Residing at: SALT LAKE CITY

**EXHIBIT A  
TO  
AMENDMENT NO. 2  
TO AMENDED AND RESTATED DECLARATION  
OF CONDOMINIUMS AND DECLARATION OF COVENANTS,  
CONDITIONS, AND RESTRICTIONS OF  
ROCKWELL SQUARE CONDOMINIUMS**

---

Retail Units 1 thru 4, inclusive, in Building 1, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-163 (Unit 1), 34-06-328-164 (Unit 2), 34-06-328-165 (Unit 3), 34-06-328-166 (Unit 4).

Units 20 thru 49, inclusive, in Building 1, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-003 thru 34-06-328-032, inclusive.

Retail Units 1 thru 4, inclusive, in Building 2, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-167 (Unit 1), 34-06-328-168 (Unit 2), 34-06-328-169 (Unit 3) and 34-06-328-170 (Unit 4).

Units 20 thru 49, inclusive, in Building 2, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-035 thru 34-06-328-064, inclusive.

Retail Units 1 thru 4, inclusive, in Building 3, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-171 (Unit 1), 34-06-328-172 (Unit 2), 34-06-328-173 (Unit 3) and 34-06-328-174 (Unit 4).

Units 20 thru 49, inclusive, in Building 3, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium

of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-067 thru 34-06-328-096, inclusive.

Retail Units 1 and 2, in Building 4, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-097 (Unit 1) and 34-06-328-098 (Unit 2)..

Units 20 thru 49, inclusive, in Building 4, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-099 thru 34-06-328-128, inclusive.

Retail Units 1 thru 4, inclusive, in Building 5, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book



2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

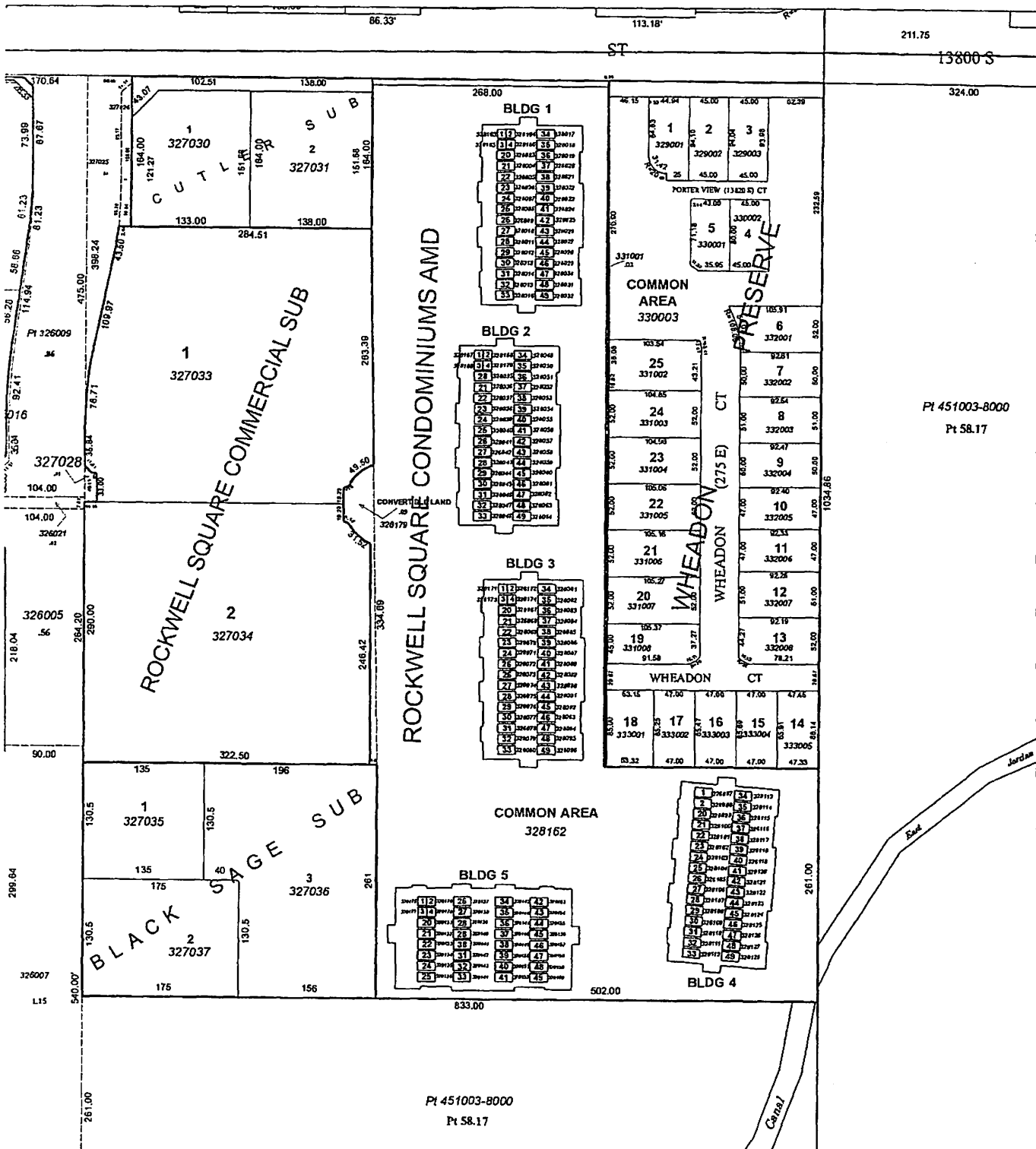
Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-175 (Unit 1), 34-06-328-176 (Unit 2), 34-06-328-177 (Unit 3) and 34-06-328-178 (Unit 4).

Units 20 thru 49, inclusive, in Building 5, contained within the ROCKWELL SQUARE CONDOMINIUMS AMENDED, a Utah condominium project as identified in the Record of Survey Map recorded October 1, 2008 as Entry No. 10532621, in Book 2008, at Page 255 of Plats, (as said Record of Survey Map may have been amended and/or supplemented) and as further defined and described in the Declaration of Condominium of ROCKWELL SQUARE CONDOMINIUMS, recorded July 2, 2008, as Entry No. 10470405, in Book 9623, at Page 8416 (as said Declaration may have been amended and/or supplemented) in the Office of the Recorder of Salt Lake County, Utah.

Together with the appurtenant undivided interest in and to the common areas and facilities more particularly described in said Declaration and any amendments and/or Supplements thereto.

Parcel Identification No's. 34-06-328-131 thru 34-06-328-160, inclusive.



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**AMENDED AND RESTATED  
DECLARATION OF CONDOMINIUM  
AND DECLARATION OF COVENANTS,  
CONDITIONS, AND RESTRICTIONS FOR  
ROCKWELL SQUARE CONDOMINIUMS**

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**AMENDED AND RESTATED  
DECLARATION OF CONDOMINIUM  
AND DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS  
FOR ROCKWELL SQUARE CONDOMINIUMS**

THIS AMENDED AND RESTATED DECLARATION OF CONDOMINIUM AND DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR ROCKWELL SQUARE CONDOMINIUMS (as amended from time to time, this "Declaration") is made as of January 7, 2011, by ROCKWELL HOUSING, LLC, a Utah limited liability company, as successor-in-interest to Rockwell Square, LLC, a Utah limited liability company, (together with its successors and assigns, "Declarant").

**RECITALS**

A. Declarant owns the land located in Salt Lake County, State of Utah, which is more particularly described on Exhibit A attached hereto and incorporated herein.

B. Declarant desires to create a condominium project on such land pursuant to the Utah Condominium Ownership Act, Utah Code Ann. § 57-8-1 through § 57-8-38, as the same may be amended from time to time. The condominium project shall be known as the "Rockwell Square Condominiums" (the "Project" or the "Condominium Project").

C. Declarant deems it necessary and desirable to subject such property and all improvements now or hereafter constructed on such property to the covenants, conditions, restrictions, reservations, easements, assessments, charges, and liens set forth in this Declaration.

D. Declarant's predecessor-in-interest previously recorded that certain Declaration of Condominium and Declaration of Covenants, Conditions and Restrictions recorded on July 2, 2008 as Entry No. 10470405 in Book 9623, beginning on Page 1816 (the "Original Declaration"). Declarant is the owner of all but one of the Units (as defined herein). Pursuant to Section 18.03 of the Original Declaration, Declarant now desires to amend and restate the Original Declaration as provided herein.

**DECLARATION**

In consideration of the foregoing, Declarant hereby declares as follows:

**ARTICLE I  
DEFINITIONS**

**1.01 Basic Definitions.**

As used in this Declaration, the following terms have the meanings given to them in this Section 1.01.

(a) "Act" means the Utah Condominium Ownership Act, Utah Code Annotated § 57-8-1 through § 57-8-41, as the same may be amended from time to time.

(b) "Area" when reference is made to a Unit or Units, means the total number of square feet of the ground or floor surface thereof, rounded to the nearest whole number ending in zero, and computed and determined as follows on the basis of dimensions shown on the Plat. The measurements used in determining Area shall run from the interior surfaces of the walls surrounding the Unit concerned and each separate level, story, or floor contained within or making up the Unit shall be taken into account and, subject to the following provisions, shall augment the Area thereof. So long as it substantially complied with the provisions of this Section and is not arbitrary, Declarant's determination of the Area of a Unit, as set forth in this Declaration or in any amendment hereto shall be conclusive.

(c) "Allocated Interest" means the undivided right, title, and interest (the "Interest") (expressed as a fraction or percentage in this Declaration) in the Common Areas, the Common Expenses, and votes in the Association allocated to each Unit.

(d) "Articles" means the articles of incorporation of the Association, as the same may be amended from time to time.

(e) "Assessment" means a General Assessment, a Special Assessment, a Service Area Assessment, or a Default Assessment levied and assessed pursuant to Article VII below.

(f) "Assessment Lien" has the meaning given to that term in Section 7.08 below.

(g) "Association" means the association of Owners known as Homeowner's Association of Rockwell Square, Inc., a Utah nonprofit corporation, and its successors and assigns.

(h) "Association Documents" means this Declaration, the Articles, the Bylaws, and the Rules and Regulations, as the same may be amended from time to time:

(i) "Building" means the structures constructed, or to be constructed, within the Project, which structures comprise, Retail Buildings, Residential Buildings, and Residential Parking Facilities.

(j) "Bylaws" means the bylaws of the Association, attached hereto and forming a part hereof as Exhibit B, as the same may be amended from time to time.

(k) "Common Elements" means the General Common Elements and the Limited Common Elements.

(l) "Common Expenses" means:

(i) any and all costs, expenses, and liabilities incurred by or on behalf of the Association, including, without limitation, costs, expenses, and liabilities for (A) managing, operating, insuring, improving, repairing, replacing, and maintaining the Common Elements (except for such Common Elements as are separately maintained and repaired by Owners or Sub-Associations pursuant to the terms of this Declaration); (B) providing facilities, services, and other benefits to Owners; (C) administering and enforcing the covenants, conditions, restrictions, reservations, and easements created, hereby including, but not limited to, the Rules and Regulations; (D) levying, collecting, and enforcing the Assessments, charges, and liens imposed pursuant hereto; (E) regulating and managing the Condominium Project; and (F) operating the Association;

(ii) costs, expenses, and liability agreed upon as Common Expenses by the Association or declared to be Common Expenses by this Declaration, the Act or the Association;

(iii) all sums lawfully assessed against the Owners; and

(iv) reserves for any such costs, expenses, and liability.

(m) "Condominium Project" means the real estate condominium project created on the Land by this Declaration, consisting of the Units and the Common Elements, known as the Rockwell Square Condominium Project.

(n) "Condominium Unit" means a Retail Unit or Residential Unit together with:

(i) the Interest in General Common Elements allocated to that Unit;

(ii) the right to the exclusive or nonexclusive use of the General Common Elements and Limited Common Elements allocated to that Unit, if any; and

(iii) the Membership in the Association and/or Sub-Association allocated to that Unit.

(o) "Convertible Space" has the meaning given in Section 57-8-3(13) of the Act and shall include that portion of the Project as so designated on the Plat and further described in Section 3.09 hereof. Pursuant to the Act, all Convertible Space shall be treated as a single Retail Unit unless it is converted pursuant to Section 3.09.

(p) "Declarant" means ROCKWELL HOUSING, LLC, a Utah limited liability company, and its successors and assigns.

(q) "Declarant Control Period" has the meaning given to that term in Section 6.03 below.

(r) "Declaration" means this Amended and Restated Declaration of Condominium and Declaration of Covenants, Conditions, and Restrictions for Rockwell Square Condominiums, as the same may be amended from time to time.

(s) "Default Assessment" has the meaning given to that term in Section 7.06 below.

(t) "Director" means a duly elected or appointed member of the Management Committee.

(u) "First Mortgage" means any Mortgage that is not subordinate to any other monetary lien or encumbrance, except liens for taxes or other liens that are given priority by statute.

(v) "First Mortgagee" means a Mortgagee under a First Mortgage.

(w) "General Assessment" has the meaning given to that term in Section 7.04 below.

(x) "General Common Elements" means (except, particularly, for any of the following contained in a Residential Unit or a Retail Unit) all of the areas of the Condominium Project, other than the Units and the Limited Common Elements. Without limiting the generality of the preceding sentence, the General Common Elements include, without limitation:

(i) the Land;

(ii) all improvements, including without limitation, the foundations, columns, girders, beams, supports, perimeter and supporting walls, utility systems, mechanical systems, sprinkler systems, exhaust, heating and ventilation systems, storage areas, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, chimneys, drainage facilities, yards, gardens, patios, balconies, decks, courtyards, stoops, exits and entrances, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use, and all other parts of the Land necessary or convenient to the existence, maintenance and safety of the Project, or normally in use by two or more Units, except for those Improvements (including, specifically, the structural elements associated with the Residential Units and the Retail Units) that are designated by the Act, by this Declaration, or by the Plat as Units or Limited Common Elements (the General Common Elements include those areas designated as "Common Area" on the Plat; and

(iii) any parcels of real property and improvements and fixtures located thereon (A) that are owned by a Person other than the Association, but in which the Association has rights of use or possession pursuant to this Declaration or a lease, license, easement or other agreement, and (B) that are used or possessed by the Association for the benefit of all Owners.

(y) "Guest" means any family member, employee, agent, independent contractor, lessee, customer or invitee of an Owner.

(z) "Improvement(s)" means the Building, together with any other building, structure or other improvement (including, without limitation, all fixtures and improvements contained therein) located on the Land and within or upon which one or more Units or Common Elements are or will be located.

(aa) "Land" means the real property that Article II of this Declaration submits to the terms of the Act.

(bb) "Limited Common Elements" means the Limited Common Residential, the Limited Common Retail, and the Limited Common Elements designated by this Declaration or the Plat for the exclusive use of one or more Units, but fewer than all of the Units. Without limiting the generality of the foregoing, "Limited Common Elements" include, without limitation,

(i) The mechanical rooms, balconies, elevators and elevator lobbies, and any other physical portion of the Condominium Project depicted on the Plat as Limited Common Elements, Limited Common Residential, or Limited Common Retail.

(ii) Any shutters, awnings, window boxes, windows, doors, doorsteps, porches, balconies, patios, and other apparatus intended to serve a single Unit but located outside the boundaries of such Unit;

(iii) All installations for and all equipment connected with furnishing the Condominium Project with utility service, including, but not limited to, utility systems, mechanical systems and exhaust and ventilation systems;

(iv) Patios, decks, porches, elevators, waiting areas, laundry facilities, storage spaces, entrances, exits, and walkways and other areas and improvements that are designed to serve fewer than all of the Units; and

(v) Any parcels of real property and Improvements and fixtures located thereon (A) that are owned by a Person other than the Association, but in which the Association has rights of use or possession pursuant to this Declaration or a lease, license, easement, or other agreement, and (B) that are used or possessed by the Association for the benefit of Owners of fewer than all of the Units.

If any chute, flue, duct, wire, conduit, bearing wall, bearing column or other structural component, any portion of a mechanical system, or any fixture lies partially within and partially outside of the designated boundaries of a Unit, any portion thereof serving only that Unit is a Limited Common Element allocated solely to that Unit, any portion thereof serving more than one Unit of a particular type (i.e., Residential or Retail) shall be, as the case may be, Limited Common Residential or Limited Common Retail and any portion thereof serving more than one Unit of a different type or any portion of the Common Elements is a part of the General Common

Elements. Nonstructural walls located wholly within a Unit are a part of the Unit in which they are located. Limited Common Elements identified on the Plat as being of a particular type but not specifically designated to the use of a particular Unit are designated for the use of all Units of that particular type (i.e. an area designated "Limited Common Retail" or "Retail Limited Common" on the Plat is for the use of all Retail Units), or if there is only one Unit of that particular type, then that Unit only.

(cc) "Limited Common Retail" means the Limited Common Elements designated in this Declaration or the Plat, if any, for the exclusive use of one or more Retail Units and labeled "Limited Common Retail" on the Plat.

(dd) "Limited Common Residential" means the Limited Common Elements designated in this Declaration or the Plat, if any, for the exclusive use of one or more Residential Units and labeled "Limited Common Residential" or "Residential Parking Facility" on the Plat.

(ee) "Management Committee" means the Association's board of directors that shall also be and have all of the rights, duties, and authority of the management committee described in the Act, except as otherwise expressly provided herein.

(ff) "Majority" regardless of whether capitalized, means the Owners of more than fifty percent (50%) of the aggregate Allocated Interest.

(gg) "Member" shall mean any person holding a Membership in the Association pursuant to this Declaration.

(hh) "Membership" shall mean a Membership in the Association and the rights granted to the Owners and Declarant pursuant to Article V to participate in the Master Association.

(ii) "Mortgage" means any mortgage, deed of trust or other documents pledging any Condominium Unit or interest therein as security for payment of a debt or obligation.

(jj) "Mortgagee" means any person named as a mortgagee or beneficiary in any Mortgage and any successor to the interest of any such Person under a Mortgage.

(kk) "Officer" means a duly elected or appointed officer of the Association.

(ll) "Option to Contract Land" " has the meaning given to that term in Section 3.08 below.

(mm) "Option to Convert Space" " has the meaning given to that term in Section 3.09 below.

(nn) "Option to Withdraw Land" " has the meaning given to that term in Section 3.08 below.

(oo) "Owner" means the Person who is the record holder or legal title to the fee simple interest in any Condominium Unit as reflected in the Salt Lake County Records. If there is more than one record holder of legal title to a Condominium Unit, each record holder shall be an Owner. The term "Owner" includes Declarant to the extent that Declarant is the record holder of legal title to the fee simple interest in a Condominium Unit. Notwithstanding any applicable theory relating to a mortgage, deed of trust, or like instrument, the term "Owner" shall not mean or include mortgagee or a beneficiary or trustee under a deed of trust unless and until such Person has acquired title pursuant to foreclosure or any arrangement or proceeding in lieu thereof.

(pp) "Parking Stall" means each parking stall designated on the Plat or any amendment thereto, including a Residential Parking Stall.

(qq) "Person" means any natural person, corporation, partnership, limited liability company, association, trustee, governmental or quasi-governmental entity or any other entity capable of owning real property under the laws of the State of Utah.

(rr) "Plat" means the condominium plat map entitled "Rockwell Square Condominiums," executed and acknowledged by Rockwell Square, LLC, consisting of six sheets, and prepared by Patrick Harris, a duly registered Utah Land Surveyor holding Certificate No. 286882, and recorded in the Office of the Salt Lake County Recorder on July 2, 2008, as Entry No. 10470401 in Book 9623, beginning on Page 8409, as amended by that condominium plat map entitled "Rockwell Square Condominiums Amended," recorded in the Office of the Salt Lake County Recorder on October 1, 2008, as Entry No. 10532621 in Book 2008, beginning on Page 255, as may be amended or supplemented in accordance with law and the provisions hereof from time to time or any additional Plat that may be recorded with any Supplemental Declaration.

(ss) "Property" shall mean the real property described on Exhibit A.

(tt) "Purchaser" means a Person, other than Declarant or a Successor Declarant, who acquires legal title to the fee simple interest in any Condominium Unit or portion thereof.

(uu) "Record", "Recording", "Recorded", and "Recorder" each have the meaning stated in Utah Code Annotated § 57-3-1 through § 57-3-2, as the same may be amended from time to time.

(vv) "Reserve Analysis" has the meaning given in Section 57-8-7.5 of the Act.

(ww) "Residential Building" means that portion of any Building designated as "Residential" on the Plat or any amendment thereto.

(xx) "Residential Parking Facility" means that, portion of a Building designated as "Residential Parking Facility" on the Plat or any amendment thereto.

(yy) "Residential Parking Stall" means each parking stall assigned to a particular Residential Unit as designated on the Plat or any amendment thereto.



(zz) "Residential Unit" means the one of the Units of a Building that shall be used exclusively for residential purposes in conformity with all laws and ordinances and allocated one (1) or more Residential Parking Stalls as designated on the Plat.

(aaa) "Retail Building" means that portion of any Building designated as "Retail" on the Plat or any amendment thereto.

(bbb) "Retail Unit" means the one of the Units of a Building that shall be used exclusively for retail purposes in conformity with all laws and ordinances each Unit designated as a Retail Unit on the Plat, or any amendment thereto.

(ccc) "Rules and Regulations" means any instrument adopted from time to time by the Association for the regulation and management of the Condominium, as the same may be amended from time to time.

(ddd) "Salt Lake County Records" means the Official Records for Salt Lake County, Utah.

(eee) "Service Area" has the meaning given that term in Section 7.13 below.

(fff) "Service Area Assessment" means those assessment described in Section 7.13 to fund the Service Area Assessments, and any other assessments levied by the Association in connection with a Service Area.

(ggg) "Service Area Committee" means the committee elected by the Owners of the Units in a designated Service Area to act on behalf of such Owners with respect to the services and benefits that the Association provides the respective Service Area.

(hhh) "Service Area Expenses" means all the expenses that the Association incurs or expects to incur in connection with providing benefits or services to a Service Area, including any operating reserve or reserve for repair and replacement of capital items maintained for the benefit of the a Service Area.

(iii) "Share of Common Expenses" means the share of Common Expenses allocated to each Unit in, accordance with the terms and conditions of Section 7.02 below.

(jjj) "Special Assessment" has the meaning given to that term in Section 7.05 below.

(kkk) "Special Declarant Rights" means all rights that Declarant reserves for itself in this Declaration.

(III) "Sub-Association" means the association of Owner's of the Units in one or more Buildings and organized with the written consent of the Management Committee of the Association.

(mmm) "Supplemental Declaration" means a written instrument recorded in the records of the County Recorder of Salt Lake County, Utah which refer to this Declaration and which amends, modifies, or supplements this Declaration in accordance with its terms.

(nnn) "Supplemental Plat" shall mean any amendment to the Plat made in accordance with this Declaration and the Act.

(ooo) "Successor Declarant" means any Person who succeeds to any Special Declarant Right.

(ppp) "Unit" means a physical portion of the Condominium Project, including one or more rooms situated in a Building comprising part of the Condominium Project designated for separate ownership and is designated as a Retail or Residential Unit in Exhibit E attached to this Declaration and incorporated herein and on the Plat, and includes, lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and other material constituting part of the finished surface of a wall, floor or ceiling, spaces, interior partitions, fixtures, and improvements.

(qqq) "Unit Number" means the number, letter, or combination thereof that designates a Unit on the attached Exhibit E and on the Plat.

(rrr) "Withdrawable Land" has the meaning given in Section 57-8-10(5)(b)(i) of the Act and shall include that portion of the Project that may be withdrawn from the Project as a contractible condominium and is described on Exhibit C.

## 1.02 Gender and Number.

Whenever the context of this Declaration so requires:

- (a) words used in the masculine gender shall include the feminine and neuter genders;
- (b) words used in the neuter gender shall include the masculine and feminine genders;
- (c) words used in the singular shall include the plural; and
- (d) words used in the plural shall include the singular.

## ARTICLE II SUBMISSION

### 2.01 Submission.

The Property is hereby submitted to the provisions of the Act as the Land associated with the Rockwell Square Condominium Project.

TOGETHER WITH: (i) all buildings, if any, improvements, and structures situated on or comprising a part of the above-described parcel of real property, whether now existing or hereafter construed; (ii) all easements, rights-of-way, and other appurtenances and rights incident to, appurtenant to, or accompanying said parcel; and (iii) all articles of personal property intended for use in connection with said parcel.

ALL OF THE FOREGOING IS SUBJECT TO: all liens for current and future taxes, assessments, and charges imposed or levied by governmental or quasigovernmental authorities; all patent reservations and exclusions; any mineral reservations of record and rights incident thereto; all instruments of record which affect the above-described Land or any portion thereof, including, without limitation, any mortgage or deed of trust; all visible easements and rights-of-way; all easements and rights-of-way of record; any easements, rights-of-way, encroachments, or discrepancies shown on or revealed by the Plat or otherwise existing; an easement for each and every pipe, line, cable, wire, utility line, or similar facility which traverses or partially occupies the above-described Land at such times as construction of all Improvements is complete; and all easements necessary for ingress to, egress from, maintenance of, and replacement of all such pipes, lines, cables, wires, utility lines, and similar facilities.

RESERVING UNTO DECLARANT, however, such easements and rights of ingress and egress over, across, through, and under the above-described Land and any improvements now or hereafter constructed thereon as may be reasonably necessary for Declarant or for any assignee or successor of Declarant (in a manner which is reasonable and not inconsistent with the provisions of this Declaration): (i) to construct and complete the Buildings and all of the other improvements described in this Declaration or in the Plat recorded concurrently herewith, and to do all things reasonably necessary or proper in connection therewith; and (ii) to improve portions of the Land with such other or additional improvements, facilities, or landscaping designed for the use and enjoyment of all the Owners as Declarant or as such assignee or successor may reasonably determine to be appropriate. If, pursuant to the foregoing reservations, the above-described Land or any improvement thereon is traversed or partially occupied by a permanent improvement or utility line, a perpetual easement for such improvement or utility line shall exist. With the exception of such perpetual easements, the reservations hereby effected shall, unless sooner terminated in accordance with their terms, expire five (5) years after the date on which this Declaration is filed for record in the Salt Lake County Records.

## 2.02 Covenants Running with the Land.

All covenants, conditions, restrictions, reservations, easements, charges, liens, and other provisions of this Declaration are covenants running with the Land, or equitable servitudes, as the case may be. The obligations, burdens and benefits created by this Declaration shall bind and inure to the benefit of Declarant, the Owners, the Association, all other parties having any right, title or interest in the Land or any portion thereof and their respective successors, assigns, heirs, devisees, executors, administrators, and personal representatives.

## 2.03 Statement of Intention.

The condominium project to be created on the Land is hereby created pursuant to and shall be governed by the provisions of the Act.

**ARTICLE III**  
**BUILDING, UNITS, AND COMMON ELEMENTS**

**3.01 The Building.**

(a) The Improvements included in the Condominium Project are now, or will be located, on the Land. The significant Improvements contained in the Condominium Project include: five (5) Buildings, one hundred fifty (150) Residential Units; eighteen (18) Retail Units, and five (5) Residential Parking Facilities, storage areas, asphalt or concrete driveways, and the Common Elements. The location and configuration of the Improvements referred to in the foregoing sentence are depicted on the Plat. The Condominium Project also contains other improvements of a less significant nature that are not depicted on the Plat, such as outdoor lighting, area landscaping and concrete sidewalks and walkways. The Plat shows the number of stories and the number of Units that are contained, or are to be contained, in the Buildings included in the Condominium Project.

(b) The principal materials use or to be used in the construction of the Building are as follows: all load bearing and non-load, bearing walls are wood frame, steel or concrete; the parking level is comprised of reinforced concrete; the ground floor is comprised of reinforced concrete; the above-grade floors are of reinforced concrete or wooden joists covered with plywood or concrete; the roof is of wood framing or concrete covered with single ply roofing asphalt shingles, fluid applied water proofing, or metal roofing; interior walls are surfaced with sheetrock or gypsum board; and exterior walls are surfaced with EFIS, faux stone, siding, and/or pre-cast concrete.

**3.02 Units.**

(a) Declarant hereby creates one hundred fifty (150) Residential Units and eighteen (18) Retail Units within the Condominium Project. The Plat shows the Unit Number of each Unit, its location, dimensions from which its Area may be determined, and the General Common Elements and Limited Common Elements to which it has access. Each Unit shall be capable of being separately owned, encumbered and conveyed. Each Owner of a Unit shall be entitled to the exclusive ownership and possession of such Owner's Unit, subject to the terms and conditions of this Declaration.

(b) No Owner may alter its Unit, subdivide its Unit, or relocate the boundaries between a Unit and an adjacent Unit, except as expressly provided by this Declaration and the Act.

(c) Except as expressly provided to the contrary in this Declaration, the Allocated Interest and the right to use Limited Common Elements allocated to the Unit may not be partitioned or separated from the Unit or any part thereof; provided that this subparagraph shall not prejudice or otherwise affect the rights set forth in Article XIII and Article XIV of this Declaration in the event of casualty or condemnation.

(d) Notwithstanding anything to the contrary contained in paragraphs 3.02(b) and 3.02(c) above or elsewhere in this Declaration:

(i) nothing shall prevent or limit Declarant's exercise or enjoyment of any Special Declarant Right;

(ii) an Owner may grant its rights to use any General Common Element or any Limited Common Element appurtenant to the Owner's Unit to the Owner's Guests.

3.03 Interests in Common Elements.

(a) The Allocated Interest in Common Elements shall be allocated among the Units as set forth in this Section 3.03. The Allocated Interest appurtenant to a Unit shall be expressed as a percentage and calculated in accordance with the following formula:

$$\begin{array}{lcl} \text{Allocated Interest} & & \text{(Area of the Unit)} \\ \text{in Common} & = & \text{(Total Area of All Constructed} \\ \text{Elements} & & \text{Units in Project)} \end{array}$$

In determining the Allocated Interest, Declarant may have made minor adjustments in some or all of the Allocated Interests, which result from a strict application of the formula described in the immediately foregoing sentence for the purpose, but only for the purpose of assuring that the total Allocated Interest equals 100.00%. The Allocated Interests which are allocated to the constructed Units and which are set forth on Exhibit E have been computed in the aforesaid manner. Units that have not yet been constructed shall not be allocated any interest in the Common Elements.

(b) The Allocated Interest allocated to each of the constructed Units of the Condominium Project is set forth on Exhibit E. As additional Buildings are constructed, as contemplated by this Declaration and the Plat, Declarant (without further Association or Owner consent) shall file a Supplemental Declaration describing the re-allocated ownership interest in the Common Elements based upon the number of Units in the constructed Buildings. Said changes in ownership interest shall be reflected in a Supplemental Declaration to be Recorded with the Salt Lake County Recorder as part of the Supplemental Plat. It is contemplated that there may be multiple Supplemental Declarations and Supplemental Plats filed by Declarant and such are hereby expressly authorized. Each Owner of a constructed Unit shall be entitled to a Membership and votes in the Association as provided for in Article V. Assessments and voting rights shall commence as of the date the Declarant Records a Supplemental Declaration. Declarant shall have the right to adjust the resulting ownership interests of all Units in the Common Elements of the Project as may be necessary to assure that the total ownership interest equals 100% as required by the Act.

(c) The Allocated Interest shall have a permanent character and shall not be altered without the express consent of all Owners expressed in an amendment to this Declaration adopted as provided in Section 18.03 hereof. If any Units are added to or withdrawn from the Condominium Project, or if the Area of one, or more Units is increased or decreased, the Allocated Interest for all Units within the Condominium

Project after such addition or withdrawal, increase or decrease shall be recalculated in accordance with the formula set forth in paragraph 3.03 (a) above.

(d) Except as expressly provided to the contrary elsewhere in this Declaration, an Allocated Interest may not be partitioned from the Unit to which it is appurtenant, and any purported conveyance, encumbrance, or transfer of an Allocated Interest made without the Unit to which the Allocated Interest is allocated shall be void. The immediately foregoing sentence shall not prejudice or otherwise affect the rights set forth in Articles XIII and XIV of this Declaration in the event of casualty or condemnation. There shall not be any restriction upon an Owner's right of ingress to and egress from such Owner's Unit.

#### 3.04 Limited Common Elements.

Except as expressly provided to the contrary in this Declaration, the allocation of the Limited Common Elements to the Units as set forth in this Declaration or as shown on the Plat may not be altered without the consent of all Owners whose Units would be affected by such reallocation.

#### 3.05 Separate Taxation of Condominium Units.

Pursuant to the Act, each Condominium Unit, after construction of such Unit, constitutes a separate parcel of real estate and after construction will be separately assessed and taxed.

#### 3.06 Description of Condominium Units.

Any deed, lease, mortgage, deed of trust, or other instrument conveying, encumbering or otherwise affecting a Condominium Unit shall describe the interest or estate substantially as follows:

Residential Unit \_\_\_\_/Retail Unit \_\_\_\_/, contained within the Rockwell Square Condominium Project as the same is identified in the Record of Survey Plat recorded in Salt Lake County, Utah, on \_\_\_\_\_, 20\_\_ as Entry No. \_\_\_\_\_, in Book No. \_\_\_\_\_ at Page \_\_\_\_\_ (as said Declaration may have heretofore been amended or supplemented). TOGETHER WITH the undivided ownership interest in said Project's Common Elements that is appurtenant to said Unit as more particularly described in said Declaration, as may be amended or supplemented from time to time.

Whether or not the description employed in any such instrument is in the above-specified form, however, all provisions of this Declaration shall be binding upon and shall inure to the benefit of any party who acquires any interest in a Condominium Unit. Neither the Allocated Interest, nor the right of exclusive use of the Limited Common Elements, shall be separated from the Unit to which it appertains; and even though not specifically mentioned in the instrument of transfer, such Interest in the Common Elements and such right of exclusive use shall automatically accompany the transfer of the Unit to which they relate.

### 3.07 Interpretation.

In interpreting this Declaration, the Plat or any deed or other instrument affecting a Building or a Unit, or the boundaries of a Building or Unit constructed or reconstructed in substantial accordance with the Plat shall be conclusively presumed to be the actual boundaries rather than the description expressed in the Plat, regardless of settling or lateral movement of a Building, and regardless of minor variance between boundaries shown on the Plat and those of a Building or Unit.

### 3.08 Contractible Land.

Declarant hereby reserves the option, pursuant to Section 57-8-13.8 of the Act, to withdraw some or all of the Withdrawable Land (collectively, the "Option to Withdraw Land") upon the terms and provisions set forth in this Section and the Act. Declarant may exercise the Option to Withdraw Land in its discretion and without limitation, as provided in this Section 3.08. Each Option to Withdraw Land must be exercised no later than seven (7) years from the date of recording this Declaration. The terms and conditions of the Option to Withdraw Land shall be as follows:

(a) The Withdrawable Land includes all those portions of the Project that are more particularly described on Exhibit C, and consists of all or a portion of the Common Elements.

(b) Declarant may withdraw from time to time and at different times, all or any portion or portions of the Withdrawable Land from the Project, so long as such withdrawal is made pursuant to the provisions of this Section 3.08. No assurance is made with regard to which portions of the Withdrawable Land, if any, will be so withdrawn, or the order in which such portions will be withdrawn. In the event the Option to Withdraw Land is exercised with respect to a portion of the Withdrawable Land, such option may subsequently be exercised by Declarant with respect to any other portion of the Withdrawable Land.

(c) Declarant shall not be required to obtain the consent of any Owners or of any other person or entity having any right or interest in all or any portion of the Project prior or subsequent to withdrawing all or portions of the Withdrawable Land.

(d) In order to withdraw all or any portion of the Withdrawable Land, the Declarant shall Record, with regard to the Withdrawable Land or any portion thereof that is being withdrawn from the Project, a Supplemental Declaration describing the withdrawal.

(e) The legal description for the portion of the Project not subject to the Option to Withdraw Land is attached hereto as Exhibit D.

(f) No provision of this Section 3.08 shall be amended without the prior written consent of Declarant so long as it owns or has the right to acquire any Units in the Project.

(g) Each Owner, by execution of a contract for deed or the acceptance of a deed to a Unit in the Project, shall be deemed to have consented to all provisions of this Section 3.08.

### 3.09 Convertible Space.

Declarant hereby reserves the option, pursuant to Section 57 8 13.4 of the Act, to create additional Units (Residential or Retail), and Common Elements within certain portions of the Buildings (collectively, the "Option to Convert Space") upon the terms and provisions set forth in this Section and the Act. Declarant shall have the right to exercise the rights under this Section 3.09 with respect to the portion of the Property to which it holds fee simple title or an option to purchase. The terms and conditions of the Option to Convert Space shall be as follows:

(a) The Convertible Space subject to this Option to Convert Space consists of the property identified in subsection (c) below. The Declarant shall initially own all Units created pursuant to the exercise of the Option to Convert Space. All Units converted to Common Elements must be owned by the Declarant at the time of conversion.

(b) Declarant may convert from time to time and at different times, all or any portion or portions of the Convertible Space into one or more Units (Residential or Retail) and/or Common Elements, so long as such conversion is made pursuant to the provisions of this Section 3.09. No assurance is made with regard to which portions of the Convertible Space, if any, will be so converted, or the order in which such portions will be converted. In the event the Option to Convert Space is exercised with respect to a portion of the Convertible Space, such option may subsequently be exercised by Declarant with respect to any other portion of the Convertible Space.

(c) The Convertible Space includes all those portions of the Project that have been designated on the Plat as Convertible Space, and consists of all or a portion of the ground floor of the Buildings. Any such space converted to Units shall be subject to the provisions of this Declaration. Each Unit created shall be apportioned a share of the Common Expenses attributable to the Project, as provided in Article VII. Each Owner of a Unit or Parcel shall be entitled to Memberships and votes in the Association as provided for in Article V. Assessments and voting rights shall commence as of the date the Declarant Records a Supplemental Declaration. Declarant shall have the right to adjust the resulting ownership interests of all Units in the Common Elements of the Project as may be necessary to assure that the total ownership interest equals 100% as required by the Act. Declarant reserves the right to exercise all other Developmental Rights with respect to any Units created from the Convertible Space.

(d) Declarant shall not be required to obtain the consent of any Owners or of any other person or entity having any right or interest in all or any portion of the Project prior or subsequent to converting all or portions of the Convertible Space into Units (Residential or Retail) or Common Elements.



(e) In order to convert all or any portion of the Convertible Space, the Declarant shall:

(i) Record, with regard to the Convertible Space or any portion thereof that is being converted to Units or Common Elements, a Supplemental Plat showing the location and dimensions of the vertical and horizontal boundaries of each Unit and Common Elements, if any, formed out of the Convertible Space or a portion thereof, and assigning or reassigning any Limited Common Elements that are to be appurtenant to any such Unit. Each such Supplemental Plat shall be certified as to its accuracy and compliance with the requirements of the Act by the engineer or land surveyor who prepared or supervised the preparation of it; and

(ii) Record simultaneously with each Supplemental Plat a Supplemental Declaration describing the conversion. Each such Supplemental Declaration shall assign a Unit Number to each Unit, if any, formed out of the Convertible Space or a portion thereof and shall reallocate to each Unit, on the basis provided herein, the percentage of undivided interest in the Common Elements appertaining to all Units and votes following such conversion. Except as otherwise provided by the Act, each such Supplemental Declaration or Supplemental Plat shall also describe the Limited Common Elements, if any, formed out of the Convertible Space or a portion thereof, showing or designating the Unit or Units to which each is assigned.

(f) No provision of this Section 3.09 shall be amended without the prior written consent of Declarant so long as it owns or has the right to acquire any Units in the Project.

(g) Each Owner, by execution of a contract for deed or the acceptance of a deed to a Unit in the Project, shall be deemed to have consented to all provisions of this Section 3.09.

(h) In accordance with Section 57-8-13.4(3) of the Act, the Convertible Space shall be treated for all purposes as a single Retail Unit, until and unless it is so converted. The Act and this Declaration shall be deemed applicable to the Convertible Space as though the same were a Unit. The Convertible Space shall be assessed its appropriate portion of the Common Expenses related to the Project, and Declarant shall pay the Common Expenses attributable to such Convertible Space.

#### **ARTICLE IV** **THE ASSOCIATION**

##### **4.01 Formation of the Association.**

On or before the date on which Declarant conveys the first Unit to a Purchaser, Declarant shall form the Association.

4.02 Purposes and Powers.

- (a) The Association's purposes are:
  - (i) to manage, operate, insure, construct, improve, repair, replace, alter, and maintain the Common Elements;
  - (ii) to provide certain facilities, services, and other benefits to the Owners;
  - (iii) to administer and enforce the covenants, conditions, restrictions, reservations, and easements created hereby;
  - (iv) to pay Common Expenses and Service Area Expenses;
  - (v) to levy, collect and enforce the Assessments, charges and liens imposed pursuant hereto;
  - (vi) to enter into agreements with other Persons, including, without limitation, easements, licenses, leases, and other agreements with one or more condominium associations, with or without the vote or consent of the Owners, Mortgagees, insurers, or guarantors of Mortgages, or of any other Person, including but not limited to, those which contemplate the sharing of expenses among the Association and other condominium associations for facilities and services that serve the Association and other condominium associations;
  - (vii) to take any action that it deems necessary or appropriate to protect the interests and general welfare of Owners;
  - (viii) to regulate and manage the Condominium Project, including the adoption of Rules and Regulations; and
  - (ix) to execute and record, on behalf of the Owners, any amendment to this Declaration or the Plat which has been approved by the vote or consent necessary to authorize such amendment.
- (b) Unless expressly prohibited by law or any of the Association Documents, the Association may:
  - (i) take any and all actions that it deems necessary or advisable to fulfill its purposes;
  - (ii) exercise any powers conferred on it by the Act or any Association Document; and
  - (iii) exercise all powers that may be exercised in Utah by nonprofit corporations.

(c) Without in any way limiting the generality of paragraph 4.02(b) above, the Association may, but is not obligated to:

(i) to the extent not provided by a public, quasi-public or private utility provider, provide certain facilities and services to the Owners, such as (A) recreational facilities and services, (B) water, sewer, propane, electric, cable television, or other utility services, and (C) trash collection facilities and services;

(ii) acquire, sell, lease, and grant easements over, under, across, and through Common Elements which are reasonably necessary to the ongoing development and operation of the Condominium Project;

(iii) borrow monies and grant security interests in the Common Elements and in the assets of the Association as collateral therefore;

(iv) make capital improvements, repairs, and replacements to Common Elements; and

(v) hire and terminate managers and other employees, agents, and independent contractors.

(d) In the exercise of its power to adopt Rules and Regulations, the Association shall not adopt any Rule or Regulation that interferes with:

(i) the use of a Retail Unit or Residential Unit for usual and customary purposes otherwise permitted by law or any of the Association Documents;

(ii) the pedestrian access provided for in Section 11.09 hereof;

(iii) snow removal, maintenance, and repair of the roof; or

(iv) unreasonably impede Declarant's right to develop the Property.

(e) By a majority vote, the Management Committee may, from time to time and subject to the provisions of this Declaration, adopt, amend and repeal the Rules and Regulations. The Rules and Regulations may restrict and govern the use of any area of the Project by any Owner or Guest; provided, however, that the Rules and Regulations shall not discriminate among Members and shall be consistent with the Association Documents. The Rules and Regulations shall not restrict the Owner of any Retail Unit from operating as permitted by the zoning. Any Rule or Regulation that affects only the Owners of the Retail Units shall be approved by all Directors appointed by the majority vote of the Owners of the Retail Units.

#### 4.03 Association Documents.

(a) This Declaration and the Plat create the Condominium Project and set forth certain covenants, conditions, restrictions, reservations, easements, assessments, charges, and liens applicable to the Land. The Articles create the Association. The

Bylaws provide for the regulation and management of the Association, and the Rules and Regulations provide for the regulation and management of the Condominium Project.

(b) If there is any conflict or inconsistency between the terms and conditions of this Declaration and the terms and conditions of the Articles, the Bylaws, or the Rules and Regulations, the terms and conditions of this Declaration shall control. If there is any conflict or inconsistency between the terms and conditions of the Articles and the terms and conditions of the Bylaws or the Rules and Regulations, the terms and conditions of the Articles shall control. If there is any conflict or inconsistency between the terms and conditions of the Bylaws and the terms and conditions of the Rules and Regulations, the terms and conditions of the Bylaws shall control.

#### 4.04 Books and Records.

The Management Committee, or manager, if any, shall keep detailed, accurate records in chronological order, of receipts and expenditures affecting the Common Elements, specifying and itemizing the Common Expenses and any other expenses incurred. Upon request, the Association shall allow Owners, mortgagees, and their respective agents to inspect current copies of the Association Documents and the books, records, budgets, and financial statements of the Association during normal business hours and under other reasonable circumstances. The Association may charge a reasonable fee for copying such materials.

### ARTICLE V MEMBERSHIP AND VOTING

#### 5.01 Membership.

Every Person who is the Owner of a Unit, including Declarant, shall be subject to Assessments and shall be a Member of the Association. Each such Owner of a Unit shall have one Membership for each separate Unit owned by such Owner. There shall be no fractional Memberships. No Memberships shall be allocated to Common Elements. Each such Membership shall be appurtenant to and may not be separated from ownership of the Unit to which the Membership is attributable. All Memberships shall be shared by any joint Owners of, or Owners of undivided interests in a Unit. Tenants or lessees shall not be Members of the Association. The Declarant shall be a Member of the Association with voting rights until the expiration of the Declarant Control Period, pursuant to Section 6.03. Thereafter, Declarant shall be a Member so long as Declarant owns any Units within the Project. Notwithstanding the foregoing, Memberships shall only be allocated to constructed Units, and no Membership shall be allocated to a Unit prior to construction.

#### 5.02 Voting.

(a) At any meeting of the Association, the Allocated Interest allocated to a Unit may be voted in connection with issues presented to the Owners for vote.

(b) The votes allocated to the constructed Units of the Condominium Project are equal to the Allocated Interests set forth on Exhibit E.

(c) If any Units are added to or withdrawn from the Condominium Project and as Units are constructed, or the Area of one or more Units is increased or decreased, the total number of votes allocated to all Memberships and the allocation thereof after such addition, withdrawal, increase or decrease shall be adjusted so that such votes at all times remain equal to the Allocated Interest appurtenant to such Unit.

(d) Each Unit shall be entitled to the number of votes allocated to it in accordance with paragraphs 5.02(a), (b) and (c) above, regardless of the number of Owners of the Unit. If the Owners of a Unit cannot agree among themselves as to how to cast their votes on a particular matter, they shall lose their right to vote on such matter. If any Owner casts a vote representing a particular Unit, it will thereafter be presumed to all purposes that the Owner was acting with the authority and consent of all other Owners with whom such Owner shares the Unit, unless objection thereto is made by an Owner of that Unit to the Person presiding over the meeting at the time the vote is cast. If more than the number of allocated votes is cast for any particular Unit, none of such votes shall be counted and all of such votes shall be deemed null and void other than to determine whether a quorum exists.

(e) Each Owner, by acceptance of the deed to such Owner's Unit, covenants and agrees that it shall exercise its voting rights granted hereunder in good faith and in a manner that deals fairly and reasonably with all those having an interest in the Project.

(f) In any case in which the Act or this Declaration requires the vote of a stated percentage of the Owners or approval of an act or transaction, such requirement shall be fully satisfied by obtaining, with or without a meeting, consents in writing to such transaction from Owners who collectively hold at least the stated percentage of required votes. Such written consents shall be subject to the following conditions:

(i) all necessary consents must be obtained prior to the expiration of one hundred twenty (120) days after the first consent is given by any Owner;

(ii) any change in ownership of a Condominium Unit which occurs after consent has been obtained by the Owner having an interest therein shall not be considered or taken into account for any purpose; and

(iii) when consent from one Owner having an interest in a Unit is secured when there is more than one Owner, it will be presumed that such Owner was acting with the authority and consent of all other Owners with whom such Owner shares the Unit, unless objection thereto is made in writing by another Owner, in which case the consent of none of such Owners shall be effective.

## **ARTICLE VI**

### **MANAGEMENT COMMITTEE**

#### **6.01 Number and Election of Directors.**

During the Declarant Control Period, the Management Committee shall consist of three (3) Directors. Following the Declarant Control Period, the Management Committee shall consist

of five (5) Directors, two (2) of whom shall be appointed by the majority vote of the Owners of the Retail Units and three (3) of whom shall be appointed by the majority vote of the Owners of the Residential Units. At the first annual meeting after the expiration of the Declarant Control Period, one (1) director appointed by the Owners of the Retail Units shall be appointed for a term of two years, and two (2) directors appointed by the Owners of the Residential Units shall be appointed for a term of two years, and the remaining directors shall be appointed for a period of one year. Subject to the terms and conditions of Sections 6.03 and 6.04 below, each Director will hold office for a term of two (2) years and the Owners shall appoint the Directors.

(a) Except as provided in this Declaration, the Articles and the Bylaws, the Management Committee may act on behalf of the Association in all instances.

(b) The Management Committee may not act on behalf of the Association to:

- (i) amend this Declaration;
- (ii) terminate the Association, this Declaration or the Condominium;
- (iii) elect Directors to the Management Committee; or
- (iv) determine the qualifications, powers, and duties, or terms of office, of Directors.

#### 6.02 Declarant Control Period.

(a) Subject to the terms and conditions of paragraphs 6.03(b) and (c) below, but notwithstanding anything else to the contrary contained in this Declaration or in any other Association Document, Declarant shall have the exclusive right to appoint and remove all Directors and Officers during the Declarant Control Period. The phrase "Declarant Control Period" means the period commencing on the date on which this Declaration is Recorded, and ending on the first to occur of the following:

- (i) six (6) years from the date that the Declaration is Recorded, or
- (ii) the date upon which Units representing seventy-five percent (75%) of the total Interests in the Common Elements have been conveyed to Purchasers.

(b) Declarant may voluntarily surrender its right to appoint and remove Officers and Directors prior to the expiration of the Declarant Control Period, but, in that event, Declarant may require, for the remainder of the Declarant Control Period, that specific actions of the Association or the Management Committee, as described in a recorded instrument executed by Declarant, be approved by the Declarant before they become effective.

(c) During the thirty (30) day period immediately preceding the date on which the Declarant Control Period expires, the Owners shall appoint a Management Committee of five (5) Directors as set forth in Section 6.01 above consisting of Owners or designated representatives of Owners. Directors shall take office upon appointment.

(d) No management contract, lease of recreational areas or facilities, or any other contract or lease designed to benefit the Declarant which was executed by or on behalf of the Association or the Unit Owners as a group shall be binding after the expiration of the Declarant Control Period unless renewed or ratified by the consent of a Majority of the votes allocated to the Units as provided in Section 5.02(b).

**6.03 Removal of Directors.**

(a) During the Declarant Control Period, Directors appointed by Declarant may be removed, with or without cause, solely by Declarant.

(b) After the expiration of the Declarant Control Period, Directors may be removed, with or without cause, by the vote of the Owners who appointed such Director.

**6.04 Replacement of Directors.**

(a) Vacancies on the Management Committee created by the removal, resignation or death of a Director appointed by Declarant shall be filled by a Director appointed by Declarant.

(b) A vacancy on the Management Committee created by the removal, resignation or death of a Director appointed by the Owners shall be filled by a Director appointed by the Owners pursuant to the provisions of the Bylaws of the Association.

(c) Any Director appointed pursuant to this Section 6.05 shall hold office for the remainder of the unexpired term of the Director that Director replaced.

**6.05 Management Committee Liability.**

No Director shall be liable to the Owners for any mistake in judgment, for negligence, or on other grounds, except for such Director's own individual and willful misconduct or bad faith. The Owners and Association shall indemnify and hold harmless each Director from and against all liability to third parties arising out of any contract made by the Management Committee on behalf of the Association or Owners, unless such contract was made in bad faith or contrary to the provisions of the Act or this Declaration. The liability of an Owner arising out of the foregoing indemnification shall be limited to the total liability concerned multiplied by such Owner's Allocated Interest.

**ARTICLE VII**  
**ASSESSMENTS, COMMON EXPENSES, BUDGETS AND LIENS**

**7.01 Obligations for Assessments.**

(a) Each Owner, by accepting a deed to a Unit (regardless of whether it shall be expressly stated in such deed), shall be deemed to have covenanted and agreed, to pay to the Association all:

(i) General Assessments;

- (ii) Special Assessments;
- (iii) Default Assessments; and
- (iv) Other charges,

that the Association is required or permitted to levy or impose on such Owner or such Owner's Unit pursuant to this Declaration or any other Association Document, including any Service Area Assessments as may be assessed pursuant to Section 7.13 below.

(b) Notwithstanding the definition of the term "Owner":

(i) a Person who acquires a Unit in a foreclosure sale shall be personally liable for all Assessments and other charges that the Association is required or permitted to levy or impose on that Unit or on the Owner of that Unit on or after the date of the foreclosure sale; and

(ii) a Person who acquires a Unit by deed-in-lieu of foreclosure shall be personally liable for all Assessments and other charges that the Association is required or permitted to levy or impose on that Unit or on the Owner of that Unit on or after the date on which the Owner of the Unit executes the deed-in-lieu of foreclosure.

(c) No Owner shall be exempt from liability for any Assessment or other charges by waiving the use or enjoyment of any Common Element or by abandoning a Unit against which such Assessments or other charges are made.

(d) Each Owner shall be personally liable for all Assessments and other charges levied on such Owner or such Owner's Unit during the period of such Owner's ownership of the Unit. If there is more than one Owner of a Unit, each Owner shall be jointly and severally liable with the other Owners of the Unit for all Assessments and other charges levied on the Unit or any Owner of the Unit. In a voluntary conveyance, the grantee of a Unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor without prejudice to the grantee's rights to recover from the grantor the amount of the Assessment paid by the grantee.

(e) Each Assessment or other charge, together with interest and penalties thereon and all costs and expenses incurred by the Association to collect such Assessment or other amount, including all fees and disbursements of attorneys, accountants, appraisers, receivers, and other professionals engaged by the Association in connection therewith, may be recovered by a suit for a money judgment by the Association without foreclosing or waiving any Assessment Lien securing the same.

#### 7.02 Shares of Common Expenses.

(a) Except as otherwise set forth in this Declaration, the Association's Common Expenses shall be allocated among the Units in accordance with the Allocated Interest allocated to such constructed Units (the "Shares of Common Expenses").



(b) Until the Association levies an Assessment, Declarant shall pay all Common Expenses.

**7.03 Budgets.**

(a) Prior to the first levy of a General Assessment, and thereafter on or before October 1 of each calendar year, the Management Committee shall adopt a proposed annual budget for the Association for the following calendar year that Sets forth:

(i) the Management Committee's estimates of Common Expenses for the next calendar year, taking into account any default or surplus realized for the current calendar year and any amounts as may be necessary to fund the reserve provided for in Section 7.11 of this Declaration;

(ii) the amount of funds for such Common Expenses that the Management Committee proposes to raise through General Assessments; and

(iii) the amount of funds for such Common Expenses that the Management Committee proposes to raise through Special Assessments.

(b) Within thirty (30) days after adopting a proposed annual budget, the Management Committee shall deliver a summary of the proposed annual budget to the Owners and set a date for a meeting of the Owners to consider the proposed annual budget. The date of such meeting shall not be less than fourteen (14) days nor more than sixty (60) days after the delivery of the summary of the proposed annual budget to the Owners. Unless the proposed budget is rejected at the meeting of the Owners by a vote of at least seventy-six percent (76%) of the votes allocated to all Units, the proposed budget shall be deemed approved. If the proposed annual budget is rejected, the annual budget last approved by the Owners shall be deemed renewed for the next calendar year and shall remain in full force and effect until the Owners ratify a subsequent annual budget proposed by the Management Committee.

(c) If the Management Committee deems it necessary or advisable to amend an annual budget that has been ratified by the Owners under paragraph 7.03(b) above, the Management Committee may adopt a proposed amendment to the annual budget, deliver a summary of the proposed amendment to all Owners and set a date for a meeting of the Owners to consider ratification of the proposed amendment. The date of such meeting shall not be less than fourteen (14) days nor more than sixty (60) days after the delivery of the summary of the proposed amendment. Unless the proposed amendment is rejected at the meeting of the Owners by a vote of at least seventy-six percent (76%) of the votes allocated to all Units, the proposed amendment shall be deemed approved.

**7.04 General Assessments.**

(a) After the Management Committee has adopted an annual budget pursuant to paragraph 7.03(b) above, the Association shall levy an assessment for Common Expenses (a "General Assessment") on each constructed Unit. The amount of the General Assessment levied against a Unit shall equal the product obtained by multiplying:

(i) the amount set forth in the annual budget adopted by the Management Committee as the amount of Common Expenses to be raised by General Assessments, by

(ii) that Unit's Allocated Interest.

(b) The Owners shall pay the General Assessments levied against their respective Units in such periodic installments as may be required by the Association.

(c) If the Management Committee adopts an amendment to the General Assessment portion of an annual budget pursuant to paragraph 7.03(c) above, the amount of the General Assessment levied against each Unit shall be adjusted accordingly, as shall the amount of each Owner's periodic installments.

(d) If the Management Committee fails to adopt an annual budget for any calendar year prior to January 1 of that calendar year, the Owners shall continue to pay periodic installments of the General Assessment to the Association at the rate payable during the prior calendar year until such time as the Management Committee adopts a new annual budget for the then current calendar year. Once the Management Committee adopts a new annual budget, the Association shall levy against each Unit the General Assessment for the then current calendar year and each Owner's periodic installments shall be adjusted as necessary to pay the new General Assessment in equal periodic installments over the remainder of such calendar year, giving the Owners credit, in such manner as the Management Committee deems necessary or appropriate, for any installments that the Owners have previously paid to the Association during such calendar year.

(e) The failure of the Association to levy a General Assessment for any calendar year shall not be deemed a waiver, modification or release of an Owner's liability for the Share of Common Expenses allocated to such Owner's Unit.

(f) The Management Committee may approve the formation of a Sub-Association, which approval shall not be unreasonably withheld, upon the request of the Owners of Units in one or more Buildings.

#### 7.05 Special Assessments.

(a) The Assessments that the Association may levy pursuant to this Section 7.05 are referred to in this Declaration as "Special Assessments."

(b) Notwithstanding anything to the contrary contained in Section 7.04 above, if the Association determines that an Assessment is required to fund immediately any Common Expense attributable to the Common Elements, the Association shall amend the budget in accordance with Section 7.03 and thereafter levy an Assessment for such Common Expense against the constructed Units in proportion to the Allocated Interest.

(c) Each Special Assessment levied against any Unit shall be shown on an annual budget, or an amendment to an annual budget, adopted by the Management

Committee pursuant to Section 7.03 above and shall be paid as and when required by the Association. Nothing in this Section 7.05 shall be deemed to require the Association to adopt an annual budget, or an amendment to an annual budget, in contravention, of the voting requirements set forth in Section 7.03.

#### 7.06 Default Assessments.

(a) Notwithstanding anything to the contrary contained herein, if any Common Expense is caused by:

(i) the negligence or misconduct of an Owner or an Owner's Guest; or

(ii) a violation of any covenant or condition of an Association Document by an Owner or an Owner's Guest, the Association may levy an Assessment for such Common Expense against such Owner's Unit. Any such Assessment levied by the Association and each fine, penalty, fee, or other charge imposed upon an Owner for the Owner's violation of any covenant or condition of any Association Document are each referred to herein as a "Default Assessment."

(b) Default Assessments need not be shown on an annual budget, or on an amendment to an annual budget, adopted by the Management Committee pursuant to Section 7.03 above.

(c) With respect to any Default Assessment, or portion thereof, levied other than as a late charge, the Owner of the Unit against which the Association seeks to levy the Default Assessment shall be provided notice and an opportunity to be heard. Owners of Units against which Default Assessments have been levied shall pay such Default Assessments as and when required by the Association.

#### 7.07 Assignment of Assessments.

The Association shall have the unrestricted right to assign its right to receive assessments and other future income, either as security for obligations of the Association or otherwise, on the condition that any such assignment is approved by a Majority of the votes allocated to Units represented at a meeting at which a quorum is present.

#### 7.08 Assessment Lien.

(a) The Association shall have a lien on each Unit for any Assessment levied against that Unit and for any fines, late charges, penalties, interest, and attorneys' fees, disbursements and costs of collection imposed against the Owner of such Unit under any Association Document (the "Assessment Lien"). The Assessment Lien shall secure all of the foregoing obligations of an Owner from the time such obligations become due. If an Assessment is payable in installments, the Assessment Lien shall secure each installment from the time it becomes due, including the due date set by any valid Association acceleration of Installment obligations.

(b) An Assessment Lien shall constitute a lien upon the Owner's Unit, and, upon the Recording of a notice of lien by the Management Committee or manager, if any, it is a lien prior to all other liens and encumbrances on a Unit, recorded and unrecorded except:

(i) encumbrances on the interest of an Owner recorded prior to the date such notice is recorded which by law would be a lien prior to subsequently recorded encumbrances; and

(ii) liens for real estate taxes and special assessment liens on the Unit in favor of any governmental assessing unit or special improvement district; and

(c) Notwithstanding the terms and conditions of subparagraph 7.08(b) above, an Assessment Lien shall not be prior to a First Mortgage recorded before the date on which the Assessment sought to be enforced became delinquent.

(d) An Assessment Lien is extinguished unless proceedings to enforce the Assessment Lien are instituted within six (6) year after the full amount of the Assessment secured thereby becomes due. Suit to recover a money judgment for unpaid Assessments is maintainable without foreclosing or waiving the lien securing it.

(e) This Section 7.08 does not prohibit actions or suits to recover sums secured by an Assessment Lien or the Association from taking a deed in lieu of foreclosure.

(f) In any action by the Association to collect Assessments or to foreclose an Assessment Lien for unpaid Assessments, the court may appoint a receiver of the Owner to collect all sums alleged to be owed by the Owner prior to or during the pendency of the action, including, but not limited to, all costs and expenses of such proceedings, reasonable attorneys' fees, and a reasonable rental for the Unit. A court may order the receiver to pay any sums held by the receiver to the Association during the pending of the action to the extent of the Association's Assessments.

(g) An Assessment Lien may be foreclosed in like manner as a deed of trust or mortgage on real estate or in any other manner permitted by law. Periodic Assessments shall be payable during the period of foreclosure of an Assessment Lien.

#### 7.09 Waiver of Homestead Exemptions.

To the fullest extent permitted by law, by acceptance of the deed or other instrument of conveyance of a Unit, each Owner, irrevocably waives the homestead exemption provided by the Utah Exemptions Act, Utah Code Ann. § 78B-5-501 through § 78B-5-513 as amended from time to time, as the same may apply to the Assessment Lien.

#### 7.10 Estoppel Certificates: Notices to Mortgagees.

(a) The Association shall furnish to an Owner or to a Mortgagee or its designee upon written request, delivered personally or by certified mail, first-class

postage prepaid, return receipt requested, to the Association's registered agent, and payment of a reasonable fee not to exceed the amount provided for in the Act, a statement setting forth the amount of unpaid Assessments currently levied against such Owner's Unit. The statement shall be furnished within ten (10) calendar days after receipt of the request and is binding on the Association, the Management Committee and every Owner in favor of all Persons who rely upon such statement in good faith. If no statement is finished to the Owner, the Mortgagee or their designee, delivered personally or by certified mail, first-class postage prepaid, return receipt requested, to the inquiring party, then the Association shall have no right to assert the priority of its Assessment Lien upon the Unit for unpaid Assessments that were due as of the date of the request.

(b) If a First Mortgagee delivers to the Association a written request for notice of unpaid Assessments levied against a Unit subject to a First Mortgage held by that First Mortgagee, the Association shall report to the First Mortgagee any unpaid Assessments levied against such Unit that remain unpaid for more than sixty (60) days after the same shall have become due. The First Mortgagee may pay any such unpaid Assessment, together with any and all costs and expenses incurred with respect to the Assessment Lien securing such unpaid Assessment, and upon such payment, such First Mortgagee shall have a lien on the Unit for the amounts paid with the same priority as a lien of the First Mortgage held by such First Mortgagee.

#### 7.11 Reserve Fund.

(a) The Association shall maintain a reserve fund for Common Expenses. The reserve fund shall include such amounts as the Management Committee may deem proper for general working capita, for a general operating reserve, and for a reserve fund for replacements and major maintenance or capital replacement, and will be funded as follows. At the closing of the sale of a Unit by Declarant to a Purchaser, the Purchaser shall pay to the Association an amount equal to the Association's estimate of three (3) months of Common Expenses for the fiscal year in which the sale of the Unit occurs. Thereafter, the Association may increase the reserve fund or replace funds withdrawn from the reserve fund with funds collected through Assessments.

(b) Payments by Purchasers to the Association under paragraph 7.11(a) above shall not be credited against, or relieve Purchasers from, their obligation to pay other Assessments levied against Units by the Association.

(c) Upon the sale of a Unit from one Owner to another, the Association shall not be obligated to return to the transferor any funds held in reserve, but the transferor shall be entitled to an appropriate credit from its transferee.

#### 7.12 Reserve Analysis.

The Association shall cause to be conducted a Reserve Analysis within five (5) years of Recording this Declaration, and thereafter no less frequently than every five years, or as otherwise required by Section 57-8-7.5 of the Act.

7.13 Service Area: Expenses and Assessments.

(a) Declarant may, in its discretion, designate certain Units as belonging to a "Service Area" in order to receive services from the Association that it does not provide to all Units within the Project. Following the expiration of the Declarant Control Period, the Management Committee may designate a Service Area. For example, Declarant contemplates there may be amenities constructed as Limited Common Residential that benefit only the Residential Units and not the Retail Units. In such event, Declarant or the Management Committee may deem it appropriate to designate the Residential Units as a Service Area to use such amenities and pay for costs and expenses related to the maintenance of such amenities. By way of further example, if the Declaration, or later the Management Committee, determines the Retail Units require a different level of maintenance of the Limited Common Retail, the Declarant or Management Committee could designate the Retail Units as a Service Area.

(b) If a Service Area is designated, the Owners of Units within the Service Area shall elect a Service Area Committee in accordance with the Bylaws to represent and act on behalf of the Owners of such Units with respect to the services and benefits that the Association provides the Service Area. The Service Area Committee shall coordinate with the Management Committee regarding matters affecting the Service Area. The Service Area Committee may consist of as few as three (3) and as many as five (5) members.

(c) If a Service Area is designated, the Association shall provide certain services to such Service Area as deemed appropriate by the Management Committee (collectively, the "Services"). An increase or change in such Services shall require approval of the Service Area Committee.

(d) The Service Area Expenses shall include, without limitation, all expenses that the Association incurs or expects to incur in connection with provision of the Services. Service Area Expenses may include a reasonable charge in such amount, as the Management Committee deems appropriate, provided that any such administrative charge is applied at a uniform rate per Unit in the Service Area.

(e) Each Owner of a Unit in a Service Area, including Declarant for each Unit that it owns in a Service Area, shall be liable for a proportionate share of the Service Area Expenses, which shall be levied as "Service Area Assessments". Except as otherwise provided herein, Service Area Assessments shall be allocated equally among the Units within the Service Area. All amounts the Association collects as Service Area Assessments shall be held in trust for, and expended solely for the benefit of, the Service Area and shall be accounted for separately from the Association's general funds. The Management Committee shall address Service Area Expenses in the budget as described above, and the Association shall have all collection, lien and foreclosure rights in connection with Service Area Assessments as granted the Association in connection with Common Expenses as set forth in this Article VII.

**ARTICLE VIII**  
**UTILITY AND OTHER SERVICES**

**8.01 Water, Sewer, Propane, Electric, and Trash Removal Services.**

(a) It is initially contemplated that natural gas, electric, water, and sewer services shall be separately obtained by each Owner and that all such services will be separately metered and billed to such Unit by the utility company or other party furnishing such services. The charges incurred by the Owners of Units for such services shall not be a part of the Common Expenses of the Condominium Project.

(b) All water, sewer, natural gas, and electric services furnished to the Condominium Project that are separately metered and billed to an individual Unit by the utility company or other party furnishing such services shall be paid for by the Owner of the Unit to which such utility is metered. All other: water, sewer, natural gas, trash removal and electric services shall be a part of the Common Expenses and shall be allocated by the Association among the Units and charged to the Owners in accordance with their Shares of Common Expenses.

(c) Each Owner shall ensure that its Unit is sufficiently heated to prevent the freezing of water and sewer lines serving the Condominium Project.

**8.02 Cable Television and Internet.**

(a) If a Building is wired for cable and/or satellite television services, and/or internet services, each Owner may elect to receive such services for its Unit and the Limited Common Elements appurtenant thereto through the providers for the Building and will be responsible for the charges in connection with such services as provided below. An Owner may not elect to receive services from outside providers, unless such providers require no additional installation of equipment or wiring.

(b) All cable and/or satellite television services and internet services furnished to the Condominium Project which are separately metered and billed to an individual Unit by the cable company, satellite company, or other party furnishing such services shall be paid for by the Owner of the Unit to which such services are metered and shall be paid directly to the provider of such services. All other cable and satellite television services and internet services shall be a part of the Common Expenses and shall be allocated by the Association among the Units and charged to the Owners in accordance with their Shares of Common Expenses. The Declarant, or following the expiration of the Declarant Control Period, the Association, may enter into a bulk services contract with the provider of cable and/or satellite television services and internet services to furnish such services to the Units. In such event, such services shall be a part of the Common Expenses and shall be allocated by the Association among the Units and charged to the Owners in accordance with their Shares of Common Expenses.

### 8.03 Telephone.

(a) If an Owner elects to obtain telephone services for its Unit and the Limited Common Elements designed to serve only its Unit, such Owner shall be responsible for obtaining such services and shall pay all costs, expenses, fees, rates and other charges incurred in connection therewith, including, without limitation, any connection fees, directly to the provider of such services.

(b) The Association shall determine what, if any, telephone services are necessary for the General Common Elements that serve all of the Units and shall be responsible for obtaining those services, including two telephone lines designated for fire protection and elevator service uses. The Common Expenses incurred by the Association for those services shall be allocated among the Units in accordance with their proportionate Shares of Common Expenses.

### 8.04 Other Utilities.

If the Association incurs Common Expenses for any utility service not described above, or if the manner of providing or metering any utility service described above changes from the manner in which such service is provided or metered as of the date of this Declaration, the Association may allocate the Common Expenses incurred for such new utility service or changed utility service in any reasonable and equitable manner consistent with the Act.

## ARTICLE IX MAINTENANCE OF COMMON ELEMENTS AND UNITS

### 9.01 Maintenance of Common Elements.

Except as otherwise provided in this Declaration, the Association, or its duly designated agent, shall maintain the General Common Elements and the other Association property in good order and condition and shall otherwise manage and operate the General Common Elements as it deems necessary or appropriate. The Management Committee shall have the irrevocable right to have access to each Unit and appurtenant Limited Common Elements from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of the General Common Elements or for making emergency repairs necessary to prevent damage to the General Common Elements or to another Unit or Units. In addition, the Association shall ensure that all interior General Common Elements are sufficiently heated to prevent the freezing of water and sewer lines serving the Condominium Project. Without limiting the foregoing, the Association may:

- (a) construct, modify, add to, repair, replace or renovate any improvements that are located on or constitute a part of any General Common Element;
- (b) plant, remove, and replace trees, shrubs and other vegetation on any General Common Element;
- (c) place, maintain, and replace signs upon any General Common Element;



(d) adopt and enforce Rules and Regulations regulating the use of General Common Elements; and

(e) take any other actions as the Association deems necessary or advisable to protect, maintain, operate, manage, or regulate the use of the General Common Elements.

9.02 Maintenance of Units and Limited Common Elements.

Each Owner, at such Owner's sole cost and expense, shall maintain in good order and repair its respective Unit and all structural elements, utility facilities, lines, ducts, and other such apparatus (including all fixtures located therein) serving solely such Unit. The Owners of the Retail Units and Residential Units in any one Building, shall separately maintain, clean, repair, and generally keep in good order and operating condition the Limited Common Elements serving solely, respectively and as the case may be, the Retail Units and Residential Units in such Building; provided further, that if certain Limited Common Elements are designated for use by multiple types of Unit Owners (e.g. Residential and Retail), then such Unit Owners shall collectively maintain, clean, repair, and generally keep in good order and operating condition the Limited Common Elements serving such Units. Each Owner shall separately maintain, clean, repair, and generally keep in good order and operating condition the Limited Common Elements serving solely such Owner's Unit. The Association shall have no obligation regarding maintenance, repair, or care that is required to be accomplished by any Owner or group of Owners. Nothing in this Declaration shall prohibit one or more groups of Owners from forming a Sub-Association to maintain and care for shared Limited Common Elements.

9.03 Mechanic's Liens and Indemnification.

No labor performed or materials furnished and incorporated into a Unit with the consent or at the request of an Owner or an agent, contractor or subcontractor of an Owner shall be the basis either for filing a lien against the Unit of any other Owner not expressly requesting or consenting to the same, or against the Common Elements. Notwithstanding the foregoing, labor performed or materials furnished for the Common Elements, if authorized by the Owners, the manager or the Management Committee in accordance with this Declaration, the Bylaws, the Rules and Regulations, or the Act, shall be deemed to be performed or furnished with the express consent of each Owner and shall be the basis for filing a lien pursuant to applicable law. Payment for any such lien shall be made as provided in the Act. Each Owner shall indemnify and hold harmless each of the other Owners and any Mortgagee from and against all liability arising from any claim or lien against the Unit of any other Owner or against the Common Elements for construction performed or for labor, materials, services or supplies incorporated in the Owner's Unit at the Owner's request.

**ARTICLE X**  
**COVENANTS, CONDITIONS, AND RESTRICTIONS**

10.01 Applicability of Covenants, Conditions, and Restrictions.

Except as otherwise provided in this Declaration, the covenants, conditions, and restrictions set forth in this Article X shall apply to all Units and Common Elements.

#### 10.02 Association Documents.

Each Owner shall strictly comply with, and shall require its Guests to comply with all provisions of the Association Documents that apply to such Owner or such Owner's Unit.

#### 10.03 Notice of Conveyance, Assignment or Encumbrance.

(a) Promptly after a conveyance of a fee simple interest in a Unit or portion thereof, the grantee shall furnish a copy of the conveyance deed to the Association.

(b) Promptly after an encumbrance of a fee simple interest in a Unit or portion thereof, the Owner shall furnish the Association with a copy of the Mortgage creating the encumbrance.

#### 10.04 Use of Common Elements.

All Owners and their Guests may use the General Common Elements and the Limited Common Elements designed, to serve their Units for the purposes for which such Common Elements are intended. Notwithstanding the preceding sentence, neither an Owner nor a Guest may use any Common Element in any manner that unreasonably interferes with, hinders, or encroaches upon the rights of other Owners in and to the Common Elements. Without limiting the generality of the foregoing, no Owner shall cause, or permit its Guests to cause, waste to any Common Element. Use of the Common Elements shall be restricted as follows: (A) Common Elements labeled as Limited Common Residential on the Plat and which serve only one Residential Unit or a balcony, deck or patio adjacent to a Residential Unit are for the exclusive use of the Owner of such Unit or the Guests of such Unit; (B) Common Elements labeled as Limited Common Residential on the Plat and which serve all of the Residential Units in a particular Building shall be for the exclusive use of the Owners of the Residential Units in such Building and the Guests of such Owners; and (C) Common Elements labeled as a Residential Parking Facility shall be for the exclusive use of the Owners of the Residential Units located within the same Building and as specifically designated on the Plat as to which Parking Stall(s) is assigned for the exclusive use of a Residential Unit.

#### 10.05 Alterations.

(a) Except as otherwise expressly provided in this Declaration, an Owner of a Unit may not make (i) any improvement or alteration to a Common Element, or (ii) any improvement or alteration to its Unit that affects any Common Element or any other Unit, without the prior written consent of the Association. No Owner shall do any work or make any alterations or changes that would jeopardize the soundness or safety of the Condominium Project without obtaining the written consent of each Owner. No Owner shall do any work or make any alterations or changes that would reduce the value of the Condominium Project or impair any easement or hereditament, without in every case first obtaining the prior written consent of the Association.

(b) Except as otherwise set forth in this Declaration, no new Improvement shall be constructed on the Land and no construction, alteration, installation, or other

work affecting the exterior surface of any existing Improvement shall be made, without the prior written consent of the Association.

(c) Notwithstanding paragraphs 10.05(a) and 10.05(b) above, initial construction of a Building or Unit may be carried out by the Declarant or any Owner responsible for such initial construction without obtaining the prior written consent of the Association; provided, however, that all such initial construction shall be accomplished in accordance with plans and specifications approved by the Declarant prior to the commencement of such construction.

(d) Without limiting the generality of paragraphs 10.05(a) through (c) above, an Owner of a Unit may not, without the prior written consent of the Association, install or erect any improvement, mechanical system or fixture that either:

(i) protrudes beyond the boundaries of the Owner's Unit; or

(ii) is located wholly outside the Owner's Unit (even if located within a Limited Common Element that is assigned to solely the Owner's Unit).

(e) Following completion of a Building, the Association or the Owner of a Retail and/or Residential Unit, as the case may be, shall perform or make, or cause to be performed or made, any Improvement, construction, alteration, installation or other work on, to or affecting the exterior of any Improvement on the Land which the Declarant requires, in writing, be performed or made; provided, however, the Declarant's ability to require any of the foregoing shall be limited to such items as the Declarant determines are necessary to maintain the exterior of such Improvements, clean, safe, and in good condition and repair consistent with the overall quality of the project as a first-class mixed use project.

#### 10.06 Nuisances, Hazardous Activities, and Unsightliness; No Smoking.

(a) No Person shall conduct any activity in the Project that creates a nuisance.

(b) No Person shall conduct any activity in the Project that is or might be hazardous to any Person or property.

(c) No unsightliness shall be permitted in the Project.

(d) Normal construction activities shall not be considered to violate the terms and conditions of this Section 10.06. By accepting a deed to a Unit, an Owner acknowledges that noises, lights, and odors common to recreational and commercial activities, as well as construction activities, may exist on or near the Land, at any time and from time to time.

(e) Declarant intends for the Project to be smoke-free. Smoking is prohibited within any Common Element or Limited Common Element (including on a balcony) and smoking is strongly discouraged within a Unit. Each Owner acknowledges it may be difficult for Declarant and the Association to enforce a smoking ban everywhere within

the Project. Neither Declarant nor the Association shall bear any liability for failure to enforce this provision or for failure to maintain a smoking ban within the Project.

10.07 Signs.

(a) No signs whatsoever shall be erected or maintained on the Land, except signs required by legal proceedings and those permitted or approved by this Declaration.

(b) Without limiting the generality of paragraph 10.07(a) above, no "For Sale" or "For Rent" signs shall be displayed on the exterior or interior of a Unit, except that a limited amount of signage for the Retail Units may be permitted in accordance with reasonable Rules and Regulations established by the Association with respect to the type and location of such signs.

10.08 Compliance with Laws.

Nothing shall be done or kept at the Land in violation of any law, ordinance, rule, regulation or other requirement of any governmental or quasi-governmental authority. There shall be no illegal activity within a Unit, on or in a Common Element, or anywhere in the Project.

10.09 Compliance with Insurance.

Except as may be approved in writing by the Association, nothing shall be done or kept at the Land that may result in the cancellation of any insurance maintained by the Association or may result in an increase in the rates of any such insurance. Activities incident to or necessary for the conduct of commercial operations shall not violate the terms of this Section 10.09 even if such activities result in an increase in rates of insurance. Any such increase in the rates of insurance shall be charged to the Owners of the Retail Units whose uses create such increases as Special Assessments.

10.10 Subdivision, Rezoning, and Timesharing.

(a) No Unit may be subdivided, unless the subdivision has been approved by 100 percent (100%) of the votes allocated to all Units at a duly convened meeting of the Association and the Unit has received all applicable governmental and quasigovernment approvals.

(b) No application for rezoning any portion of the Land, and no applications for variances or use permits, shall be filed with any governmental or quasi-governmental authority, unless the proposed rezoning has been approved by 100 percent of the votes allocated to all Units at a duly convened meeting of the Association (or pursuant to written consents in lieu of such a meeting) and the uses that would be permitted under the rezoning comply with this Declaration and the other Association Documents.

(c) No Owner shall offer or sell any interest in any Unit under a "timesharing" or "interval ownership" plan or similar plan.

(d) The covenants, conditions, and restrictions set forth in paragraphs 10.10(a) and (b) above shall not apply to Declarant's development of the Land or to Declarant's exercise of any Special Declarant Right.

10.11 Vehicles and Parking.

(a) No motor vehicle classed by manufacturer rating as exceeding three-quarter ton and no mobile home, trailer, detached camper or camper shell, boat, or other similar equipment or vehicle may be kept or parked at the Condominium Project, except such delivery and service trucks as are temporarily parked in locations designated by the Association for such purposes.

(b) No motor vehicle shall be constructed, repaired or serviced at the Condominium Project, except on a short-term emergency basis where such repairs are necessary to affect the removal of a disabled vehicle. Any disabled vehicle shall be repaired and/or removed from the Condominium Project as soon as practicable but no longer than seven (7) calendar days.

(c) No motor vehicle shall be stored at the Condominium Project for a period of more than 30 calendar days.

(d) Owners of the Retail Units shall have no right to use, and shall not permit their lessees and other Guests to use, any parking space located in a Residential Parking Facility except by separate agreement or license with the Owner of the applicable parking Stall.

10.12 Deliveries, Trash Removal, and Other Services.

(a) By acceptance of a deed to a Unit, an Owner agrees that all deliveries and all trash removal services, and other such services to that Owner or its Unit shall be effected at a location or locations designated by the Association and/or the Declarant from time to time for such purposes. Unless otherwise directed by the Association, Owners of all Units and their Guests shall place all trash and other waste from the Units in receptacles that are located in the Condominium Project and designated for that purpose.

(b) Owners shall not, and shall not permit their Guests to litter. No burning of trash, garbage or other waste materials will be permitted at the Land.

(c) No Owner or Guest shall impede or prevent any delivery, trash removal, or other service.

10.13 Exterior Storage.

No Owner shall store any materials or items on or in any Common Element, including the balcony attached to a Unit, other than those Common Elements designed for that purpose, such as storage lockers, and then only in strict accordance with the terms and conditions of the

Association Documents. The Balcony shall be maintained in a neat and orderly condition and shall be aesthetically pleasing from the exterior of the Building.

#### 10.14 Animals.

No animals, livestock or poultry of any kind shall be raised, bred, or kept in or on the Property or in any Unit, except no more than two pets per Unit that weigh less than fifty (50) pounds each. The keeping of pets and their ingress and egress to the Common Elements shall be subject to the Rules and Regulations established by the Association. In addition, the following provisions shall apply. No reptile may be kept as a pet. No dog of any breed that is commonly known as an aggressive breed shall be allowed, nor shall any animal with any history of aggression be allowed. Under no circumstances shall any pets be kept, bred, or maintained for any commercial purpose. No pet enclosures shall be erected, placed or permitted to remain on any portion of the Common Elements, nor shall pets be kept tied to any structure outside the Unit. Pets shall be on a leash at all times when outside a Unit. No pet shall be permitted to urinate or defecate on any portion of the Common Elements, and the owner of such pet shall immediately remove feces left upon the Common Elements by his/her pet. If the Owner or resident of the Project fails to abide by the Rules and Regulations and/or covenants applicable to pets, the Management Committee may bar such pet from use of or travel upon the Common Elements. The Management Committee may subject ingress, egress, use or travel upon the Common Elements to a user fee, which may be a general fee for all similarly situated persons or a specific fee imposed for failure of an Owner, or resident of the Project to abide by the Rules and Regulations and/or covenants applicable to pets. In addition, any pet which endangers the health or welfare of any Owner, resident, invitee, or Guest of the Project or which creates a nuisance (e.g., unreasonable barking, howling, whining or scratching) or an unreasonable disturbance or is not a common household pet, as may be determined in the sole discretion of the Management Committee, must be permanently removed from the Project upon seven (7) days written notice by the Management Committee. Each Owner acknowledges it may be difficult, if not impossible, for Declarant and the Association to know the breed, history, nature, or personality of any animal within the Project. Neither Declarant nor the Association shall bear any liability for failure to enforce this provision or for any harm or injury caused by an animal within the Project. Every Owner that owns an animal within the Project or whose Guest or invitee brings an animal into the Project hereby indemnifies and holds harmless Declarant and the Association against all claims, losses, damages, or liabilities arising from or in connection with any personal injury or death, or damage to property of others directly or indirectly due in connection with the actions of such animal within the Project.

#### 10.15 Solid-Fuel Burning Devices: Grills.

No solid-fuel burning devices (such as charcoal grills and wood-burning stoves or fireplaces), or gas or propane grills shall be used, kept or stored in a Unit or on the balcony attached to a Unit.

#### 10.16 Rental of Retail Units.

- (a) Prior to renting any Retail Unit, the Owner and the tenant shall execute a written lease agreement that shall include the following provisions.

(i) Any lease agreement between an Owner and a lessee respecting a Unit shall be subject in all respects to the provisions of this Declaration, the Articles and Bylaws, and any failure by the lessee to comply with the terms of such documents shall be a default under the lease;

(ii) The tenant shall agree not to allow or commit any nuisance, waste, unlawful or illegal act upon the Project, including within a Unit or in any Common Area; and

(iii) The owner and the tenant shall acknowledge that the Association is an intended third party beneficiary of the lease agreement, that the Association shall have the right to enforce compliance with the Declaration, Bylaws, Rules and Regulations, and to abate any nuisance, waste, unlawful or illegal activity upon the premises; and that the Association shall be entitled to exercise all of the Owner's rights and remedies under the lease agreement or available at law or equity, regardless of the Owner's action or inaction in response to such default.

(iv) The initial term of a lease shall be at least thirty (30) days.

(b) The Owner shall provide a copy of the lease or rental agreement, along with the name, address and telephone number of the tenant, to the Management Committee within ten (10) days after the lease is executed and prior to occupancy. An Owner shall be responsible and liable for any damage to the Project caused by its tenants. Within ten (10) days after delivery of written notice of the creation of a nuisance or material violation of these restrictive covenants, the Owner shall proceed promptly to abate the nuisance or cure the default, and notify the Management Committee in writing of his or her intentions. The Association shall have the right and the obligation to enforce compliance with the Declaration and Bylaws against any Owner and/or occupant of any Condominium Unit, and shall have all rights and remedies available under state or local law, in addition to its rights and remedies as a third party beneficiary under any lease agreement, to enforce such compliance.

(c) No Residential Unit may be leased or rented.

#### 10.17 Use of Retail Units.

(a) Each Retail Unit may be used and occupied for commercial purposes only.

(b) Owners of Retail Units shall not use, and shall not permit their Guests to use (i) any entrance to or exit from the Condominium Project which is designated on the Plat for exclusive use by Owners of Residential Units or (ii) any portion of the Limited Common Residential. The Owner(s) of Retail Units shall have the right to use Common Areas and those Limited Common Retail areas identified for such Retail Unit's use on the Plat.

(c) Notwithstanding anything to the contrary contained in this Declaration, an Owner of a Retail Unit may make improvements or alterations to its Retail Unit or the

Limited Common Retail Elements designed to serve only its Retail Unit, without the consent of any Owner or the Association, on the conditions that:

- (i) the improvement or alteration does not impair or cause damage to any other Unit or any Limited Common Element designed to serve any Residential Unit;
  - (ii) the Owner of the Retail Unit promptly repairs any damage to any General Common Element caused thereby at its cost and expense;
  - (iii) the improvement or alteration complies with all applicable requirements of this Declaration, the Act and all laws, ordinances, regulations, and rules of governmental and quasi-governmental authorities with jurisdiction.
- (d) If any such improvement or alteration will impair any other Unit or any Limited Common Element assigned to serve any other Unit, the Owner of the Retail Unit shall not make the improvement or alteration without the prior written consent of the Majority of the Owners of the Units, or the Owners of the Units served by the Limited Common Elements that will be impaired thereby, as the case may be.
- (e) Notwithstanding anything to the contrary in this Article X, the Owner of a Retail Unit may:

(i) Conduct any commercial or retail business, and perform such related activities, which are lawfully permitted and conforms to all laws, ordinances, and codes, and is validly licensed. Notwithstanding anything else contained in this Declaration, a Retail Unit shall not be used for a hotel, motel, hostel, massage parlor, tattoo shop, check cashing business, pawn shop, any establishment engaged in the business of selling, exhibiting or delivering pornographic or obscene materials, a so-called "head shop," off-track betting parlor, video game or penny arcade, billiard or pool hall, storage or dispenser of hazardous substances, or other dispenser of illegal substances.

(ii) Erect and attach signs, banners, window boxes, decorations, and other similar items on the exterior of the Condominium Project or projections from the exterior of the Condominium Project on the condition that such signs, banners, window boxes, decorations, and other similar items and their locations are approved by the Management Committee and otherwise comply with this Declaration.

(iii) Apply for and obtain special use permits and license (e.g., liquor licenses) which are necessary or appropriate for the conduct of commercial activities in its Unit in accordance with this Declaration and the other Association Documents, without obtaining the approval otherwise required under paragraph 10.12(b) above, on the condition that such permits and licenses are consistent with the existing zoning and actual uses of the Retail Unit at the time the permit or license is applied for.



(f) No Unit shall be used for a business or use which creates strong, unusual or offensive odors, fumes, dust or vapors; emits noise or sounds which are objectionable due to intermittence, beat, frequency, shrillness or loudness; creates unusual fire, explosive or other hazards, or materially increases the rate of insurance for the Project; provided however, that any lights, sounds and odors which result from activities permitted by this Declaration shall not violate the terms of this Article X.

(g) The Management Committee shall have the right to review the use of any Unit for compliance with the terms of this Declaration. If the Management Committee incurs any legal expenses incurred in connection with its review and evaluation of such compliance, the Owner of such Retail Unit shall pay the reasonable costs of any such legal fees, as well as any defense or other action arising from an Owner's commercial use of a Unit. In addition, each Owner shall indemnify and hold harmless Declarant, the Management Committee, the Association and their respective members, shareholders, owners, managers, agents and assigns from any and all damages they might suffer in connection with an Owner's use of a Unit.

#### 10.18 Parking Stalls and Restrictions.

(a) Each Parking Stall may be used and occupied for parking purposes only for the specific use of vehicles and no other storage shall be allowed. Owners of a Residential Unit are assigned a Parking Stall(s) within the Residential parking Facility and as designated on the Plat. Owners of Retail and Residential Units may be assigned certain Parking Units within the uncovered parking as designated by the Association.

(b) Owners of Residential and Retail Units shall not use, and shall not permit their Guests to use (except such Guests who are also Owners otherwise entitled to use such facilities) (i) any entrance to or exit from the Condominium Project which is designated on the Plat for exclusive use by Owners of Residential Units or (ii) any portion of the Limited Common Residential or Limited Common Retail.

#### 10.19 Use of Residential Units.

(a) Except as otherwise expressly permitted by this Declaration, an Owner of a Residential Unit may use such Residential Unit for residential purposes only by the said Units occupants and their Guests. No Owner of a Residential Unit shall conduct any business, profession, occupation or trade from its Unit, including, without limitation, the operation of a so-called "bed and breakfast" or "chalet."

(b) Notwithstanding the restrictions set forth, in paragraph 10.19(a) above, an Owner may use its Residential Unit as its private office, on the condition that the Owner does not invite others to its Unit to conduct business and such use complies with all applicable federal, state and local laws, ordinances, regulations and rules; and

(c) Owners of Residential Units shall not use, and shall not permit their Guests to use (i) any non-public entrance to or exit from the Condominium Project which is designated on the Plat for exclusive use by Owners of Retail Units or (ii) any portion of the Limited Common Retail. The Owner(s) of Residential Units and their guests shall

have the right to use Common Areas and those Limited Common Residential areas identified for such Residential Unit's use on the Plat.

(d) Owners of Residential Units shall not use, and shall not permit their Guests to use any non-public stairway, elevator, patio, walkway, hallway, storage area, restroom or other portion of the Condominium Project which is designated on the Plat as Limited Common Retail.

(e) Notwithstanding anything to the contrary contained in this Declaration, an Owner of a Residential Unit may make improvements, or alterations to its Residential Unit or the Limited Common Residential Elements designed to serve only its Residential Unit, without the consent of any Owner or the Association, on the conditions that:

(i) the improvement or alteration does not impair or cause damage to any other Unit or any Limited Common Element designed to serve any Retail or Parking Unit;

(ii) the Owner of the Residential Unit promptly repairs any damage to any General Common Element caused thereby at its cost and expense;

(iii) the improvement or alteration complies with all applicable requirements of this Declaration, the Act and all laws, ordinances, regulations and rules of governmental and quasi-governmental authorities with jurisdiction.

(f) If any such improvement or alteration will impair any other Unit or any Limited Common Element assigned to serve any other Unit, the Owner of the Residential Unit shall not make the improvement or alteration without the prior written consent of the Majority of the Owners of the Units, or the Owners of the Units served by the Limited Common Elements that will be impaired thereby, as the case may be.

#### 10.20 Aerials, Antennas, and Satellite Systems.

An Owner or occupant is prohibited from installing any antenna or satellite dish, including, without limitation, an antenna for amateur ("HAM") radio, citizens band radio, and digital audio radio services signals in any Common Elements within the Project. Antennas designed to receive television broadcast signals, video programming or fixed wireless signals and satellite dishes that are one-half meter or less in diameter or diagonal measurement and designed to receive direct broadcast satellite service shall be permitted (each, a "Permitted Device") in Units and Limited Common Elements, provided that any such Permitted Device is located in the interior space of the Unit so as not to be visible from outside the Unit. No antennas or satellite dishes may be located in the Limited Common Elements.

#### 10.21 Declarant's Exemption.

Nothing contained in this Declaration or in any other Association Document shall be construed to prevent:

(a) Declarant's exercise and enjoyment of any Special Declarant Right or any other rights of Declarant under this Declaration or any other Association Document; or

(b) the conduct by Declarant or its employees or agents of any activity, including, without limitation, the erection or maintenance of temporary structures, improvements or signs, necessary or convenient to the development, construction, marketing or sale of property within or adjacent to the Condominium.

## **ARTICLE XI**

### **EASEMENTS AND RESERVATIONS**

#### **11.01 Declarant's Easements over Common Elements.**

(a) In accordance with the Act, Declarant hereby reserves for itself, its successors and assigns a general, transferable easement over, across, thorough and under the Common Elements to:

(i) discharge Declarant's obligations under this Declaration;

(ii) exercise any of Declarant's rights under this Declaration; and

(iii) make improvements on the Land or any other real estate owned by Declarant, for the purpose of doing all things reasonably necessary and proper in connection with the foregoing.

(b) Declarant hereby reserves for itself, its successors and assigns, the right to:

(i) establish from time to time utility and other easements, permits or licenses over, across, through and under the Common Elements for the benefit of the Condominium Project, any property owned by Declarant or any other real property within the Condominium Project; and

(ii) create other reservations, exceptions and exclusions for the best interest of the Declarant and other Persons, on the conditions that (A) the parties benefited by the easement, license, permit, reservation, exception or exclusion must use reasonable efforts to locate any such easement, license, permit reservation, exception or exclusion to minimize interference with the use of the Land by the Owners to the extent practicable; and (B) if the parties benefited by the easement, license, permit, reservation, exception or exclusion construct or install any improvements on the Land pursuant to the same, the benefited parties shall promptly repair any damage caused to the Land thereby at their sole cost and expense.

#### **11.02 Utility Easement.**

(a) Subject to the terms and conditions of this Declaration and all other Association Documents, Declarant hereby creates a general easement over, across, through and under the Land for ingress to, egress from, and installation, replacement,

repair and maintenance of, all utility and service lines and systems, including, without limitation, water, sewer, natural gas, telephone, electricity and cable communication that service the Land or any portion thereof. The Association may, but is not obligated to, authorize the release of portions of the general easement created pursuant to this Section 11.02 upon the request of any Owner showing good cause thereof

(b) Pursuant to this easement, a utility or service company may install and maintain facilities and equipment on the Land and affix and maintain wires, circuits and conduits on, in and under the roofs and exterior walls of Improvements to provide service to the Units or the Common Elements. Notwithstanding anything to the contrary contained in this Section 11.02, no sewers, electrical lines, water lines, or other utilities or service lines may be installed or relocated on any portion of the Land, except in accordance with terms and conditions of Sections 10.07 and 10.18 above. Any utility or service company using this general easement shall use its best efforts to install, repair, replace and maintain its lines and systems without disturbing the uses of Owners, the Association, Declarant and other utility and service companies.

(c) If any utility or service company furnishing utilities or services to the Land or any portion thereof as permitted under paragraph 11.02(a) above requests a specific easement by separate recordable document, the Association shall have the right and authority, but not the obligation, to grant such easement over, across, through and under any portion of the Land.

#### 11.03 Association's Easement.

(a) The Association shall have a general easement over, across, through and under each Unit and each Common Element to:

(i) exercise any right held by the Association under this Declaration or any other Association Document; and

(ii) perform any obligation imposed upon the Association by this Declaration or any other Association Document.

(b) Notwithstanding the foregoing, the Association shall not enter any Unit without reasonable prior notice to the Owner thereof, except in cases of emergency.

#### 11.04 Easements to Retail Owners.

The Owner of a Retail Unit shall have the right and a perpetual easement, without charge, to install, operate, maintain, repair and replace machinery, equipment, utility lines, wires, circuits, cables and conduits serving such Retail Unit, along, across and through any and all General Common Elements, Limited Common Elements and through the Units within the Condominium Project on the conditions that (A) the Owner of the Retail Unit, at its sole cost and expense, shall repair, replace and restore any damage to the Common Elements and the Units caused by such installation, operation, maintenance, replacement or repair, (B) all such machinery, equipment utility lines, wires, circuits, cables and conduits are located within a Unit, shall, except for minor variations, be in the number, specification, and location provided for in

construction drawings approved by the Management Committee prior to the commencement of construction of any such facilities, and to the extent that such machinery, equipment, utility lines, wires, circuits, cables and conduits are located within a Unit, the location shall be designated by the Owner of such Unit, pursuant to its reasonable discretion; and (C) such installation, maintenance, repair or replacement complies with all applicable requirements of this Declaration, the Act and all laws, ordinances, regulations and rules of governmental and quasi-governmental authorities with jurisdiction. Any Owner utilizing the easement on, across, or through the Common Elements as granted herein shall provide the Management Committee (or its designee, such as a management company) with written notice of such work, including the information required in (B) above, at least seven (7) days prior to the commencement of work, except in case of an emergency, in which case verbal notice to the Management Committee or its designee should be given as soon as practicable, and written notice being delivered within 2 days following such emergency.

11.05 Easements to Residential Owners.

(a) The Owner of a Residential Unit shall have an easement to construct, maintain, inspect, repair, and replace, when reasonably necessary, within and through such structural supports and anchors as are necessary and advisable with respect to the construction, maintenance and operation of all Buildings.

(b) The Owner of a Residential Unit shall have the right and a perpetual easement, without charge, to install, operate, maintain, repair and replace machinery equipment, utility lines, wires, circuits, cables and conduits serving such Residential Unit, along, across and through along, across and through the Common Elements and through the Units within the Condominium Project on the condition that (A) the Owner of the Residential Unit, at its sole cost and expense, shall repair, replace and restore any damage to the Common Elements or any Units caused by such installation, operation, maintenance, replacement or repair, (B) all such machinery, equipment, utility lines, wires, circuits, cables and conduits shall, except for minor variations, be in the number, specification, and location provided for in construction drawings approved by the Management Committee prior to the commencement of construction of any such facilities, and, to the extent that such machinery, equipment, utility lines, wires, circuits, cables and conduits are located within a Unit, the location shall be designed by the Owner of such Unit pursuant to its reasonable discretion; and (C) such installation, maintenance, repair or replacement does not materially interfere with the use of the Retail Units and complies with all applicable requirements of this Declaration, the Act and all laws, ordinances, regulations and rules of governmental and quasi-governmental authorities with jurisdiction. Any Owner utilizing the easement on, across, or through the Common Elements as granted herein shall provide the Management Committee (or its designee, such as a management company) with written notice of such work, including the information required in (B) above, at least seven (7) days prior to the commencement of work, except in case of an emergency, in which case verbal notice to the Management Committee or its designee should be given as soon as practicable, and written notice being delivered within 2 days following such emergency.

11.06 Entry in Aid of Other Rights.

There shall be an easement in favor of each Owner to: enter in and upon the Common Elements and Units with workers, materials and tools to the extent, at the time, and for the periods reasonably necessary to enable an Owner to access Limited Common Elements appurtenant to such Owner's Unit or Units isolated from public access or via Common Areas and to otherwise perform all of the construction, maintenance, inspection, repair, and replacement required of such Owner hereunder or necessary to the operation of the said Owner's Unit. Notwithstanding the foregoing and except when access is required on an emergency basis, any access may be limited to such reasonable times as the Management Committee may designate.

11.07 Easements for Encroachments.

In the event that any portion of the General Common Elements, a Limited Common Element Unit and/or the Building encroaches or comes to encroach on the General Common Elements, a Limited Common Element or another Unit, as a result of construction, reconstruction, repair, shifting, settlement, or movement of any portion of the foregoing, an easement is created hereby and shall exist so long as such encroachment exists, but such easement shall not relieve an Owner of liability in the case of willful misconduct.

11.08 Emergency Access Easement

Declarant hereby grants a general easement to all police, sheriff, fire protection, ambulance and all other similar emergency agencies or Persons to enter upon the Land in the proper performance of their duties.

11.09 Pedestrian Access Easements.

Declarant hereby creates a nonexclusive access easement for the benefit of the general public over and across any and all roads, streets, plazas, courtyards, paths, pathways, sidewalks and boardwalks located outside of the Building and on the Land, subject to the Rules and Regulations.

**ARTICLE XII**  
**INSURANCE**

12.01 General Liability Insurance.

The Association shall obtain and maintain one or more policies of commercial general liability insurance insuring the Owners, the Association, the Management Committee, the manager engaged by the Association, if any, and their respective agents against general liability and claims arising in connection with the ownership, existence, use or management of the Common Elements, in an aggregate amount that is not less than \$3,000,000 or such greater amount as the Management Committee deems appropriate. Such insurance shall cover claims of one or more insured parties against other insured parties.

#### 12.02 Property Insurance.

The Association shall obtain and maintain a master or blanket policy of property insurance coverage for no less than the full insurable replacement cost of all of the Common Elements, including the Buildings (sheetrock out), subject to reasonable deductibles and exclusive of land, excavations, foundations and similar items normally excluded from property insurance policies. The policy shall contain each of the following features, to the extent that such features are, in the reasonable discretion of the Management Committee, available at reasonable cost:

- (a) An agreed-amount endorsement or its equivalent;
- (b) An increased-cost-of-construction endorsement or a contingent-liability-from-operation-of buildings-laws endorsement or their equivalent;
- (c) an extended-coverage endorsement;
- (d) vandalism and malicious mischief coverage;
- (e) a special-form endorsement; and
- (f) a determinable-cash-adjustment clause or a similar clause to permit cash settlement covering full value of the Common Elements in case of partial destruction and a decision not to rebuild.

#### 12.03 Additional Provisions to be Contained in Insurance Policies.

Any insurance policies obtained and maintained by the Association pursuant to Sections 12.01 and 12.02 above, shall name as insuree the Association and the Owners (including Declarant, so long as Declarant is the Owner of any Unit) and provide that:

- (a) the insurer waives its right of subrogation under the policy against any Owner or member of the Owner's household;
- (b) no act or omission by any Owner, unless acting within the scope of such Owner's authority on behalf of the Association, will void the policy or be a condition to recovery under the policy; and
- (c) if, at the time of a loss under the policy, there is other insurance in the name of an Owner covering the same risk covered by the policy, the Association's policy provides primary insurance.

#### 12.04 Trustee.

Any loss covered by the property insurance policy described in Section 12.02 above must be adjusted with the Association, and the insurance proceeds for that loss shall be payable to the Association or any insurance trustee designated for that purpose, and not to any Owners or Mortgagees. The insurance trustee or the Association shall hold any insurance proceeds in trust

for the Owners and Mortgagees as their interests may appear. Subject to the provisions of Section 13.02 below, the proceeds must be disbursed first for the repair or restoration of the damaged property, and the Owners and Mortgagees are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the Condominium Project has been repaired or restored or the Condominium Project is terminated.

12.05 Owner Maintained Insurance.

(a) Every Owner of a Residential Unit and Retail Unit shall, respectively, separately insure its Unit (sheetrock in) for no less than the full insurable replacement cost subject to reasonable deductibles and exclusive of land, excavations, foundations and similar items normally excluded from property insurance policies. The policy shall contain each of the following features, to the extent that such features are, in the reasonable discretion of the Management Committee, available at reasonable cost:

- (i) an agreed-amount endorsement or its equivalent;
- (ii) an increased-cost-of construction endorsement or a contingent-liability-from-operation-of-building-laws endorsement or their equivalent;
- (iii) an extended-coverage endorsement;
- (iv) vandalism and malicious mischief coverage;
- (v) a special-form endorsement; and
- (vi) a determinable-cash-adjustment clause or a similar clause to permit cash settlement covering full value of the Common elements in case of partial destruction and a decision not to rebuild.

Any insurance policies obtained and maintained by the Owner of the Residential Unit or the Retail Unit pursuant to this paragraph shall name as insureds the Association and the Owners (including Declarant, so long as Declarant is the Owner of any Unit), as their respective interests may appear, and provide that:

(vii) the insurer waives its right of subrogation under the policy against the Association, Declarant, Mortgagees and any Owner or member of the Owner's household;

(viii) no act or omission by an Owner, unless acting within the scope of such Owner's authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

(ix) if, at the time of a loss under the policy, there is other insurance in the name of an Owner of the Association covering the same risk covered by the policy, the Residential or Retail Unit Owner's policy provides primary insurance.



(b) Each Owner shall have the right to insure separately its personal property against loss by fire or other casualty. In addition, any Improvements made by an Owner within its Unit may be separately insured by the Owner, but the insurance is to be limited to the type and nature of coverage commonly known as "tenant's improvements." All such insurance that is carried individually must contain a waiver of subrogation rights by the insurer as to other Owners, the association, Declarant, and Mortgagees.

#### 12.06 Management Committee's Authority to Revise Insurance Coverage.

(a) Subject to any restrictions imposed by the Act, the Management Committee shall have the power and right to deviate from the insurance requirements contained in this Article XII in any manner that the Management Committee, in its discretion, considers to be in the best interests of the Association. If the Management Committee elects to materially reduce the coverage from the coverage required in this Article XII, the Management Committee shall make all reasonable efforts to notify the Owners of the reduction in coverage and the reasons therefore at least thirty (30) days before the effective date of the increase or reduction. Notwithstanding the foregoing, the Association shall only institute such material increase or reduction following a vote of at least seventy-six percent (76%) of the votes allocated to all Units.

(b) The Association and its Directors and Officers shall have no liability to any Owner or Mortgagee if, after a good faith effort, (i) the Association is unable to obtain any insurance required hereunder because the insurance is no longer available; or (ii) if available, the insurance can be obtained only at a cost that the Management Committee, in its sole discretion, determines is unreasonable under the circumstances.

(c) The Management Committee is authorized to negotiate and agree on the value and extent of any loss under any policy carried by the Association, including, but not limited to, the right and authority to compromise and settle any claim or enforce any claim by legal action or otherwise and to execute releases in favor of any insurer.

(d) Each Owner, by acceptance of a deed to a Unit irrevocably appoints the Association as that Owner's attorney in fact for purposes of procuring, negotiating, accepting, compromising, releasing, settling, distributing, and taking other related actions in connection with any insurance policy maintained by the Association and any losses or claims related thereto and agrees to be bound by the actions so taken as if the Owner had personally taken the action.

#### 12.07 Periodic Insurance Review.

The Management Committee periodically (and not less than once every three (3) years) shall review the Association's insurance policies and make such adjustments to the policies' terms and conditions as the Management Committee considers to be in the best interests of the Association. The review shall include an appraisal by a qualified appraiser of the current replacement costs of all covered property under the Association's policy unless the Management Committee is satisfied that the current dollar limit of the property policy, coupled with the amount of actual reserves on hand, is equal to or greater than the current replacement costs.

#### 12.08 Combined Insurance.

If at any time and for any reason it is not reasonably possible to obtain separate casualty insurance coverage relative to each of the Buildings and Common Elements, or if at any time and for any reason the Management Committee and the Owner of the Residential and Retail Units should determine that such separate coverage should not be maintained, the Association shall obtain insurance coverage covering all structures and equipment located on the Land under a single policy which otherwise meets the requirements of this Article 12. If for any of the foregoing reasons the Association obtains insurance covering all structures and equipment, then concurrently with payment by the Association of the cost of such insurance, and upon the Association's demand, the Owner of the Residential and Retail Units shall reimburse the Association for that part of said total cost as is fairly allocable to the Residential and/or Retail Units. In determining what part of total insurance cost is fairly allocable to the Residential and/or Retail Units, consideration shall be given to the respective replacement values of those structures and items of equipment which are contained in each, any different insurance risk factors that may apply thereto, and the like. If any reimbursement to the Association is called for by the foregoing provisions of this paragraph is not paid when due by the Owner of the Residential or Retail Unit, it shall be deemed a violation of the Association Documents by such Owner and the Association may levy a Default Assessment against the such Owner.

### ARTICLE XIII CASUALTY

#### 13.01 Total or Partial Destruction of the Condominium Project.

If there is a total or partial destruction of the Condominium Project, the Condominium Project shall be promptly rebuilt or repaired in accordance with the Act, unless:

- (a) the Condominium Project is terminated in accordance with Section 18.02 hereof;
- (b) repair or replacement would be illegal under any state or local statute governing health or safety;
- (c) seventy-five percent (75%) or more of the Buildings are destroyed or substantially damaged, and the Owners, by a vote of at least seventy-five percent (75%) of the Interests in Common Elements, do not voluntarily, within 100 days after the occurrence of such damage, make provision for reconstruction, and the Management Committee shall Record, in the Salt Lake County Records, a notice, in accordance with the Act, thereby subjecting the Condominium Project to an action for partition and sale; or
- (d) the Owners, by a vote of at least seventy-five percent (75%) of the Owners of the interests in Common Elements, elect to sell or otherwise dispose of the Condominium Project in accordance with the Act.

13.02 Excess Insurance Proceeds.

If the entire Condominium Project is not repaired or replaced, the insurance proceeds attributable to the damaged Common Elements must be used to restore the damaged area to a condition compatible with the remainder of the Condominium Project, and except to the extent that other persons will be distributees, the insurance proceeds attributable to Units and Limited Common Elements that are not rebuilt must be distributed to the Owners of those Units and the Owners of the Units 4:1 which those Limited Common Elements were allocated, or to Mortgagees, as their interests may appear, and the remainder of the proceeds, if any, must be distributed to all the Owners of Mortgagees, as their interests may appear, in proportion to the Interests in Common Elements of all the Units.

13.03 Casualty to a Unit.

To the extent that the Association is not obligated to make any such repairs or replacements, each Owner shall repair or replace any damage to or destruction to the interior of its Unit, as soon as is reasonably practical after such damage or destruction occurs.

**ARTICLE XIV**  
**CONDEMNATION**

14.01 Condemnation of All Units.

If the entire Condominium Project is taken by condemnation, eminent domain or similar proceeding, the Condominium Project shall terminate as of the date of the taking and any condemnation award payable in connection therewith shall be paid to the Association and then disbursed by the Association to the Owners in proportion to their Allocated Interest.

14.02 Condemnation of Fewer than All Units.

If one or more Units, but less than the entire Condominium Project, is taken by condemnation, eminent domain or similar proceeding,

(a) any condemnation award payable in connection therewith shall be paid to the Owners of the Units taken, and

(b) the Allocated Interest appurtenant to those Units shall be reallocated, in accordance with the terms and conditions of the Act.

14.03 Condemnation of Common Elements.

If any portion of the Common Elements is taken by condemnation, eminent domain or similar proceeding, any condemnation award payable in connection therewith shall be paid to the Association and then disbursed by the Association to the Owners in proportion to their Interests in Common Elements,

ARTICLE XV  
SPECIAL DECLARANT RIGHTS

15.01 Improvements.

Declarant hereby reserves for itself, its successors and assigns the right, but is not obligated, to construct:

- (a) any Improvements shown on the Plat; and
- (b) any other buildings, structures or improvements that Declarant desires to construct on the Land, or any other real estate owned by Declarant, regardless of whether the same ever become part of the Condominium Project.

15.02 Development Rights.

Declarant hereby reserves for itself, its successors and assigns the right to create easements, permits, licenses and other property rights and reservations as described in Articles II and XI of this Declaration.

15.03 Sales Offices and Models.

Notwithstanding anything in the Declaration to the contrary, during the Declarant Control Period, Declarant shall have the following rights in furtherance of any sales, promotional, or other activities designed to accomplish or facilitate the sale of all Units owned or to be owned by Declarant.

- (a) Declarant shall have the right to maintain a reasonable number of promotional, advertising, and/or signs, banners, or similar devices at any place or places on the Land, but any such device shall be of a size and in a location as is reasonable and customary.
- (b) Declarant shall have the right from time to time to locate or relocate any signs, banners, or similar devices, but in connection with such location or relocation shall observe the limitations imposed by the preceding portion of this Section. Within a reasonable period after the end of the Declarant Control Period, Declarant shall have the right to remove from the Condominium Project any signs, banners, or similar devices and any separate structure or facility that was placed on a portion of the Land for aiding Declarant's sales efforts. Any signs, banners, or similar devices, and any separate structure or facility for aiding Declarant's sales efforts shall comply with applicable zoning ordinances.

15.04 Exercising Special Declarant Rights.

Declarant may exercise its Special Declarant Rights at any time prior to the later to occur of the date on which the Declarant Control Period expires or the date that is fifty (50) years after the date on which this Declaration is recorded in the Salt Lake county Records; provided that (a) a Successor Declarant's rights with respect to the conversion of Retail Units shall not be

subject to the foregoing limitation. Declarant may exercise its Special Declarant Rights in any order and no assurance is given as to the order in which Declarant will exercise its Special Declarant Rights. If Declarant exercises any Special Declarant Right with respect to any portion of the Land, Declarant may, but is not obligated to, exercise that Special Declarant Right with respect to any other portion of the Land. Notwithstanding anything to the contrary contained in this declaration, Declarant My exercise any Special Declarant Right described in this Article XV and any other right reserved to Declarant in this Declaration, without the consent of the Association or any of the Owners.

15.05 Interference with Special Declarant Rights.

Neither the Association nor any Owner may take any action or adopt any Rule or Regulation that interferes with or diminishes any Special Declarant Right, without Declarant's prior written consent. Any action taken in violation of this Section 15.05 shall be null and void and have no force or effect.

15.06 Declarant; Rights Transferable.

The term "Declarant" as used herein shall mean and include Declarant and any person or persons who might acquire title from it to all or some of the unsold Units through purchase, assignment or other transfer including foreclosure or deed in lieu of foreclosure; or, in the situation where, any person purchases all, or some of the remaining Units in a sale in the nature of a bulk sale. The person acquiring any of such property from the Declarant shall be considered a Declarant with respect to that portion of the property so acquired and shall have the right to develop the property and/or sell such property in accordance with the terms and provisions of this Declaration and the Act. Any right or any interest reserved or contained in this Declaration for the benefit of Declarant may be transferred or assigned by Declarant, either separately or with one or more other such rights or interests, to any person, corporation, partnership, association, or other entity, only by written instrument executed by both Declarant and the transferee or assignee and recorded in the Office of the Clerk and Recorder of Salt Lake County, Utah. Upon such recording, Declarant's rights and obligations under this Declaration shall cease and terminate to the extent provided in such instrument.

**ARTICLE XVI**  
**MORTGAGEE PROTECTIONS**

16.01 Benefit of Mortgagees.

This Article establishes certain standards and covenants which are for the benefit of Mortgagees. This Article is supplemental to, and not in substitution of, any other provisions of this Declaration, but in the case of any conflict, this Article shall control.

16.02 Notice of Actions.

If requested in writing to do so, the Association shall give prompt written notice of the following to each First Mortgagee making such request:

(a) any condemnation loss or any casualty loss which affects a material portion of the Common Elements or any Unit in which an interest is held by the First Mortgagee;

(b) any delinquency in the payment of Assessments which remains uncured for sixty days by an Owner whose Unit is encumbered by a First Mortgage held by such First Mortgagee;

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

(d) any proposed action which would require the consent of First Mortgagees as set forth in this Article; and

(e) any judgment rendered against the Association.

A general request from a First Mortgagee requesting notice from the Association with respect to each of the foregoing matters shall be deemed a sufficient request for notice with respect to all such matters and notice shall be provided by the Association with respect to each such matter.

#### 16.03 Consent Required.

Notwithstanding anything to the contrary contained in this Declaration, the Association may not take any of the following actions without the consent of seventy-six percent (76%) of the First Mortgagees (based on the Allocated Interest attributable to each Unit covered by a First Mortgage):

(a) by act or omission seek to abandon or terminate the Condominium Project, except after condemnation or substantial casualty;

(b) except as provided herein change the Allocated Interests, Shares of Common Expenses or votes in the Association of any Unit;

(c) subdivide, partition, or relocate the boundaries of any Unit, except as permitted with respect to Special Declarant Rights;

(d) abandon, subdivide, partition, encumber, sell, or transfer the Common Elements (the granting of easements for public utilities or for other purposes provided for in this Declaration shall not be deemed transfers);

(e) use property insurance proceeds for losses to any portion of the Common Elements for other than repair, replacement, or reconstruction of such Common Elements, except as provided by this Declaration; or

(f) merge the Condominium Project with any other common interest community.

16.04 Notice of Objection.

Unless a First Mortgagee provides the Association with written notice of its objection, if any, to any proposed amendment or action requiring the approval of First Mortgagees within thirty days following the receipt of notice of such proposed amendment or action, the first Mortgagee will be deemed conclusively to have consented to or approved the proposed amendment or action.

16.05 First Mortgagee's Rights.

(a) First Mortgagees, jointly or singly, may pay taxes or other charges which are in default and which may or have become a charge against any of the Common Elements or improvements thereon, and may pay overdue premiums on hazard insurance policies, for the Common Elements. First Mortgagees making such payment shall be owed immediate reimbursement from the Association.

(b) A First Mortgagee shall be entitled to cure any delinquency of the Owner of the Unit encumbered by its First Mortgage in the payment of Assessments. In that event, the First Mortgagee shall be entitled to obtain a release from the lien imposed or perfected by reason of such delinquency.

16.06 Limitations on First Mortgagee's Rights.

No requirements for approval or consent by a First Mortgagee provided in this Article shall operate to:

(a) deny or delegate control over the general administrative affairs of the Association by the Owners or the Management Committee;

(b) prevent the Association or the Management Committee from commencing, intervening and/or settling any legal proceeding; or

(c) prevent any insurance trustee of the Association from receiving and distributing any insurance proceeds in accordance with the requirements of the Article XII above.

16.07 Declarant Rights.

No provision or requirement of this Article XVI shall apply to any Special Declarant Rights or other rights or options reserved to Declarant in this Declaration.

**ARTICLE XVII**  
**ENFORCEMENT AND REMEDIES**

**17.01 Enforcement.**

(a) Each provision of this Declaration with respect to the Association or the Common Elements shall be enforceable by Declarant or by any Owner by a proceeding for injunctive relief.

(b) Each provision of this Declaration with respect to an Owner or a Unit shall be enforceable by Declarant or by the Association by:

(i) a proceeding for injunctive relief;

(ii) a suit or action to recover damages; or

(iii) in the discretion of the Association, for so long as any Owner fails to comply with any such provisions, exclusion of such Owner and its Guests from the use of any Common Elements and from participation in any Association affairs.

(c) In addition to the rights and remedies described in paragraph 17.01(b) above, if an Owner fails to strictly perform or observe any covenant or condition to be performed or observed by such Owner under this Declaration or any other Association Document, the Association shall have the following rights and remedies:

(i) The Association may, but is not obligated to, cure such failure to comply at the Owner's sole cost and expense. If the Association cures any such failure to comply, or the default causes the Association to incur other additional costs, the Owner shall pay to the Association the amount of all costs incurred by the Association in connection therewith within thirty days after the Owner receives a written invoice therefore from the Association.

(ii) The Association may, after notice and an opportunity to be heard, fine the Owner, as a Default Assessment, an amount not to exceed \$100 for each violation. The Owner shall pay any such fine to the Association within thirty days after the Owner receives written invoice therefore from the Association. Any such fine shall be in addition to any costs charged pursuant to Section 17.01(c)(i) above.

(iii) With respect to an Owner's failure to pay an installment of any Assessment, the Association may accelerate the due date for the payment of the full amount of the Assessment.

(iv) The Association shall have all other rights and remedies available to it under this Declaration, at law or in equity.



(d) All rights and remedies of the Association shall be cumulative and the exercise of one right or remedy shall not preclude the exercise of any other right or remedy.

17.02 Attorneys' Fees.

In the event of any dispute under or with respect to this Declaration or any other Association Document, the prevailing party shall be entitled to recover from the non-prevailing party all of its costs and expenses in connection therewith, including, without limitation, the fees and disbursements of any attorneys, accountants, engineers, appraisers or other professionals engaged by the prevailing party.

17.03 Interest.

If an Owner fails to pay to the Association any Assessment or other amount due to the Association as and when the same becomes due, the Owner shall pay to the Association interest on such unpaid amount at the rate of eighteen percent (18%) per annum, or such other rate as the Management Committee may establish from time to time, from the due date of such unpaid amount until the date paid.

17.04 Right to Notice and Hearing.

Whenever an Association Document requires that an action be taken after "notice and hearing," the following procedure shall be observed. The party proposing to take the action (e.g., the Management Committee or a committee or officer of the Association) shall give at least five (5) business days' prior written notice of the proposed action to all Owners whose interests would be significantly affected by the proposed action, as reasonably determined by the proposing party. The notice shall include a general statement of the proposed action and the date, time and place of the hearing. At the hearing, the party proposing to take the action, and all affected Owners may give testimony orally, in writing or both (as specified in the notice), subject to reasonable rules of procedure established by the party conducting the hearing to assure a prompt and orderly resolution of the issues. Such evidence shall be considered in making the decision in the same manner in which notice of the hearing was given. Any Owner having a right to notice and hearing shall have the right to appeal to the Management Committee from a decision of a proposing party other than the Management Committee. Such right of appeal may be exercised within ten (10) days after an Owner receives notice of the decision, by filing a written notice of appeal with the Management Committee. The Management Committee shall conduct a hearing within forty-five (45) days thereafter, giving the same notice and observing the same procedures as were required for the original hearing.

17.05 Non-Waiver.

Failure by Declarant, the Association or any Owner to enforce any covenant, Condition, restriction, reservation, easement, assessment, charge, lien or other provision of this Declaration or any other Association Document shall in no way be deemed a waiver of the right to do so thereafter.

**ARTICLE XVIII**  
**TERM AND AMENDMENTS**

**18.01 Term.**

The covenants, conditions, restrictions, reservations, easements, assessments, charges and liens set forth in this Declaration shall run with and bind the Land until the Declaration is terminated pursuant to Section 18.02 below.

**18.02 Termination.**

Subject to the rights of Mortgagees under Article XVI above, the Owners may terminate the Condominium Project and this Declaration, by the vote of 100 percent of the votes allocated to all Units. If the necessary votes are obtained, the agreement of the Owners to terminate the Condominium Project and this Declaration shall be evidenced by a termination agreement or ratification thereof, executed by the required number of Owners in accordance with the Act. Upon recordation of the termination agreement in the Salt Lake County Records, the Condominium Project shall be terminated, this Declaration shall have no further force or effect, and the Association shall be dissolved. Notwithstanding the foregoing, the Owners may not terminate the Condominium Project during the Declarant Control Period without Declarant's prior written consent, which consent Declarant may withhold in its sole discretion.

**18.03 Amendments.**

Except as otherwise expressly provided in this Declaration or the Act, and except for provisions of this Declaration regarding the rights and obligations of Declarant, which may not be amended without Declarant's prior written consent, and subject to the rights of Mortgagees under Article XVI above, Owners may amend any provision of this Declaration and the Plat at any time by a vote of at least sixty-seven percent (67%) of the votes allocated to all Units. If the necessary votes and consent are obtained, the Association shall cause a Supplemental Declaration, and if applicable, a Supplemental Plat, to be Recorded in the Salt Lake County Records. Notwithstanding the foregoing, the Owners may not amend this Declaration or the Plat during the Declarant Control Period without Declarant's prior written consent, which consent Declarant may withhold in its sole discretion.

**18.04 Unilateral Amendments.**

Notwithstanding anything contained in this Declaration to the contrary, this Declaration, and the Plat may be amended unilaterally at any time and from time to time by Declarant (a) if such amendment is necessary to bring any provision hereof into compliance with any applicable governmental statute, rule, or regulation or judicial determination which shall be in conflict therewith, to make technical corrections, to correct mistakes or to remove/clarify ambiguities; or (b) if such amendment is reasonably necessary to enable any reputable title insurance company to issue title insurance coverage with respect to the Units subject to this Declaration; provided, however, any such amendment shall not adversely affect the title to any Owner's Unit, unless any such Owner shall consent thereto in writing. Further, during the Declarant Control Period, Declarant may unilaterally amend this Declaration and the Plat for any other purpose; provided, however, any such amendment shall not materially adversely affect the substantive rights of any

Owner hereunder, nor shall it adversely affect title to any property without the consent of the affected Owner. Any such amendment hereunder shall be effected by the Recording by Declarant of a Supplemental Declaration and, if applicable, a Supplemental Plat, duly signed by the Declarant.

**18.05 Right of Amendment if Requested by Governmental Agency or Federally Chartered Lending Institutions.**

Anything in this Article or Declaration to the contrary notwithstanding, Declarant reserves the unilateral right to amend all or any part of this Declaration and the Plat to such extent and with such language as may be requested by a State Department of Real Estate (or similar agency), FHA, VA, the FHLMC or FNMA and to further amend to the extent requested by any other federal, state or local governmental agency which requests such an amendment as a condition precedent to such agency's approval of this Declaration or such agency's approval of the sale of property within the Project, or by any federally chartered lending institution as a condition precedent to lending funds upon the security of any Unit. Any such amendment shall be effected by the Recording by Declarant of a Supplemental Declaration duly signed by the Declarant, specifying the federal, state or local governmental agency or the federally chartered lending institution requesting the amendment and setting forth the amendatory language requested by such agency or institution, and if applicable, a Supplemental Plat. The Recording of such a Supplemental Declaration shall be deemed conclusive proof of the agency or institution's request for such an amendment, and such Supplemental Declaration and Supplemental Plat, when Recorded, shall be binding upon the entire Project and all persons having an interest therein.

**18.06 Declarant's Control.**

It is the desire and intent of Declarant to retain control of the Association and its activities during the Declarant Control Period. If any amendment requested pursuant to the provisions of this Article XVIII deletes, diminishes or alters such control, Declarant alone shall have the right to amend this Declaration to restore such control.

**ARTICLE XIX**  
**DISPUTE RESOLUTION**

**19.01 Agreement to Arbitrate.**

Declarant, the Association and its officers, directors, and committee members, all persons subject to this Declaration, and any person not otherwise subject to this Declaration who agrees to submit to this Section (collectively, "Bound Parties"), agree that it is in the best interests of all concerned to encourage the amicable resolution of disputes involving the Project without the emotional and financial costs of litigation. Accordingly, each Bound Party agrees not to file suit in any court with respect to a Claim described below, unless and until it has first submitted such Claim to the alternative dispute resolution procedures set forth in Section 19.03 in a good faith effort to resolve such Claim.

#### 19.02 Claims.

As used in this article, the term "Claim" shall refer to any claim, grievance, or dispute arising out of or relating to (i) the interpretation, application or enforcement of the Association Documents, (ii) the rights, obligations, and duties of any Bound Party under the Association Documents, or (iii) the design or construction of improvements within the Project.

(a) Notwithstanding the foregoing, the following will not be considered "Claims" unless all parties to the matter otherwise agree to submit the matter to the procedures set forth in Section 19.03: (i) any suit by the Association to collect assessments or other amounts due from any Owner, (ii) any suit by the Association to obtain a temporary restraining order (or emergency equitable relief and such ancillary relief as the court may deem necessary in order to maintain the status quo, (iii) any suit between Owners, which does not include Declarant or the Association as a party, if such suit asserts a Claim which would constitute a cause of action independent of the documents for the Association, (iv) any suit in which an indispensable party is not a Bound Party, and (v) any suit as to which any applicable statute of limitations would expire within one hundred eighty (180) days of giving the Notice required by Section 19.03, unless the parties against who the Claim is made agree to toll the statute of limitations as to such Claim for such period as may reasonably be necessary to comply with this Section.

#### 19.03 Dispute Resolution Procedures.

(a) The Bound Party asserting a Claim ("Claimant") against another Bound Party ("Respondent") shall give written notice to each Respondent and to the Management Committee stating plainly and concisely: (i) the nature of the Claim, including the persons involved and the Respondent's role in the Claim, (ii) the legal basis of the Claim (i.e., the specific authority out of which the Claim arises), (iii) the Claimant's proposed resolution or remedy, and (iv) the Claimants desire to meet with the Respondent to discuss in good faith, ways to resolve the Claim.

(b) The Claimant and Respondent shall make every reasonable effort to meet in person and confer for resolving the Claim by good faith negotiation. If requested in writing, accompanied by a copy of the Notice, the Management Committee may appoint a representative to assist the parties in negotiating a resolution of the Claim.

(c) If the parties have not resolved the Claim through negotiation within 30 days of the date of the notice described in subsection (a) above (or within such other period as the parties may agree upon), the Claimant shall have 30 additional days to submit the Claim to mediation with an entity designated by the Association (if the Association is not a party to the Claim) or to an independent agency providing dispute resolution services in Salt Lake County.

If the Claimant does not submit the Claim to mediation within such time, or does not appear for the mediation when scheduled, the Claimant shall be deemed to have waived the

Claim, and the Respondent shall be relieved of any and all liability to the Claimant (but not third parties) on account of such Claim.

If the parties do not settle the Claim within 30 days after submission of the matter to mediation, or within such time as determined reasonable by the mediator, the mediator shall issue a notice of termination of the mediation proceedings indicating that the parties are at an impasse and the date that mediation was terminated. The Claimant shall thereafter be entitled to file suit or to initiate administrative proceedings on the Claim, as appropriate.

(d) Any settlement of the claim through negotiation or mediation shall be documented in writing and signed by the parties. If any party thereafter fails to abide by the terms of such agreement, then any other party may file suit or initiate administrative proceedings to enforce such agreement without the need to comply again with the procedures set forth in this Section. In such event, the party taking action to enforce the agreement or award shall, upon prevailing, be entitled to recover from the non-complying party (or if more than one non-complying party, from all such parties in equal proportions) all costs incurred in enforcing such agreement or award, including, without limitation, attorney's fees and court costs.

#### 19.04 Initiation of Proceeding by Association.

In addition to compliance with the foregoing alternative dispute resolution procedures, if applicable, the Association shall not initiate any judicial or administrative proceeding unless first approved by a vote of Owners entitled to cast seventy-six percent (76%) of the votes allocated to all Units, except that no such approval shall be required for actions or proceedings: (i) initiated to enforce the provisions of this Declaration, including collection of assessments and foreclosure of liens; (ii) initiated to challenge ad valorem taxation or condemnation proceedings; (iii) initiated against any contractor, vendor, or supplier of goods or services arising out of a contract for services or supplies, or (iv) to defend claims filed against the Association or to assert counterclaims in proceedings instituted against the Association. This Section shall not be amended unless such amendment is approved by the same percentage of votes necessary to institute proceedings.

### **ARTICLE XX MISCELLANEOUS**

#### 20.01 Interpretation of the Declaration.

Except for the judicial construction, the Association, by its Management Committee, 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 benefited or bound by the covenants and the provisions hereof.

20.02 Severability.

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

20.03 Disclaimer of Representations.

Notwithstanding anything to the contrary contained in this Declaration, Declarant makes no warranties or representations whatsoever that the plan presently envisioned for the complete development of the Condominium Project can or will be carried out or that any land now owned or hereafter acquired by Declarant is or will be subject to this Declaration, or that any such land, whether or not it has been subjected to this Declaration, is or will be committed to or developed for a particular use, that such use will continue in effect.

20.04 Reference to Declaration and Deeds.

Deeds to and instruments affecting any Unit or any other part of the Condominium Project may contain the provisions set forth herein by reference to this Declaration, but regardless of whether any such reference is made in any deed or instrument, each and all of the covenants, conditions, restrictions, reservations, easements, assessments, charges and liens set forth herein shall be binding upon the grantee-owner of other persons claiming through any deed or other instrument and his heirs, executors, administrators, successors and assigns.

20.05 Successors and Assigns of Declarant.

Any reference in this Declaration to Declarant shall include any successors or assignees of Declarant's rights and powers hereunder on the condition that Declarant's rights and powers may only be assigned by a written recorded instrument expressly assigning such rights and powers.

20.06 Captions and Titles.

All captions and titles of headings of Articles and Sections in this Declaration are for the purpose of reference and convenience 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 or context thereof.

20.07 Exhibits.

All exhibits attached to this Declaration are a part of, and are incorporated into, this Declaration.

20.08 Governing Law.

This Declaration shall be governed by and construed in accordance with Utah law.

20.09 Notices.

All Owners of each Unit shall have one and the same registered mailing address to be used by the Association of other Owners for notices, demands, and all other communications regarding Association Matters. The Owner or the representative of the Owners of a Unit shall furnish such registered address to the secretary of the Association within ten (10) days after transfer of title to the Unit to such Owner or Owners. Such registration shall be in written form and signed by all of the Owners of the Unit or by such persons as are authorized to represent the interests of all Owners of the Unit. If no address is registered or if all of the Owners cannot agree, then the address of the Unit shall be deemed their registered address of the Owners(s), and any notice shall be deemed duly given or delivered to the Unit. All notices and demands intended to be served upon the Association shall be sent to the following address or such other address as the Association may designate from time to time by notice to the Owner(s):

Homeowners' Association of Rockwell Square, Inc.  
124 South 600 East, Salt Lake City, Utah 84102

20.10 Waivers.

No waivers by the Association of any right of the Association shall constitute a waiver by Declarant.

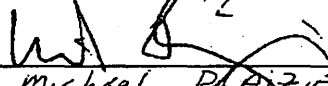
20.11 Service of Process.

The name and place of business of the person to receive service of process is as set forth in the Articles of Incorporation of the Association, and initially shall be Josh Cohen whose place of business within Salt Lake County, Utah is located at 124 South 600 East, Salt Lake City, Utah 84102.

20.12 Priority of Condominium Master Documents.

The other Association Documents shall be subject and subordinate to this Declaration. If there is any conflict or inconsistency between the terms and conditions of this Declaration or any of the other Association Documents, the terms and conditions of this Declaration shall control. The terms and conditions of this Section may not be amended or deleted without the prior written consent of the Declarant.

Declarant has caused its name to be signed by the signature of a duly authorized officer as of the day and year first written above.

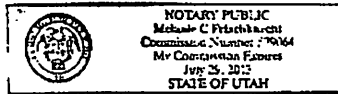
ROCKWELL HOUSING, LLC,  
a Utah limited liability company  
By HOUSING PLUS, a Utah nonprofit corporation  
MANAGER  
By:   
Name: MICHAEL PLAUTZ  
Title: SECRETARY

STATE OF UTAH )

: ss.

COUNTY OF SALT LAKE )

On this 11th day of January, 2011, before me personally appeared MICHAEL PLAIZIER, who acknowledged himself to be the SECRETARY OF HOUSING PLUS, Manager of ROCKWELL HOUSING, LLC, a Utah limited liability company, and being authorized to do so, he executed the foregoing instrument for the purpose therein contained, by signing the name of the company, by himself or such officer.



Michael C. Prischke  
NOTARY PUBLIC  
Residing at: Salt Lake, UT

My Commission Expires:

July 29, 2013



**EXHIBIT A  
TO  
AMENDED AND RESTATED DECLARATION  
OF CONDOMINIUMS AND DECLARATION OF COVENANTS,  
CONDITIONS, AND RESTRICTIONS OF  
ROCKWELL SQUARE CONDOMINIUMS**

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Legal Description

Beginning at a point on the South line of 13800 South Street said point being West 244.00 feet along the center line of said 13800 South Street and South 33.00 feet from a found Street Monument at the intersection of 13800 South Street and 300 East Street and running:

thence South 765.00 feet;  
thence East 244.00 feet;  
thence South 261.00 feet;  
thence West 502.00 feet;  
thence North 261.00 feet  
thence West 331.00 feet to a point on the east line of Bangerter Parkway;  
thence North 290.00 feet along the east line of said Bangerter Parkway;  
thence East 14.18 feet along the east line of said Bangerter Parkway;  
thence North 00°15'30" West 33.00 feet along the east line of said Bangerter Parkway;  
thence South 89°45'37" West 6.00 feet along the east line of said Bangerter Parkway;  
thence North 45°13'01" West 11.31 feet along the east line of said Bangerter Parkway;  
thence North 35.84 feet; along the east line of said Bangerter Parkway;  
thence Northeasterly 78.71 feet along the arc of a 555.00 foot radius curve to the right  
(center bears North 00°00'01" East and the chord bears North 04°03'46" East  
78.64 feet with a central angle of 08°07'31") along the east line of said Bangerter  
Parkway;  
thence North 12° 01'21" East 109.97 feet along the east line of said Bangerter Parkway;  
thence Northeasterly 43.50 feet along the arc of a 652.48 foot radius curve to the left  
(center bears North 12°14'35" East and the chord bears North 10°20'00" East  
43.49 feet with a central angle of 03°49'11") along the east line of said Bangerter  
Parkway;  
thence Northeasterly 2.44 feet along the arc of a 655.00 foot radius curve to the left  
(center bears North 04°55'50" East and the chord bears North 04°49'25" East  
2.44 feet with a central angle of 00°12'49") along the east line of said Bangerter  
Parkway to the southwest corner of the Cutler Subdivision as found on file at the  
Salt Lake County Records Office;  
thence East 284.51 feet along the south line of said Cutler Subdivision;  
thence North 167.00 feet along the east line of said Cutler Subdivision to a point on the  
south line of said 138.00 South Street;  
thence East 268.00 feet along the south line of said 13800 South Street to the point of  
beginning.

Containing 524,041 square feet or 12.03 acres.

EXHIBIT B  
TO  
AMENDED AND RESTATED DECLARATION  
OF CONDOMINIUMS AND DECLARATION OF COVENANTS,  
CONDITIONS, AND RESTRICTIONS OF  
ROCKWELL SQUARE CONDOMINIUMS

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BYLAWS OF  
HOMEOWNERS' ASSOCIATION OF ROCKWELL SQUARE, INC.

ARTICLE 1  
DEFINITIONS

1.01 Declaration.

As used herein "Declaration" means the Amended and Restated Declaration of Condominium for Rockwell Square Condominiums, recorded in the Official Records of Salt Lake County, Utah.

1.02 Other Definitions.

Unless otherwise defined herein, all capitalized terms used herein shall have the meanings given to them in the Declaration.

ARTICLE 2  
OFFICES

The Association is a Utah nonprofit corporation, with its principal office located at 124 South 600 East, Salt Lake City, Utah 84102.

ARTICLE 3  
VOTING, QUORUM AND PROXIES

3.01 Voting.

Votes shall be allocated as set forth in Section 5.02 of the Declaration.

3.02 Quorum.

Except as otherwise required by law or by the Articles, the presence in person or by proxy of Owners entitled to vote more than thirty-five percent (35%) of the total votes of the Owners shall constitute a quorum.

3.03 Proxies.

Votes may be cast in person or by proxy. Every proxy must be executed in writing by the Owner or his duly authorized attorney-in-fact. Such proxy shall be filed with the secretary of the Association before or at the time of the meeting. No proxy shall be valid after the expiration of eleven months from the date of its execution unless otherwise provided in the proxy.

3.04 Majority Vote.

At any meeting of the Owners, if a quorum is present, the affirmative vote of a majority of the votes represented at the meeting, in person or by proxy, shall be the act of the Owners, unless the vote of greater number is required by law, the Articles, the Declaration, or these Bylaws.

ARTICLE 4  
ADMINISTRATION

4.01 Annual Meeting.

The annual meeting of the Owners shall be held at a time designated by the Management Committee in the month of November in each year, or at such other date designated by the Management Committee, beginning with the year 2011, for the purpose of electing Directors and for the transaction of such other business as may come before the meeting.

4.02 Special Meetings.

Special meetings of the Owners, for any purpose, unless otherwise prescribed by statute, may be called by the president or by a majority of the Directors and shall be called by the president at the request of Owners entitled to vote twenty percent (20%) or more of the total votes of all Owners.

4.03 Place of Meeting.

The Management Committee may designate the Association's principal offices or any place within Salt Lake County, Utah, as the place for any annual meeting or for any special meeting of the Owners called by the Management Committee. Such meeting may also take place by telephone if so designated by the Management Committee, provided that each Owner can hear each other Owner.

4.04 Notice of Meeting.

Written or printed notice of any meeting of the Owners, stating the place, day, and hour of the meeting and the purpose or purposes for which the meeting is called, shall be delivered personally or by registered or certified mail to each Owner entitled to vote at such meeting not less than ten nor more than fifty days before the date of the meeting. If mailed, such notice shall be deemed to be delivered five (5) business days after deposit in the United States mail, addressed to the Owner at his address as it appears in the office of the Association, with postage thereon prepaid return receipt requested. For the purpose of determining Owners entitled to

notice of or to vote at any meeting of the Owners, the Management Committee may set a record date for such determination of Owners, in accordance with the laws of the state of Utah. If requested by the person or persons lawfully calling such meeting, the secretary shall give notice thereof at the expense of the Association.

4.05 Informal Action by Owners.

Any action required or permitted to be taken at a meeting of the Owners may be taken without a meeting if a consent is made in writing, setting forth the action so taken, and is signed by all of the Owners entitled to vote with respect to the subject matter thereof. Such consent shall have the same force and effect as a unanimous vote of the Owners.

ARTICLE 5  
DECLARANT CONTROL

Declarant shall be entitled to control the Association as set forth in Section 6.03 of the Declaration.

ARTICLE 6  
MANAGEMENT COMMITTEE

6.01 Number and Election of Directors.

Directors shall be appointed, elected, and removed as set forth in Article VI of the Declaration.

6.02 Resignations, Vacancies.

Any Director may resign at any time by giving written notice to the president or to the secretary of the Association. Such resignation shall take effect at the time specified therein and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. Other than with respect to a Director appointed by the Declarant during the Declarant Control Period, any vacancy occurring on the Management Committee (by reason of resignation or death) shall be filled by a Director appointed by the remaining Directors. A vacancy occurring on the Management Committee created by the resignation or death of a Director appointed by the Declarant during the Declarant Control Period shall be filled by the Declarant appointing a new Director. A Director elected to fill a vacancy shall hold office until the next annual meeting of the Owners and until his successor is duly appointed and qualified.

6.03 Regular Meetings.

Regular meetings of the Management Committee may be held at such places within or outside the state of Utah or by telephone, provided that each Director can hear each other Director, and at such times as the Management Committee from time to time by vote may determine upon the giving of at least ten days' prior notice of the time and place thereof to each Director by leaving such notice with such Director or at such Director's residence or usual place of business, or by mailing it prepaid and addressed to such Director at such Director's address as it appears on the books of the Association. Notices need not state the purposes of the meeting.

No notice of any adjourned meeting of the Directors shall be required. Any business may be transacted at a regular meeting. The regular meeting of the Management Committee for the election of Officers and for such other business as may come before the meeting may be held without call or formal notice immediately after, and at the same place as, the annual meeting of Owners; or any special meeting of Owners at which a Management Committee is elected.

6.04 Special Meetings.

Special meetings of the Management Committee may be held at any place within the state of Utah or by telephone, provided that each Director can hear each other Director, at any time when called by the president, or by two or more Directors, upon the giving of at least three days' prior notice of the time and place thereof to each Director by leaving such notice with such Director or at such Director's residence or usual place of business, or by mailing it prepaid and addressed to such Director at such Director's address as it appears on the books of the Association, or by telephone. Notices need not state the purposes of the meeting. No notice of any adjourned meeting of the Directors shall be required.

6.05 Quorum.

A majority of the number of Directors fixed by these Bylaws, as amended from time to time, shall constitute a quorum for the transaction of business, but a lesser number may adjourn any meeting from time to time. When a quorum is present at any meeting, a majority of the Directors in attendance except where a larger number is required by law, by the Articles, or by these Bylaws, decide any question brought before such meeting.

6.06 Waiver of Notice.

Before, at, or after any meeting of the Management Committee, 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 Management Committee shall be a waiver of notice by such Director except when such Director attends the meeting for the express purpose of objecting to the transaction of business because the meeting is not lawfully called or convened.

6.07 Informal Action by Directors.

Any action required or permitted to be taken at a meeting of the Director may be taken without a meeting if a consent is made in writing, setting forth the action so taken, and is signed by all of the Directors entitled to vote with respect to the subject matter thereof. Such consent shall have the same force and effect as a unanimous vote of the Directors.

ARTICLE 7  
OFFICERS AND AGENTS

7.01 General.

The Officers of the Association shall be a president (who shall be chosen from among the Directors), one or more vice presidents, a secretary, and a treasurer. The Management

Committee may appoint such other officers, assistant officers, committees, and agents, including assistant secretaries and assistant treasurers, as they may consider necessary or advisable, who shall be chosen in such manner and hold their offices for such terms and have such authority and duties as from time to time may be determined by the Management Committee. One person may hold any two offices, except that no person may simultaneously hold the offices of president and secretary. In all cases where the duties of any officer, agent, or employee are not prescribed by the Bylaws or by the Management Committee, such Officer, agent, or employee shall follow the orders and instructions of the president.

7.02 Removal of Officers.

The Management Committee may remove any Officer, either with or without cause, and elect a successor at any regular meeting of the Management Committee, or at any special meeting of the Management Committee called for such purpose.

7.03 Vacancies.

A vacancy in any office, however occurring, shall be filled by the Management Committee for the unexpired portion of the term.

7.04 President.

The president shall be the chief officer of the Association. The president shall preside at all meetings of the Association and of the Management Committee. The president shall have the general and active control of the affairs and business of the Association and general supervision of its officers, agents, and employees. The president of the Association is designated as the Officer with the power to prepare, execute, certify, and record amendments to the Declaration on behalf of the Association.

7.05 Vice Presidents.

The vice president shall assist the president and shall perform such duties as may be assigned to them by the president or by the Management Committee. In the absence of the president, the vice president designated by the Management Committee or (if there be no such designation) designated in writing by the president shall have the powers and perform the duties of the president. If no such designation shall be made, all vice presidents may exercise such powers and perform such duties.

7.06 Secretary.

The secretary shall:

(a) keep the minutes of the proceedings of the Owners Meetings and of the Management Committee Meetings;

(b) see that all notices are duly given in accordance with the provisions of these Bylaws, the Declaration, and as required by law;

(c) be custodian of the corporate records and of the seal of the Association and affix the seal to all documents when authorized by the Management Committee;

(d) maintain at the Association's principal offices a record containing the names and registered addresses of all Owners, the designation of the Unit owned by each Owner, and, if such Unit is mortgaged, the name and address of each Mortgagee; and

(e) in general, perform all duties incident to the office of secretary and such other duties as from time to time may be assigned to him by the president or by the Management Committee. Assistant secretaries, if any, shall have the same duties and powers, subject to supervision by the secretary.

7.07 Treasurer.

The treasurer shall be the principal financial officer of the Association, shall have the care and custody of all funds, securities, evidences of indebtedness, and other personal property of the Association, and shall deposit the same in accordance with the instructions of the Management Committee. The treasurer shall receive and give receipts and quittances for moneys paid in on account of the Association, and shall pay out of the funds on hand all bills, payrolls, and other just debts of the Association of whatever nature upon maturity. The treasurer shall perform all other duties incident to the office of the treasurer and, upon request of the Management Committee, make such reports to it as may be required at any time. The treasurer shall, if required by the Management Committee, give the Association a bond in such sums and with such sureties as shall be satisfactory to the Management Committee, conditioned upon the faithful performance of his duties and for the restoration to the Association of all books, papers, vouchers, money, and other property of whatever kind in his possession or under his control belonging to the Association. He shall have such other powers and perform such other duties as may be from time to time prescribed by the Management Committee or the president. The assistant treasurers, if any, shall have the same powers and duties, subject to the supervision of the treasurer.

ARTICLE 8  
EVIDENCE OF OWNERSHIP, REGISTRATION OF  
MAILING ADDRESS, AND LIEN HOLDERS

8.01 Proof of Ownership.

Except for those Owners who initially contracted to purchase a Unit from the Declarant, any person on becoming an Owner shall furnish to the Association a photocopy or a certified copy of the recorded instrument vesting that person with an ownership interest in the Unit. Such copy shall remain in the files of the Association. An Owner shall not be deemed to be in good standing and shall not be entitled to vote at any annual or special meeting of Owners unless this requirement is first satisfied.

8.02 Registration of Mailing Address.

If a Unit is owned by two or more Owners, such Owners shall designate one address as the registered address required by the Declaration. The registered address of an Owner or

Owners shall be furnished to the secretary of the Association within ten days after transfer of title, or after a change of address. Such registration shall be in written form and signed by all of the Owners of the Unit. If no address is registered or if not all of the Owners can agree, then the address of the Unit shall be deemed the registered address of the Owner(s), and any notice shall be deemed duly given if delivered to the Unit.

8.03 Liens.

Any Owner who mortgages or grants a deed of trust covering his Unit shall give the Association written notice of the name and address of the Mortgagee and shall file true, correct, and complete copies of the note and security instrument with the Association.

8.04 Address of the Association.

The address of the Association shall be 124 South 600 East, Salt Lake City, Utah 84102. Such address may be changed from time to time upon written notice to all Owners and all listed Mortgagees.

ARTICLE 9  
SECURITY INTEREST IN MEMBERSHIP

Owners shall have the right irrevocably to constitute and appoint a mortgagee their true and lawful attorney-in-fact to vote their Membership in the Association at any and all meetings of the Association and to vest in the Mortgagee any and all rights, privileges and powers that they have as Owners under the Articles and these Bylaws or by virtue of the Declaration. Unless otherwise expressly provided in such proxy, such proxy shall become effective upon the filing of notice by the Mortgagee with the secretary of the Association. A release of the Mortgage covering the subject Unit shall operate to revoke such proxy. Nothing herein contained shall be construed to relieve Owners, as mortgagors, of their duties and obligations as Owners or to impose upon the Mortgagee the duties and obligations of an Owner.

ARTICLE 10  
AMENDMENTS

10.01 By Directors.

Subject to the approval of the Owners as provided in Section 10.02 below and except as limited by law, the Articles, the Declaration, or these Bylaws, the Management Committee shall have power to make, amend, and repeal the Bylaws of the Association at any regular meeting of the Management Committee or at any special meeting called for that purpose at which a quorum is represented. If, however, the Owners shall make, amend, or repeal any Bylaw, the Directors shall not thereafter amend the same in such manner as to defeat or impair the object of the Owners in taking such action.

10.02 Owners.

Subject to any rights conferred upon first Mortgagees in the Declaration, the Owners, may, by the vote of the holders of at least sixty-seven percent (67%) of the total votes of all



Owners, unless a greater percentage is expressly required by law, the Articles, the Declaration, or these Bylaws, make alter, amend, or repeal the Bylaws of the Association at any annual meeting or at any special meeting called for that purpose at which a quorum shall be represented.

ARTICLE 11  
MISCELLANEOUS

11.01 Fiscal Year.

The fiscal year of the Association shall be such as may from time to time be established by the Management Committee.

11.02 Other Provisions.

The Declaration contains certain other provisions relating to the administration of the Condominium Project, which provisions are hereby incorporated by reference.

Adopted and executed by Declarant on JANUARY 6, 2011.

**EXHIBIT C  
TO  
AMENDED AND RESTATED DECLARATION OF CONDOMINIUM  
AND DECLARATION OF COVENANTS,  
CONDITIONS, AND RESTRICTIONS OF  
ROCKWELL SQUARE CONDOMINIUMS**

Withdrawable Land

Located in the Southwest Quarter of Section 6,  
Township 4 South, Range 1 East,  
Salt Lake Base and Meridian.

Beginning at a point at the Southeast corner of the Cutler Subdivision as found on file at the Salt Lake County Recorder's Office said point being West 512.00 feet along the center line of said 13800 South Street and South 200.00 feet from a found Street Monument at the Intersection of 13800 South Street and 300 East Street, said monument also being used as the Center of Section, Township 4 South, Range 1 East, Salt Lake Base and Meridian in some surveys, and running;

thence South 00°57'29" East 263.39 feet;

thence Southwesterly 34.61 feet along the arc of a 49.50 foot radius curve to the left (center bears South 18°22'16" East and the chord bears South 51°35'45" West 33.91 feet with a central angle of 40°03'57");

thence Southwesterly 9.18 feet along the arc of a 9.00 foot radius curve to the right (center bears North 58°26'13" West and the chord bears South 60°46'42" West 8.79 feet with a central angle of 58°25'50");

thence South 38.58 feet;

thence Southeasterly 9.18 feet along the arc of a 9.00 foot radius curve to the right (center bears South 00°00'23" West and the chord bears South 60°46'42" East 8.79 feet with a central angle of 58°25'50");

thence Southeasterly 31.52 feet along the arc of a 49.50 foot radius curve to the left (center bears North 58°26'13" East and the chord bears South 49°48'19" East 30.99 feet with a central angle of 36°29'05");

thence South 246.42 feet;

thence West 322.50 feet to the east line of Bangerter Parkway;

thence North 290.00 feet along the east line of said Bangerter Parkway;

thence East 14.18 feet along the east line of said Bangerter Parkway;

thence North 00°15'30" West 33.00 feet along the east line of said Bangerter Parkway;

thence South 89°45'37" West 6.00 feet along the east line of said Bangerter Parkway;

thence North 45°13'01" West 11.31 feet along the east line of said Bangerter Parkway;

thence North 35.84 feet along the east line of said Bangerter Parkway;

thence Northeasterly 78.71 feet along the arc of a 555.00 foot radius curve to the right (center bears South 89°59'59" East and the chord bears North 04°03'46" East 78.64 feet with a central angle of 08°07'31") along the east line of said Bangerter Parkway;

thence North 12°01'21" East 109.97 feet along the east line of said Bangerter Parkway;

thence Northeasterly 43.50 feet along the arc of a 652.48 foot radius curve to the left (center bears North 77°45'25" West and the chord bears North 10°20'00" East 43.49 feet with a central angle of 03°49'11") along the east line of said Bangerter Parkway;

thence Northeasterly 2.44 feet along the arc of a 655.00 foot radius curve to the left (center bears North 85°04'10" West and the chord bears North 04°49'25" East 2.44 feet with a central angle of 00°12'49") along the east line of said Bangerter Parkway to the Southwest corner of the Cutler Subdivision as found on file at the Salt Lake County Recorder's Office;

thence East 284.51 feet along the south line of said Cutler Subdivision to the point of beginning.

Contains 187,075 Square Feet or 4.29 Acres

**EXHIBIT D**  
**TO**  
**AMENDED AND RESTATED DECLARATION OF CONDOMINIUM**  
**AND DECLARATION OF COVENANTS,**  
**CONDITIONS, AND RESTRICTIONS OF**  
**ROCKWELL SQUARE CONDOMINIUMS**

Land Not Subject to Option to Withdraw Land  
(Rockwell Square Residential Remainder)

Located in the Southwest Quarter of Section 6,  
Township 4 South, Range 1 East,  
Salt Lake Base and Meridian.

Beginning at a point on the South line of 13800 South Street said point being West 244.00 feet along the center line of said 13800 South Street and South 40.00 feet from a found Street Monument at the Intersection of 13800 South Street and 300 East Street said monument also being used as the Center of Section, Township 4 South, Range 1 East, Salt Lake Base and Meridian in some surveys, and running:

thence South 758.00 feet;  
thence East 244.00 feet;  
thence South 261.00 feet;  
thence West 502.00 feet;  
thence North 261.00 feet;  
thence West 8.50 feet;  
thence North 246.42 feet;  
thence Northwesterly 31.52 feet along the arc of a 49.50 foot radius curve to the right (center bears North 21°57'08" East and the chord bears North 49°48'19" West 30.99 feet with a central angle of 36°29'05");  
thence Northwesterly 9.18 feet along the arc of a 9.00 foot radius curve to the left (center bears South 58°26'13" West and the chord bears North 60°46'42" West 8.79 feet with a central angle of 58°25'50");  
thence North 38.58 feet;  
thence Northeasterly 9.18 feet along the arc of a 9.00 foot radius curve to the left (center bears North 00°00'23" West and the chord bears North 60°46'42" East 8.79 feet with a central angle of 58°25'50");  
thence Northeasterly 34.61 feet along the arc of a 49.50 foot radius curve to the right (center bears South 58°26'13" East and the chord bears North 51°35'46" East 33.91 feet with a central angle of 40°03'57");  
thence North 00°57'29" West 263.39 feet to the southeast corner of the Cutler Subdivision;  
thence North 160.00 feet along the east line of said Cutler Subdivision to a point on the south line of said 13800 South Street;  
thence East 268.00 feet along the south line of said 13800 South Street to the point of beginning.  
Contains 336,967 Square Feet or 7.736 Acres

**EXHIBIT E**  
**TO**  
**AMENDED AND RESTATED DECLARATION OF CONDOMINIUM**  
**AND DECLARATION OF COVENANTS,**  
**CONDITIONS, AND RESTRICTIONS OF**  
**ROCKWELL SQUARE CONDOMINIUMS**

Allocated Interests and Votes of Constructed Units

**Allocated Interest**

		Unit Number	Square Footage/ Unit	Number of Votes/ Unit	Allocated Interest/ Unit
<b>Building 1</b>					
<b>First Floor</b>	Retail Unit	1	1973	297	2.97%
	Retail Unit	2	2006	302	3.02%
	Retail Unit	3	2003	302	3.02%
	Retail Unit	4	1977	298	2.98%
<b>Second Floor</b>	Residential Unit	20	2125	320	3.20%
	Residential Unit	21	2027	305	3.05%
	Residential Unit	22	1919	289	2.89%
	Residential Unit	23	1759	265	2.65%
	Residential Unit	24	2285	344	3.44%
	Residential Unit	25	1544	232	2.32%
	Residential Unit	26	1919	289	2.89%
	Residential Unit	27	1759	265	2.65%
	Residential Unit	28	2125	320	3.20%
	Residential Unit	29	2027	305	3.05%
<b>Third Floor</b>	Residential Unit	30	2125	320	3.20%
	Residential Unit	31	2027	305	3.05%
	Residential Unit	32	1919	289	2.89%
	Residential Unit	33	1759	265	2.65%
	Residential Unit	34	2285	344	3.44%
	Residential Unit	35	1544	232	2.32%
	Residential Unit	36	1919	289	2.89%
	Residential Unit	37	1759	265	2.65%
	Residential Unit	38	2125	320	3.20%
	Residential Unit	39	2027	305	3.05%
<b>Fourth Floor</b>	Residential Unit	40	2125	320	3.20%
	Residential Unit	41	2027	305	3.05%
	Residential Unit	42	1919	289	2.89%
	Residential Unit	43	1759	265	2.65%
	Residential Unit	44	2285	344	3.44%
	Residential Unit	45	1544	232	2.32%
	Residential Unit	46	1919	289	2.89%
	Residential Unit	47	1759	265	2.65%
	Residential Unit	48	2125	320	3.20%
	Residential Unit	49	2027	305	3.05%
			<b>66426</b>	<b>10000</b>	<b>100.00%</b>
			<b>Total Square Footage</b>	<b>Total</b>	<b>Total Percentage</b>
<b>Total Building 1</b>				<b>Votes</b>	<b>Interests</b>

<b>Building 2</b>			
First Floor	Retail Unit	1	1973
	Retail Unit	2	2006
	Retail Unit	3	2003
	Retail Unit	4	1977
Second Floor	Residential Unit	20	2125
	Residential Unit	21	2027
	Residential Unit	22	1919
	Residential Unit	23	1759
	Residential Unit	24	2285
	Residential Unit	25	1544
	Residential Unit	26	1919
	Residential Unit	27	1759
	Residential Unit	28	2125
	Residential Unit	29	2027
Third Floor	Residential Unit	30	2125
	Residential Unit	31	2027
	Residential Unit	32	1919
	Residential Unit	33	1759
	Residential Unit	34	2285
	Residential Unit	35	1544
	Residential Unit	36	1919
	Residential Unit	37	1759
	Residential Unit	38	2125
	Residential Unit	39	2027
Fourth Floor	Residential Unit	40	2125
	Residential Unit	41	2027
	Residential Unit	42	1919
	Residential Unit	43	1759
	Residential Unit	44	2285
	Residential Unit	45	1544
	Residential Unit	46	1919
	Residential Unit	47	1759
	Residential Unit	48	2125
	Residential Unit	49	2027

<b>Building 3</b>			
First Floor	Retail Unit	1	1973
	Retail Unit	2	2006
	Retail Unit	3	2003
	Retail Unit	4	1977
Second Floor	Residential Unit	20	2125
	Residential Unit	21	2027
	Residential Unit	22	1919
	Residential Unit	23	1759
	Residential Unit	24	2285
	Residential Unit	25	1544
	Residential Unit	26	1919
	Residential Unit	27	1759
	Residential Unit	28	2125
	Residential Unit	29	2027
Third Floor	Residential Unit	30	2125
	Residential Unit	31	2027

	Residential Unit	32	1919
	Residential Unit	33	1759
	Residential Unit	34	2285
	Residential Unit	35	1544
	Residential Unit	36	1919
	Residential Unit	37	1759
	Residential Unit	38	2125
	Residential Unit	39	2027
Fourth Floor	Residential Unit	40	2125
	Residential Unit	41	2027
	Residential Unit	42	1919
	Residential Unit	43	1759
	Residential Unit	44	2285
	Residential Unit	45	1544
	Residential Unit	46	1919
	Residential Unit	47	1759
	Residential Unit	48	2125
	Residential Unit	49	2027
Building 4			
First Floor	Retail Unit	1	2150
	Retail Unit	2	1617
Second Floor	Residential Unit	20	2125
	Residential Unit	21	2027
	Residential Unit	22	1919
	Residential Unit	23	1759
	Residential Unit	24	2285
	Residential Unit	25	1544
	Residential Unit	26	1919
	Residential Unit	27	1759
	Residential Unit	28	2125
	Residential Unit	29	2027
Third Floor	Residential Unit	30	2125
	Residential Unit	31	2027
	Residential Unit	32	1919
	Residential Unit	33	1759
	Residential Unit	34	2285
	Residential Unit	35	1544
	Residential Unit	36	1919
	Residential Unit	37	1759
	Residential Unit	38	2125
	Residential Unit	39	2027
Fourth Floor	Residential Unit	40	2125
	Residential Unit	41	2027
	Residential Unit	42	1919
	Residential Unit	43	1759
	Residential Unit	44	2285
	Residential Unit	45	1544
	Residential Unit	46	1919
	Residential Unit	47	1759
	Residential Unit	48	2125
	Residential Unit	49	2027

<b>Building 5</b>			
<b>First Floor</b>	Retail Unit	1	1973
	Retail Unit	2	2006
	Retail Unit	3	2003
	Retail Unit	4	1977
<b>Second Floor</b>	Residential Unit	20	2125
	Residential Unit	21	2027
	Residential Unit	22	1919
	Residential Unit	23	1759
	Residential Unit	24	2285
	Residential Unit	25	1544
	Residential Unit	26	1919
	Residential Unit	27	1759
	Residential Unit	28	2125
	Residential Unit	29	2027
<b>Third Floor</b>	Residential Unit	30	2125
	Residential Unit	31	2027
	Residential Unit	32	1919
	Residential Unit	33	1759
	Residential Unit	34	2285
	Residential Unit	35	1544
	Residential Unit	36	1919
	Residential Unit	37	1759
	Residential Unit	38	2125
	Residential Unit	39	2027
<b>Fourth Floor</b>	Residential Unit	40	2125
	Residential Unit	41	2027
	Residential Unit	42	1919
	Residential Unit	43	1759
	Residential Unit	44	2285
	Residential Unit	45	1544
	Residential Unit	46	1919
	Residential Unit	47	1759
	Residential Unit	48	2125
	Residential Unit	49	2027



Tab B

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IN THE THIRD JUDICIAL DISTRICT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

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CRITERIUM, LLC, a Utah limited liability  
company,

Plaintiff,

vs.

HOMEOWNERS ASSOCIATION OF  
ROCKWELL SQUARE, INC., a Utah non-  
profit corporation, *et al.*,

Defendants.

**RULING & ORDER**

Civil No. 140903232

Judge Royal I. Hansen

Pending before this Court is a Motion to Dismiss (the "Motion") filed by the Defendants in the present case (collectively "Defendants"). This matter came before the Court for oral argument on July 21, 2014, at which hearing Plaintiff Criterium, LLC ("Plaintiff") was represented by J. Angus Edwards and Susan Peters and Defendants were represented by Cory B. Mattson, Thor B. Roundy, and Kevin P. Dwyer. Based on the arguments presented at the July 21 hearing and on briefing and argument submitted by the Parties, the Court issues the following Ruling and Order.

**DISCUSSION**

"Rule 12(b)(6) of the Utah Rules of Civil Procedure allows for a complaint to be dismissed where the pleadings fail to state a claim upon which relief can be granted." *Williams v. Bench*, 2008 UT App 306, ¶ 20, 193 P.3d 640. "The general rule is that allegations in a complaint should be construed liberally and against a motion for failure to state a claim for relief." *Debry v. Noble*, 889 P.2d 428, 443 (Utah 1995). Thus, in addressing a *Rule 12(b)(6)*

motion, the court will "assume that the factual allegations in the complaint are true and [] draw all reasonable inferences in the light most favorable to the plaintiff." *Berneau v. Martino*, 2009 UT 87, ¶ 3, 223 P.3d 1128. Nevertheless, "in deciding the propriety of a Rule 12(b)(6) motion, the [] court[] [is] obliged to address the legal viability of a plaintiff's underlying claim as presented in the pleadings." *Williams*, 2008 UT App 306, at ¶ 20, 193 P.3d 640. It is in this context the Court examines the sufficiency of Plaintiff's pleadings.

In its first cause of action, Plaintiff seeks declaratory relief declaring the Amended and Restated Declaration of Condominium and Declaration of Covenants, Conditions, and Restrictions for Rockwell Square Condominiums recorded on January 11, 2011 (the "Declaration") grants Plaintiff 80% of the undivided interests in the common areas, corresponding voting rights, and membership in the Association. *See* Compl. 10-11. Defendants argue that the Utah Condominium Ownership Act (the "Act") does not require recognition of Plaintiff's voting rights until the units in which Plaintiff claims ownership are actually constructed. While this would certainly be the case if the Declaration included reference to Rockwell Square (the "Development") being an expandable condominium project under *Section 58-7-13.10*, the Declaration makes no such reference. Moreover, the *Utah Code* provides that "voting rights shall be available to, the unit owners according to their respective percentage or fractional undivided interests in the common areas and facilities." *See* Utah Code Ann. § 57-8-24. In this context, the Complaint alleges that Plaintiff possesses an undivided interest in 80% of the common areas in the Development as evidenced by its payment of taxes for the common area property. Accordingly, at this stage the Court must draw the reasonable inference that Plaintiff's ownership interests should grant Plaintiff corresponding voting rights pursuant to the *Utah Code* notwithstanding the language of the Declaration. Thus, in construing Plaintiff's Complaint

liberally and against Defendants' *Rule 12(b)(6)* motion, the Court determines Plaintiff has sufficiently pled its claim for declaratory relief to survive dismissal.

The same is true with regard to Plaintiff's claim for breach of fiduciary duty. Defendants correctly observe that "[n]o Director shall be liable to the Owners . . . except for such Director's own individual and willful misconduct or bad faith." *See* Mem. Supp. Mot. to Dismiss 5. However, given the Court's decision, *infra*, the Court must, at this stage, draw the reasonable inference that the Directors were acting with self interest in denying Plaintiff voting rights in the Association. The Court must also draw the reasonable inference that such self-interest represents willful misconduct on the part of the Directors. Accordingly, the Complaint contains sufficient factual allegations with regard to Plaintiff's breach of fiduciary duty claim to survive dismissal.

The same cannot be said for Plaintiff's claim for unjust enrichment. Plaintiff seeks through its claim for unjust enrichment, reimbursement for payment of taxes on the common areas in the Development. Plaintiff clarified at oral argument that it would only pursue such relief should the Court determine the Declaration provides voting rights and membership in the Association only for constructed units. Courts have reasoned "parties must exhaust applicable administrative remedies as a prerequisite to seeking judicial review." *See State Tax Comm'n v. Iverson*, 782 P.2d 519, 524 (Utah 1989). Indeed, in the context of tax assessments, courts have reasoned "if an administrative proceeding might leave no remnant of the [] question, the administrative remedy plainly should be pursued." *See Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 16, 34 P.3d 180. Thus, "[w]here the legislature has imposed a specific exhaustion requirement . . . [courts] will enforce it strictly." *Patterson v. Am. Fork City*, 2003 UT 7, ¶ 17, 67 P.3d 466. Accordingly, "if a party fails to exhaust its administrative remedies prior to filing

suit, the suit must be dismissed." *Salt Lake City Mission v. Salt Lake City*, 2008 UT 31, ¶ 6, 184 P.3d 599.

Here, the *Utah Code* provides a method whereby an aggrieved taxpayer may appeal tax assessments to the tax commission. See *Utah Code Ann.* § 59-2-1006(1). Additionally, the Complaint contains no factual allegation demonstrating Plaintiff availed itself of the administrative remedy set forth in *Section 59-2-1006*. The Court must strictly enforce the imposition of such an exhaustion requirement. See *Patterson*, 2003 UT 7, at ¶ 17, 67 P.3d 466. Accordingly, the Court dismisses Plaintiff's claim for unjust enrichment based on Plaintiff's failure to exhaust administrative remedies. See *Salt Lake City Mission*, 2008 UT 31, at ¶ 6, 184 P.3d 599.

Based on the foregoing, Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. Plaintiff's claim for unjust enrichment is dismissed with prejudice and on the merits based on Plaintiff's failure to exhaust administrative remedies with regard thereto. However, Plaintiff may proceed as outlined, *supra*, with regard to its claims for declaratory judgment and breach of fiduciary duty.

This is the final order of the Court and no further order is required.

So Ordered this 25 day of August, 2014.



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Judge Royal I. Hansen  
District Court Judge



Tab C

IN THE THIRD JUDICIAL DISTRICT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

FEB 10 2015

Salt Lake County

Deputy Clerk

CRITERIUM, LLC, a Utah limited liability  
company,

Plaintiff,

vs.

HOMEOWNERS ASSOCIATION OF  
ROCKWELL SQUARE, INC., a Utah non-  
profit corporation, *et al.*,

Defendants.

**RULING & ORDER**

Civil No. 140903232

Judge Royal I. Hansen

Pending before this Court is a Motion for Partial Summary Judgment filed by Plaintiff Criterium, LLC ("Plaintiff"). Also pending before this Court is an Alternative Cross-Motion for Partial Summary Judgment filed by the Defendants in the present case (collectively "Defendants"). This matter came before the Court for oral argument on February 5, 2015, at which hearing Plaintiff was represented by J. Angus Edwards and Defendants were represented by Kevin P. Dwyer and Thor B. Roundy.<sup>1</sup> The Court, having fully reviewed all relevant pleadings and law to both Plaintiff's Motion for Partial Summary Judgment and Defendants' Cross-Motion for Partial Summary Judgment (collectively the "Motions"), having considered the argument of counsel, and having now been fully informed, rules and orders as follows.

<sup>1</sup> The Court notes Plaintiff filed an Objection to New Arguments Asserted in Oral Arguments ("Plaintiff's Objection") on or about February 6, 2015. Defendant Corner Canyon Properties ("CCP") filed a Reply to Plaintiff's Objection on or about February 9, 2015. The "new arguments" addressed in Plaintiff's Objection were simply CCP's responses to questions posed by the Court. Moreover, the matters addressed in Plaintiff's Objection ultimately do not affect the Court's decision expressed herein. Accordingly, Plaintiff's Objection is overruled.

## DISCUSSION

Rule 56 of the Utah Rules of Civil Procedure provides summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." UTAH R. CIV. P. 56(c). Utah courts have clarified that Rule 56 contains a presumption in favor of the nonmoving party, stating "the moving party [must meet] its initial burden to present evidence establishing that no genuine issue of material fact exists" before the court should obligate the nonmoving party "to demonstrate that there is a genuine issue for trial." *See Orvis v. Johnson*, 2008 UT 2, ¶16, 177 P.3d 600 (citations omitted). However, courts have further stated "[t]he non-moving party must set forth specific facts showing that there is a genuine issue for trial" to survive a summary judgment motion. *See Peterson v. Coca-Cola USA*, 2002 UT 42, ¶20, 48 P.3d 941. Finally, courts have clarified that in addressing a summary judgment motion, a court is required "to draw all reasonable inferences in favor of the nonmoving party." *IHC Health Serv., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶19, 196 P.3d 588. It is in this context the Court examines whether the Declaration complies with the requirements set forth in the Utah Condominium Ownership Act (the "Act").

The Act defines "unit" to mean "a separate physical part of the property intended for any type of independent use, including one or more rooms or spaces located in one or more floors or part or parts of floors in a building or a time period unit, as the context may require." Utah Code Ann. § 57-8-3(31) (West 2014).<sup>2</sup> It is against this backdrop the Act defines the rights of unit owners. For example, in addressing interest in the common areas and facilities, the Act provides

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<sup>2</sup> The Court notes the analysis of the Act is the same under the 2011 version as the applicable provisions have not been significantly amended in the interim.



[e]ach unit owner shall be entitled to an undivided interest in the common areas and facilities in the percentages or fractions expressed in the declaration. The declaration may allocate to each unit an undivided interest in the common areas and facilities proportionate to either the size or par value of the unit. Otherwise the declaration shall allocate to each unit an equal undivided interest in the common areas and facilities.

Utah Code Ann. § 57-8-7(2) (West 2014). Likewise, with regard to membership in the homeowners' association, the Act defines "association of unit owners" to mean "all of the unit owners: (a) acting as a group in accordance with the declaration and bylaws; or (b) organized as a legal entity in accordance with the declaration." Utah Code Ann. § 57-8-3(2). Finally, in addressing unit owners' voting rights, the Act clarifies "[t]he common profits of the property shall be distributed among, the common expenses shall be charged to, and the voting rights shall be available to, the unit owners according to their respective percentage or fractional undivided interest in the common areas and facilities." Utah Code Ann. § 57-8-24 (West 2014).

Courts have clarified "[t]he Condominium Act provides significant guidance as to the operation of condominium associations." *See Park W. Condo. Ass'n, Inc. v. Deppe*, 2006 UT App 507, ¶13, 153 P.3d 821. In examining the Act, courts have reasoned "the Act anticipates that a condominium project may contain proposed units that are not yet constructed. However, this does not undermine [the] conclusion that for a unit to actually exist, it must be within a physically enclosed space." *See Country Oaks Condo. Mgmt. Comm. v. Jones*, 851 P.2d 640, 642 (Utah 1993); *see also B. Inv. LC v. Anderson*, 2012 UT App 24, ¶18, 270 P.3d 548 (recognizing a "definition of unit as an enclosed space"). The Court must therefore turn to the definition of unit set forth in the Declaration.

The Amended Declaration of Condominium for Rockwell Square Condominiums (the "Declaration") defines "unit" to mean "a physical portion of the Condominium Project, including

one or more rooms situated in a Building comprising part of the Condominium Project." *See* Mem. in Supp. of Mot. for Partial Summ. J. Ex. A, at 9. The Declaration further clarifies that a unit "includes[] lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and other material constituting part of the finished surface of a wall, floor or ceiling, spaces, interior partitions, fixtures, and improvements." *Id.* The proposed units in Buildings 2-5 would include none of these elements. In interpreting these provisions in relation to the Act's requirements, the Court concludes the proposed units are not included in the definition of "unit" set forth in the Declaration. *See B. Inv. LC*, 2012 UT App 24, at ¶18, 270 P.3d 548.

Having thus determined the proposed units are not "units" as defined in the Declaration, the Court must now turn to the Declaration's provisions governing common area interests, membership in the homeowners' association and voting rights. In dividing common area interests, the Declaration provides "[t]he Allocated Interest in Common Elements shall be allocated among the Units." *See* Mem. in Supp. of Mot. for Partial Summ. J. Ex. A, at 12. Likewise, the Declaration provides "[e]very person who is the Owner of a Unit . . . shall be a Member of the Association [and] [a]t any meeting of the Association, the Allocated Interest allocated to a Unit may be voted." *See id.* at 19.


Thus, in limiting the allocation of interest in common elements to Units as defined in the Declaration, the Declaration allocates no interest in the common elements to the proposed units in Buildings 2-5. Nor does the Declaration establish Plaintiff's (as owner of the proposed units in Buildings 2-5) entitlement to membership or voting rights in the association. Notwithstanding Plaintiff's assertion to the contrary, such limitation of interest in the common elements, membership and voting rights to constructed units complies with the requirements set forth in the

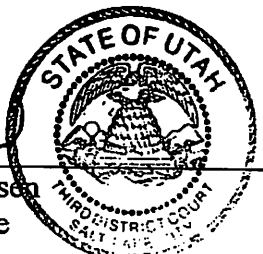
Act. *See Country Oaks Condo. Ass'n*, 851 P.2d at 642. Accordingly, Plaintiff is not entitled to judgment as a matter of law with regard to its claim for declaratory judgment. Likewise, Defendants are not entitled to judgment as a matter of law with regard to Plaintiff's alleged liability for unpaid common expenses.

Based on the foregoing, Plaintiff's Motion for Partial Summary Judgment is DENIED. Likewise, Defendant's Alternative Cross-Motion for Partial Summary Judgment is also DENIED. The provisions set forth in the Declaration limiting interest in common elements, membership in the association and voting rights to constructed units comply with the Utah Condominium Ownership Act. Therefore, pursuant to the Declaration, the proposed units in Buildings 2-5 are allocated no ownership interests in the common elements, nor is Plaintiff—as owner of the proposed units—entitled to membership or voting rights in the association.

This Ruling and Order is the order of the Court, and no further order is required.

So Ordered this 9 day of March, 2015.

  
\_\_\_\_\_  
Judge Royal I. Hansen  
District Court Judge



Tab D

JUN - 5 2015

Salt Lake County

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, STATE OF UTAH

IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

CRITERIUM, LLC, a Utah limited liability  
company,

Plaintiff,

vs.

HOMEOWNERS ASSOCIATION OF  
ROCKWELL SQUARE, INC., a Utah non-  
profit corporation, *et al.*,

Defendants.

**RULING & ORDER**

Civil No. 140903232

Judge Royal I. Hansen

Pending before this Court is a Motion for Summary Judgment as to Plaintiff's First and Second Causes of Action (the "Motion for Summary Judgment") filed by Defendants Homeowners Association of Rockwell Square, Inc. (the "HOA") and all other Defendants in the present case (collectively "Defendants"). The Motion for Summary Judgment and accompanying memorandum with attached Exhibit "A" were filed on or about March 13, 2015. Plaintiff Criterium, LLC ("Plaintiff") filed a Memorandum in Opposition to the Motion for Summary Judgment with attached Declaration of Brian Davis on or about April 6, 2015. Defendants filed a Reply Memorandum in Support of the Motion for Summary Judgment on or about April 8, 2015. Neither party has requested oral argument with regard to the Motion for Summary Judgment. The Motion for Summary Judgment is therefore fully briefed and ready for decision.

Also pending before this Court is a Motion for Reconsideration filed by Plaintiff. The Motion for Reconsideration, accompanying memorandum, and Declaration of Brian Davis were

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filed on or about April 6, 2015. Defendants filed a Memorandum in Opposition to the Motion for Reconsideration with attached Exhibit "A" on or about April 17, 2015. Plaintiff filed a Reply Memorandum in Support of the Motion for Reconsideration on or about April 23, 2015. The Motion for Reconsideration is therefore fully briefed and ready for decision. Plaintiff twice requested oral argument with regard to the Motion for Reconsideration, first in the Reply Memorandum in Support of the Motion for Reconsideration, filed on or about April 23, 2015 and again in a Request to Submit with regard to the Motion for Reconsideration, filed on or about April 23, 2015. However, the Court does not believe oral argument will substantially assist the Court in deciding the matter. Therefore, the Court respectfully denies Plaintiff's request for oral argument.

### **DISCUSSION**

#### **A. The Motion for Reconsideration**

The Court first turns to Plaintiff's Motion for Reconsideration, as resolution of the issues raised therein inform the Court's decision with regard to Defendants' Motion for Summary Judgment. Plaintiff argues the legislative debate concerning the 1994 amendment to the Utah Condominium Act (the "Act") requires recognition of unconstructed units as "units" thereby abrogating *Country Oaks Condo. Mgmt. Comm. v. Jones*. However, the Court does not agree. The 1994 amendment specifically addresses "[a] proposed condominium unit *under an expandable condominium project*." See Mem. in Supp. of Mot. for Recons. 3 (emphasis added). This specific reference to expandable condominium projects clarifies the legislators' intent that the provision apply only to expandable condominium projects. The reason for the limitation is clear—where land not currently part of an expandable condominium project remains undeveloped and a developer is gone, the land could easily fall into disrepair as the only party with an interest

in the land—the developer—has no interest in maintaining the property. Indeed, in such a situation the homeowners association would have no right to maintain or develop the property absent its inclusion in the expandable condominium project. This concern is not present where, as here, the subject property is already included in the condominium project as common areas. In this situation, the unit owners pay dues in relation to their interest in the common areas thus providing for their maintenance and ensuring they don't fall into disrepair. Accordingly, the Court remains unconvinced that the debate concerning the 1994 amendment to the Act requires reconsideration of its prior decision.

The Court therefore concludes the reasoning set forth in *Country Oaks* and *B Inv. LC v. Anderson* remains applicable here. In *Country Oaks*, the Utah Supreme Court clarified "the Act anticipates that a condominium project may contain proposed units that are not yet constructed. However, this does not undermine [the] conclusion that for a unit to actually exist, it must be within a physically enclosed space." *Country Oaks*, 851 P.2d 640, 642 (Utah 1993). Moreover, in *B Inv.*—decided well after the 1994 amendment—the Utah Court of Appeals "allow[ed] declarants a measure of latitude in defining a unit." *B Inv.*, 2012 UT App 24, ¶19, 270 P.3d 548. Accordingly, the Court remains convinced the Act does not preclude the definition of a unit to include only constructed units and therefore, the proposed units in Buildings 2-5 are allocated no ownership interests in the common elements, nor is Plaintiff—as owner of the proposed units—entitled to membership or voting rights in the HOA. Accordingly, the Court's March 10, 2015 Ruling and Order remains the order of the Court.<sup>1</sup>

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<sup>1</sup> Plaintiff also argues that the interpretation of the Declaration to include only constructed units in the definition of "units" undermines the rights expressly reserved to Declarant. However, the Declarant's rights set forth in the Declaration must be read in concert with the remaining provisions of the Declaration and therefore, any rights reserved to Declarant are subject to the definition of a "unit" as well as the corresponding common area interest, membership and voting rights provisions set forth in the Declaration. Moreover, the Declarant rights Plaintiff

## B. The Motion for Summary Judgment

Rule 56 of the Utah Rules of Civil Procedure provides summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." UTAH R. CIV. P. 56(c). Utah courts have clarified that Rule 56 contains a presumption in favor of the nonmoving party, stating "the moving party [must meet] its initial burden to present evidence establishing that no genuine issue of material fact exists" before the court should obligate the nonmoving party "to demonstrate that there is a genuine issue for trial." *See Orvis v. Johnson*, 2008 UT 2, ¶16, 177 P.3d 600 (citations omitted). However, courts have further stated "[t]he non-moving party must set forth specific facts showing that there is a genuine issue for trial" to survive a summary judgment motion. *See Peterson v. Coca-Cola USA*, 2002 UT 42, ¶20, 48 P.3d 941. Finally, courts have clarified that in addressing a summary judgment motion, a court is required "to draw all reasonable inferences in favor of the nonmoving party." *IHC Health Serv., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶19, 196 P.3d 588. It is in this context the Court examines whether Defendants are entitled to judgment as a matter of law with regard to Plaintiff's remaining claims.<sup>2</sup>

The Court first turns to Plaintiff's first cause of action (Declaratory Relief). Resolution of the first cause of action requires the Court to interpret the provisions set forth in the Declaration.

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argues apply here relate only to Plaintiff's right to construct "any improvements shown on the Plat" or "[a]ny other buildings, structures or improvements" on land not currently part of the Condominium Project. The Court is unconvinced that limiting common area interest, membership in the HOA and voting rights to owners of constructed units would violate Plaintiff's "right to build" set forth in the Declaration.

<sup>2</sup> The Court previously entered a Ruling and Order on August 25, 2014 dismissing Plaintiff's Third Cause of Action (Unjust Enrichment) for failure to exhaust administrative remedies.



Thus, the Court must first "look at the language within the four corners of the [declaration] and determine whether the [declaration] is unambiguous." *Tom Heal Commercial Real Estate, Inc. v. Overton*, 2005 UT App 257, ¶8, 116 P.3d 965. "If the language within the four corners of the [declaration] is unambiguous, the parties' intentions are determined from the plain meaning of the [ ] language, and the [declaration] may be interpreted as a matter of law." *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶17, 84 P.3d 1134.

The Court concludes the language within the four corners of the Declaration is unambiguous, and therefore the Declaration may be interpreted as a matter of law. *See id.* The Declaration unambiguously defines "Unit" to mean "a physical portion of the Condominium Project, including one or more rooms situated in a Building." *See* Compl. Ex. A, at 9. Defendants argue the definition of "Building" to include "structures constructed, or to be constructed," *see id.* at 2, establishes an ambiguity with regard to the inclusion of unconstructed units within the definition of "units" in the Declaration. However, the Declaration further clarifies a "unit . . . includes lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, . . . interior partitions, fixtures, and improvements." *See id.* at 9. While not all these elements need be included in a unit, the list clarifies the unambiguous intent of the original parties to limit the definition of a "unit" to constructed units.

The Court next turns to the specific provisions regarding common area interest, membership in the HOA, and voting rights. Regarding common area interest, the Declaration unambiguously provides "[u]nits that have not yet been constructed shall not be allocated any interest in the Common Elements." *See id.* at 12. Likewise, the Declaration unambiguously limits membership rights in the HOA to owners of constructed units, providing "Memberships shall only be allocated to constructed Units, and no Membership shall be allocated to a Unit prior

to construction." *Id.* at 19. Finally, regarding voting rights in the HOA, the Declaration unambiguously limits voting rights to "constructed Units." *See id.* at 19-20. Accordingly, pursuant to the plain meaning of the Declaration, the proposed units in Buildings 2-5 are allocated no ownership interests in the common elements, nor is Plaintiff—as owner of the proposed units—entitled to membership or voting rights in the HOA.<sup>3</sup> Defendants are therefore entitled to judgment as a matter of law with regard to Plaintiff's first cause of action.

The Court's determination regarding Plaintiff's rights pursuant to the Declaration necessarily resolves Plaintiff's second cause of action. Plaintiff's second cause of action relies on a finding that Plaintiff possessed an interest in the common areas and corresponding membership in the HOA and voting rights. Thus, because the Court determined, *supra*, the proposed units in Buildings 2-5 are allocated no ownership interests in the common elements and Plaintiff—as owner of the proposed units—is not entitled to membership or voting rights in the HOA, Defendants cannot have breached a fiduciary duty to Plaintiff in refusing to recognize these interests. Accordingly, Defendants are entitled to judgment as a matter of law with regard to Plaintiff's second cause of action.

Based on the foregoing, Plaintiff's Motion for Reconsideration is DENIED. The March 10, 2015 Ruling and Order remains the Order of the Court. Furthermore, Defendants' Motion for Summary Judgment is GRANTED. Plaintiff's first cause of action (Declaratory Relief) and second cause of action (Breach of Fiduciary Duty) are therefore DISMISSED, with prejudice and on the merits.<sup>4</sup>

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<sup>3</sup> Correspondingly, Plaintiff is not liable for any assessments with regard to the common areas.

<sup>4</sup> The Court notes Defendants also requested attorney fees in their Motion for Summary Judgment. However, the Court reserves decision with regard to an award of attorney fees pending the filing of a request for attorney fees in compliance with Rule 73 of the Utah Rules of Civil Procedure.

This Ruling and Order is the order of the Court, and no further order is required.

So Ordered this 4 day of June, 2015.

